

# THE OKLAHOMA BAR **Journal**

Volume 89 — No. 24 — 9/8/2018

## Court Issue



**OCTOBER IS  
DOMESTIC VIOLENCE  
AWARENESS MONTH**

## DOMESTIC VIOLENCE TRAINING FOR GUARDIAN AD LITEMS

**OCTOBER 11 1:30 - 3:40 P.M.**

University of Tulsa College of Law Moot Courtroom,  
3120 East 4th Place, Tulsa

## DOMESTIC VIOLENCE AT WORK AWARENESS, PLANNING & PREVENTION

CoSponsored by the Community Learning Council

**OCTOBER 12 8:30 A.M. - 3 P.M.**

University of Tulsa College of Law Moot Courtroom,  
3120 East 4th Place, Tulsa

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**OCT. 11 MCLE CREDIT 3/1**  
**OCT. 12 MCLE CREDIT 7/2**

### OCTOBER 11:

**Program Planner:**

**G. Gail Stricklin, Attorney, Oklahoma City**

### TOPICS COVERED

- Domestic Violence and Trauma
- GAL Law and Best Practices
- Case Study (to include 1 Hr Ethics)

\$75 for registration. Lawyers providing pro bono services through Legal Aid, Lawyers for Children, public defender GALs or court-appointed pro bono GALs may pre-register for \$25 by contacting Renee at 405.416.7029 or [ReneeM@okbar.org](mailto:ReneeM@okbar.org). NO OTHER DISCOUNTS.

This program will not be webcast.

### OCTOBER 12:

**Program Planner: Ginger Decoteau,**

*Founder, Executive Director,  
Community Learning Council, Inc.*

During this program, participants will review case studies that detail incidents of domestic violence-related incidents and injuries. This program was designed to help professionals identify warning signs, strengthen policies, implement safety measures and develop an action plan to create a safer and supportive work environment for all employees.

\$150 for early registration (before Oct. 4). Late Fees Apply. Lawyers providing pro bono services through Legal Aid, Lawyers for Children, public defender GALs or court-appointed pro bono GALs may pre-register for \$25 by contacting Renee at 405.416.7029 or [ReneeM@okbar.org](mailto:ReneeM@okbar.org).

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# THE OKLAHOMA BAR Journal

Volume 89 – No. 24 – 9/8/2018

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The Oklahoma Bar Journal (ISSN 0030-1655) is published three times a month in January, February, March, April, May, August, September, October November and December and bimonthly in June and July by the Oklahoma Bar Association, 1901 N. Lincoln Boulevard, Oklahoma City, Oklahoma 73105. Periodicals postage paid at St. Joseph, Michigan.

**Subscriptions** \$60 per year except for law students registered with the OBA and senior members who may subscribe for \$30; all active members included in dues. Single copies: \$3

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**Program Planner/Moderator** -Jim Calloway, Director, Management Assistance Program,  
Oklahoma Bar Association

## Schedule

- 8:30am Registration and Continental Breakfast**
- 9:00 The Starting Line**  
Jim Calloway, Director, OBA Management Assistance Program
- 9:30 It's All About the Clients: From Client Communication to Client Development and Marketing**  
Jim Calloway
- 11:00 Break**
- 11:10 How to Manage-Everything!**  
Jim Calloway
- 12:00pm Lunch provided by Oklahoma Attorneys Mutual Insurance Company**
- 12:20 Malpractice Insurance and Other Risk Management Issues**  
Eric Janzen, Oklahoma Attorneys Mutual Insurance Company - Tulsa  
Phil Fraim, President, Oklahoma Attorneys Mutual Insurance Company - OKC
- 1:00 Professionalism in the Practice of Law**  
Judge David Lewis, Presiding Judge, Oklahoma Court of Criminal Appeals
- 1:30 Break**
- 1:40 Trust Accounting and Legal Ethics**  
Gina Hendryx, OBA General Counsel
- 2:40 Break**
- 2:50 Some Words from the OBA General Practice Solo & Small Firm Section**  
Frank Urbanic, Ashley Forrester & Michael Whiting
- 3:00 Equipping the Law Office**  
Jim Calloway
- 3:50 Your Money: Accounting and Tax for Law Firms**  
James A. Porter, III, CPA, P.L.L.C.
- 4:30 Adjourn**

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**NOTICE OF REAPPOINTMENT OF INCUMBENT MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT EASTERN DISTRICT OF OKLAHOMA**

The current term of office of the United States Magistrate Judge Steven P. Shreder at Muskogee, Oklahoma, is due to expire on May 14, 2019. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term.

The duties of the position are demanding and wide-ranging. Such duties include, but are not limited to:

- (1) Conduct of preliminary proceedings in criminal cases;
- (2) Trial and disposition of misdemeanor cases;
- (3) Conduct of various pretrial matters and evidentiary proceedings on delegation from the judges of the district court; and
- (4) Trial and disposition of civil cases upon consent of the litigants.

Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court. Comments should be directed to:

Tami Collins, Chief Deputy Clerk  
United States District Court for the Eastern District of Oklahoma  
P.O. Box 607  
Muskogee, OK 74402

Comments must be received by October 19, 2018.



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# Opinions of Court of Criminal Appeals

*Manner and Form of Opinions in the Appellate Courts;  
See Rule 1.200, Rules — Okla. Sup. Ct. R., 12 O.S. Supp. 1996 (1997 T. 12 Special Supplement)*

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**2018 OK CR 32**

**ROY DALE THOMPSON, Appellant, v. THE  
STATE OF OKLAHOMA, Appellee.**

**Case No. F-2016-1117. August 30, 2018**

## **OPINION**

**LEWIS, VICE PRESIDING JUDGE:**

¶1 Roy Dale Thompson, Appellant, was tried by jury and convicted of Count 1, second degree burglary, in violation of 21 O.S.2011, § 1435; Count 2, assault with a deadly weapon, in violation of 21 O.S.2011, § 652; Count 3, possession of a firearm after former conviction of a felony, in violation of 21 O.S.Supp.2014, § 1283(A); and Count 4, possession of a firearm during the commission of a felony, in violation of 21 O.S.Supp.2012, § 1287,<sup>1</sup> in the District Court of Lincoln County, Case No. CF-2015-370A. In the sentencing stage, the jury found Appellant committed these crimes after former conviction of two (2) or more felonies, and sentenced Appellant to life imprisonment and a \$10,000.00 fine in each of Counts 1 through 4. The Honorable Cynthia Ferrell Ashwood, District Judge, pronounced judgment and ordered the sentences served concurrently.<sup>2</sup> Mr. Thompson appeals in the following propositions of error:

1. Mr. Thompson was denied due process when he was convicted of a crime that does not exist. The Judgment and Sentence for Count II must be vacated.
2. Mr. Thompson has suffered double punishment by his convictions and sentences on Count III — possession of a firearm after former conviction of a felony and Count IV — possession of a firearm during the commission of a felony in violation of due process under the 14th Amendment to the United States Constitution and Art. II, § 7, of the Oklahoma Constitution.
3. Insufficient evidence was presented at trial to show beyond a reasonable doubt that Mr. Thompson committed the crime of possession of a firearm during the com-

mission of a felony or the crime of burglary in the second degree.

4. Mr. Thompson was denied his right to the effective assistance of trial counsel, in violation of the 6th and 14th Amendments to the United States Constitution and Art. II, §§ 7, 9, and 20, of the Oklahoma Constitution.
5. Based on the facts and circumstances of this case, Mr. Thompson's sentences are grossly excessive and should shock the conscience of this Court.
6. Cumulative errors deprived Mr. Thompson of a fair proceeding and a reliable outcome.

## **FACTS**

¶2 On the morning of November 25, 2015, Appellant and his accomplice, Marcus Catron, arrived in the small town of Davenport, Oklahoma, hoping to burglarize and perhaps steal one or more cars in the area. This plan led them to approach the home of the victim at around 10 a.m. Catron knocked at the door of the victim's residence. The victim, who had been paying bills, slipped his pistol into his back brace and opened the door. Catron then distracted the victim with some questions about raking his leaves. Appellant was already breaking into the victim's truck, looking for something to steal.

¶3 The victim declined Catron's offer to rake his leaves but stepped outside to direct him toward some other potential customers. Appellant saw the victim talking to Catron and shot his pistol at the victim through the windshield of the truck. The victim heard a bullet whiz past him, approximately a foot away, and strike the side of the house. The victim drew his pistol and returned several shots in Appellant's direction, wounding him in the belly. Appellant returned more shots as he took off running, and managed to get away. The victim ordered Catron to the ground at gunpoint and called police, who came and arrested him.

¶4 Around 5:30 p.m. that evening, another Davenport resident saw a man he didn't know

stumbling along a road in Davenport, then falling down, and figured him for drunk. He told his wife to call police, but the man disappeared. A few hours later, this same man appeared on their front porch, leaning against the wall. Appellant told the couple he'd been hurt in a car accident and needed medical attention. He mentioned that his friend had been driving, but when asked where the friend was, Appellant said he didn't know.

¶5 The couple invited Appellant into their home and called police. Hearing their description of the man, police told the couple to quickly clear out of their house. Police later took Appellant into custody and eventually transported him to Tulsa, where he underwent surgery to remove a bullet fragment from his stomach. Appellant's weapon was never recovered.

### ANALYSIS

¶6 In Proposition One, Appellant argues that his conviction under 21 O.S.2011, § 652(C)<sup>3</sup> for the crime of assaulting the victim with a deadly weapon, without proof of an accompanying battery, is reversible error. Because this question of statutory interpretation is raised for the first time on appeal, Appellant must show that a plain or obvious error affected the outcome of the proceedings. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923; *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 692-93.

¶7 The amended information in Count 2 charged Appellant with assaulting the victim with a deadly weapon by shooting at him with intent to do bodily harm. The trial court's jury instructions on this count permitted a conviction of the charged crime based on the elements of assaulting another person with a deadly weapon. The court also instructed the jury that it could convict Appellant of the lesser-included offenses of assault with a dangerous weapon with intent to do bodily harm, in violation of 21 O.S.2011, § 645,<sup>4</sup> or of simple assault. By failing to object to the information or the trial court's instructions in these particulars, Appellant has waived all but plain error.

¶8 However, it is plain or obvious that a violation of section 652(C) requires not only proof of an assault, but also an accompanying battery. *Avants v. State*, 1983 OK CR 35, ¶¶ 4-7, 660 P.2d 1051, 1051-52; *see also*, OUJI-Cr(2nd), Instruction No. 4-3 (identifying section 652 offense as requiring "that the defendant commit both assault and battery"). The Court in *Avants* found that the Legislature could have

specifically enumerated assault with a deadly weapon as a separate crime under section 652(C), but had not done so. *Avants*, 1983 OK CR 35, ¶ 5, 660 P.2d at 1052; *see also*, *Meggett v. State*, 1979 OK CR 89, ¶ 10, 599 P.2d 1110, 1114 (finding "[a]n assault — whether by firearm or by some other dangerous weapon — made without the intent to kill is proscribed by [21 O.S.2011,] § 645"). Under this longstanding interpretation of subsection 652(C), Appellant's conviction for assaulting the victim with a deadly weapon with intent to do bodily harm, without proof of an accompanying battery, is plainly erroneous.

¶9 We remedy plain error only when it seriously affects the fairness, integrity, or public reputation of the proceedings. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. A conviction under section 652(C) carries up to life imprisonment for a first offense, and is subject to the 85% Rule. 21 O.S.Supp.2015, § 13.1(5). Appellant's current conviction and life sentence thus render him ineligible for parole consideration for at least twenty (23) years, three (3) months longer than a non-85% life sentence. 57 O.S. Supp.2013, § 332.7(B)(requiring parole consideration after 1/3 of sentence); *Anderson v. State* 2006 OK CR 6, ¶ 24, 130 P.3d 273, 282-83 (noting Pardon and Parole Board policy of computing a life sentence as 45 years).

¶10 The overwhelming evidence at trial, and the jury's verdict that Appellant committed assault with a deadly weapon, establish beyond a reasonable doubt that Appellant is actually guilty of assault with a dangerous weapon with intent to do bodily harm or shooting at another with intent to injure, a felony violation of section 645.<sup>5</sup> This crime, after two (2) or more prior felony convictions, is punishable by twenty (20) years to life imprisonment, but is not subject to the 85% Rule.<sup>6</sup>

¶11 Appellant's erroneous conviction and sentence for a crime subject to the 85% Rule significantly affects his parole consideration eligibility, and thus seriously affects the fairness and integrity of the proceedings. We therefore exercise our discretion to remedy this error by modifying Appellant's conviction to assault with a dangerous weapon or shooting with intent to injure, after former conviction of two (2) or more felonies, and affirming the sentence of life imprisonment.<sup>7</sup> No additional relief is warranted.



¶12 In Proposition Two, Appellant claims his convictions and sentences for assault with a deadly weapon, possessing a firearm in the commission of a felony (burglary), and possessing a firearm after former conviction of a felony, punish him separately for a single criminal act in violation of 21 O.S. 2011, § 11. Reviewing for plain error, as defined above, this claim is without merit. While Counts 3 and 4 arose in part from one continuous act of firearm possession, Appellant's possession of the firearm in the commission of burglary is sufficiently "separate and distinct" from both his earlier criminal possession of the firearm and his subsequent assault of the victim to warrant separate punishments. *Sanders v. State*, 2015 OK CR 11, ¶¶ 8-12, 358 P.3d 280, 284-85 (finding possession of single, stolen firearm within defendant's home cannot be punished as both felon in possession and knowingly concealing stolen property; but that section 11 generally allows punishment for both the felonious possession of a firearm and for other crimes in which the weapon is possessed or used). Proposition Two is denied.

¶13 In Proposition Three, Appellant challenges the sufficiency of the evidence to show possession of a firearm in the commission of a felony (burglary), and the crime of second degree burglary. We determine whether the evidence, taken in the light most favorable to the prosecution, permits any rational trier of fact to find the essential elements of the crime charged beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. This Court will accept all reasonable inferences and credibility choices that tend to support the verdict. *Washington v. State*, 1986 OK CR 176, ¶ 8, 729 P.2d 509, 510. We find the evidence sufficient in each count, and no relief is warranted. Proposition Three is denied.

¶14 In Proposition Four, Appellant argues that trial counsel was ineffective for failing to object to: (1) the improper conviction in Count 2 (see Proposition One); (2) the violations of section 11 (see Proposition Two); and the insufficient evidence of burglary and possession of a firearm in commission of burglary (see Proposition Three). We review these claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), requiring Appellant to show both deficient performance and prejudice. *Id.*, 466 U.S. at 687, 104 S.Ct. at 2064.

¶15 These claims are either moot or without merit. We agreed with Appellant that his conviction for assault with a deadly weapon was plainly erroneous, and modified the conviction to assault with a dangerous weapon or shooting with intent to injure. Appellant's remaining section 11 and sufficiency of the evidence claims are without merit. Assuming any deficiency in counsel's performance in failing to raise these errors at trial, Appellant cannot show a reasonable probability of a different outcome. Proposition Four is therefore denied.

¶16 Proposition Five challenges Appellant's life sentences as excessive. This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it shocks the conscience of the Court. *Pullen v. State*, 2016 OK CR 18, ¶ 16, 387 P.3d 922, 928. Appellant is a violent recidivist who fired several shots at his latest victim during an attempted auto burglary, and might have easily committed a senseless murder. His sentences do not shock the conscience. Proposition Five is denied.

¶17 Appellant argues in Proposition Six that the accumulation of prejudice from errors warrants relief. We remedied the only prejudicial error by modification. There is no other individual, harmful error, and no cumulative prejudice from individually harmless errors. *Barnett v. State*, 2011 OK CR 28, ¶ 34, 263 P.3d 959, 970. Proposition Six is therefore denied.

## DECISION

¶18 The Judgment and Sentence in Count 2 is **MODIFIED** to assault with a dangerous weapon or shooting another with intent to injure, and otherwise **AFFIRMED**. The Judgment and Sentence in Counts 1, 3, and 4 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

## AN APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY

HONORABLE CYNTHIA FERRELL  
ASHWOOD, DISTRICT JUDGE

## APPEARANCES AT TRIAL

Charles Michael Thompson, 104 W. 8th, Chandler, OK 74834, Attorney for Defendant

Emily Mueller, Asst. District Attorney, 811 Manvel Ave., Ste. 1, Chandler, OK 74834, Attorney for the State

### APPEARANCES ON APPEAL

Sarah MacNiven, P.O. Box 926, Norman, OK 73070, Attorney for Appellant

Mike Hunter, Attorney General, Joshua L. Lockett, Asst. Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Attorneys for Appellee

OPINION BY: LEWIS, V.P.J.

LUMPKIN, P.J.: Concur

HUDSON, J.: Concur

KUEHN, J.: Concur

ROWLAND, J.: Concur

1. The jury acquitted Appellant of Count 5, possession of burglary tools.

2. Appellant must serve 85% of his sentence in Count 2 before he is eligible for consideration for parole. 21 O.S.Supp.2015, § 13.1 (5).

3. The pertinent part of section 652(C), says:

Any person who commits *any assault and battery upon another ...* by means of any deadly weapon ... shall upon conviction be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding life (emphasis added).

4. Every person who, with intent to do bodily harm and without justifiable or excusable cause, commits *any assault*, battery, or assault and battery upon the person of another with any sharp or dangerous weapon, or *who, without such cause, shoots at another*, with any kind of firearm, air gun, conductive energy weapon or other means whatever, *with intent to injure any person*, although without the intent to kill such person or to commit any felony, upon conviction is guilty of a felony ...” (emphasis added).

5. The trial court’s definition of “assault” required the jury to find Appellant guilty of a “willful and unlawful attempt or offer to do a bodily harm to another.” We therefore find the jury’s guilty verdict of assault in Count 2 tantamount to a verdict that Appellant shot at the victim with a formed intent to do bodily harm.

6. With Appellant’s two or more prior convictions, he is subject to the same sentence for either crime, ten (20) years to life imprisonment. 21 O.S.2011, § 51.1(B).

7. *Birdine v. State*, 2004 OK CR 7, ¶ 6, 85 P.3d 284, 286 (modifying murder conviction to manslaughter, where necessary finding of fetus’s viability to convict of murder was rendered doubtful under erroneous instruction, but evidence showed, beyond a reasonable doubt, that defendant committed manslaughter by killing an unborn quick child; and affirming life sentence).



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# 2019 OBA Board of Governors Vacancies

**Nominating Petition deadline was 5 p.m. Friday, Sept. 7, 2018**

## OFFICERS

### President-Elect

Current: Charles W. Chesnut, Miami  
Mr. Chesnut automatically becomes  
OBA president Jan. 1, 2019  
(One-year term: 2019)  
Nominee: **Susan B. Shields,**  
**Oklahoma City**

### Vice President

Current: Richard Stevens, Norman  
(One-year term: 2019)  
Nominee: **Lane R. Neal,**  
**Oklahoma City**

## BOARD OF GOVERNORS

### Supreme Court Judicial District Three

Current: John W. Coyle III,  
Oklahoma City  
Oklahoma County  
(Three-year term: 2019-2021)  
Nominee: **David T. McKenzie,**  
**Oklahoma City**  
**Andrew E. Hutter, Oklahoma City**

### Supreme Court Judicial District Four

Current: Kaleb K. Hennigh, Enid  
Alfalfa, Beaver, Beckham, Blaine,  
Cimarron, Custer, Dewey, Ellis,  
Garfield, Harper, Kingfisher,  
Major, Roger Mills, Texas, Washita,  
Woods and Woodward counties  
(Three-year term: 2019-2021)  
Nominee: **Vacant**

### Supreme Court Judicial District Five

Current: James L. Kee, Duncan  
Carter, Cleveland, Garvin, Grady,  
Jefferson, Love, McClain, Murray  
and Stephens counties  
(Three-year term: 2019-2021)  
Nominee: **Vacant**

### Member At Large

Current: Alissa Hutter, Norman  
Statewide  
(Three-year term: 2019-2021)  
Nominee: **Josh D. Lee, Vinita**  
**Miles T. Pringle, Oklahoma City**

## SUMMARY OF NOMINATIONS RULES

Not less than 60 days prior to the annual meeting, 25 or more voting members of the OBA within the Supreme Court Judicial District from which the member of the Board of Governors is to be elected that year, shall file with the executive director, a signed petition (which may be in parts) nominating a candidate for the office of member of the Board of Governors for and from such judicial district, or one or more county bar associations within the judicial district may file a nominating resolution nominating such a candidate.

Not less than 60 days prior to the annual meeting, 50 or more voting members of the OBA from any or all judicial districts shall file with the executive director a signed petition nominating a candidate to the office of member at large on the Board of Governors, or three or more county

bars may file appropriate resolutions nominating a candidate for this office.

Not less than 60 days before the opening of the annual meeting, 50 or more voting members of the association may file with the executive director a signed petition nominating a candidate for the office of president elect or vice president, or three or more county bar associations may file appropriate resolutions nominating a candidate for the office.

If no one has filed for one of the vacancies, nominations to any of the above offices shall be received from the House of Delegates on a petition signed by not less than 30 delegates certified to and in attendance at the session at which the election is held.

See Article II and Article III of OBA Bylaws for complete information regarding offices, positions, nominations and election procedure.

Elections for contested positions will be held at the House of Delegates meeting Nov. 9, during the Nov. 7-9 OBA Annual Meeting.

Terms of the present OBA officers and governors will terminate Dec. 31, 2018.

Nomination and resolution forms can be found at [www.okbar.org/members/BOG/BOGvacancies](http://www.okbar.org/members/BOG/BOGvacancies).

## NOTICE

**This issue went to press before the deadline, and the list of nominees may not be complete. See [www.okbar.org/annualmeeting](http://www.okbar.org/annualmeeting) for updates.**

# Oklahoma Bar Association Nominating Petitions

(See Article II and Article III of the OBA Bylaws)

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## OFFICERS

### President-Elect

**Susan B. Shields, Oklahoma City**

Nominating Petitions have been filed nominating Susan B. Shields for President-Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2019.

**A total of 573 signatures appear on the petitions.**

### Vice President

**Lane R. Neal, Oklahoma City**

Nominating Petitions have been filed nominating Lane R. Neal for Vice President of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2019.

**A total of 127 signatures appear on the petitions.**

## BOARD OF GOVERNORS

### Supreme Court Judicial District No. 3

**David T. McKenzie, Oklahoma City**

Nominating Petitions have been filed nominating David T. McKenzie for election of Supreme Court Judicial District No. 3 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019.

**A total of 57 signatures appear on the petitions.**

**Andrew E. Hutter, Oklahoma City**

Nominating Petitions have been filed nominating Andrew E. Hutter for election of Supreme Court Judicial District No. 3 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019. Twenty-five of the names thereon are set forth below:

John W. Coyle III, Brian Morton, Sonja Porter, Mike Arnett, Kenneth Watson, Jason Spanich, Myong Chung, Joan Lopez, Lance Phillips, E. Seth Hendrick, Kelli Kelso, Redmond Kemether, John Hunsucker, Paul Austin, Lily Cruickshank, Keith McGill, Todd Kernal, Amber Godfrey, Josh Lee, Aaron Glover, Brian Young, Hayley Potts, Phillip Winters, Angela Sonagerra and Amanda Everett

**A total of 33 signatures appear on the petitions.**

### Member at Large

**Josh D. Lee, Vinita**

Nominating Petitions have been filed nominating Josh D. Lee, Vinita for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019.

**A total of 66 signatures appear on the petitions.**

**Miles T. Pringle, Oklahoma City**

Nominating Petitions have been filed nominating Miles T. Pringle, Oklahoma City for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019. Fifty of the names thereon are set forth below:

David A. Poarch, Valerie K. Couch, Len Cason, Paul Cason, Cody Cooper, Mack Martin, Amber Martin, John W. Coyle III, Jeremy Tubb, Lynn Pringle, Laura Pringle, John David Hershberger, C. Miles Tolbert, Lisa Cummings, Benjamin E. Russ, Michael P. Sullivan, Kent P. Sullivan, Douglas Dale, R. Lindsay Bailey, Greg Tontz, Jennifer Fischer, James Richard Martin, Mark H. Price, Jack H. Petty, James R. Moore, Armando Rosell, Linda K. Ellis, Elizabeth D. Crampton, Joel Hall, Steven R. McConnell, Sally K. Edwards, Amy Douglas, Alex Kaiser, Curtis Kaiser, Jennifer Kaiser, Blu Hulsey, Brent Johnson, Timothy Dowd, Megan Dowd, Chase Schnebel, John Wadley, Nicole Blair, Gregory Chansolme, Andrew Harroz, Richard Thomas Hornbeek, Daniel Hays, Daniel Couch, Peter Scimeca, Kelsey Quillian and Lindsey Ridgway

**A total of 105 signatures appear on the petitions.**

# CALENDAR OF EVENTS

## September

- 12 OBA Group Insurance Committee meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Jo Angela Ables 405-272-9221
- 14 OBA Law-Related Education Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Amber Peckio Garrett 918-895-7216
- 15 OBA Young Lawyers Division meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Nathan Richter 405-376-2212
- 17 OBA Board of Editors meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Melissa DeLacerda 405-624-8383
- 18 OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Rod Ring 405-325-3702
- OBA Women in Law Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Melanie Christians 405-705-3600 or Brittany Byers 405-682-5800
- 19 OBA Family Law Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Jeffrey H. Crites 580-242-4444
- OBA Indian Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Valery Giebel 918-581-5500
- OBA Clients' Security Fund Committee meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Micheal Salem 405-366-1234
- 20 OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Telana McCullough 405-267-0672
- OBA Professionalism Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Linda Scoggins 405-319-3510



- 21 OBA Board of Governors meeting;** 10 a.m.; Stillwater; Contact John Morris Williams 405-416-7000
- OBA Lawyers Helping Lawyers Assistance Program Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Hugh E. Hood 918-747-4357 or Jeanne Snider 405-366-5466
- 25 OBA Access to Justice Committee meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Rod Ring 405-325-3702
- 26 OBA Immigration Law Section meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Melissa R. Lujan 405-600-7272
- OBA Financial Institutions and Commercial Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Miles T. Pringle, 405-848-4810
- 27 OBA General Practice/Solo and Small Firm Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Ashley B. Forrester 405-974-1625
- 28 OBA Professional Responsibility Commission meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Gina Hendryx 405-416-7007
- OBA Environmental Law Section meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Teena G. Gunter 405-522-4576

# Disposition of Cases Other Than by Published Opinion

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## COURT OF CRIMINAL APPEALS Thursday, August 16, 2018

**RE-2017-0695** — Michael Angelo Terry, Appellant, entered a plea of guilty on May 5, 2016, in Oklahoma County District Court Case No. CF-2016-1792 to Count 1 – Possession of a Controlled Dangerous Substance (Meth), a felony, and Count 2- Possession of Drug Paraphernalia. He was sentenced to ten years on Count 1 and 1 year on Count 2, all suspended with rules and conditions of probation. The State filed an application to revoke Appellant's suspended sentences on September 1, 2016. Following a revocation hearing on June 26, 2017, before the Honorable Cindy H. Truong, Appellant's suspended sentences were revoked in full. The sentences were ordered to run concurrently. Appellant appeals the revocation of his suspended sentences. The revocation of Appellant's suspended sentences is **AFFIRMED**. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

**F-2017-782** — Larry Gene Keeler, Appellant, was tried by jury for the crimes of Count 1 - First Degree Murder and Count 2 - Cruelty to Animals in Case No. CF-2014-306 in the District Court of McClain County. The jury returned a verdict of guilty and recommended as punishment life imprisonment without parole on Count 1 and a \$5000 fine on Count 2. The trial court sentenced accordingly. From this judgment and sentence Larry Gene Keeler has perfected his appeal. **AFFIRMED**. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

**F-2017-821** — Justin Anthony Braun, Appellant, was tried in a non-jury trial for the crimes of Count 1, lewd or indecent proposals to a child under sixteen (16), and Count 2, attempted lewd or indecent acts to child under sixteen (16), in Case No. CF-2016-316 in the District Court of Custer County. The Honorable F. Doug Haight found Braun guilty and sentenced him to fifteen years imprisonment and a \$500.00 fine in Count 1, and ten years imprisonment and a \$500.00 fine in Count 2. The trial

court further ordered the sentences to be served concurrently, with all but seven years suspended. From this judgment and sentence Justin Anthony Braun has perfected his appeal. The Judgment and Sentence of the District Court is **AFFIRMED**. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

**F-2017-235** — Cody Lloyd Haynes, Appellant, was tried in a non-jury trial for the crimes of Count 1, child abuse by injury, and Counts 2-5, child neglect, in Case No. CF-2015-192 in the District Court of Creek County. The Honorable Douglas W. Golden, District Judge, found Haynes guilty and sentenced him to forty years imprisonment with all but the first twenty years suspended and a \$500.00 fine in Count 1, and ten years imprisonment and a \$500.00 fine in each of Counts 2-5. The trial court further ordered the sentences on Counts 2-5 to be served concurrently with each other but consecutively to the sentence on Count 1, with credit for time served. From this judgment and sentence Cody Lloyd Haynes has perfected his appeal. The Judgments and Sentences are **AFFIRMED**. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

**F-2017-563** — Farron Robert Deerleader, Appellant, was tried by jury for the crimes of Count 1, second degree burglary, and Count 2, larceny of an automobile, both after former conviction of two or more felonies, in Case No. CF-2016-319 in the District Court of Creek County. The jury returned a verdict of guilty and set punishment at forty-five years imprisonment and a \$10,000.00 fine in Count 1, and forty-five years imprisonment and a \$50,000.00 fine in Count 2. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Farron Robert Deerleader has perfected his appeal. The Judgment and Sentence is **AFFIRMED**. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.



**Thursday, August 23, 2018**

**RE-2017-51** — Justin Kyle Taylor, Appellant, appeals from the revocation in full of his suspended sentences in Case No. CF-2014-1450 in the District Court of Cleveland County, by the Honorable Tracy Schumacher, District Judge. **AFFIRMED.** Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs in results; Rowland, J., concurs.

**F-2016-908** — Orlando Delgado, Appellant, was tried by jury for the crime of shooting with the intent to kill in Case No. CF-2015-6626 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at thirty years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Orlando Delgado has perfected his appeal. The Judgment and Sentence of the District Court is **AFFIRMED.** Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs in results; Rowland, J., concurs in results.

**F-2017-566** — Donald Ray Lockridge, Appellant, was tried by jury for the crime of attempting to obtain a controlled substance by forged or altered prescription, after former conviction of two or more felonies, in Case No. CF-2015-60 in the District Court of Canadian County. The jury returned a verdict of guilty and set punishment at fifteen years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Donald Ray Lockridge has perfected his appeal. The Judgment and Sentence of the District Court is **AFFIRMED.** Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

**F-2017-65** — Appellant, Earnesto Ray Loya, was tried by jury and convicted of Child Sexual Abuse (Count 1) and Lewd Molestation (Count 2) in District Court of Alfalfa County Case Number CF-2014-65. The jury recommended as punishment, imprisonment for twenty (20) years in Count 1 and five (5) years in Count 2. Appellant was simultaneously tried by jury and convicted of Forcible Sodomy (Count 1) and Rape in the First Degree (Count 2) in District Court of Alfalfa County Case Number CF-2016-24. The jury recommended as punishment, imprisonment for ten (10) years in each of the counts. The trial court sentenced Appellant in accordance with the jury's recommendations and imposed a period of post-imprisonment supervision for five (5) years in each case. The trial court ordered the sentences

in CF-2016-24 to run concurrently with each other and further ordered the sentences in CF-2014-65 to run consecutive to each other and consecutive with the sentences imposed in CF-2016-24. From this judgment and sentence Earnesto Ray Loya has perfected his appeal. The Judgment and Sentence of the District Court is hereby **AFFIRMED.** Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Specially Concur; Rowland, J., Specially Concur.

**F-2017-466** — Appellant, Jerimiah Don Newcomb, was charged on November 6, 2014, with Count 1 – Manufacture of CDS, Methamphetamine, a felony; Counts 2-6 – Child Neglect, felonies; Count 7 – Speeding in a School Zone, a misdemeanor; Count 8 – Driving Under Suspension, a misdemeanor; and Count 9 – Failure to Maintain Security, a misdemeanor. Appellant pled guilty on December 17, 2014, and was accepted into the Delaware County Drug Court Program. Pursuant to the plea agreement, upon successful completion of the program, all charges would be dismissed; if not successful, he would be sentenced to life imprisonment with twenty years to serve and the balance suspended on Counts 1-6. He would also be fined \$50,000.00 on Count 1, \$500.00 on Counts 2-6, \$20.00 on Count 7, and \$250.00 on Counts 8 and 9. The State filed an application on August 25, 2016, to remove Appellant from the Drug Court program and for sentencing pursuant to the plea agreement. Following a hearing on April 26, 2017, before the Honorable Robert G. Haney, District Judge, Appellant was terminated from Drug Court and sentenced in accordance with the plea agreement. The sentences were ordered to run concurrently. Appellant appeals from his termination from Drug Court. Appellant's termination from the Delaware County Drug Court Program is **AFFIRMED.** Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

**F-2017-605** — Mark Anthony Ford, Appellant, was tried by jury for the crimes of Count I – Possession of Controlled Drug (Cocaine Base) after former conviction of two or more felonies and Count II – Failure to Obey Traffic Control Device (misdemeanor) in Case No. CF-14-359 in the District Court of Comanche County. The jury returned a verdict of guilty and recommended as punishment 21 years imprisonment on Count I and a \$250 fine in Count II. The trial court sentenced accordingly. From this judgment and sentence Mark Anthony Ford has

perfected his appeal. **AFFIRMED.** Opinion by: Kuehn, J.; Lumpkin, P.J., concur in results; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

**F-2017-838** — Troy Jason McNeely, Appellant, was tried by jury for the crime of Injuring a Public Building after former conviction of a felony in Case No. CF-2016-299 in the District Court of Creek County. The jury returned a verdict of guilty and recommended as punishment 10 years imprisonment and a \$1,000 fine. The trial court sentenced accordingly. From this judgment and sentence Troy Jason McNeely has perfected his appeal. **AFFIRMED.** Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

#### **Thursday, August 30, 2018**

**F-2017-98** — Charles Edward Frierson, Appellant, was tried by jury, in Case No. CF-2015-2124, in the District Court of Oklahoma County, of Count 1: Trafficking in Illegal Drugs (Cocaine Base); Count 2: Trafficking in Illegal Drugs (Phencyclidine); Count 3: Possession of a Controlled Dangerous Substance (Marijuana) with Intent to Distribute; Count 4: Possession of an Offensive Weapon While Committing a Felony; and Count 6: Possession of Proceeds Derived from a Violation of the Uniform Controlled Dangerous Substances Act. The jury returned a verdict of guilty and recommended as punishment twenty years imprisonment and a \$100,000.00 fine on Count 1; life imprisonment and a \$100,000.00 fine on Count 2; five years imprisonment and a \$20,000.00 fine on Count 3; seven years imprisonment on Count 4; and five years imprisonment and a \$25,000.00 fine on Count 6. The Honorable Cindy H. Truong, District Judge, sentenced Appellant in accordance with the jury's verdicts. However, Judge Truong ordered the sentences on all counts to run concurrently. From this judgment and sentence Charles Edward Frierson has perfected his appeal. **AFFIRMED.** Opinion by : Hudson, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

**F-2016-1008** — Jack Leroy O'Donnell, Appellant, was tried by jury for the crimes of Count 1: First Degree Manslaughter; and Count 2: Driving Under the Influence - Great Bodily Injury, in Case No. CF-2015-2919, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment twelve years imprisonment and a \$10,000.00 fine on Count 1; and two years imprisonment and a

\$5,000.00 fine on Count 2. The Honorable Kelly Greenough, District Judge, sentenced accordingly and ordered the sentences on Counts 1 and 2 to run consecutively each to the other and consecutively to Appellant's sentences in Tulsa County Case Nos. CF-2012-1691 and CF-2012-3726. From this judgment and sentence Jack Leroy O'Donnell has perfected his appeal. **AFFIRMED.** Opinion by: Hudson, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concur; Kuehn, J., Concur in Results; Rowland, J., Concur.

**F-2017-148** — Antonio Bernard Ford, Appellant, was tried by jury for the crime of Robbery with a Firearm, in Case No. CF-2014-3766, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment ten years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Antonio Bernard Ford has perfected his appeal. **AFFIRMED.** Opinion by: Hudson, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concur; Kuehn, J., Concur; Rowland, J., Recuses.

**F-2017-593** — Watani Phinnes Gleason, Appellant, was tried by jury for the crime of Murder in the First Degree (Malice Aforethought) in Case No. CF-2016-779 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at life imprisonment with the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Watani Phinnes Gleason has perfected his appeal. **AFFIRMED.** Opinion by: Rowland, J.; Lumpkin, P.J., concurs in results; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

**F-2017-585** — David Allen Knight, Appellant, was tried by jury for the crime of Robbery by Force or Fear, After Former Conviction of Two or More Felonies (Count 1) and Endangering Others While Eluding Police Officer, After Former Conviction of Two or More Felonies (Count 2) in Case No. CF-2015-222 in the District Court of Pottawatomie County. The jury returned verdicts of guilty and set punishment at twenty years imprisonment on Count 1 and three years imprisonment on Count 2, with nine months post imprisonment supervision upon his release. The trial court sentenced accordingly and ordered the sentences to run consecutively to each other, and also consecutive to his sentences in Oklahoma County Case Nos. CF-2016-9955, CF-2014-925, CF-2014-1717, CF-2006-2172, and CF-2015-7401. From these judgments and sentences David Allen Knight has perfected his appeal. **AFFIRMED.** Opinion

by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

**F-2017-153** — Michael Ray Crawley, Appellant, was tried by jury for the crime of First Degree Felony Murder (Count 1), Eluding/ Attempting to Elude a Police Officer, After Two or More Prior Convictions (Count 2), Second Degree Burglary, After Two or More Prior Convictions (Count 3) and Possession of Burglary Tools (Count 8) in Case No. CF-2015-866 in the District Court of Pittsburg County. The jury returned verdicts of guilty and set punishment at life imprisonment with the possibility of parole on Count 1, three years imprisonment on Count 2, six years imprisonment on Count 3 and one year imprisonment on Count 8. The trial court sentenced accordingly. Judge Mills ordered the sentences on Counts 1, 2, 3 and 8 to be served concurrently, but consecutively to Crawley's revoked sentences. Judge Mills further awarded credit for time served, but only from the time of Crawley's arrest to the revocation of his prior sentences. From these judgments and sentences Michael Ray Crawley has perfected his appeal. **AFFIRMED.** The Judgement and Sentence of the district court on Counts 1 and 2 is **REVERSED** and the case **REMANDED** for a new trial. Appellant's Notice of Extra-Record Evidence Supporting Proposition IX of Brief of Appellant and/or Alternatively Application for Evidentiary Hearing on Sixth Amendment Claims is **MOOT**. Opinion by: Rowland, J.; Lumpkin, P.J., concurs in part and dissents in part; Lewis, V.P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs.

**RE-2016-1049** — On February 27, 2006, Appellant George, represented by counsel, entered a guilty plea to Second Degree (Statutory) Rape in Oklahoma County Case No. CF-2005-6817. George was sentenced to twenty (20) years with all but the first eight (8) years suspended, subject to terms and conditions of probation. On July 22, 2010, George entered a guilty plea to Attempted Larceny of a Vehicle and Possession of a Controlled Dangerous Substance (Methamphetamine), after former conviction of a felony, in Oklahoma County Case No. CF-2010-2865. George was sentenced to ten (10) years for each count, the sentences to run concurrently with each other. The balance of the sentences was suspended upon George's successful completion of a substance abuse treatment program. On June 26, 2016, George entered a guilty plea to Possession of a Controlled Dangerous Substance (Methamphetamine), after former con-

viction of two or more felonies in Oklahoma County Case No. CF-2015-2061. That same date he entered a guilty plea to three counts of False Declaration of Ownership to a Pawnbroker, after former conviction of two or more felonies, in Oklahoma County Case No. CF-2015-4378. George was sentenced to fifteen (15) years for each of the counts in the two cases, the sentences to be served concurrently with each other, with the balance suspended after completion of Drug Offender Work Camp. On July 25, 2016, the State filed an Application to Revoke George's suspended sentence in Case No. CF-2005-6817. On October 11, 2016, the State filed an Application to Revoke George's suspended sentences in Case Nos. CF-2010-2865, CF-2015-2061 and CF-2015-4378 alleging George violated his terms and conditions of probation by failing to pay court costs and by having contact with a child under the age of 18. At the conclusion of a revocation hearing conducted November 7, 2016, in the District Court of Oklahoma County, the Honorable Bill Graves, District Judge, revoked George's suspended sentences in full. The revocation of George's suspended sentence in Oklahoma County Case No. CF-2005-6817 is **AFFIRMED**. The district court's order revoking George's sentences in Oklahoma County Case Nos. CF-2010-2865, CF-2015-2061 and CF-2015-4378 is **REVERSED** with instructions to **DISMISS**. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur in Result; Kuehn, J., Concur; Rowland, J., Concur.

**F-2017-476** — Michael Brent Davis, Appellant, was tried by jury for the crime of Child Sexual Abuse in Case No. CF-2014-660 in the District Court of Pottawatomie County. The jury returned a verdict of guilty and set punishment at eight years imprisonment and a \$5,000.00 fine. The trial court sentenced accordingly. From this judgment and sentence Michael Brent Davis has perfected his appeal. **AFFIRMED.** Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., specially concurs.

**F-2017-714** — Tommy Dean Phillips, Appellant, was tried by jury for the crime of unlawful possession of controlled dangerous substance, after former conviction of two or more felonies in Case No. CF-2014-433 in the District Court of Carter County. The jury returned a verdict of guilty and set punishment at fourteen years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Tommy Dean Phillips has perfected his appeal.

The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

**COURT OF CIVIL APPEALS  
(Division No. 1)  
Thursday, August 16, 2018**

**116,179** — Thomas A. Quinn, Plaintiff/Appellant, vs. Estate of Aubrey K. McClendon, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Patricia G. Parrish, Judge. Plaintiff/Appellant seeks review of the trial court's order granting the motion for summary judgment of Defendant/Appellee Estate of Aubrey K. McClendon on Plaintiff's claim to collect a promissory note. In this accelerated review proceeding, Plaintiff asserts there is a controversy of material fact concerning the alleged forgery of the subject promissory note which precludes the summary adjudication of his claim. The uncontroverted evidence established the note, purportedly executed in 1991, was printed in Tahoma font, but that the Tahoma font was not created until 1995. If the Tahoma font did not exist prior to 1995, the note printed in that font and purportedly executed by Decedent was obviously created at some time after that date, and could not have been created earlier in 1991 as alleged by Plaintiff. AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Swinton, J. (sitting by designation), concur.

**116,755** — JPMorgan Chase Bank, N.A., Successor by Merger to Chase Home Finance LLC, Successor by merger to Chase Manhattan Mortgage Corporation, Plaintiff/Appellee, vs. Candas Christie Golden, a/k/a Candas C. Golden, a/k/a Candas C. Golden-Been, a/k/a Candas Estes, Defendant/Appellant. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Thad Balkman, Trial Judge. Defendant/Appellant Candas C. Golden appeals from the trial court's order granting summary judgment to Plaintiff/Appellee JP-Morgan Chase Bank, N.A., Successor by Merger to Chase Home Finance LLC, Successor by Merger to Chase Manhattan Mortgage Corporation (Bank). The undisputed material facts in the record show that Bank was the holder of the note entitled to enforcement and that Golden was in default. Accordingly, Bank was entitled to judgment as a matter of law and we AFFIRM. Opinion by Buettner, J., Bell, P.J., and Joplin, J., concur.

**116,803** — Katie McGaha, Petitioner, vs. Buffalo Wild Wings, Stone Trust Insurance Co. And the Workers' Compensation Commission, Respondents. Petitioner, Katie McGaha (Claimant), appeals from the Workers' Compensation Commission's order denying her quest for workers' compensation benefits. In 2016, Claimant was working as a server at a Buffalo Wild Wings restaurant owned by Respondent when a co-worker threw a ranch dressing-covered potato wedge at her. Moments later in the kitchen Claimant sprayed cleaning solution on the co-worker's backside. The co-worker then pushed Claimant in the back, causing injuries. A Commission ALJ found any injury sustained by Claimant was caused by "horseplay" and Claimant was not an "innocent victim." The Commission affirmed. We hold that although Claimant's co-worker initiated the horseplay in this case, Claimant transformed herself from an innocent bystander to an active participant in the horseplay when she deviated from her customary duties, retaliated against the co-worker and sprayed her with the cleaning solution. Pursuant to 85A O.S. Supp. 2013 §2(9)(b)(1), Claimant's injuries are not compensable. The Commission's order is SUSTAINED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

**Thursday, August 30, 2018**

**115,901** — Grey Aldridge and Jamie Aldridge, Husband and Wife, Plaintiffs/Appellants, v. R&R Homes, LLC, an Oklahoma Limited Liability Company, Defendant/Appellee. Appeal from the District Court of Logan County, Oklahoma. Honorable Louis A. Duel, Judge. In this action for breach of a home warranty, Plaintiffs/Appellants, Grey and Jamie Aldridge, husband and wife, appeal from the trial court's order compelling the parties to arbitration. In 2014, Plaintiffs purchased a home from Defendant/Appellee, R&R Homes, LLC, an Oklahoma Limited Liability Company. Defendant contractually agreed to provide Plaintiffs with a home warranty. The home warranty contract contained an arbitration provision. In January 2016, Plaintiffs filed the instant lawsuit against Defendant claiming the home has significant water problems due to Defendant's poor workmanship and improper grading. In February 2016, Defendant filed an answer and alleged affirmative defenses and counterclaims. Defendant's answer did not plead its contractual right to arbitration as an affirmative defense. In November 2016, Defendant moved to compel arbitration, which the trial court granted.

The trial court denied Plaintiffs' motion for a new trial which sought to set aside the arbitration provision on the basis of fraud and failure of meeting of the minds. We hold Defendant waived its right to compel arbitration because it failed to plead this right as an affirmative defense and it waited more than eight (8) months, after the initiation of this lawsuit, to file a motion to compel arbitration. The trial court's order compelling arbitration is reversed and this matter is remanded for further proceedings. REVERSED AND REMANDED. Opinion by Bell, P.J.; Joplin, J., concurs and Buettner, J., dissents.

**116,271** — Teresa Russell, Plaintiff/Appellant, v. Stroud Public Schools, Defendant/Appellee. Appeal from the District Court of Lincoln County, Oklahoma. Honorable Cynthia Ferrell Ashwood, Trial Judge Plaintiff/Appellant Teresa Russell (Russell) appeals from the trial court's bench trial verdict in favor of Defendant/Appellee Stroud Public Schools (District). Russell challenges the trial court's determination that her injuries were not caused by District's negligence. At trial, Russell failed to meet her burden of proof in establishing causation and the trial court's conclusions were reasonably supported by competent evidence. We therefore AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

**116,292** — In the matter of the Construction of W.M. Brown Trust, as Established on July 24, 1972, and In the matter of the Construction of the Katherine E. Brown Trust, as Established on July 24, 1972: Stephen E. Pollard and John Mark Pollard, Trustees of the W.M. Brown Trust and the Katherine E. Brown Trust, Petitioners, v. Marsha Kay Schubert, formerly Marsha Kay Pollard, Brandon Schubert, Hillary Schubert Patterson, Garret Lee Schubert, Respondents/Appellants, and Barry L. Pollard, Respondent/Appellee. This appeal results from the district court's July 14, 2017 grant of Barry Pollard's (Respondent/Appellee) motion for summary judgment. In addition, the district court overruled the summary judgment motions of Appellants, Marsha Schubert and her children. In July 2005, Barry Pollard was awarded a judgment of \$827,000.00 against Marsha Schubert (d/b/a Schubert and Associates). In an effort to collect on the judgment, Barry Pollard has sought claims on Schubert's non-exempt assets and attempted garnishment and execution proceedings. In March 2015, Pollard obtained service upon the trustees of the W.M. Brown Trust as Established on July 24,

1972 and the Katherine E. Brown Trust as Established on July 24, 1972, seeking execution on property held by the trusts for which Marsha Schubert was the beneficiary. Marsha Schubert is a named beneficiary of both the W.M. Brown and the Katherine E. Brown Trusts. Both trusts contain spendthrift provisions. In addition, each of the trusts provides that the trusts shall not terminate until the following people have passed away, W.M. Brown, Katherine E. Brown, Marjorie Brown Pollard and Loren Pollard. Loren Pollard, who died on July 21, 2014, was the last of the four people to pass away. Marsha Schubert disclaimed her interest in each of the trusts, filing "qualified disclaimers" on April 15, 2015. Both disclaimers were filed within nine (9) months of Loren Pollard's death, as per the requirements of 60 O.S. 2001 §753. Marsha Schubert asserts that as a result of her disclaimers her beneficial interests in the trusts passed to her three children and none of the trust property is accessible to Barry Pollard, who claims only by virtue of his status as a creditor of Marsha Schubert. See 60 O.S. 2001 §752; see also *In re Faulk*, 281 B.R. 15, 18 (Bankr.W.D. Okla.2002). Appellee-Pollard asserts Schubert's disclaimers were ineffective by virtue of the application of 60 O.S. 2001 §756, which provides "[a]ny voluntary assignment or transfer of, or contract to assign or transfer, an interest in real or personal property..made before he has disclaimed, as herein provided, bars the right otherwise hereby conferred on such beneficiary to disclaim as to such interest." Pollard asserts Schubert cannot have entered into the Beneficiary Settlement Agreement in 2002 and benefit from her interests in the trusts and then purport to disclaim those same interests twelve years later, as doing so would violate §756. We find the Beneficiary Settlement Agreement was a voluntary transfer and assignment of trust interests as contemplated in §756 and effectively bars Marsha Schubert's right to disclaim her interests in the trusts due to the application of §756. The order of the district court granting summary judgment in favor of Barry Pollard and overruling the counter motions of Appellants, Marsha Schubert and her children, is AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

**116,670** — Multiple Injury Trust Fund, Petitioner, v. Gregory J. Morgan and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to review and Order of the Workers' Compensation Court of Existing Claims. Honorable L. Brad Taylor, Trial

Judge. Petitioner Multiple Injury Trust Fund seeks review of an order of the Workers' Compensation Court of Existing Claims finding Respondent Greg Morgan was PTD. The order is not against the clear weight of the evidence or contrary to law and we SUSTAIN. Opinion by Buettner, J.; Joplin, Acting P.J., and Goree, V.C.J. (sitting by designation), concur.

**116,931** — RCB Bank, Plaintiff/Appellee, v. Stryker Building, LLC, f/k/a Lawyers Title Building, LLC; and Avraham Shemuelian, Defendants/Appellants, Parvaneh Saghian and Dan Weingarten, Defendants. Appeal from the District Court of Oklahoma County, Oklahoma. Defendants/Appellants Stryker Building, LLC (formerly known as Lawyers Title Building, LLC) (Stryker Building) and Avraham Shemuelian appeal from the trial court's order granting summary judgment to RCB Bank (Bank). The undisputed material facts in the record show that Bank was the holder of the note entitled to enforcement and that Stryker Building was in default. Accordingly, Bank was entitled to judgment as a matter of law and we AFFIRM. Opinion by Buettner, J.; Bell, J., and Joplin, J., ADD concur.

**Friday, August 31, 2018**

**116,288** — Cumis Insurance Society, Inc., Plaintiff/Appellee, v. Pamela Green, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard C. Ogden, Judge. Defendant/Appellant, Pamela Green, appeals from the trial court's refusal to vacate a default judgment entered in favor of Plaintiff/Appellee, Cumis Insurance Society, Inc. ("Cumis"), in its subrogation action against Defendant. Defendant was properly served with Cumis' action, but she failed to file any pleading or publicly appear in court. The trial court thereafter entered a default judgment to Cumis. Defendant then moved to vacate the judgment on the ground that Cumis was required, but failed, to file a motion for default judgment before such was granted. The trial court refused to vacate the default judgment. Pursuant to Rule 10 of the *Rules for District Courts*, 12 O.S. Supp. 2013, Ch. 2, App. 1, "a motion [for default judgment] must be filed in all instances, even when a party fails to make an appearance, and the motion must recite what notice was given, and, if none were given, the reason therefore." *Schweigert v. Schweigert*, 2015 OK 20, ¶15, 348 P.3d 696. Because Cumis failed to file a motion for default judgment, the trial court should not have

granted a default judgment and erred in refusing to vacate the same. Accordingly, the judgment of the trial court is reversed. REVERSED. Opinion by Bell, P.J. Joplin, J., concurs; Buettner, J., specially concurs.

**(Division No. 2)**

**Monday, August 27, 2018**

**116,428** — In the Matter of R.S., M.P., J.P., J.P., and Z.P., Adjudicated Deprived Children, Carnesha Powell, Appellant, vs. State of Oklahoma, Appellee. Appeal from an order of the District Court of Oklahoma County, Hon. Susan K. Johnson, Trial Judge, upon jury verdict terminating Mother's parental rights to her minor children. We are asked to review whether the State of Oklahoma proved by clear and convincing evidence that Mother's parental rights should be terminated. We find there was clear and convincing evidence that Mother failed to correct the condition of domestic violence by continuing to associate with the perpetrator of the domestic violence and to bring him around the children. The evidence also indicated Mother did not appreciate the severity of the situation with the perpetrator setting himself on fire and she then refused to apply for a protective order. Mother failed to acknowledge her role in the children's removal from her home and accused two of the children of lying about events they said had taken place when they lived with her. This is further evidence that Mother failed to correct the conditions that led to the deprived adjudication. State further showed Mother continued to expose the children to the perpetrator of domestic violence and Mother failed to acknowledge her role in the children's removal even after she stipulated to the deprived petition. State also showed it was in the best interests of the children for Mother's rights to be terminated. State has demonstrated by clear and convincing evidence that Mother's parental rights to HP, ZP, JSP, MP, JLP, and RS should be terminated pursuant to 10A O.S. Supp. 2014 § 1-4-904(B)(5). Accordingly, we affirm the trial court's decision. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

**Tuesday, September 4, 2018**

**116,142** — Vintage Oil & Gas, LLC, a North Carolina limited liability company, Plaintiff/Appellee, vs. McCosar Minerals, Inc., a California corporation, Defendant/Appellant. Appeal from an Order of the District Court of Oklahoma County, Hon. Don Andrews, Trial Judge.



Defendant appeals from the trial court's order granting a motion for new trial to Plaintiff following a jury verdict in favor of Defendant on Plaintiff's claims for slander of title and tortious interference with prospective business relationship. The trial court granted a new trial based on its determination that an improper statement by Defendant's counsel was "capable of influencing the jury's verdict" and therefore warranted new trial. The statement by counsel was that "there's not a malicious bone in that man's body" and was in reference to Defendant's president. Although it is improper for counsel to vouch for a witness, such conduct ordinarily will not result in a new trial or reversal of a judgment unless it substantially influences the verdict or denies the complaining party a fair trial. We find the trial court applied the improper standard in deciding to grant a new trial, and, based on a full review of the record, find that the statement did not result in actual prejudice to Plaintiff or substantially influence the verdict. Accordingly, we reverse the decision granting a new trial and remand with instructions to enter judgment on the verdict in Defendant's favor. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer, J., concur.

**(Division No. 3)**

**Monday, August 20, 2018**

**116,709** — In the Matter of the State of Oklahoma, in the Interest of W.K.K. and G.K., Deprived Children as Defined by the Laws of the State of Oklahoma. In the Matter of the Adoption of W.K. and G.K., Minor Children: Madison Rosalie Cobb, Natural Mother, Appellant, vs. State of Oklahoma, Appellee. Appeal from the District Court of Pottawatomie County, Oklahoma. Honorable Dawson R. Engle, Judge. At issue in this case is whether the trial court committed error when it denied Madison Rosalie Cobb's motions to vacate orders terminating her parental rights to her minor children, W.K.K. and G.K. We hold that the termination orders are void because Ms. Cobb did not receive constitutionally adequate notice of the proceeding where she lost a fundamental right. We also hold that the termination orders are invalid because they were not sustained by proper evidence. At the conclusion of a trial, an order terminating parental rights must rest on clear and convincing evidence – and a trial court's acknowledgment of agreements by counsel of what the proof would have been, if

it had actually been offered and admitted, is not a legitimate substitute. Because the orders terminating parental rights were void and invalid, the order denying the motions to vacate them is reversed. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

**Friday, August 24, 2018**

**115,919** — In Re the Marriage of Bozalis: Irena Damnjanoska Bozalis, Petitioner/Appellee, vs. William George Bozalis, Jr., Respondent/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Lynne McGuire, Trial Judge. Husband appeals an order denying his Motion for New Trial and/or Motion to Vacate Decree of Dissolution of Marriage on the basis that he was denied due process when the trial court refused to allow evidence of Wife's immigration status and refusal to allow a trial continuance. We AFFIRM the trial court's order. Opinion by Goree, V.C.J.; Swinton, P.J., and Buettner, J., (sitting by designation), concur.

**116,879** — Cynthia McCullough, Plaintiff/Appellant, vs. Cody Morse, Defendant, and Stuart Petroleum Testers, Inc., Defendant/Appellee. Appeal from the District Court of Canadian County, Oklahoma. Honorable Paul Hesse, Judge. Plaintiff/Appellant Cynthia McCullough (McCullough) appeals from an order dismissing her claims against Defendant/Appellee Stuart Petroleum Testers, Inc. (Stuart Petroleum) based on a lack of personal jurisdiction. McCullough also appeals the court's denial of her motion to reconsider its ruling. McCullough was injured in an accident as a passenger in a vehicle driven by Defendant Cody Morse (Morse), an employee of Stuart Petroleum. The vehicle was owned and insured by Stuart Petroleum. Morse was vacationing in Oklahoma when the accident occurred. Stuart Petroleum is not incorporated under the laws of the state of Oklahoma; its principal place of business is not in Oklahoma; and it does not conduct business in Oklahoma. After *de novo* review, we find Stuart Petroleum does not have sufficient minimum contacts to establish personal jurisdiction. We AFFIRM. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

**Tuesday, August 28, 2018**

**116,202** — Earl Wheeler, an individual and as President of Timberlane Unit Ownership Association, Inc., Plaintiff/Appellant, vs. Lewis Hoort, an individual; William Bowling, an

individual; and Ken Meredith, an individual, Defendant/Appellees, and Arvest Bank, Intervenor, and Timberlane Unit Ownership Association, Inc., Interested Party. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Linda Morrissey, Judge. SUMMARY Opinion by Mitchell, J. Swinton, P.J., concurs; Goree, V.C.J., concurs in part and dissents in part.

**(Division No. 4)**  
**Tuesday, August 28, 2018**

**116,086** — In Re The Marriage Of: Emily Walker, Petitioner/Appellee, v. Gary R. Walker, Respondent/Appellant. Appeal from an Order of the District Court of Logan County, Hon. Louis A. Duel, Trial Judge. The respondent, Gary Walker (Husband) appeals from a decree of Dissolution of Marriage entered in an action brought by the petitioner, Emily Walker (Wife). This case is Husband's appeal of a contentious divorce action. Wife has not filed a Brief, but reversal is not automatic. The trial court heard extensive testimony regarding the parties' general and specific conduct. The trial court also heard extensive testimony regarding the parties' property, support alimony, and child support and custody. The GAL made a recommendation. The Decree is comprehensive both as to the issues in a marriage dissolution case and as to the future conduct of the parties. The trial court explained the credibility concerns about Husband. Although the trial court's conclusion that the residence and a 13,000 tank were marital property is arguably incorrect, the facts show that Wife made substantial contributions to the value of the residence and all of the tanks, thereby entitling her to share in the enhanced value. The result in the Decree is consistent with sharing in the enhanced value and, therefore, reached the right result. After review, this Court finds that Husband has not demonstrated a legal basis for reversal of any of the components of the Decree he has appealed. The Decree of Dissolution is affirmed. **AFFIRMED.** Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

**116,225** — In the Matter of the Adoption of T.H.J., a Minor Child, Billy M. Johnson, Appellant, v. Barbara Johnson, Appellee. Appeal from an Order of the District Court of Pottawatomie County, Hon. John Canavan, Trial Judge. The petitioner for adoption of THJ, Billy M. Johnson, appeals an Order allowing visitation to Barbara R. Johnson, the intervenor and counter-petitioner for adoption of THJ. The trial court's Order

granting Billy Johnson's petition to adopt and denying Barbara Johnson's counter-petition has not been appealed. Barbara Johnson, grandmother, was awarded visitation of the adopted child over the objection of the adopting father, Billy Johnson. The parties had been married but divorced prior to the adoption proceedings. Barbara Johnson did not comply with the procedural requirements of the grandparent visitation statute, 43 O.S. Supp. 2017, § 109.4. This failure is generally fatal to her request for visitation, unless there is an existing visitation rights award which is not revoked. Here, by interlocutory order, the trial court had awarded Barbara Johnson visitation rights during the adoption proceedings. This award differed materially and substantially from the award set out in the Adoption Decree. The trial court necessarily revoked the interlocutory order so that it did not survive the entry of the Adoption Decree. This Court holds that the statutory exception for existing court visitation orders does not apply here. This Court further holds that Barbara Johnson did not follow the provisions of Section 109.4 regarding seeking grandparent visitation and now that Decree of Adoption has been entered and become final, the trial court is statutorily barred by 43 O.S. Supp. 2017, §109.4(D)(3)(a). Therefore, the provisions of the trial court's Decree of Adoption awarding Barbara Johnson visitation with THJ is reversed and vacated. In all other respects said Decree of Adoption is affirmed. **VISITATION ORDER REVERSED AND VACATED.** Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

**ORDERS DENYING REHEARING**  
**(Division No. 3)**  
**Monday, August 23, 2018**

**116,200** — In the matter of the Estate of Cecil Wayne Mackey: Vincent Mesis, III and Sean Mesis, Respondents/Appellants, vs. Joe Mackey, Individually and as Personal Representative of the Estate of Cecil Mackey and as Trustee of the Cecil Mackey Revocable Trust, Petitioner/Appellee. Appellants' Petition for Rehearing, filed August 9, 2018, is **DENIED**.

**(Division No. 4)**  
**Monday, August 20, 2018**

**115,767** — Michelle Renee Coble, Petitioner/Appellee, vs. Camden Lee Coble, Respondent/Appellant. Appellant's Petition for Rehearing is hereby **DENIED**.

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SEPTEMBER 21  
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