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Jon Jacobmeier has been the Chief Deputy Pottawattamie County Attorney since 2003. He graduated from Brigham Young University in 1987 and Creighton Law School in 1997. He was an assistant Pottawattamie County Attorney from 1997 to 2000 and then worked for the Richter & Wilber law firm from 2000 to 2003. Currently, Jon's primary responsibilities range from managing the office's twelve assistant county attorneys to prosecuting arsons, kidnappings and murders. Jon has tried over 50 jury trials, including 23 Class "A" (murders and kidnappings) felony trials.

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THE OKLAHOMA BAR
Journal

Volume 91 – No. 10 – May 22, 2020

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NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF JACQUELINE FORSGREN CRONKHITE, SCBD #6905 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if Jacqueline Forsgren Cronkhite should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Wednesday, June 17, 2020**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF TRAVIS KENDALL SIEGEL, SCBD #6908 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if Travis Kendall Siegel should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Thursday, July 23, 2020**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

OKLAHOMA BAR ASSOCIATION

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2020 OK 22

ORDER REGARDING THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (CARES ACT, PUBLIC LAW NO. 116-136)

SCAD 2020-38. May 1, 2020

1. The Supreme Court continues to issue orders implementing emergency procedures to address the challenges raised by the COVID-19 pandemic. In response to this pandemic, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act, Public Law No. 116-136). The law includes important, immediate protections for tenants and homeowners.

2. In order to address residential evictions, an issue that has health and safety implications, and pursuant to our superintending authority under Article 7, Section 4 of the Oklahoma Constitution, this Court adopts and mandates the implementation of the following temporary pleading requirement.

   A. In support of a Petition for Forcible Entry and Detainer or Affidavit for Possession filed on or after March 27, 2020, the date of passage of the CARES Act, the Plaintiff in any action for eviction shall affirmatively plead that the property that is the subject of the eviction dispute **is or is not a covered dwelling under the CARES Act.**

   B. This requirement shall be met by the filing of the attached VERIFICATION OF COMPLIANCE WITH SECTION 4024 OF THE CARES ACT. The Plaintiff shall supplement all pending cases where the Petition or Affidavit for Possession was not filed with a Verification of Compliance with Section 4024 of the CARES Act. All new filings must comply with this order until further order of this Court.

3. This temporary pleading requirement merely reflects the Act's moratorium prohibiting the lessor of a covered dwelling from filing a legal action to recover possession of the property for nonpayment of rent. See CARES Act Section 4024(b). This requirement shall remain in force and effect until further order of this Court.

4. This order is effective upon the date of filing.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 1st day of May, 2020.

/s/ Noma D. Gurich,
Chief Justice

Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Colbert, and Combs, JJ., concur;

Kane, J., concurs in part and dissents in part;

Rowe, J., dissents (by separate writing).

(see CARES Act form — following 2 pages)

IN THE DISTRICT COURT OF _____ COUNTY
STATE OF OKLAHOMA

_____,	)	
PLAINTIFF,	)	
	)	CASE NO.: _____
VS.	)	
	)	
_____,	)	
DEFENDANT.	)	

VERIFICATION OF COMPLIANCE
WITH SECTION 4024 OF THE CARES ACT

I, _____, in support of Petition for Forcible Entry & Detainer or Affidavit for possession of the dwelling unit located at:

_____,

submit this Verification of Compliance with Section 4024 of the CARES Act.

1. I am __the Plaintiff or __an authorized agent of the Plaintiff in this action.

2. The facts stated in this Verification are within my personal knowledge and are true and correct.

3. I submit this Verification in support of this action with knowledge of my pleading obligations under 12 O.S. § 2011.

4. This action is being filed due to the non-payment of rent, fees, or other charges.

___Yes ___No

5. The property underlying this action is subject to a mortgage: ___Yes ___No.

6. If yes to paragraph 5, the mortgage is a federally backed mortgage loan or federally backed multifamily mortgage loan as defined in Section 4024(a)(2)(B) of the CARES Act and explained below: ___Yes ___No

A federally backed mortgage is defined as any loan subject to a lien that was made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way by the Federal Government, or that is purchased or securitized by Freddie Mac or Fannie Mae.

7. The property underlying this action is a "covered property" as defined in Section 4024(a)(2)(A) of the CARES Act and specified below: ___Yes ___No

A "covered property" includes any property that participates in any of the following programs or receives funding from any of the following sources:

- Public Housing (42 U.S.C. § 1437d)
- Section 8 Housing Choice Voucher program (42 U.S.C. § 1437f)
- Section 8 project-based housing (42 U.S.C. § 1437f)
- Section 202 housing for the elderly (12 U.S.C. § 1701q)
- Section 811 housing for people with disabilities (42 U.S.C. § 8013)
- Section 236 multifamily rental housing (12 U.S.C. § 1715z–1)
- Section 221(d)(3) Below Market Interest Rate (BMIR) housing (12 U.S.C. § 1715l(d))
- HOME (42 U.S.C. § 12741 et seq.)
- Housing Opportunities for Persons with AIDS (HOPWA) (42 U.S.C. § 12901, et seq.)
- McKinney-Vento Act homelessness programs (42 U.S.C. § 11360, et seq.)
- Section 515 Rural Rental Housing (42 U.S.C. § 1485)
- Sections 514 and 516 Farm Labor Housing (42 U.S.C. §§ 1484, 1486)
- Section 533 Housing Preservation Grants (42 U.S.C. § 1490m)
- Section 538 multifamily rental housing (42 U.S.C. § 1490p-2)
- Low-Income Housing Tax Credit (LIHTC) (26 U.S.C. § 42)
- Rural housing voucher program under section 542 of the Housing Act of 1949 (42 U.S.C. 1490r).

8. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

_____ _____

Date Signature

_____

Printed Name

_____

Title/Position

_____

Address

_____

Phone

2020 OK 26

THE LEAGUE OF WOMEN VOTERS OF OKLAHOMA, ANGELA ZEA PATRICK, and PEGGY JEANNE WINTON, Petitioners, v. PAUL ZIRIAX, SECRETARY OF THE OKLAHOMA STATE ELECTION BOARD, in his official capacity, Respondent.

No. 118,765. May 5, 2020

ORDER CORRECTING OPINION

The dissenting opinion, filed herein on May 4, 2020, is corrected to reflect the following changes. Paragraph 3 will be replaced with the following new ¶3:

¶3 When reviewing the validity of the Oklahoma Voter I.D. Act in *Gentges v. Oklahoma State Election Board*, 2014 OK 8, ¶21, 319 P.3d 674, 679, we remarked:

> While the people have made it clear by constitutional command that they do not want the civil or military power of the state to interfere to prevent the free exercise of the right of suffrage, the people have made it equally clear by a coordinate constitutional command that they want the right of suffrage protected from fraud.

We later upheld the constitutionality of the Oklahoma Voter I.D. Act in *Gentges v. Oklahoma State Election Board*, 2018 OK 39, ¶19, 419 P.3d 224, 230.

In all other respects the May 4, 2020 dissenting opinion shall remain unchanged.

DONE BY ORDER OF THE SUPREME COURT THIS 5TH DAY OF MAY, 2020.

/s/ Noma D. Gurich,
Chief Justice

2020 OK 27

ROBINSON KENNETH ROGERS, Plaintiff/Appellant, v. ESTATE OF JUDITH K. PRATT DECEASED, Defendant/Appellee.

No. 117,671. May 7, 2020

CORRECTION ORDER

¶1 The opinion in the above styled and numbered cause filed on May 5, 2020, is hereby corrected as follows:

¶18, "Okfuske" should be "Okfuskee"

The first line of first footnote "throughly" should be "thoroughly"

(Plaintiff's) – possessive form of name – **Roger's** appearing in ¶¶0, 12, and 13 case should be **Rogers'**

The duplicate sentence at the top of page 19 which states "succession.[2] Consequently, the question of undue influence is moot" is deleted

The last footnote of the opinion currently numbered "1" is hereby corrected to number "27" and amended to state: "Title 84 O.S. 2011 §213, supra, note 1"

In all other respects, the order shall remain unaffected by this correction order.

DONE BY ORDER OF THE SUPREME COURT THE 7th DAY OF MAY, 2020.

/s/ Noma D. Gurich
Chief Justice

2020 OK 31

JAMES C. PAYNE, Plaintiff/Appellant, v. JOEL KERNS and MISSY ELDRIDGE, Defendants/Appellees.

Case No. 116,978. May 12, 2020

ON CERTIORARI FROM THE COURT OF CIVIL APPEALS, DIVISION I

¶0 The plaintiff/appellant, prisoner, sued various defendants for his detention lasting several months past the end of his sentence. The district court granted summary judgment in favor of the defendants. The Oklahoma Court of Civil Appeals affirmed. This Court granted certiorari on the remaining issue preserved for our review, i.e., whether a private right of action under Article 2 Section 9 of the Oklahoma Constitution exists under the facts of this case. We hold a private right of action existed at the time the plaintiff/appellant was detained past his sentence and remand for further proceedings consistent with this opinion.

COURT OF CIVIL APPEALS' OPINION VACATED IN PART; JUDGMENT REVERSED AND REMANDED

J. Derek Ingle, Boettcher Devinney Ingle & Wicker, PLLC, Tulsa, OK, for Plaintiff/Appellant

Wellon B. Poe, Collins Zorn & Wagner, P.C., Oklahoma City, for Defendants/Appellees

COMBS, J.:

I. FACTS AND PROCEDURAL HISTORY

¶1 On February 8, 2010, the appellant, James C. Payne (Payne), pled nolo contendere to the crime of stalking in Case No. CF-2010-27, District Court of Pittsburg County, State of Oklahoma. He received a five-year deferment with special rules and conditions of probation. He was required to have no contact with the stalking victim. In addition, Payne pled guilty to violating a protective order in many other cases filed in Pittsburg County related to the same victim and was sentenced to six months in the county jail. The sentences were to run concurrently. He received extra credits and was released from custody on May 5, 2010. A month later, on June 10, 2010, the district attorney filed a motion to accelerate the deferred judgment for probation violations. It alleged Payne had been contacting and harassing the victim. The district court issued a felony warrant and Payne was arrested and booked into jail by the Pittsburg County Sheriff's Office on June 11, 2010. Payne did not post bail and remained in the county jail.

¶2 On August 23, 2010, the district court executed a minute order finding Payne guilty of violating the terms of his deferred sentence. He was sentenced to a term of five years imprisonment with four years suspended and one year to serve in the Department of Corrections (DOC). Payne also received credit for the time he had been serving in the county jail since his June 11, 2010 arrest. Therefore, the one year sentence was to expire on June 11, 2011. A formal Judgment and Sentence was filed on May 13, 2011 and dated October 15, 2010. This occurred less than a month of when Payne's sentence was set to expire. The record reflects the Pittsburg County Sheriff's Office received the Judgment and Sentence on May 17, 2011. The Judgment and Sentence ordered Payne into DOC custody and directed the Sheriff's office to transfer Payne to DOC. It provided:

> In the event the above sentence is for incarceration in the Department of Corrections, the Sheriff of Pittsburg County, Oklahoma is ordered and directed to deliver the Defendant to the Lexington Assessment and Reception Center at Lexington, Oklahoma, and leave therewith a copy of this Judgment and Sentence to serve as warrant authority of the Sheriff for the transportation and the imprisonment of the Defendant as herein before provided. The sheriff to make due return to the clerk of this Court, with his proceedings endorsed thereon.

The Sheriff's Office of Pittsburg County did not transfer Payne to the Lexington Assessment and Reception Center (LARC) until September 6, 2011, almost three months past the end of his sentence. Payne was released that same day without serving any of his time in DOC custody.

¶3 Payne filed a Notice of Governmental Tort Claims on February 27, 2012 against the State of Oklahoma, Oklahoma Department of Corrections, Pittsburg County Jail, Pittsburg County Sheriff's Department, Pittsburg County Commissioners Chairman Gene Rogers, Commissioner Kevin Smith, and Commissioner Ronnie Young, Pittsburg County Sheriff Joel Kerns, and Pittsburg County Jail Administrator Missy [sic] Eldridge.[1] The claim was denied on March 30, 2012. On September 6, 2012, he filed a Petition in the District Court of Pittsburg County (Case No. CJ-2012-233) against the same Defendants. He alleged various violations of his constitutional rights under the United States Constitution, federal statute (42 U.S.C. § 1983) and tort causes of action related to his extended incarceration past his sentence expiration. Less than a month later, October 2, 2012, the case was removed to the United States District Court for the Eastern District of Oklahoma (Case No. 12-CV-407) based upon federal question jurisdiction. After some litigation the parties attempted to settle the action and the federal case was dismissed without prejudice by an Administrative Closing Order filed July 15, 2013.

¶4 On April 11, 2014, Payne re-filed his Petition against the same Defendants in the District Court of Pittsburg County (Case No. CJ-2014-73). The Petition was identical to the one filed in CJ-2012-233, with the addition of alleged violations of his rights under the Oklahoma Constitution. Payne alleged the Defendant's actions violated his rights under the following sections of Article II of the Oklahoma Constitution:

> §2. All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.
>
> §7. No person shall be deprived of life, liberty, or property, without due process of law.

> §9. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.
>
> §30. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized.

Based upon these state constitutional violations and this Court's jurisprudence in *Washington v. Barry*, 2002 OK 45, 55 P.3d 1036 and *Bosh v. Cherokee County Building Authority,* 2013 OK 9, 305 P.3d 994, the Petition asserted Payne had a private right of action against the Defendants notwithstanding the Oklahoma Government Tort Claims Act (OGTCA), 51 O.S. § 151, *et seq*.

¶5 On January 8, 2015, the Defendants again filed a Notice and Petition for Removal in the United States District Court for the Eastern District of Oklahoma (Case No. 15-CV-10). The case was removed and the parties litigated the matter in federal court for almost two years. On January 14, 2015, the Defendants, State of Oklahoma and the Oklahoma Department of Corrections, moved to dismiss all claims against those defendants. The court granted their motion on September 17, 2015. Also, on January 14, 2015, the Defendants Pittsburg County Jail, Pittsburg County Sheriff's Department, Sheriff Joel Kerns, Pittsburg County Commissioners Gene Rogers and Kevin Smith, and Pittsburg County Jail Administrator "Missi" Eldridge moved to enforce the settlement agreement from 2013 or in the alternative to dismiss the action against those defendants. The court denied their motion on September 17, 2015.[2] On November 25, 2015, the Defendants, Pittsburg County Jail, Pittsburg County Sheriff's Office, County Commissioner Gene Rogers and County Commissioner Kevin Smith, filed a Motion to Dismiss. A few days later, December 10, 2015, Payne filed a Partial Dismissal of Defendants, County Commissioners Gene Rogers, Kevin Smith and Ronnie Young, the Pittsburg County Sheriff's Department and the Pittsburg County Jail. On June 8, 2016, by Minute Order, the court granted the Defendants' Motion to Dismiss and Payne's Partial Motion to Dismiss and stated "[t]he only defendants remaining are Pittsburg County Sheriff Joel Kerns and Pittsburg County Jail Administrator Missy Eldridge."

¶6 On December 7, 2016, Payne filed a Motion for Partial Dismissal and Remand wherein he requested to dismiss all his federal claims and have the matter remanded to the state district court to determine his Oklahoma state law claims. On December 13, 2016, the court entered an Order. The Order notes Payne's federal claims are dismissed by agreement of the parties but it found no compelling reason to retain jurisdiction over Payne's "pendent state *Bosh* claim." The court held "any issues the parties may have under *Bosh* should be decided by the Pittsburg County, Oklahoma District Court including any defenses regarding individual capacity. This action is therefore remanded to the Pittsburg County, Oklahoma District Court." On February 23, 2017, the District Court of Pittsburg County (Case No. CJ-2014-73) entered a status and scheduling conference journal entry noting the case was on remand from the federal district court "on issues of state law only."

¶7 On April 7, 2017, the remaining Defendants, "Sheriff Joel Kerns" (Kerns) and "Jail Administrator Missi Eldridge" (Eldridge) filed a Motion for Summary Judgment in the District Court of Pittsburg County. They argued 1) the remaining Defendants were not proper parties under a *Bosh* claim, 2) Payne had no private right of action against the Defendants under the Oklahoma Constitution, 3) the constitutional claims are time barred, 4) Payne abandoned his state tort law claims, 5) the Defendants were not liable for the state tort law claims, and 6) the state law claims should be dismissed based upon promissory estoppel. On August 8, 2017, the district court entered a Minute Order granting the Defendants' motion. The Minute Order states:

> After hearing argument of counsel, review of the parties' motions, briefs, attached exhibits, and review of the relevant provisions of the Oklahoma Constitution, the OGTCA, applicable statute and case law, including, but not limited to, *Bosh v. Cherokee Bldg. Authority,* 2013 OK 9, GJA v. OK DHS 2015 OK CIV APP 32, and *Deal v. Brooks* 2016 OK CIV APP 81; the Court finds that Defendant's Motion for Summary Judgment, in its entirety, should be and is hereby GRANTED. This Court is not comfortable extending the analysis and holding in *Bosh* to claims asserted in this

action, and therefore the Court finds that there is no substantial controversy as to any material fact.

The Defendants were ordered to prepare a journal entry. On December 5, 2017, the Defendants filed a Motion to Settle Journal Entry with an attached proposed journal entry. The Defendants asserted in their motion "[t]he Minute Order reflects the general rulings of the Court but does not set forth sufficient factual and legal conclusions necessary for any appeal." The proposed journal entry included findings of fact and conclusions of law. Its conclusions of law section asserted the individual Defendants are not proper parties because they are immune from liability under the OGTCA and that the court declines to extend the analysis in *Bosh* to recognize a private right of action under the Oklahoma Constitution to the facts of this case. In addition, the Defendants provided it was unnecessary to address the other defenses they had raised, i.e., improper parties, promissory estoppel, and statute of limitations. Payne responded to the motion and asserted the proposed journal entry does not accurately reflect the court's ruling. The court, he asserted, only focused on the *Bosh* claim and not on any other issue raised by the Defendants. He noted it was apparent that the Defendants themselves do not construe the court's statement of "in its entirety" to include every defense argued for in the Motion for Summary Judgment. He requested the court enter a journal entry that reflected the Minute Order. The court apparently agreed with Payne and denied Defendants' Motion to Settle Journal Entry. It entered a Journal Entry and Order on April 4, 2018, which was identical to the Minute Order. On May 1, 2018, Payne appealed.

¶8 The only issues Payne raised in his Petition in Error were whether the district court erred by not finding sections 2, 7, 9 and 30 of Article II of the Oklahoma Constitution created a private right of action for his delayed release pursuant to *Washington v. Barry*, 2002 OK 45, 55 P.3d 1036, *Bosh v. Cherokee County Governmental Building Authority*, 2013 OK 9, 305 P.3d 994, and *Deal v. Brooks*, 2016 OK CIV APP 81, 389 P.3d 375 (approved for publication by the Oklahoma Supreme Court). The matter was assigned to the Oklahoma Court of Civil Appeals, Division I. The court filed its opinion on May 17, 2019, affirming the district court's Journal Entry and Order granting summary judgment. The Oklahoma Court of Civil Appeals opinion is paraphrased as follows: 1) a right of action under Okla. Const. art. 2, §30 applies only to citizens who are seized, arrestees and pre-incarcerated detainees, pursuant to *Bosh*, 2013 OK 9, ¶22, and therefore it is not applicable to Payne who was incarcerated and whose private right of action, if one exists, would be under Okla. Const. art. 2, §9; 2) the court focused on *Bosh* and *Washington* which concerned a private right of action based upon "excessive force," and found the conduct here was not the type that would rise to the level of a constitutional violation for cruel and unusual punishment and therefore it would not expand an Okla. Const. art. 2, §9 right of action to the facts of this case; 3) the conduct at issue here was not shocking to the conscience and did not violate substantive due process protections found in Okla. Const. art. 2, §7; and 4) the Oklahoma Supreme Court has never recognized a private right of action pursuant to Okla. Const. art. 2, §2.

¶9 Payne filed a Petition for Certiorari with this Court on July 19, 2019. The petition was granted on January 13, 2020. Payne's petition only challenges the Oklahoma Court of Civil Appeals' ruling concerning a private right of action under Okla. Const. art. 2, §9 (cruel or unusual punishments). We therefore affirm the opinion of the Oklahoma Court of Civil Appeals concerning sections 2, 7, and 30 of Article II of the Oklahoma Constitution and turn to the issue preserved for our review, i.e, whether there exists a private right of action under Okla. Const. art. 2, §9 under the facts of this case. *See Oklahoma Association of Broadcasters, Inc. v. City of Norman*, 2016 OK 119, ¶¶12-13, 390 P.3d 689; *Hough v. Leonard,* 1993 OK 112, ¶1, 867 P.2d 438. This matter was assigned to this office on January 13, 2020.

II. STANDARD OF REVIEW

¶10 Whether summary judgment was properly entered is a question of law which we review *de novo*. *Manley v. Brown*, 1999 OK 79, ¶ 22, 989 P.2d 448, 455. In a *de novo* review, we have plenary, independent and non-deferential authority to determine whether the trial court erred in its application of the law and whether there is any genuine issue of material fact. *Kluver v. Weatherford Hosp. Auth.*, 1993 OK 85, ¶ 14, 859 P.2d 1081, 1084. Like the trial court, we examine the pleadings and summary judgment evidentiary materials submitted by the parties to determine if there is a genuine issue of material fact. *Carmichael v. Beller,* 1996 OK 48,

¶ 2, 914 P.2d 1051, 1053. We view the facts and all reasonable inferences arising therefrom in the light most favorable to the non-moving party. *Id.* The purpose of summary adjudications is not to substitute a trial by affidavit for one by jury, but rather to afford a method of summarily terminating a case when only questions of law remain. *Martin v. Aramark Services, Inc.*, 2004 OK 38, ¶12, 92 P.3d 96. When uncontroverted proof lends support to conflicting inferences, the choice to be made between the opposite alternatives does not present an issue of law but rather one for the trier of fact. *Walters v. J.C. Penny Co., Inc.*, 2003 OK 100, ¶13, 82 P.3d 578. Even when basic facts are undisputed, motions for summary judgment should be denied if, under the evidence, reasonable persons might reach different inferences or conclusions from the undisputed facts. *Bird v. Coleman,* 1997 OK 44, ¶20, 939 P.2d 1123. It is not the duty of the appellate court on review to make first-instance determinations of disputed law or fact issues. *Bivins v. State of Oklahoma, ex rel. Oklahoma Memorial Hospital, et al.,* 1996 OK 5, ¶19, 917 P.2d 456. An appellate court cannot craft an initial decision upon an untried question and then direct that it be followed on remand. *Id.*

III. ANALYSIS

A. A PRIVATE RIGHT OF ACTION FOR DETENTION BEYOND THE EXPIRATION OF ONE'S SENTENCE EXISTS UNDER OKLA. CONST. ART. 2, §9.

¶11 Payne asserts his delayed release amounted to cruel or unusual punishment in violation of Okla. Const. art. 2, §9. In 2002, this Court first recognized a potential private right of action under Okla. Const. art. 2, §9 for the use of excessive force upon a prisoner when the defendants were immunized from liability under the OGTCA. *Washington v. Barry*, 2002 OK 45, 55 P.3d 1036. Being a first impression issue, this Court turned to federal precedent to establish a standard.[3] *Id.*, ¶¶9-10. The opinion relied heavily upon *Whitley v. Albers,* 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251, which we found was determinative of the appeal. *Whitley* spelled out what was required to make actionable the conduct of prison officials when a prisoner resists the maintenance of order. *Id.*, ¶11. That case involved an alleged violation of a prisoner's right to be protected from cruel and unusual punishment under the Eighth Amendment of the United States Constitution.[4] The Supreme Court focused on the occurrence of unnecessary and wanton pain and suffering. It held whether the measures taken inflicted unnecessary and wanton pain and suffering turns on whether the force applied was made in a good faith effort to maintain or restore discipline or was done maliciously and sadistically for the very purpose of causing harm. *Id.* We noted, in determining whether the conduct was done maliciously and sadistically, *Whitley* found factors such as the need for the application of force, the relationship between the need and the amount of force, and the extent of injury inflicted should be considered. *Id.* In affirming the trial court's dismissal, we held plaintiff could prove no set of facts that would entitle him to relief. *Id.*, ¶14. His allegations simply did not support the inference of "wantonness in the infliction of pain" which *Whitley* requires before a right of action will be held to exist. *Id.*

¶12 Over a decade after *Washington*, this Court reaffirmed its holding and found no reason why a private right of action for excessive force should not also be extended to pre-incarcerated detainees and arrestees pursuant to Okla. Const. art. 2, §30. *Bosh v. Cherokee County Bldg. Authority,* 2013 OK 9, 305 P.3d 994. In *Bosh* this Court answered a federal certified question and held Okla. Const. art. 2, §30 provides a private right of action for excessive force notwithstanding the limitations under the OGTCA.[5] *Id.*, ¶23. We held in ¶23 that:

> The OGTCA cannot be construed as immunizing the state completely from all liability for violations of the constitutional rights of its citizens. To do so would not only fail to conform to established precedent which refused to construe the OGTCA as providing blanket immunity, but would also render the Constitutional protections afforded the citizens of this State as ineffective, and a nullity.

The Oklahoma Court of Civil Appeals examined this language several years later.

¶13 In *GJA v. Oklahoma Dept. of Human Services,* a father sued the Department of Human Services (DHS) and many John Doe employees for failing to stop abuse of his children while they were in the custody of their mother. 2015 OK CIV APP 32, 347 P.3d 310. The father alleged DHS violated the children's constitutional right to Due Process of Law pursuant to *Bosh*. *Id.*, ¶22. DHS moved to dismiss arguing *Bosh* did not create an actionable claim under

the facts of this case. The court determined the first inquiry is whether *Bosh* should be limited to its facts and holdings or does the decision stand for the proposition that the Supreme Court of Oklahoma recognizes a broader scope of actionable claims based upon violations of constitutional rights. *Id.*, ¶26. It noted clearly the father's allegations did not involve the same or similar circumstances as in *Bosh*, but such a limitation fails to account for the reasoning in *Bosh*. *Id.*, ¶¶28-29. After examining the quoted language in paragraph 12 of this opinion, the court determined:

> [t]he Court has not only adjudicated a specific claim based upon a set of facts, but also the Court made a statement of policy (upholding constitutional guarantees and protections) as its broader holding. The Court then specifically applied that broader policy statement holding to the facts of the case.

Id., ¶30. It found, *Bosh* stood for the proposition that the protections and guarantees afforded the citizens by the state and federal constitutions represented the highest values of the people and the Supreme Court recognizes a broader scope of actionable claims based upon violations of constitutional rights. *Id.*, ¶¶31-32. The court further found that a court's role as gatekeeper will serve to focus *Bosh* claims upon those acts or inactions which rise to the level of a constitutional claim without having to limit the interpretation of *Bosh*. *Id.*, 35.

¶14 Following our decision in *Bosh*, the state legislature amended the OGTCA. On April 21, 2014, H.B. No. 2405 became effective. 2014 Okla.Sess.Laws c. 77. The Act extended the State's immunity from suit to torts arising from alleged deprivations of constitutional rights. In *Barrios v. Haskell County Public Facilities Authority*, we noted, prior to this amendment, the OGTCA did not expressly include immunity from such torts and therefore this Court acknowledged common law tort remedies for claims arising under the constitution. 2018 OK 90, ¶9, 432 P.3d 233. In *Barrios* we were asked to answer a federal certified question, i.e., "do sections 7 and 9 of Article II of the Oklahoma Constitution allow an inmate to bring a tort claim for denial of medical care notwithstanding the OGTCA's provisions providing immunity to the State from torts arising out of the 'provision, equipping, operation or maintenance of any prison, jail or correctional facility.'" *Id.*, ¶1. We acknowledged the Legislature's long-recognized power to define the scope of the State's sovereign immunity and held the amendments in H.B. 2405 foreclosed our ability to expand the common law in a manner inconsistent with statutory law. *Id.* ¶12. Therefore, "because these 'constitutional' torts are now clearly 'torts' governed by the [O]GTCA, the [O]GTCA's specific prohibition against tort suits arising out of the 'operation or maintenance of any prison, jail or correctional facility' bars the claims at issue here." *Id. Barrios*, however, is not relevant to the present case. Payne's delayed release occurred in 2011, well before H.B. 2405 became effective. The Oklahoma Constitution further limits the effectiveness of H.B. 2405 and our decision in *Barrios.* Article 5, Section 52 of the Oklahoma Constitution provides:

> The Legislature shall have no power to revive any right or remedy which may have become barred by lapse of time, or by any statute of this State. After suit has been commenced on any cause of action, the Legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit.

Therefore, at the moment this cause of action accrued and at the time the suit was commenced, tort remedies for claims arising under the constitution were not expressly foreclosed.

¶15 Neither *Washington* nor *Bosh* limited a private right of action to claims based upon excessive force. Since 2002, this Court has recognized the potential for a private right of action for violations of Okla. Const. art. 2, §9. We hold a private right of action also exists for detention beyond the expiration of one's sentence under this section. Next we must establish the proper standard to be used to determine if a violation of Okla. Const. art. 2, §9's protection against cruel or unusual punishments has occurred.

B. THE DEFENDANTS' STATE OF MIND IS DISPOSITIVE TO DETERMINING WHETHER PAYNE'S CONSTITUTIONAL RIGHT TO BE PROTECTED FROM CRUEL AND UNUSUAL PUNISHMENT HAS BEEN VIOLATED

¶16 The opinion of the Oklahoma Court of Civil Appeals interpreted Payne's cruel or unusual punishment claims as one based upon "excessive force" and focused on the standard discussed in *Washington*. However, the standard for actions based upon detention past the expiration of one's sentence is not identical. As

in *Washington*, we turn to federal precedent to help establish the standard in this first impression issue.

¶17 In *Sample v. Diecks*, a prisoner was held over nine months past the expiration of his sentence. 885 F.2d 1099 (3d Cir. 1989). Upon his release, Sample filed a damages suit against Diecks, the senior records officer in the correctional facility, and Robinson, the Commissioner of the bureau of corrections pursuant to 42 U.S.C. § 1983. *Id.* at 1103. A motion for summary judgment was filed and the magistrate determined summary judgment was inappropriate. *Id.* at 1106. It found Diecks violated the Eighth Amendment's prohibition of cruel and unusual punishment by failing to take any meaningful action in response to Sample's complaints. *Id.* at 1103. The magistrate also found Robinson violated Sample's right to procedural due process under the Fourteenth Amendment by failing to establish a system for a prisoner to challenge the computation of his sentence. *Id.* The district court adopted the findings of the magistrate. On appeal, the United States Court of Appeals for the Third Circuit affirmed the district court's holding against Diecks but reversed and remanded on its findings concerning Robinson. *Id.* at 1119.

¶18 The appellate court determined whether the detention beyond expiration of a sentence violates the Eighth Amendment requires two things: 1) was the detention "punishment;" and 2) was it "cruel and unusual." *Sample,* at 1108. It found detention beyond one's term no doubt constitutes punishment. *Id.* Concerning cruel and unusual punishments, the court explained the Eighth Amendment prohibits punishments which, although not physically barbarous, involve the unnecessary and wanton infliction of pain, or are grossly disproportionate to the severity of the crime. *Id.* One class of unnecessary and wanton wrongs and the one most relevant here is those that are "totally without penological justificiation." *Id.* The court first noted that once any deterrent and retributive purposes were fulfilled there was no penological justification for a prisoner's continued detention. *Id.* However, it found that elimination of all errors in many instances would be unfeasible and accidents or mistakes are a necessary cost of any prison system and aren't repugnant to the conscience of mankind and do not violate the Eighth Amendment. *Id.* at 1108-9. The court looked at the state of mind of the prison administrators and found more or less deference should be given based upon the situation. *Id.* at 1109. It determined the degree to which a harm is unnecessary in the sense of being unjustified by the exigencies of prison administration will affect the state of mind requirements a plaintiff must meet to demonstrate a prison official violated the Eighth Amendment. *Id.*

¶19 The court found the judiciary should give a high level of deference to prison officials in cases of a prison riot, as in *Whitley*. *Sample,* at 1109. In such a case, subjecting prison officials to suits based upon an absence of due care or even deliberate indifference would result in second guessing and have a deleterious effect on the broad ambit of discretion prison officials need in such situations. *Id.* An official acting in good faith within that discretion, although in the process injuring a prisoner, has not inflicted cruel and unusual punishment upon that inmate. *Id.* However, a lesser showing of deference is required in cases of deprivation of medical care. In such situations simple malpractice under a common law negligence standard without a more culpable state of mind is not enough; but where prison officials or doctors act with deliberate indifference to serious medical needs of prisoners, they have unnecessarily and wantonly inflicted pain on inmates and thereby violated the Eighth Amendment. *Id.*

¶20 The court found cases involving detention for a significant period beyond the term of one's sentence inflicts a harm similar to medical deprivation cases and deserved a lower level of deference. *Id.* In such situations, it rejected a *Whitley* good faith standard and found a prisoner held beyond his term need not demonstrate a prison official's role in the unwarranted detention amounted to a knowing willingness that the unjustified detention would occur or that the official acted maliciously or sadistically for the very purpose of causing harm. *Id.* The court held: "there can be no eighth amendment liability in this context in the absence of a showing of deliberate indifference on the part of the defendant to whether the plaintiff suffers an unjustified deprivation of liberty." *Id.* at 1110.

¶21 After determining the Eighth Amendment can be violated by a showing of deliberate indifference, the court explained the requisite elements a plaintiff must demonstrate. It found:

> [A] plaintiff must first demonstrate that a prison official had knowledge of the pris-

> oner's problem and thus of the risk that unwarranted punishment was being, or would be, inflicted. Second, the plaintiff must show that the official either failed to act or took only ineffectual action under circumstances indicating that his or her response to the problem was a product of deliberate indifference to the prisoner's plight. Finally, the plaintiff must demonstrate a causal connection between the official's response to the problem and the infliction of the unjustified detention.

Sample at 1110. The court noted that not all officials who are aware of a problem exhibit indifference by failing to resolve it. For example, a warden does not exhibit deliberate indifference by failing to address a sentence calculation problem brought to his attention when there are procedures in place for others to pursue the matter. *Id.* However, if a prison official knows, given his or her job description or role he or she has assumed in the administration that the sentencing matter will not likely get resolved unless he or she addresses it or refers it to others, then it is more likely the requisite attitude will be present. *Id.*

¶22 In 2010, this Court vacated an Oklahoma Court of Civil Appeals decision and reversed in part the decision of the trial court granting summary judgment. *Estate of Crowell v. Board of County Commissioners*, 2010 OK 5, 237 P.3d 134. We held reasonable minds could differ on the issue of whether the sheriff and jail personnel acted with deliberate indifference in the delay to provide medical treatment to an inmate. *Id.*, ¶37. A prisoner died in custody due to delayed receipt of medical attention. The personal representative of the prisoner's estate brought a civil rights action under 42 U.S.C. §1983 based upon a violation of the Eighth Amendment's protection against cruel and unusual punishments. We held a prisoner must show acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. *Id.*, ¶26. Deliberate indifference requires more than negligence, but less than conduct undertaken for the very purpose of causing harm. *Id.*, ¶33. It is a state of mind more blameworthy than negligence and requires more than ordinary lack of due care for the prisoner's interests or safety. *Id.* An official acts with the requisite deliberate indifference when that official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and he or she must also draw the inference. *Id.*, ¶34. We noted, the sheriff, as a supervisory authority, could be held liable under §1983 if an affirmative link exists between the constitutional deprivation and either the supervisor's personal participation, his or her exercise of control or direction, or his or her failure to supervise. *Id.*, ¶30. The sheriff has a statutory duty to provide medical care and is responsible for the proper management of the jail and proper conduct of the jail personnel. *Id.*, ¶31. As a result, a sheriff is accountable in a §1983 action whenever he or she knew or should have known of misconduct, and yet failed to prevent future harm. *Id.* Where liability is based on what the defendants knew or should have known, "self-imposed ignorance" on the part of the defendants is not determinative, and a plaintiff may show the matters the defendants knew or should have known by circumstantial evidence and inference. *Id.* (citing *Copeland v. Tela Corp.*, 1999 OK 81 at ¶¶8 and 10, 996 P.2d 931).

¶23 A year later, the Oklahoma Court of Civil Appeals reversed a judgment dismissing a petition with similar facts to *Crowell. Edelen v. Board of Commissioners of Bryan County*, 2011 OK CIV APP 116, 266 P.3d 660. The opinion quoted Crowell's language concerning a sheriff's liability, i.e., a sheriff may be accountable whenever a sheriff knew or should have known of the misconduct and yet failed to prevent future harm. *Id.*, ¶8. The court found "Edelen's petition states a claim against the Sheriff based on a potential violation of the Eighth Amendment to the United States Constitution pursuant to 42 U.S.C. §1983. It would also establish a violation of Okla. Const. art. 2, §9 [citing *Washington*]." *Id.*

IV. CONCLUSION

¶24 In the present matter, the Journal Entry and Order granting summary judgment was inappropriate. The district court ruled it was uncomfortable in extending the analysis and holding in *Bosh* to the claims asserted in this action and therefore there was no substantial controversy as to any material fact. The district court made no factual determinations concerning whether the remaining defendants showed the requisite state of mind to violate Payne's constitutional right to be protected from "cruel or unusual punishments" under the Oklahoma Constitution. Having determined a private right of action existed at the time Payne was

detained past his sentence under Okla. Const. art. 2, §9, we reverse and remand for further proceedings consistent with this opinion.

COURT OF CIVIL APPEALS' OPINION VACATED IN PART; JUDGMENT REVERSED AND REMANDED

¶25 Gurich, C.J., Kauger (by separate writing), Edmondson, Colbert and Combs, JJ., concur.

¶26 Darby, V.C.J., Winchester (by separate writing), Kane and Rowe (by separate writing), JJ., dissent.

KAUGER, J., concurring:

I.
JAMES C. PAYNE v. JOEL KERNS and MISSY ELDRIDGE,
Case No. 116,978

¶1 I concur with the majority opinion. I am writing to address the spate of recent troubling incidents involving the Department of Corrections (DOC) and access to justice. In this cause, the DOC extended the prisoner's confinement for more than 3 months past his sentence. The failure of the DOC to timely release him is exacerbated by the absence of a final order.

¶2 We do not recognize the minute order entered in this cause by the district court as a final appealable order.[1] When the Court of Criminal Appeals does not receive a final order, jurisdiction is declined. The failure of the trial court to prepare a final order denies the prisoner the right of access to the Court.

¶3 Were the prisoner held in a federal prison, the United States would be liable for false imprisonment. In Millbrook v. United States, 569 U.S. 50, 133 S.Ct. 1441 (2013), the unanimous Court held that the waiver of sovereign immunity based on the law enforcement provision in the Federal Torts Claims Act extends to acts or omissions of law enforcement officers that arise during the scope of their employment. This cause should be remanded to determine if the material facts support relief under Oklahoma law.

II.
MARSDEN VOLTAIRE ELIAS v. STATE
Case No. 118,074

¶4 Marsden Elias (Elias) entered a plea of nolo contendre to a felony offense on November 16, 2004. The trial court sentenced him to fifteen years with the first three years to be served in the custody of the Department of Corrections with the balance as supervised probation. When Elias committed another felony offense in 2008, he pled guilty and was sentenced to six months in the county jail and four years probation. Because the first sentence included a finite time for incarceration, followed by probation, no consideration was given to the maximum term that Elias would have to serve.

¶5 Because Elias had committed two offenses, the State, on June 18, 2010, filed an Application to Revoke the Suspended Sentences. During the December 16, 2010, revocation hearing, the transcript reflects that the trial judge stated he would show on the record that the crime to which Elias had pled guilty in 2004, was not an eighty-five percent crime. The judge, the prosecutor, and defense counsel agreed that it was not.[2] The court minute regarding the Application to Revoke/Accelerate shows that Elias was not sentenced to an eighty-five percent crime.[3] The trial court later recanted its opinion that the crime was not an eighty-five percent crime. However, the trial court did nothing to correct its mistake, other than observe that it was incorrect when it denied Elias's Application for Post Conviction Relief.[4] The Department of Corrections' records show that it determined Elias's term of incarceration to be subject to the eighty-five percent rule.[5] The Minute Order, filed October 31, 2012, noted that Elias needed to file an action against the Department of Correction to address the interpretation of his sentence.[6]

¶6 When a trial court commits a mistake seriously affecting a substantial right, such as the length of the required time of incarceration, the trial court must correct the mistake to conform the sentence accurately with the law.[7] Even so, it is not up to the Department of Corrections to unilaterally correct a mistake.[8] The power to define and to fix the punishment for crimes is vested in the legislature.[9] The imposition of the sentence within the limits prescribed by the legislature is purely a judicial function.[10] The Legislature has invested the Department of Corrections with the authority to ensure a judicial sentence is carried out as ordered by the district court.[11] Nevertheless, the court's authority to impose a sentence cannot be, and is not delegated to an administrative body such as the Department of Corrections.[12]

¶7 Someone needs to fix this!

III.
GLEN FOLSOM v. OKLAHOMA DEPARTMENT OF CORRECTIONS
Case No. 118,395 cons. with 118,411

A.
FAILURE TO ENTER AN APPEALABLE ORDER BY THE TRIAL COURT

¶8 Glen Folsom (prisoner/Folsom) is an indigent inmate incarcerated under the custody of the DOC at Oklahoma State Penitentiary. On January 16, 2019, the District Court entered a court minute in the District Court of Pottawatomie County Case No. CF-2002-327 denying Folsom's application for post-conviction relief. Title 22 O.S. 2011 §1084, requires a District Court to issue a "final judgment" in all post conviction proceedings. The pertinent part of §1084 provides:

> . . .The court shall make specific findings of fact and state expressly its conclusions of law, relating to each issue presented. This order is a final judgment.

Despite the lack of a final judgment, Folsom filed a post-conviction appeal on May 24, 2019, in the Court of Criminal Appeals Case No. PC-2019-379. The Court of Criminal Appeals summarily dismissed his appeal for lack of a formal order, but it did not direct the trial court to comply with its statutory duty.

¶9 On January 3, 2020, Folsom filed a "Motion for Relief" in Court of Criminal Appeals Case No. MA-2020-9 seeking extraordinary relief from the District Court's failure to enter the requisite final judgment. On January 22, 2020, the Court of Criminal Appeals declined to exercise jurisdiction over the matter finding Folsom had not served the adverse party with his request for relief.

¶10 On January 15, 2020, Folsom filed a "Petition in Error" with this Court in Case No. 118,574. Folsom challenges the Court of Criminal Appeals October 7, 2019, order in Case No. PC-2019-379 declining jurisdiction of his post-conviction appeal. Folsom further challenges his criminal convictions. Contemporaneous with this Petition, Folsom filed a "Motion to File Out of Time" seeking this Court to consider his appeal despite its alleged untimeliness.

¶11 On that same date, Folsom also filed a petition in error to review a certified interlocutory order raising the same challenges to his criminal convictions. However, Folsom also complained that the District Court of Pottawatomie County had not entered a final judgment in the post-conviction proceedings contrary to the Rules of the Court of Criminal Appeals, Rule 5.4(A) o the Rules of the Court of Criminal Appeals which provides:

> The Judge assigned to adjudicate the application for post-conviction relief shall prepare a detailed order setting out specific findings of fact and conclusions of law on each proposition for relief presented in the application. The order shall also specify the pleadings, documents, exhibits, specific portions of the original record and transcripts, considered in adjudicating the application, which shall then become a part of the record on appeal as defined by Rule 5.2(C)(6).

For almost a year, the District Court of Pottawatomie County failed to comply with both Rule 5.4 and §1084. The District Court of Pottawatomie County docket in Case No. No. CF-2002-327 does not reflect that anything other than a minute order was ever filed in this matter until February 14, 2020.

¶12 On May 8, 2019, Folsom filed an action in Pittsburg County District Court Case No. CV-2019-65 challenging the conditions of his confinement and asserting the denial of access to the courts. On September 16, 2019, the trial court entered ten separate court minutes sustaining the DOC's various motions to dismiss. On October 21, 2019, Folsom filed an appeal from this ruling in Case No. 118,341. The premature nature of Folsom's appeal has since been cured. Finally, the trial court entered a final journal entry as to each of the defendants with the last journal entry being filed on January 29, 2020.

¶13 Once again in Cause No. 118,575, Folsom appealed seeking a certified copy of the January 16, 2019, order denying his post-conviction relief so that he could appeal to the Court of Criminal Appeals. Once again this is a minute order. The docket does not indicate whether the order was mailed to Folsom or his lawyer. Nor is it clear whether the court minute contained a certificate of service. Court minutes should be banished. Trial courts should see to it that final judgments are prepared in a timely manner.

¶14 Normally jurisdiction of this cause would belong in the Court of Criminal Appeals. Correction of any errors in the criminal matters involving Folsom through post-conviction

relief, obviously rests with the Court of Criminal Appeals. However, there is a consistent pattern of interference with access to justice which we are free to address.[13]

B.
FAILURE TO PROVIDE SUFFICIENT PHOTOCOPIES

¶15 Folsom filed a *pro se* pleading on November 4, 2019, asking this Court to order the law librarian at the Oklahoma State Penitentiary to provide him with sufficient copies of documents that he was preparing to file with this Court. He states that he received three copies of his petition for certiorari and three copies of the petition in error. Folsom also alleged that the law librarian advised him that he could not appeal to the Oklahoma Supreme Court. On November 14, 2019, Folsom was directed by this Court to provide more facts and to clarify his complaints.

¶16 On November 20, 2019, he requested nineteen copies of his five page conclusion. He was provided three copies. The request for nineteen copies was said to be too voluminous. On that same date, Folsom's request for nineteen copies of the Petition in Error and Part two of the Habeas was also denied by a penitentiary librarian as too voluminous. On that same date, he was provided three copies of his Petition for Certiorari instead of the fifteen requested. The Oklahoma Department of Corrections Request for Legal Research Assistance stated in pertinent part:

> 15 copies of your 5 page Petition for Certiorari Certified Interlocutory Order is denied due to being to [*sic*] voluminous. You have been provided 3 copies of your petition.

Again, the reason given was that the request was too voluminous. Folsom alleged that the librarian stated that she ran the law library and did not give a —— what he filed. Apparently the DOC counsel agreed with her.

¶17 On November 25, 2019, Folsom filed a pleading with this Court which stated that a law library staff member refused to provide the requisite number of copies so that he could file documents in pending matters. He also alleges that he was denied copies, pens, and paper. Foust v. Pearman, 1992 OK 135, 850 P.2d 1047, 1050 states:

> Prisoners are entitled to access to the courts. Gaines v. Maynard, 808 P.2d 672, 675 (Okla. 1991). The method of the access may be by persons trained in the law, law libraries, or a combination of the two. *Id.* This access includes stamps. 'It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notatorial services to authenticate them, and with stamps to mail them.' Bounds v. Smith, 430 U.S. 817, 824-825, 97 S.Ct. 1491, 1496, 52 L.Ed.2d 72 (1977).

¶18 On December 23, 2019, apologizing for having to use toilet paper, the prisoner sought requested forms and court rules. Folsom filed a pleading with the Court on December 2, 2019, alleging that he could neither get copies, nor go to the law library. The DOC filed a response to the petitioner's motion for extraordinary relief on December 12, 2019. The document states that the DOC found Folsom's request for fifteen (15) to nineteen (19) copies of pleadings to be unreasonably voluminous. It also states that Folsom did not provide a clear legal right to have the things done which are asked for or show that the DOC has a clear and indisputable legal duty to accommodate such request.

¶19 The rules of this Court have the force and effect of a statute.[14] Here, the DOC employee has substituted her opinion for the rules of the Court.[15] The DOC regulation process provides that legal photocopying services can be denied for being "unreasonably voluminous."[16]

¶20 The DOC is without authority to decide that our rule requirements are too voluminous. And, even if it could, it is ignoring the definition of voluminous. Voluminous has been defined as:

> 1). forming, filing or writing a large volume or many volumes
>
> 2). sufficient to fill a volume or volumes
>
> 3). of great volume, size or extent, of ample size, extent,
>
> or fullness
>
> 4). having many coils, convolutions, or windings.[17]

His request would not result in an unreasonably voluminous endeavor, nor would it fill a large volume. Instead it hinders the prisoner's access to justice, and it is a practice that is most capable of being repeated to deny other prisoners the same rights. It is not within the authority of a DOC librarian to ignore a Supreme

Court rule nor to predetermine to which court the prisoner should appeal. Nor is it within the authority of counsel for the DOC to decide that compliance with Supreme Court Rule 1.4 is too voluminous. The prisoner requested copies to comply with the Supreme Court rule.[18] Regardless of how the DOC may perceive the prisoner's cause of action, it is not within its authority to regulate the appellate process. Nevertheless, the counsel for the DOC asserts that it had determined that the requested 15-19 copies of the prisoner's various pleadings were too voluminous. The brief states:

> Instead of denying the entire request, DOC limited the request to a more reasonable amount of copies. Petitioner provides no authority demonstrating a clear legal right to have the things done which are asked for or that DOC has a clear and indisputable legal duty to accommodate such request. Accordingly, Petitioner's motion for extraordinary relief should be denied.

¶21 In other words, the DOC is free to ignore the rules of appellate procedure insofar as the prisoner was concerned because it felt like it. Or, that it knows better than the Court. Or, perhaps, as many children have heard their parents say, "Because we said so!" One can but wonder if the DOC refused to follow the rules and filed only three copies of its response to the prisoner's petition? (The answer is NO!) Perhaps the rule should be changed, but it is not within the authority of the DOC to do so.

¶22 Evidently, the refusal to make the necessary copies is the practice of the DOC. In the most recent filing by the prisoner, the DOC magnanimously increased the number of copies that it will make from 3 to 6. At the same time, it is alleged that the DOC continues to deny paper to the prisoner to prepare his appeals. This is a potential unconstitutional denial of access to the courts for all prisoners who seek redress because of the initial hurdle it places on all those who seek access to justice before the appellate courts of the State of Oklahoma.

Because of these reasons, and the mockery the DOC makes of the rules of this Court, I would order a special report [19] to examine the barriers which the DOC has erected to prevent access to justice by Oklahoma prisoners. I would also order the DOC to appear and to show cause as to why it continues to violate the rules of this court – to explain why "what's sauce for the goose is not sauce for the gander."

IV.
GLEN FOLSUM v. STAFF IN STATE AND PRIVATE PRISON et al.
Case No. 118,753

C. FAILURE TO PROVIDE SUFFICIENT MEDICAL CARE.

¶23 Folsum, who is currently incarcerated at the Oklahoma State Penitentiary in McAlester, Oklahoma, sought relief as a medical emergency because he was bleeding internally from his rectum and he was refused treatment. On May 4, 2020, the Court dismissed his application for relief as frivolous. I would order a special Martinez report. *See*, Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978). The fact that the same issue is on appeal in Cause No 118,341 is small comfort if the issue of rectal bleeding and cancer are true.

V.
DANIEL PAUL STARR v. OKLAHOMA DEPARTMENT OF CORRECTIONS, et al.
Case No. 118,466

¶24 Starr is an Oklahoma DOC inmate currently incarcerated in the Cimarron Correctional Facility. This correctional facility is a medium security prison in Payne County, Oklahoma; it is owned and operated by CoreCivic, formerly Corrections Corporation of America, under contract with the Oklahoma Department of Corrections.[20]

¶25 Starr received a misconduct citation for an incident on July 11, 2018, when he went to the mail room to mail a package as legal mail. Inside was a hidden compartment as well as a return envelope addressed to another inmate with instructions on how to send back 28 grams worth of a controlled substance. Starr's disciplinary hearing was held on August 8, 2018.

¶26 Starr asserted he was denied due process during the disciplinary process because the DOC refused to provide him with closed circuit video footage to prove he did not send anything to the mail room on July 11, 2018. Starr contended another inmate attempted to send contraband through the postal service as legal mail by addressing it under Starr's name.

¶27 State statutes do not authorize or require judicial review of internal prison disciplinary actions in circumstances such as these where

an inmate is punished with changes to the situs of his confinement and not loss of earned credits.[21] However, both the federal and the state Due Process Clauses command that prisoners with claims to interests of expectations of a constitutionally-protected nature be afforded access to the courts. *See*, Prock v. District Court of Pittsburg County, 1981 OK 41, ¶22, 630 P.2d 772. By punishing inmates with something less than revocation of earned credits, the DOC escapes the statutory review process of 57 O.S. 2011§564.1.[22] Inmates must be afforded some other process by which they can challenge the DOC's adherence to its own rules, and the regulations that limit its official latitude to change the conditions of confinement and the circumstances under which breach-of-discipline sanctions may be imposed. *See*, Prock, supra at ¶15.

¶28 The DOC's justification for its alleged inability to provide Starr with the video footage he seeks are questionable. The DOC asserts it has no authority or duty to compel Cimarron Correctional Facility, a private prison, to produce records. It provides no authority in support of that argument. However, the DOC website is contra to this argument. The Oklahoma Department of Corrections website states:

> The Oklahoma Department of Corrections contracts with private prison and county jail contractors as a means to provide bed space and constitutionally required services for inmates. **State statutes deem the Director of the Department of Corrections responsible for the monitoring of private prisons in Oklahoma**.[23]

[Emphasis supplied].

¶29 If the touchstone of due process is protection of the individual from arbitrary action of government, the DOC should not be able to escape judicial review of the arbitrariness of the disciplinary process by imposing a lesser punishment than revocation of earned credits, thus evading review. A special report should have been ordered to determine whether this is a persistent attempt to circumvent due process.

VI.
FLOYD MARKHAM, Jr. v. HONORABLE IRMA J. NEWBURN
Case No. 118,186

¶30 Floyd Markham (Markham/petitioner) is an inmate in the custody of the DOC. He was housed at the Lawton Correctional Facility, a private prison. On October 22, 2018, he filed a writ of mandamus in Comanche County against the DOC and several of its employees. The matter concerned the calculation of the time he has remaining to serve on several criminal convictions. The cause was assigned to Judge Irma Newburn. A cover letter to the court clerk indicates that all officials were served. Counsel for the Lawton Correctional Facility filed a response stating that they were not served. The respondents never filed responses to the action pending in the District Court. On February 15, 2019, petitioner filed a motion asking that respondents reply. On May 23, 2019, he filed a motion to expedite proceedings. The trial court did nothing in response to either filing.

¶31 This Court has general superintending control of the courts of the State of Oklahoma. Okla. Const. art. 7, §4. This cause involves an administrative civil matter involving the correction of DOC records. Failure of a district judge to take any action in a matter for nearly two years is unsupportable. I would issue a writ of mandamus directing the trial court to issue an order: 1) Requiring the defendants in the underlying action to respond to petitioner's application for writ of mandamus; 2) Directing defendants to show cause why the application should not be allowed; or 3) Granting the writ without further notice.

VII.
BRIAN ADAMS v. THE DISTRICT COURT FOR THE 13TH JUDICIAL DISTRICT, OTTAWA COUNTY, STATE OF OKLAHOMA
Case No. 118,618

¶32 Adams, (Petitioner/Adams) seeks a writ of mandamus from this Court directing the trial court in State of Oklahoma v. Brian Frank Adams, No. CM-2015-213 (Ottawa County) to dismiss the underlying misdemeanor criminal proceeding for failure to prosecute. Petitioner is currently in the custody of the Department of Corrections, serving a sentence imposed in State of Oklahoma v. Brian Frank Adams, No. CF-2014-56A (Delaware County) for three felony counts of unauthorized use of an implement of husbandry, selling a stolen implement of husbandry, and altering/defacing a vehicle identification number. In 2015, prior to his current incarceration, petitioner was charged with misdemeanor counts of driving under suspension and without a seatbelt in State of Oklahoma v. Brian Frank Adams, No. CM-2015-213

(Ottawa County). A bench warrant was issued in that case on April 5, 2016, for his failure to appear.

¶33 While in custody, he was informed by the DOC of the pending charges and warrant in No. CM-2015-213. On July 11, 2019, Adams filed a motion to dismiss the Ottawa county misdemeanor case. On July 18, 2019, the Ottawa County district court held a hearing on his motion and determined: 1) Petitioner was incarcerated by the DOC in Taft, Oklahoma; 2) there was a pending untried case against Adams with an outstanding arrest warrant; and 3) Adams was available to the State of Oklahoma. The trial court entered an order that Adams be transported to the Ottawa County Detention Center on the outstanding warrant.

¶34 This never happened. On November 5, 2019, petitioner filed a motion to dismiss the Ottawa county case for failure to prosecute, pursuant to 22 O.S. 2011 §13.[24] He asserted the State's failure to diligently prosecute the misdemeanor Ottawa County case for over three months, despite the trial court's order for transport, deprived him of his constitutional right to a speedy trial guaranteed by the Okla. Const., art. 2, §20. His motion further asserted the outstanding warrant was therefore illegal and void. In support, Adams cited several decisions of the Oklahoma Court of Criminal Appeals: Cooper v. State, 1983 OK CR 154, 671 P.2d 1168; McDuffie v. State, 1982 OK CR 150, 651 P.2d 1055; and Thacker v. Marshall, 1958 OK CR 97, 331 P.2d 488.

¶35 Petitioner initiated this original proceeding on February 6, 2020, by filing his Petition for Alternative Writ of Mandamus pursuant to 12 O.S. 2011 § 1451. Adams asserted that the trial court had not ruled on his motion to dismiss the Ottawa County case. He asked this Court to issue a writ of mandamus ordering the District Court of Ottawa County to dismiss No. CM-2015-213 with prejudice for failure to prosecute based upon his statutory and constitutional rights to a speedy criminal trial.

¶36 Petitioner is correct. On the docket entry for No. CM-2015-213, the date he filed his writ application did not indicate dismissal or that the trial court has directly ruled on his motion Adams is currently incarcerated. There is a good reason for his desire to have his misdemeanor traffic charges resolved. The Department of Corrections Sentence Administration Guidelines, Department of Corrections, OP-060211, IV (A) (2) (e) enacted July 18, 2017, states:

> ....(e). Inmates with outstanding warrants/ detainers or pending charges involving law violations committed while in agency custody... [are not eligible for restoration of earned credits.]

It is obviously a reasonable action by Adams to attempt get the matter resolved.

Apparently, the February 6, 2020, petition for mandamus in this Court activated the judicial process. On February 18, 2020, the District Court of Ottawa County dismissed the case for failure to prosecute, and ordered costs assessed against the State of Oklahoma. I, therefore, concur that this proceeding should be dismissed as moot.

CONCLUSION

¶37 Each of these incidents considered alone might not be egregious, However, we have confronted several incidents within the last few months. How many more similar events have occurred? Although one of these failures by the DOC might be ignored, each of them is capable of happening again. In an era of "criminal justice reform" it is appropriate to address these denials of access and to remember that prisoners have rights too.

Winchester, J., with whom Darby, V.C.J. and Kane, J. join, dissenting:

¶1 The majority opinion recognizes a private right of action for violations of Okla. Const. art. II, § 9 based solely on the holdings in *Washington* and *Bosh*.[1] However, these cases did not create a wide-ranging tort claim, and "[n]ot every malfeasance, misfeasance, or nonfeasance rises to the level of a violation of constitutional rights." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The *Washington* Court never held a cause of action existed under Okla. Const. art. II, § 9, and the *Bosh* Court only addressed a constitutional violation of Okla. Const. art. II, § 30, which is not alleged here.[2] Additionally, both *Washington* and *Bosh* involved an intentional, egregious use of excessive force against an inmate or detainee arising from conduct demonstrating a "wantonness in the infliction of pain." *Washington*, 2002 OK 45, ¶ 14, 305 P.3d at 1040. This Court has never extended *Washington* or *Bosh* to a factual scenario like the one present here and should not do so today.

¶2 The county's continued detention of Payne based on the facts of this case – the delay of the district court in filing the Judgment and Sentence, the county's understanding and application of Oklahoma statutes and DOC rules, and DOC's delayed release of Payne – was at most a negligent unlawful extension of Payne's incarceration. It is not the type of conduct that rises to the level of cruel and unusual punishment prohibited by the Oklahoma Constitution and U.S. Constitution, even under the standard of "deliberate indifference" proposed by the majority today.

¶3 In *Barrios v. Haskell County Public Facilities Authority,* 2018 OK 90, ¶¶ 16-17, 432 P.3d 233, 240, this Court indicated a strong reluctance to extend *Bosh* or expand tort remedies for constitutional violations. The Court noted that expanding tort remedies for constitutional violations is a "disfavored judicial activity." *Id.* ¶ 16, 432 P.3d at 240 (citing *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1857 (2017)). The majority opinion in this case is inconsistent with this pronouncement in *Barrios* and extends *Bosh* to conduct that is at most negligent.

¶4 Under existing Oklahoma precedent, I do not believe the conduct of Defendants Joel Kerns and Missy Eldridge supports a private cause of action for violation of Okla. Const. art. II, § 9. I, therefore, respectfully dissent.

Rowe, J., with whom Darby, V.C.J., Winchester and Kane, JJ., join, dissenting:

¶1 I dissent from the Court's decision to recognize a private cause of action for civil damages under Okla. Const. art. 2, §9.

¶2 The questions raised by the case at bar do not pertain to cruel and unusual punishment but rather whether the two county officials' tortious conduct creates a private right of action under the Oklahoma Constitution.

¶3 Here, the Plaintiff, James C. Payne, alleges that he was held in detention at the Pittsburg County jail for approximately three months beyond the end of his sentence. Over the course of nearly a decade since his release, the Plaintiff has sought to recover civil damages from the Defendants, the State of Oklahoma, and various other county institutions and officials for violations of his rights under the United States Constitution, federal statute, and the Oklahoma Constitution. The Plaintiff now asks this Court to reverse an order granting summary judgment in favor of the Defendants on his claim for damages under Okla. Const. art. 2, §9 (cruel and unusual punishment).

¶4 Prior to 1978, this Court recognized the common law doctrine of sovereign immunity. *See, e.g., Henry v. Oklahoma Turnpike Authority*, 1970 OK 232, 478 P.2d 898; *State ex rel. Dept. of Highways v. Keen*, 1960 OK 170, 354 P.2d 399; *State ex rel. Com'rs of Land Office v. Duggins,* 1953 OK 402, 258 P.2d 891; *Patterson v. City of Checotah*, 1940 OK 294, 103 P.2d 97; *Wentz v. Potter,* 1933 OK 655, 28 P.2d 562. Under the common law approach to sovereign immunity, a sovereign government could not be sued without its consent. *Vanderpool v. State,* 1983 OK 82, ¶7, 672 P.2d 1153, 1154.

¶5 In 1983, this Court acknowledged in *Vanderpool v. State* the legislature's right to codify sovereign immunity by statute.[1] It is only by virtue of explicit legislation, like that in The Governmental Tort Claims Act ("GTCA"), 51 O.S. §§ 151 *et seq.*, that a state provides its consent to be subject to civil liability.[2] *Vanderpool,* 1983 OK 82, ¶11, 672 P.2d at 1155.

¶6 The Plaintiff seeks to prevail on a claim that has not previously been recognized by this Court, i.e. whether there exists a private right of action under Okla. Const. art. 2, § 9. We previously recognized a plaintiff's potential cause of action for the excessive use of force under Okla. Const. art. 2, §9 in *Washington v. Berry,* 2002 OK 45, 55 P.3d 1036, but we stopped short of officially recognizing it because the case could be resolved on other grounds.[3] In *Washington*, the plaintiff suffered injuries when a team of correctional officers entered his cell and attempted to forcibly remove restraints that he refused to give up voluntarily. 2002 OK 45, ¶2, 55 P.3d at 1038. The plaintiff sought to impose liability on the correctional officers for the use of excessive force. *Id.* at ¶9, 55 P.3d at 1039. We affirmed the trial court's dismissal of the claim because although the plaintiff had a "potential" cause of action, the actions of the corrections officers would not have supported such a claim. *Id.* at ¶18, 55 P.3d at 1041-42.

¶7 In *Bosh v. Cherokee County Bldg. Authority,* we held that Okla. Const. art. 2, §30 provides a cause of action for the use of excessive force on arrestees and pre-incarcerated detainees, notwithstanding the limitations of sovereign immunity set out in the GTCA. 2013 OK 9, ¶23, 305 P.3d at 1001. In that case, the plaintiff suffered serious injuries after jailers at the county detention center assaulted him during the

booking process. *Id.* at ¶¶3-4, 305 P.3d at 996. *Bosh* recognized that the GTCA expressly immunizes the state, its political subdivisions, and employees from tort liability for claims arising from the operation of any prison, jail, or correctional facility. *Id.* at ¶8, 305 P.3d at 997; 51 O.S. 2012 §155(24); *see Vanderpool supra.*

¶8 Nevertheless, in *Bosh* we carved out an exception to the GTCA by imposing liability vis-à-vis the doctrine of *respondeat superior,* to hold that the State should be liable for the tortious conduct of its employees when they are acting within the scope of employment. 2013 OK 9, ¶¶9-13, 305 P.3d at 998-99. Despite acknowledging the claimed immunity regarding the operation of prisons and jails, we disregarded it because the alternative might run contrary to the potential cause of action discussed in *Washington* and create blanket immunity for state employees to violate citizens' constitutional rights. *Id.* at ¶¶17-23, 305 P.3d at 1000-01.

¶9 In *Barrios v. Haskell County Public Facilities Authority*, we held that the plaintiff's causes of action under Okla. Const. art. 2, §§ 7 and 9 were barred by the GTCA after amendments to the act extended the State's immunity to constitutional tort claims.[4] However, we went even further in *Barrios*, finding that there was no foundation in Oklahoma common law for recognizing a money damage tort claim under Okla. Const. art. 2 § 7 or 9.[5] "Certainly nothing in the text of Article II, Sections 7 and 9 creates a tort cause of action for money damages as a remedy to vindicate violations of those rights ...."[6]

¶10 Although the instant cause of action accrued prior to *Barrios*, and prior to the 2014 GTCA amendments barring constitutional tort claims, 51 O.S. 2015 §§ 152(14), 153(B), our reasoning in *Barrios* is still applicable here. In review of Oklahoma case law, *Bosh* stands alone as a jurisprudential anomaly that provides us no foundation worthy of recognition by today's decision. I do not see *Bosh*, in light of Oklahoma's extant jurisprudence, as precedent for recognizing Plaintiff's cause of action.

¶11 As noted in *Barrios,* the justification for recognizing constitutional tort claims, particularly at the federal level, has eroded in recent years.

> The best support for the notion that violations of Article II, Section 9 rights should be vindicated through tort suits comes from the United States Supreme Court's decision in *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980), where that Court held that Eighth Amendment rights could be vindicated through tort suits. In the very recent decision of *Ziglar v. Abbasi,* [] 137 S.Ct. 1843, 198 L.Ed.2d 290 (2017), however, the United States Supreme Court declined to recognize a tort claim brought by detainees who alleged they were abused in violation of their Due Process Rights. In so doing, the *Ziglar* Court called the continuing validity of Carlson into grave doubt, saying that it might decide the case differently today because "the arguments for recognizing implied causes of action for damages" had "los[t] their force."

2018 OK 90, ¶14, 432 P.3d 233, 239. The *Ziglar* Court expressed concerns regarding the separation of powers and imposition on legislative authority. *Ziglar*, 137 S.Ct. at 1856.

¶12 The unavailability of money damages as a remedy for violations of one's rights under the Oklahoma Constitution, however, does not render these constitutional provisions hollow, nor does it deprive a plaintiff of the opportunity to seek financial redress for harm already suffered.[7] For example, one may still seek injunctive relief to prevent anticipated constitutional violations.[8] Additionally, under 42 U.S.C. § 1983, citizens may seek money damages for deprivations of their federal constitutional rights by the State, as the Plaintiff did here.[9] Because the provisions of Okla. Const. art. 2, §9 mirror those of the Eighth Amendment to the United States Constitution, a violation of one's rights under the Oklahoma Constitution necessarily gives rise to a § 1983 claim.[10]

¶13 Accordingly, I would affirm the Court of Civil Appeals' holding that no private cause of action exists under Okla. Const. art. 2, §9. Therefore, I respectfully dissent.

COMBS, J.:

1. The record reflects the proper spelling is "Missi." Many filings spell her name Missy and some spell it Missi. The record contains an affidavit signed by the defendant as Missi. Where applicable her name will be spelled in the manner of the referenced filing.

2. On May 16, 2016 the court entered a Settlement Conference Order setting the conference for October 26, 2016 for the remaining defendants. The October 26, 2016 Minutes of the settlement conference reflects the conference was concluded without settlement.

3. In *Washington* the trial court dismissed Washington's petition and the Oklahoma Court of Civil Appeals affirmed. Washington had refused to allow another prisoner be placed in his cell. The guards had to restrain him with handcuffs and leg restraints. Washington refused to allow removal of these restraints therefore the guards allowed him to sleep in the restraints. The next day the guards had to forcibly remove the restraints which Washington would not give up voluntarily. The guards videotaped the incident and had a nurse on the

scene. His injuries were determined to be minor and he did not seek medical attention.

4. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Article 2, Section 9 of the Oklahoma Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." Okla. Const. art. 2, §9. The two constitutional provisions are essentially identical. The only difference is the conjunction used between the words "cruel" and "unusual."

5. The plaintiff, Daniel Bosh (detainee), was attacked by jailers while he was being booked into the jail. He was severely injured. He originally filed suit in state court asserting civil rights claims under 42 U.S. §1983. The case was removed to federal court. Based upon a recent decision of the Oklahoma Court of Civil Appeals in *Bryson v. Oklahoma County ex rel. Oklahoma County Det. Ctr.*, 2011 OK CIV APP 98, 261 P.3d 627, which determined a claim for excessive force of a detainee is based upon Okla. Const. art. 2, §30, the federal court allowed Bosh to amend his complaint to assert such a claim.

KAUGER, J., concurring:

1. Title 12 O.S. 2011 §696.2 provides:

> The filing with the court clerk of a written judgment, decree or appealable order, prepared in conformance with Section 696.3 of this title and signed by the court, shall be a jurisdictional prerequisite to the commencement of an appeal. The following shall not constitute a judgment, decree or appealable order: A minute entry; verdict; informal statement of the proceedings and relief awarded, including, but not limited to, a letter to a party or parties indicating the ruling or instructions for preparing the judgment, decree or appealable order.

Mansell v. City of Lawton, 1994 OK 75, ¶3, 877 P.2d 1120 [An order of the District Court titled "Court Minute" is not a judgment, decree or appealable order for the purpose of commencing the time to appeal.]; Aven v. Reeh, 1994 OK 67, ¶4, 878 P.2d 1069.

2. Transcript of the proceedings of December 16, 2010, in the District Court of Washington County, concerning case numbers, CF-02-497 and CF -08-279.

Title 21 O.S. Supp. 2002 §13.1, the statute in effect at the time of Elias' first crime, required anyone convicted of certain crimes against a child to serve not less than eighty-five percent (85%) of any sentence imposed by the judicial system prior to being eligible for parole. The version of the statute at the time of the offense became effective on March 8, 2002. The felony was committed September 5, 2002.

Letter to Elias from his counsel at the December 16, 2010 hearing, dated January 16, 2012.

3. The court minute of the Application to Revoke/Accelerate filed in the District Court of Washington County on December 16, 2010.

4. The Order Denying Application for Post-Conviction Relief filed in CF-2002-497 in the District Court of Washington County on November 25, 2014.

5. On-line inmate records of the Oklahoma Department of Corrections accessed October 2, 2019.

6. Court Minute Order filed October 12, 2012, CF-02-497, in the District Court of Washington County.

7. A sentencing mistake should be reversed when the defendant shows a clear or obvious error that affects his substantial right and the court has discretion to correct that error. Puckett v. United States, 556 U.S. 129, 129 S.Ct. 1423, 1429, 173 L.Ed 2d 266 (2009); U.S. v. Mudekunye, 646 F.3d 281, 287 (5th Cir. 2011). *See*, The People of the State of New York v. Wright, 56 N.Y.2d 613, 435 N.E.2d 1088, 450 N.Y.S.2d 473 (Ct. App. New York 1982). A defendant is entitled to be sentenced in accord with the law, and is entitled to be sentenced by a judge who is acting in conformity with such law. People v. Francisco, 711 N.W.2d 44, 49 (Mich. 2006). A trial judge is presumed to know the law and apply it properly, and this presumption may be overcome by an affirmative showing contrary to the record. People v. Solis, 367 Il. ApP.3d 10-94.

8. The powers of the government of the State of Oklahoma divided between the Legislative, Executive and Judicial branches are separate and distinct, and neither shall exercise the powers properly belonging to either of the others. Okla. Const. art. 4, §1.

9. State v. A.C. Ford, 539 N.W.2d 214, 230 (Minn. 1995).

10. *See* State v. Hunter, 1990 OK CR 13, 787 P.2d 864, State v. A.C. Ford, *see* note 9, supra; Poitier v. State, 844 So. 2d 707 (Fla. Dist. Ct. App. 2003); Oakman v. Dep't of Corr., 903 A.2d 106 (Pa. Commw. Ct 2006).

11. Warnick v. Booher, 2006 OK CR 41, ¶10, 144 P.3d 897. Okla. Const., art.4, §1. *See also*, State v. A.C. Ford, *see* note 9, supra. The Department of Corrections is an executive branch administrative agency. *See*, The Oklahoma Corrections Act of 1967, 57 O.S. 2011 §§501 et. seq.

12. Apparently, this has been an ongoing concern. In Fields v. Driesel, 1997 OK CR 33, 941 P.2d 1000, the Court of Criminal Appeals also discussed the authority of the Department of Corrections to change the terms of the judicial ordered confinement. Although the Court lists it as a majority opinion, the third vote was a concurring specially, which stated that the judge agreed with the dissenters, in many respects. In an unpublished opinion, Tate Lyle Red Leaf v. Oklahoma Department of Corrections, Case No. 116,787, (Court of Appeals opinion withdrawn and petition for certiorari denied on October 21, 2019), the Court of Appeals also recognized the lack of notice and the consequences of pleading nolo contendere as a denial of procedural due process. Because of its holding, the issue of separation of powers was not addressed.

13. Dutton v. City of Midwest City, 2015 OK 51, ¶31, 353 P.3d 532.

14. Administrative rules and court rules are valid expressions of lawmaking powers having the force and effect of law. Bertrand v. Laura Dester Ctr., 2013 OK 18, 300 P.3d 1188.

15. Okla. Sup. Ct. R. 1.4 provides:

> **(f) Copies.** The original shall be filed with the following number of copies, unless the Rules for Electronic Filing in the Oklahoma Courts provide otherwise when a document is electronically filed.
>
> 1. Petition in Error – Fourteen copies (Rule 1.23).

16. The provisions of the Department of Corrections, OP-030115 Page: 1 Effective Date: 10/29/2019 Access to Courts/Law Library ACA Standards provide:

> Photocopying Services for Documents Legal photocopying services will be available during regular law library hours.
>
> 1. Requests for photocopies will be initiated by the inmate by submitting "Inmate's Request for Disbursement of Legal Costs" form (DOC 030115A) to the law library supervisor.
>
> 2. Inmates will be charged 25¢ cents per copy(i.e., one page front and back would total 50¢ cents).
>
> 3. Inmates who do not have enough funds to cover the cost of photocopying and who have a court-imposed or rule-imposed deadline will be provided the requested service. The cost of photocopying will be collected as soon as funds become available in his or her trust fund. Inmates with funds to cover the costs of photocopying and who desire a working copy of their pleading will be provided the requested service.
>
> 4. When legal photocopying services are denied, reasons for such denial will be documented on "Inmate's Request for Disbursement of Legal Costs" form. The law library supervisor may deny legal photocopying services if the material is:
>
> a. Not of a legal nature or not to a legal correspondent as defined in OP-030117 entitled "Correspondence, Publications, and Audio/Video Media Guidelines"(Example: A copy of a program completion certificate for personal use);
>
> b. **Unreasonably voluminous;**
>
> c. Of poor copy quality;
>
> d. Not for purposes of judicial legal redress relating to post conviction relief or conditions of confinement;
>
> e. Solely a working copy when the inmate lacks the necessary funds:
>
> **f. In excess of the judicial requirements for the number of required sets for distribution (Examples: Requesting ten copies of a pleading when there are only three defendants; the attaching of exhibits to a pleading that does not allow the attachment of exhibits); org. Duplicate material is already available to the judiciary and opposing counsel (Example: Copies to both the defendant and to his or her attorney).**
>
> Section-03 Facility Operations OP-030115 Page: 9 Effective Date: 10/29/20195.The law library supervisor will ensure the photocopies are available within 48 hours (excluding weekends and holidays) after the documents were submitted for photocopying. Staff will only view material for photocopying to the extent necessary to determine whether appropriate for legal photocopying and to ensure legible copying by the machine. 6. Photocopying services will be provided by the law library supervisor. 7. At no time is an inmate to have access to a copier/printer/scanner without permission from the law library supervisor. [Emphasis supplied.]

17. Dictionary.com, accessed February 6, 2020.

18. Oklahoma Supreme Court Rule 1.23 provides in pertinent part:

> **Commencement.** An appeal from a district court is commenced by:

(1) filing a petition in error with fourteen (14) copies with the Clerk of this Court within the time prescribed in Rule 1.21.....

19. Martinez v. Aaron, 570 F.2d 317 (10th Cir.1978).

20. The Department of Corrections website, http://doc.ok.gov/private-institutions, accessed February 10, 2020.

21. Prock v. Dist. Court of Pittsburg City, 1981 OK 41, ¶9, 630 P.2d 772 states:

> Our statutes provide no explicit access to the district court to a prisoner who seeks review of a warden's administrative action taken in the course of maintaining internal prison discipline. Prock stands before us without the benefit of a state-created claim to question, in a judicial forum, any constitutionally impermissible agency behavior of prison authorities acting in the administration of correctional discipline.
>
> This lacuna in our state law is itself offensive to constitutional notions of legality. A prisoner's access to the courts to litigate constitutionally-cognizable claims to a denied liberty interest is clearly mandated by federal case law. If the parties to the proceedings are subject to state-court jurisdiction, a state court is authorized nay required to review violations of federal constitutional rights which occur within its borders. In short, prisoners must be provided with "some clearly defined method *776 by which they may raise claims of denial of federal rights".
>
> While statutory state law does not authorize review of actions by prison officials in dealing with internal breach of discipline, claims for vindication of constitutionally-protected interests, which may arise from prisoner misconduct disputes, must receive judicial scrutiny by the command of the Federal Government's fundamental law. [Citations ommitted].

22. Title 57 O.S. 2011 §564.1 provides in pertinent part:

> A. In those instances of prison disciplinary proceedings that result in the revocation of earned credits, the prisoner, after exhausting administrative remedies, may seek judicial review in the district court of the official residence of the Department of Corrections. To be considered by the court, the inmate shall meet the following requirements:...
>
> C. The petition shall assert that due process was not provided and prove which element of due process, relevant only to a prison administrative disciplinary proceeding, was not provided by the prison staff....

23. The Department of Corrections website, http://doc.ok.gov/private-institutions, accessed February 10, 2020. Title 57 O.S. Supp. 2012 §561 states in pertinent part:

> 1. A. The Department of Corrections is hereby authorized to provide for incarceration, supervision, and residential treatment at facilities other than those operated by the Department of Corrections. Services offered for persons under the custody or supervision of the Department are to include, but not be limited to, housing, alcoholism or drug treatment, mental health services, nursing home care, or halfway house placement. Such services must meet standards prescribed and established by the State Board of Corrections for implementing such a program, including but not limited to standards concerning internal and perimeter security, discipline of inmates, educational and vocational training programs, employment of inmates, and proper food, clothing, housing, and medical care. Such services must be contracted for in accordance with Section 85.7 of Title 74 of the Oklahoma Statutes. Such services, if provided by private prison contractors, shall be contracted for as required by this section....

24. Title 22 O.S. 2011 §13 provides:

> In a criminal action the defendant is entitled:
>
> 1. To a speedy and public trial.
>
> 2. To be allowed counsel, as in civil actions, or to appear and defend in person and with counsel; and,
>
> 3. To produce witnesses on his behalf, and to be confronted with the witnesses against him in the presence of the court.

Winchester, J., with whom Darby, V.C.J. and Kane, J. join, dissenting:

1. *See Washington v. Barry*, 2002 OK 45, 55 P.3d 1036; *Bosh v. Cherokee Bldg. Auth.*, 2013 OK 9, 305 P.3d 994.

2. *See Barrios v. Haskell Cnty. Pub. Facilities Auth.*, 2018 OK 90, ¶¶ 9, 13, 432 P.3d 233, 238, 239.

Rowe, J., with whom Darby, V.C.J., Winchester and Kane, JJ., join, dissenting:

1. *Bosh v. Cherokee County Bldg. Authority*, 2013 OK 9, ¶14, 305 P.3d 994, 1000. The Supreme Court of the United States has also recognized the right of the states to claim and the define the limits of their sovereign immunity. *Alden v. Maine*, 527 U.S. 706 (1999).

2. The Plaintiff originally brought his state claim pursuant to the GTCA, but later abandoned his state tort claim in favor of his Oklahoma constitutional tort claim.

3. *See Barrios v. Haskell County Pub. Facilities Au*th., 2018 OK 90, ¶13, 432 P.3d 233, 239.

4. *Id.* at ¶12, 432 P.3d at 238-39; 51 O.S. 2015 §§ 152(14), 153(B).

5. *Barrios*, 2018 OK 90, ¶13, 432 P.3d at 239.

6. *Id.*

7. *See id.* at ¶3, 432 P.3d at 241-42 (Edmondson, J., concurring).

8. *Id.* at ¶13, 432 P.3d at 239 n.21.

9. *Id.*

10 *Id.*; *see Phillips v. Wiseman*, 1993 OK 100, ¶9, 857 P.2d 50, 53; *Duckett v. Oklahoma ex rel. Bd. of Regents of Univ. of Okla.*, 986 F.Supp.2d 1249, 1258 (W.D. Okla. 2013).

2020 OK 32

IN THE MATTER OF K.H., C.H., E.H., C.H. DEPRIVED CHILD(REN) TAYLOR HUDSON, Appellant, v. STATE OF OKLAHOMA, Appellee. CODY HUDSON, Appellant, v. STATE OF OKLAHOMA, Appellee.

No. 118,035; Comp. w/118,078. May 12, 2020

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY JUVENILE DIVISION

Honorable Cassandra M. Williams, Trial Judge

¶0 The appellants, Taylor and Cody Hudson (Hudson/parents), were arrested and charged with felony criminal child abuse in relation to the alleged abuse of one of Cody Hudson's sons. Subsequently, the State sought to terminate the Hudsons' parental rights to the four children they had together. At trial, the parents sought to preclude any evidence of the criminal charges from being presented to the jury. The trial court limited evidence of the criminal charges to only inform the jury that charges had been filed — nothing else. The jury rendered a verdict terminating parental rights as to both parents. The Hudsons appealed. We retained the cause. We hold that the limited admission of evidence of the fact that parents have been charged with criminal felonies for child abuse (but not yet convicted) was error but does not warrant reversal. The jury's verdict was supported by the clear and convincing evidence that the abuse was heinous and shocking.

AFFIRMED.

Phillip P. Owens, II., Oklahoma City, Oklahoma, for Appellant Taylor Hudson.

Stephanie A. Younge, Oklahoma City, Oklahoma, for Appellant Cody Hudson.

Jaclyn Rivera, Assistant District Attorney, Oklahoma County, Oklahoma City, Oklahoma, for Respondent, State of Oklahoma.

KAUGER, J:

¶1 We retained this cause to address whether the admission of evidence of the fact that the parents have been charged with criminal felonies for child abuse (but not yet convicted) was error which does not warrant reversal. We hold that it does not because the jury's verdict was supported by clear and convincing evidence of heinous and shocking abuse.[1]

FACTS

¶2 The appellant, Cody Hudson (father/Hudson) lived in Tulsa, Oklahoma, and fathered two boys, R.H. and B.H., with Revona Serber (natural mother/Serber). The boys were born on April 14, 2009, and February 3, 2012, respectively. After Hudson and Serber's relationship ended, no formal custody agreement was made, but the father did see his boys occasionally. Hudson then fathered two more boys and a girl, C.H., E.H., and C.H., on January 28, 2015, December 5, 2015, and November 11, 2017, respectively, with the appellant, Taylor Ainsworth, now Hudson, (hereinafter referred to as "mother," even though she is the stepmother of R.H. and B.H.).

¶3 In October of 2015, the couple moved from Tulsa, Oklahoma, to Oklahoma City, Oklahoma, and the father stayed home with the children while the mother worked to support the family. In February of 2018, the father and mother took physical custody of R.H. and B.H. because of Serber's drug use. The couple had previously had the boys in December of 2017 for about two weeks as well.

¶4 Serber apparently lived in an apartment with broken windows, occasionally without electricity, with little food, and with drug users and strangers coming into the apartment with weapons, engaging in sex, and using drugs. B.H. moved to live with another relative in July of 2018, due to severe behavioral problems which the couple thought made it unsafe for him to be around their children. According to the mother, B.H., who was six at the time, would hit and cuss at other kids, and bang his head on the ground. He had also asked for knives to cut his own eyes out, attempted to hang himself with a belt, and threatened to kill other people. R.H. also had behavior issues, but not nearly as severe as B.H.

¶5 After a receiving a tip from an unnamed source, on August 27, 2018, police officers and the Oklahoma Department of Human Services (DHS) jointly dispatched to the Hudson's home to do a child welfare check for R.H. Police officers searched the home, but were unable to find R.H. The Hudsons told the police that R.H. was with a grandmother. The police left and contacted the grandmother, and she told them that she did not have R.H., and that they were lying. The police returned and this time they found R.H. hiding in the washing machine. R.H. had significant bruising, in different stages of healing, to his upper torso, neck, and face. DHS took R.H. to OU Children's Hospital for examination, and the police took the father to jail. A few days later, the mother was also arrested.

¶6 When R.H. was taken to the hospital, he reported to the DHS worker that he got in trouble for not listening, that the mother grabbed his face and was on top of him, and R.H. hit his head on the floor. However, he was generally reluctant to talk to DHS about what happened in the house. A trained forensic interviewer also interviewed R.H. at the hospital in a recorded interview as well.

¶7 The mother offered an explanation to the DHS worker that just days prior to the incident, she was concerned with R.H.'s behavior toward her children. R.H. had informed them that he had been playing with another kid at his natural mother's apartment in Tulsa when the other kid pulled his pants down and told R.H. to "suck it" or he would hit him in the head. She reported that after her son C.H. tried to insert a bathtub crayon in his anus, R.H. admitted that he had touched C.H. through his pants on the penis. She also said that she saw R.H. playing with himself as her daughter, E.H., watched. She also thought she caught R.H. moving his hand away from E.H.'s undone diaper. It was at this point the father got angry and spanked R.H. all over his body. They hid R.H. in the washer when the police came because they were scared they would get their kids taken away.

¶8 The Oklahoma County District Attorney (DA) filed applications on August 28, 2018, to take the father and mother's three children, C.H, E.H. and C.H., as well as R.H., into emergency custody and place in kinship foster care.

Emergency care is allowed when there is an imminent safety threat to the children.[2] The trial court granted the DA's request the same day and set a hearing for August 30, 2018. As a result of the August 30th hearing: the trial court granted the father and mother visitation; R.H. went to live with his maternal grandmother; the other three were in a foster home; and the Court set another hearing for September 17, 2018.

¶9 On September 6, 2018, the father and mother married. The next day, on September 7, 2018, apparently as a result of the forensic interview and medical examination of R.H., the DA filed petitions to have C.H., E.H., and C.H., determined to be deprived and to terminate the mother's and father's parental rights due to the shocking and heinous abuse to the half-sibling, R.H. Termination is allowed for many reasons, one of which is when abuse or neglect of a child or a sibling is heinous and shocking.[3] The DA alleged both the father and mother failed to provide proper care of their children and that they beat, slapped, hit, and caused R.H. to be covered in bruises. The DA also asserted that the mother tried to choke R.H., tied him up, hit him with a belt, poked him in the eye, stepped on him, and that she psychologically abused him and left him at home alone when the rest of the family went out.

¶10 The DA alleged that the father was unfit because he also hit R.H., and caused him to have a black eye. The children remained in DHS custody while the causes were pending. The DA also filed criminal felony charges on September 11, 2018, against the father and mother. The criminal case has not yet been resolved.

¶11 On December 6, 2018, the mother gave birth to another child, K.H., and the next day DHS also sought emergency custody of K.H. as well. On December 11, 2018, the trial court allowed K.H. to be placed with her siblings in DHS custody. The father's and mother's termination proceedings as to all four of their children proceeded to trial on May 7-10, 2019.[4]

¶12 The trial consisted of testimony and other evidence presented by the father, the mother, a police officer, R.H, and the video forensic interview of R.H. made at the hospital. Testimony of B.H., Serber's sister, two child protective services workers, a DHS permanency worker, and a grandmother, was also presented to the jury. By the conclusion of the trial, the trial court had already determined that the children were deprived. The jury returned verdicts to terminate the parental rights of both the father and the mother.

¶13 On June 7, 2019, and June 25, 2019, the mother and the father, respectively, appealed. On July 3, 2019, the Court made the mother's appeal and the father's appeal companion cases with separate records and separate briefing by the parties. We retained the cause on October 14, 2019, and it was assigned on December 9, 2019, for an opinion to address the admission of evidence of the pending criminal charges in a termination of parental rights proceeding. Because both causes involve the same trial and are companion cases, we decide them both in this single opinion.

I.

EVIDENCE OF CRIMINAL CHARGES.

¶14 Both the father and mother argue that the trial court erred in allowing the State and the children to admit evidence of their criminal charges before the jury. Both filed motions in limine to exclude such evidence[5] and continued to object to the evidence throughout the trial, after the court denied the motions in limine. While the father and mother admit that criminal convictions may be used generally to impeach witnesses, they point out that neither of them has been convicted.[6] Consequently, they argue that the evidence of only being charged with a crime would be irrelevant, and too prejudicial.[7] The State and children argue that it was not error to admit the evidence of criminal charges.

¶15 Title 12 O.S. 2011 §2609[8] addresses the admissibility of a criminal conviction as evidence, but it does not address evidence of criminal charges being filed, which have not yet resulted in conviction. It provides that such evidence of conviction shall be used unless its prejudice outweighs its probative value. Even if the evidence were irrelevant or otherwise inadmissable, the injection of irrelevant or otherwise inadmissable evidence is ordinarily not grounds to reverse a jury verdict unless that error was prejudicial.[9] The test of prejudice is the likelihood the verdict would have been different had the error not occurred, measured by the usual criterion of the verdict's support in evidence.[10]

¶16 Evidence of prejudice is not clear. The trial court expressly prohibited questions about

where the criminal case stood at the time of trial or questions which alluded to a particular result. The court only allowed the suggestion that criminal charges were still pending. No more than that. The rationale behind the trial court's ruling was explained as follows in the trial court's ruling on the motions in limine are found at Volume 1, pages 9-10, of the May 7, 2019, transcript. It provides in pertinent part:

> . . . I am not able to find any law that directs [t]his Court with respect to whether this is inadmissible evidence or, more importantly, whether or not it is unfairly prejudicial. You know, by the nature of these events that occurred, that leads us to where we are today. It is – I mean, the facts are what the facts are.
>
> In this case, what I recognize is this: I recognize that as it relates to Mr. Cody Wayne Hudson, that he has entered a no contest stipulation to the allegations in the petition.
>
> This Court made a judicial finding that there was sufficient evidence to find that the children are deprived as to the father on the grounds of lack of parental care and guardianship, heinous and shocking physical abuse, threat of harm, as well as failure to protect. That's been a determination that's been made by [t]he Court.
>
> I say that because, within the descriptors for heinous and shocking physical abuse, it clearly indicates that one of the bases or descriptions for this abuse includes the fact that the father was charged in Oklahoma County case number CF-2018-4283 with child abuse.
>
> You know, as I have looked at this and tried my best to make sure that this jury does not walk away with an impression one way or the other, this is a neutral piece of evidence. The fact that the parents were both charged is a fact. The fact that law enforcement was involved in this case is a fact.
>
> It is one that leads a jury to conclude that the abuse is heinous and shocking? Well, I don't think that that's the case. Because I think that the jury's instructions, as I look through them, Instruction No. 3.11 that defines heinous and shocking abuse, doesn't list anywhere that there's been a criminal charge. It does give the jury specific direction on what to look at in terms of the level of abuse to determine whether or not it fits within the area of physical abuse versus that higher level of heinous and shocking abuse.
>
> So, to the extent that both parents have asked [t]his Court to limit The State of Oklahoma from offering evidence and testimony about the rest, and that [sic] are charging both parents in this case, I'm going to deny that request.
>
> To ask the parents questions about where their case stands at this point in time or to allude to a particular result; I am prohibiting both sides from being able to do that.
>
> At this point in time, what I'm allowing you all to suggest as this point in time, to the jury, which is true, which in this case, the criminal charges, are still pending against both parents. No more than that. . .

Leaving out all references to the police altogether, and what occurred leading up to arrest, would have required the trial court to leave out nearly all of the events which led to the allegations in this cause. The fact that the parents were charged and not yet convicted could likely influence the jury less than if they had already been convicted and were in prison.

¶17 The terminations sought by the State were based on its allegations that the father's and mother's abuse of R.H. was heinous and shocking.[11] We cannot say that the verdict would have been different had the arrests been excluded from the jury. Jury instruction #8, which is the statement of the case mentions that the mother and father were charged with child abuse in Oklahoma County CF-2018-4283.

¶18 Jury instructions #12[12] and #14,[13] defining heinous and shocking does not list a criminal charge as a requirement for a finding of heinous and shocking. Nor does #13, which defines abuse.[14] The only mention of the criminal charges during the course of the trial was limited to the fact that an arrest occurred and the parents had been charged – nothing more.[15] No evidence was presented that alluded to the potential outcome of the criminal charges. Yet, there was overwhelming evidence about repetitive abuse to both R.H. and B.H., which we will discuss further herein.

¶19 Title 20 O.S. 2011 §3001.1 provides:

> No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground

> of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.

Neither parent argues a substantial violation of a constitutional right. The error which occurred, under the circumstances, it is clearly not a cause for reversal of the jury's express findings of heinous and shocking sufficient to terminate parental rights.

II.

CLEAR AND CONVINCING EVIDENCE WARRANTS TERMINATION.

¶20 The father and step-mother argue that the State failed to meet its burden of proof required to allow immediate termination of their parental rights. The State and children argue that there was clear and convincing evidence presented to support the jury's verdict which terminated their rights based on heinous and shocking abuse, and that termination was in the children's best interest.

¶21 The right of a parent to the care, custody, companionship and management of his or her child is a fundamental right protected by the federal and state constitutions.[16] The magnitude of such a right requires, in parental termination cases, that the State must show by clear and convincing evidence that the child's best interest is served by the termination of parental rights.[17] Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established.[18] This standard of proof balances the parents' fundamental freedom from family disruption, with the state's duty to protect children within its borders.[19]

¶22 Likewise, our review on appeal must find the presence of clear and convincing evidence to support the trial court's decision.[20] We must canvass the record to determine whether the evidence is such that a fact finder could reasonably form a firm belief or conviction that the grounds for termination were proven.[21] Our appellate review does not require a re-weighing of the evidence presented at trial.[22]

¶23 The jury heard extensive testimony and received considerable other evidence that would have allowed them to make an informed determination on whether conduct of the parents was heinous, and shocking, and whether termination was in the children's best interest. The evidence was too considerable to repeat all of it. However, we note that the parents' version of events and care of the children differed from the children's version.

¶24 The State presented evidence that the bruises were indicative of physical abuse, choking, and strangling. The boys' aunt testified that she was concerned with the boys' (R.H and B.H.) welfare, that they had lost weight, and looked sickly, and had black under their eyes from lack of sleep. She also had difficulty talking to and seeing the boys.

¶25 R.H. reported that he was made to sleep on the floor without a blanket or pillow, that he was restricted from food and water, that he was often fed oatmeal, and if he threw it up he had to eat it anyway. He was home schooled and told by the mother that his dad didn't want him or care about him. R.H.'s recorded interview was compelling and it provided insight into his injuries as well as to his hesitation to discuss everything that went on in the home. He feared his dad would go to jail. B.H. also reported similar stories and said that he would get hit everywhere, that he was made to put vinegar in his mouth when he was bad. Both boys were concerned for the safety of K.H., C.H., E.H, and C.H.

¶26 The parents had explanations for everything that the boys reported. For instance, according to the mother, on August 24, 2018, R.H. was caught inappropriately touching C.H. and when confronted he threw his laptop and his father grabbed him by the arm and spanked him. She noticed bruises the next day. Two days later, she caught R.H. quickly pulling his hand away from their daughter's undone diaper. Her version is that R.H. lunged at her and his elbow ended up in her mouth, she bit him to get him off of her and the father began hitting R.H.

¶27 The parents claimed that some of R.H.'s injuries came from falling over a chair or from playing with the other children. As far as food goes, the mother said that the boys were overweight. They went from eating only junk food to healthy food and if they refused to eat it, then they were not forced to, they just simply ate at the next meal. The parents insist they never withheld food or water from the boys or

restricted their access to the bathroom. The mother was convinced that the boys were just confused between the things they witnessed at their natural mother's house, and what actually occurred in their home.

¶28 While most heinous and shocking cases tend to involve either sexual abuse or death, they also include similar accounts of physical abuse, malnourishment, and physical and psychological injuries.[23] We have no doubt that what R.H. and B.H. may have witnessed while in the care of their natural mother left them somewhat unruly or challenging to raise, but we also have no doubt that the evidence presented at trial was sufficient for the jury to make a determination that met the clear and convincing standard required for termination of parental rights for heinous and shocking abuse, and was in the children's best interest. Accordingly, we must affirm the trial court.

CONCLUSION

¶29 Limited evidence of the filing of criminal charges in this cause, was error but does not warrant reversal. While parents have a fundamental right to raise their children, that right may be terminated by the state's duty to protect children from heinous and shocking harm. After examining the record, we have determined that there was more than sufficient evidence for the fact finder to reasonably form a firm belief that the heinous and shocking grounds for termination were proven. Accordingly, the jury verdict must be affirmed.

AFFIRMED.

DARBY, V.C.J., KAUGER, WINCHESTER, EDMONDSON, COMBS, KANE, and ROWE, JJ., concur.

GURICH, C.J. (**by separate writing**), and COLBERT, J., dissent.

GURICH, C. J., dissenting:

¶1 The majority acknowledges that admission of evidence relating to criminal charges filed against the parents was error, yet allows the jury verdict to stand because "[e]vidence of prejudice is not clear." I agree with the majority that the admission of criminal charges was error. I dissent, however, because the error was highly prejudicial, and the possibility of prejudice should be weighed in favor of the parents in this termination proceeding. The ***only*** reasons for offering evidence of the criminal charges was to "validate" the State's termination case and arouse negative emotions in the jury. The charges were irrelevant and did not support any claim or defense in the proceeding. The majority holding is inconsistent with the Evidence Code, the Oklahoma Constitution, and the intrinsic protections underpinning cases involving the severance of parental rights.

¶2 The majority, by allowing evidence pertaining to arrests or charges to be admitted as harmless error, renders substantial portions of the Oklahoma Evidence Code meaningless. Title 12 O.S.2011 §2609 provides the mechanism for impeaching witnesses with evidence of certain **convictions**. Had the legislature intended to allow impeachment of witnesses with evidence pertaining to an arrest or criminal charges, the statute would not have been written subject to limitations. *See also* 12 O.S. 2011 §2410 (prohibiting evidence pertaining to pleas or plea negotiations); and 12 O.S.2011 §2404 (disallowing the use of character or other bad acts of a witness).

¶3 The only reason the State introduced evidence of the arrest of the parents and criminal charges was to inflame the jury and validate its termination case. During the trial proceedings in this case, the State was allowed to not only question the Hudsons about their arrests and the charges, the trial court permitted the "information" to be admitted as an exhibit. Yet, evidence regarding their arrest and the filing of charges was wholly unnecessary and did not serve to establish "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 12 O.S.2011 §2401. The only things which were relevant to establishing the State's case were (1) whether parents committed shocking and heinous abuse of children; (2) whether children were adjudicated deprived; and (3) whether termination was in the children's best interests. *See* OUJI-JUV No. 3.9.

¶4 Offering testimony to show criminal charges were filed against parents was cumulative and simply "icing on the cake," designed to prejudice jurors; it was the State's method of eliminating any question in jurors' minds about whether charges had been filed (i.e., if the abuse was so bad, why were the parents not charged?). The arrest and charges were irrelevant, and therefore, should not have been admitted. 12 O.S.2011 §2402. Even if the criminal charges could arguably be construed as relevant, the cumulative nature and prejudicial effect of

those charges clearly outweighed any probative value. 12 O.S.2011 §2403, *see also* Salt Lake City Corp. v. Gallegos, 377 P.3d 185, 192 (Utah Ct. App. 2016) (holding that evidence officer was charged with crime for alleged theft was irrelevant and cumulative evidence to underlying civil suit involving same alleged acts).

¶5 To construe the error in this case as harmless, invites attorney misconduct by allowing the solicitation of irrelevant and prejudicial evidence with no possible repercussions. Given the constitutional ramifications associated with terminating the parent-child bond, I would find admission of evidence pertaining to the criminal arrest and charges was reversible error and remand the matter for a new trial.

KAUGER, J:

1. The father argues that the heightened burden of proof of beyond a reasonable doubt under the Indian Child Welfare Act (ICWA) denies him equal protection of the law under the 14th Amendment to the United States Constitution. The children in this cause are not Indian children subject to the ICWA. This argument was not presented in the trial court and no reference appears in the record on appeal. It was raised for the first time on appeal, therefore we will not consider such question on appeal. Jernigan v. Jernigan, 2006 OK 22, ¶26, 138 P.3d 539; Johnson v. City of Woodward, 2001 OK 85, ¶21, 38 P.3d 218; Northwest Datsun v. Oklahoma Motor Vehicle Com'n, 1987 OK 31, ¶16, 736 P.2d 516. There are exceptions to the general rule, such as constitutional questions of great public welfare. Northwest Datsun v. Oklahoma Motor Vehicle Com'n, supra. Nevertheless, the father's argument likely stems from the United States Court of Appeals, 5th Circuit's recent decision in Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019) wherein the 5th Circuit Court addressed this same issue. On November 7, 2019, the 5th Circuit ordered the cause to be reheard by the court en banc. 942 F.3d 287, and no final decision has been issued. Consequently, we decline to consider the constitutional question raised by the father for the first time in this appeal.

2. Title 10A O.S. 2011 §1-4-201(a) provides:

A. Pursuant to the provisions of this section, a child may be taken into custody prior to the filing of a petition:

1. By a peace officer or employee of the court, without a court order if the officer or employee has reasonable suspicion that:

a. the child is in need of immediate protection due to an imminent safety threat,

b. the circumstances or surroundings of the child are such that continuation in the child's home or in the care or custody of the parent, legal guardian, or custodian would present an imminent safety threat to the child, or

c. the child, including a child with a disability, is unable to communicate effectively about abuse, neglect or other safety threat or is in a vulnerable position due to the inability to communicate effectively and the child is in need of immediate protection due to an imminent safety threat; or

2. By an order of the district court issued upon the application of the office of the district attorney. The application presented by the district attorney may be supported by a sworn affidavit which may be based upon information and belief. The application shall state facts sufficient to demonstrate to the court that a continuation of the child in the home or with the caretaker of the child is contrary to the child's welfare and there is reasonable suspicion that:

a. the child is in need of immediate protection due to an imminent safety threat,

b. the circumstances or surroundings of the child are such that continuation in the child's home or in the care or custody of the parent, legal guardian, or custodian would present an imminent safety threat to the child, or

c. the child, including a child with a disability, is unable to communicate effectively about abuse, neglect or other safety threat or is in a vulnerable position due to the inability to communicate effectively and the child is in need of immediate protection due to an imminent safety threat.

The application and order may be verbal and upon being advised by the district attorney or the court of the verbal order, law enforcement shall act on such order. If verbal, the district attorney shall submit a written application and proposed order to the district court within one (1) judicial day from the issuance of the verbal order. Upon approval, the application and order shall be filed with the court clerk; or

3. By order of the district court when the child is in need of medical or behavioral health treatment in order to protect the health, safety, or welfare of the child and the parent, legal guardian, or custodian of the child is unwilling or unavailable to consent to such medical or behavioral health treatment or other action, the court shall specifically include in the emergency order authorization for such medical or behavioral health evaluation or treatment as it deems necessary.

3. Title 10A O.S. 1-4-904(B)(9) provides:

B. The court may terminate the rights of a parent to a child based upon the following legal grounds: . . .

9. A finding that the parent has abused or neglected the child or a sibling of the child or failed to protect the child or a sibling of the child from abuse or neglect that is heinous or shocking;

4. This cause does not concern the termination of the father's or Serber's rights to R.H. and B.H. Their status is unknown as far as this cause is concerned.

5. Title 12 O.S. 2011 §2104 provides:

A. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected, and:

1. If the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

2. If the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

B. The court may add any statement which shows the character of the evidence, the form in which it was offered, the objection made and the ruling thereon. It may direct the making of an offer in question and answer form.

C. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being presented to the jury by any means, including making statements or offers of proof or asking questions within the hearing of the jury.

D. Nothing in this section precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

6. Title 12 O.S. 2011 §2609 provides in pertinent part:

A. For the purpose of attacking the credibility of a witness:

1. Evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Section 2403 of this title, if the crime was punishable by death or imprisonment in excess of one (1) year pursuant to the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and . . .

7. Title 12 O.S. 2011 §2403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise. However, in a prosecution for any criminal homicide, an appropriate photograph of the victim while alive shall be admissible evidence when offered by the district attorney to show the general appearance and condition of the victim while alive.

8. Title 12 O.S. 2011 §2609, see note 6, supra.

9. *See*, Karriman v. Orthopetic Clinic, 1973 OK 141, ¶21, 516 P.2d 141; Teague v. United Truck Service, 1972 OK 97, ¶14, 499 P.2d 380; Title 12 O.S. 2011 §78 provides:

The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

10. Karriman v. Orthopetic Clinic, see note 9, supra.

11. *See* note 12, infra regarding the definition of heinous and shocking.

12. Jury instruction #12, taken from 10A O.S. Sup., 2010 §1-4-904(B)(4) provides:

> The State seeks to terminate the parent's rights on the basis of the parent's abuse of the child or a sibling of the child that is heinous and shocking. In order to terminate parental rights on the basis of the parent's abuse of the child or a sibling or the child that is heinous and shocking, the State must probe by clear and convincing evidence that:
>
> 1. The child has been adjudicated deprived;
> 2. The parent abused the child or a sibling of the child;
> 3. The abuse was heinous and shocking; and,
> 4. Termination of parental rights is in the best interests of the child.

13. Jury instruction #14, taken directly from 10A O.S. Supp. 2010 §1-105(31) provides:

> "Heinous and shocking abuse" includes, but is not limited to, aggravated physical abuse that results in serious bodily, mental, or emotional injury. "Serious bodily injury" means injury that involves:
>
> a. a substantial risk of death,
> b. extreme physical pain,
> c. protracted disfigurement,
> d. a loss or impairment of the function of a body member, organ, or mental faculty,
> e. an injury to an internal or external organ or the body,
> f. a bone fracture,
> g. sexual abuse or sexual exploitation,
> h. chronic abuse including, but not limited to, physical, emotional, or sexual abuse, or sexual exploitation which is repeated or continuing,
> i. torture that includes, but is not limited to, inflicting, participating in or assisting in inflicting intense physical or emotional pain upon a child repeatedly over a period of time for the purpose of coercing or terrorizing a child or for the purpose of satisfying the craven, cruel, or prurient desires of the perpetrator or another person, or
> j. any other similar aggravated circumstance.

14. Jury Instruction #13, taken from 10A O.S. Supp. §1-1-105(2) provides:

> "Abuse" means harm or threatened harm to the health, safety, or welfare, including but not limited to nonaccidental physical or mental injury. Abuse does not include a parent's use of ordinary force as a means of discipline including, but not limited to spanking, switching, or paddling.
>
> "Harm or threatened harm to the health or safety of a child" means any real or threatened physical, mental, or emotional injury or damage to the body or mind that is not accidental including but not limited to sexual abuse, sexual exploitation, neglect, or dependency.

15. The discussion of the criminal charges a/k/a the argument over the motion in limine occurred outside of the presence of the jury. The transcript of May 7, 2019, Volume 1 line 1 provides that:

> "We are outside the presence of the jury in the matter of the Hudson children, case number JD-2018-253. Before the jury is actually sworn after being impaneled, and at the beginning of the evidence in this case, The Court is taking up the issue of the mother's motion in limine filed in this case.
>
> Specifically, the mother is requesting that The Court find to inadmissable the – any references to either the fact that the mother or the father were arrested and charged for events related to the reasons why we find ourselves in court on this particular motion.

Both parties then went on to present their evidence and the Court made its ruling.

The following were the only times the arrests were mentioned:

> 1. Opening statements state that Police went to the home to do a welfare check and Mr. Hudson was arrested because he admitted that he had caused the injuries. After the child talks to them about ongoing abuse, Mrs. Hudson was also arrested and the children were placed in DHS custody. No mention of criminal charges is made whatsoever.
> 2. During the mother's testimony when she describes how the husband beat the kid up and stuffed him in the washing machine, she states that she was criminally charged with child abuse because of what happened and she spent a week in jail. Vol. II, page 24-26. She is also asked and states that "Ok, but this is not resolved? You're not convicted or found guilty? to which she answers "I am not."
> 3. During the father's description of the events. Vol II, pages 46-47 he states that he was arrested, he spent five days in jail, and that he was criminally charged but the criminal case is not resolved.
> 4. The police officer does not mention any charges. He does on page 204 of Volume II state that both parents were detained and the father was taken into custody and transported to the police station.
> 5. Jury instruction number 8 mentions only that criminal charges were filed. The defense objected to the instruction but did not offer any type of counter instruction. The transcripts recount it as the trial judge read it. It states that the Mother and Father are charged in Oklahoma County with child abuse. At the end of the instruction it notes that "These allegations are not evidence in this case."

16. In the Matter of the Adoption of L.D.S., 2006 OK 80, ¶11, 155 P.3d 1, In re Adoption of D.T.H., 1980 OK 119, ¶18, 615 P.2d 287 (overruled on other grounds).

17. In the Matter of C.D.P.F., 2010 OK 81, ¶5, 243 P.3d 21; In the Matter of C.G., 1981 OK 131, ¶17, 637 P.2d 66.

18. In the Matter of the Adoption of L.D.S., *see* note 16, supra; In the Matter of C.D.P.F., *see* note 18, supra; In the Matter of C.G., *see* note 18, supra at ¶17 n. 12.

19. In the Matter of the Adoption of L.D.S., *see* note 16, supra; In the Matter of C.D.P.F., *see* note 18, supra; In the Matter of C.G., *see* note 18, supra at ¶17 n. 12.

20. In the Matter of the Adoption of L.D.S., *see* note 16, supra; In the Matter of C.D.P.F., *see* note 18, supra; In the Matter of S.B.C., 2002 OK 83, ¶7, 64 P.3d 1080.

21. In the Matter of C.D.P.F., *see* note 18, supra; In the Matter of S.B.C., *see* note 21, supra.

22. In the Matter of C.D.P.F., *see* note 18, supra.

23. For example, *see* In the Matter of S.T.G., 1981 OK 11, 806 P.2d 636; In the Matter of T.R.W., 1985 OK 99, 722 P.2d 1197; In the Matter of D.P.D., 2006 OK CIV APP 110, 144 P.3d 202; In the Matter of T.H., M.B., and J.M.B., 2005 OK CIV APP 5, 105 P.3d 354.

2020 OK 33

RE: Rules of the Judicial Ethics Advisory Panel Title 5 O.S. Chap 1, App. 4D

SCAD 2020-35. May 11, 2020
As Corrected May 21, 2020

ORDER

Pursuant to the administrative authority vested in this Court by Article 7, Section 6 of the Oklahoma Constitution and the rule making authority of this Court as provided in Title 20 O.S. 2011, Section 24, the Court hereby adopts the Rules of the Judicial Ethics Advisory Panel which are set forth on the attached Exhibit. These rules will take effect immediately and shall supersede the Order issued on June 22, 2015 by administrative order number SCAD-2015-54.

These rules shall appear one time in the Oklahoma Bar Journal, and these rules shall be released for publication in the permanent law reports, to be codified in the Oklahoma Statutes at Title 5, Chapter 1, Appendix 4D.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 11th DAY OF MAY, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

Exhibit

Title 5
Chapter 1
Appendix 4D - Rules of the Judicial Ethics Advisory Panel

Preamble.

The Judicial Ethics Advisory Panel was established in February of 1998 by SCAD No. 1998-1 pursuant to the administrative authority vested in the Supreme Court by Article 7, Section 6 of the Oklahoma Constitution and the rule making authority of the Supreme Court as provided in Title 20 O.S. § 24. The Rules for the three-member advisory panel were found at 5 O.S. Supp. 1998, ch.1, App. 4, Application of the Code of Judicial Conduct (G). In June of 2015, the Panel was restructured by SCAD No. 2015-54. The modifications to the Judicial Ethics Advisory Panel were promulgated to increase the number of active members to 5, to memorialize the work and duties of the panel after the adoption of the new Code of Judicial Conduct effective April 15, 2011, and to ratify and affirm the authority of the advisory panel to issue advisory opinions from 1998 to the present. The rules adopted here are intended to establish a readily available published reference to preserve the work of this important body.

Rule 1.

The Judicial Ethics Advisory Panel serves as an advisory committee for justices, judges, retired or active retired justices and judges, and bona fide candidates for judicial office seeking opinions concerning the compliance of an intended future course of conduct with the Code of Judicial Conduct.

Rule 2.

The advisory panel shall consist of no more than five (5) retired justices or judges and/or retired district or associate judges who shall be appointed by the Chief Justice to serve five-year terms on the panel. A chairperson and vice-chair person shall be elected by the members of the advisory panel.

Rule 3.

Nothing shall prevent a member of the advisory panel from serving successive terms if approved by the Chief Justice. In the event a vacancy on the advisory panel occurs for any reason, the person appointed as a successor member will be appointed to fill the unexpired term of the former member. Members of the advisory panel shall be reimbursed mileage in accordance with 20 O.S. 2011 § 1104B.

Rule 4.

The Administrative Director of the Court is directed to provide the panel with access to office space and administrative assistance sufficient to meet the needs and requirements of the panel.

Rule 5.

A request for a Judicial Ethics Advisory Panel opinion shall be directed by a requesting party to the Administrative Director of the ~~Clerk of the Appellate~~ Courts who shall forward the request to the chairperson of the advisory panel ~~if the requirements of this rule are satisfied~~. Requests will be accepted only from presently elected or appointed justices or judges, active retired justices or judges or retired justices or judges, or any bona fide candidate for judicial office. The term "requesting party" as used in the Rules of the Judicial Ethics Advisory Panel shall mean justices, judges, retired or active retired justices or judges, and bona fide candidates for judicial office.

Rule 6.

A request for a Judicial Ethics Advisory Panel opinion shall relate to prospective conduct only and shall contain a complete statement of all facts pertaining to the intended conduct together with a clear, concise question of judicial ethics. The identity of the requesting party whose proposed conduct is the subject of the request shall be disclosed to the panel. The requesting party shall include with the request a memorandum including and referencing any research or opinions concerning the question and the particular judicial canon in question. ~~Requests shall not be accepted or referred for opinion unless accompanied by the required memorandum.~~

Rule 7.

Advisory opinions shall address only whether an intended, future course of conduct violates the Code of Judicial Conduct and shall provide an interpretation of the Code with regard to the factual situation presented. The opinion shall not address issues of law nor shall it address the ethical propriety of past or present conduct. The identity of the requesting party shall not be disclosed in the opinion.

Rule 8.

The original opinion shall be delivered to the AOC Director, who ~~Clerk~~ shall provide a copy of each advisory opinion to the requesting party, the Chief Justice, the Council on Judicial

Complaints, and the original opinion to the Clerk of the Appellate Courts ~~Administrative Director of the Court~~. The Clerk shall keep the original opinion in a permanent file. A compilation of the opinions by year shall be published on OSCN.

Rule 9:

The fact that a judge or candidate for judicial office has requested and relies upon an advisory opinion may be taken into account by the Council on Judicial Complaints in its disposition of complaints and in determining whether to recommend to the statutorily authorized person or entity discipline of a judge or judicial candidate. The advisory opinion shall not be binding on the Supreme Court, the Council on Judicial Complaints, or Court on the Judiciary in the exercise of their judicial discipline responsibilities.

2020 OK 34

MODIFICATION OF JUDICIAL EDUCATION REQUIREMENTS FOR 2020-2021

SCAD-2020-42. May 18, 2020

ORDER

¶1 Whereas Rule 4 of the Rules for Mandatory Judicial Continuing Legal Education. (Chapter 1, App. 4-B) requires all judges and justices to obtain twelve (12) hours annually of MJCLE;

¶2 Whereas the Governor of Oklahoma declared an Emergency on March 15, 2020, and the Supreme Court and Court of Criminal Appeals entered three joint orders dealing with the COVID-19 Emergency which altered the operation of the district courts through August 1, 2020 and suspended rules and procedures from March 16, 2020 to May 18, 2020;

¶3 Whereas the emergency continues to exist and has resulted in the cancellation of the July 2020 Annual Oklahoma Judicial Conference and the June 2020 Annual Sovereignty Symposium and neither will be rescheduled. Numerous other judicial education seminars and conferences have been cancelled for 2020;

¶4 Whereas good cause exists for modifying the annual requirement and instead temporarily allowing judges two years to meet the requirements;

¶5 Whereas this Order does not affect any statutory requirement for judicial education for those judges with juvenile dockets;

¶6 IT IS THEREFORE ORDERED that effective immediately, the MJCLE requirement for the calendar years 2020 and 2021, is reduced from 12 hours per year to a combined total of 18 hours, and any or all credit may be earned in one or both years. Carry over hours from 2019 will also apply. The Administrative Office of the Court will provide judges and justices with an interim report for 2020 and a final report for 2021.

¶7 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 18th day of May, 2020.

/s/ Noma D. Gurich
Chief Justice

ALL JUSTICES CONCUR

2020 OK 35

RE SUSPENSION OF 2020 CONTINUING EDUCATION REQUIREMENTS FOR CERTIFIED AND REGISTERED COURTROOM REPORTERS

SCAD-2020-43. May 18, 2020

ORDER

¶1 Due to the impacts of the COVID-19 pandemic, the State Board of Examiners of Certified Courtroom Interpreters has requested the Supreme Court to suspend the continuing education requirements for Registered and Certified Courtroom Interpreters for calendar year 2020. See Rule 19 of the Rules of the State Board of Examiners of Certified Courtroom Interpreters, Title 20, Chapter 23, Appendix 2.

¶2 For good cause shown, and as recommended by the Board, the Supreme Court hereby orders that the continuing education requirements applicable to Oklahoma Registered and Certified Courtroom Interpreters are suspended for the 2020 calendar year. Any approved continuing education hours that are accrued in 2020 may be carried over and counted towards the 2021 interpreter continuing education requirements.

¶3 DONE BY ORDER OF THE SUPREME COURT this 18TH day of May, 2020.

/s/ Noma D. Gurich
Chief Justice

ALL JUSTICES CONCUR

2020 OK 36

RE: Reinstatement of Certificate of Certified Shorthand Reporters

SCAD-2020-44. May 19, 2020

ORDER

The Oklahoma Board of Examiners of Certified Shorthand Reporters recommended to the Supreme Court of Oklahoma that the certificate of each of the Oklahoma Certified Shorthand Reporters named below be reinstated as they have complied with the continuing education requirements for 2019 and annual certificate renewal requirements for 2020 and have paid all applicable fees.

IT IS HEREBY ORDERED pursuant to 20 O.S., Chapter 20, App. 1, Rules 20 and 23, the certificates of the following shorthand reporters are reinstated from the suspension earlier imposed by this Court:

Name	CSR #	Effective Date of Reinstatement
Susan Griggs	943	May 11, 2020
Monique Mason	2001	May 11, 2020
Kortney Houts	1804	April 15, 2020
Dana Burkdoll	1955	April 23, 2020

DONE BY ORDER OF THE SUPREME COURT this 19th day of May, 2020.

/s/ Noma D. Gurich
Chief Justice

Bar News

OBA Member Reinstatement

The following member of the Oklahoma Bar Association suspended by Supreme Court Order has complied with the requirements for reinstatement, and notice is hereby given of such reinstatement:

Ryan Matthew McFarlin
OBA No. 22232
P.O. Box 224114
Dallas, TX 75222

OBA Member Resignation

The following member of the Oklahoma Bar Association has resigned as a member of the association and notice is hereby given of such resignation:

Randle Garrett Jones
OBA No. 10570
15 E. Rock Wing Pl.
The Woodlands, TX 77381

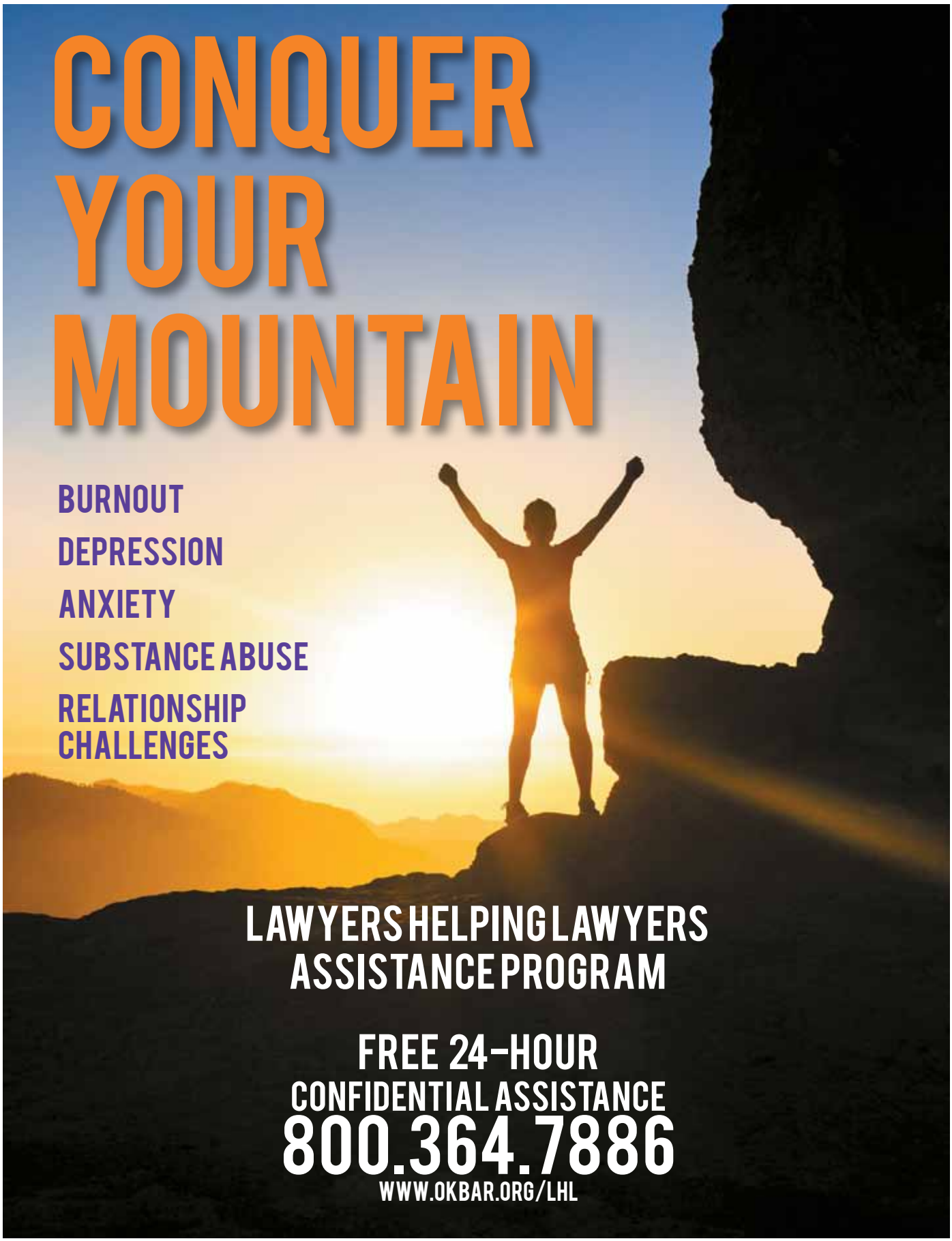
Notice of Judicial Vacancy

The Judicial Nominating Commission seeks applicants to fill a vacancy for the position of District Judge for Tulsa and Pawnee Counties, Fourteenth Judicial District, Office 5. This vacancy is created by the retirement of the Honorable Jefferson Sellers on May 1, 2020.

To be appointed to Office 5, Fourteenth Judicial District, one must be a legal resident of Pawnee County at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointee shall have had a minimum of four years' experience in Oklahoma as a licensed practicing attorney, a judge of a court of record, or both.

Application forms can be obtained online at www.oscn.net (click on "Programs", then "Judicial Nominating Commission," then "Application") or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the JNC **no later than 5:00 p.m., Friday, June 12, 2020.** Applications may be hand-delivered or mailed. If mailed, they must be postmarked **on or before June 12, 2020** to be deemed timely. Applications should be delivered/mailed to:

Jim Webb, Chairman
Oklahoma Judicial Nominating Commission
c/o Tammy Reaves — Administrative Office of the Courts
2100 N. Lincoln Blvd., Suite 3 • Oklahoma City, OK 73105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Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, May 7, 2020

RE-2019-73 — Appellant Thomas Hawk Long Crawley entered a plea of nolo contendere to First Degree Rape in Delaware County Case No. CF-2010-13 and was sentenced to thirty years imprisonment with all but the first ten years suspended. On December 13, 2018, the State filed an application to revoke Crawley's suspended sentence alleging he violated the terms and conditions of his probation. On January 23, 2019, the District Court of Delaware County, the Honorable Barry V. Denney, Associate District Judge revoked Crawley's suspended sentence in part. Crawley appeals. The partial revocation of Crawley's suspended sentence is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J, concurs.

F-2018-1194 — On November 8, 2017, Appellant Thomas Patrick Birdsong, Jr. entered a guilty plea to a charge of Conspiracy to Commit Knowingly Concealing Stolen Property in Muskogee County Case No. CF-2017-820. Sentencing was deferred pending Birdsong's successful completion of the Muskogee County Drug Court Program. On September 24, 2018, the State filed an application to terminate Birdsong from Drug Court, alleging numerous contract violations. On November 26, 2018, at the conclusion of the termination hearing, the Honorable Robin Adair, Special Judge, terminated Birdsong's drug court participation and sentenced him to twenty years imprisonment. Birdsong appeals. The termination of Birdsong's drug court participation is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

RE-2019-157 — Appellant Tylor Wayne Hernandez entered a plea of guilty to Count 1, Making a Threat or Conveying Information Known to be False Concerning an Attempt to Kill, Injure, or Intimidate Any Person in Oklahoma County Case No. CF-2014-4874. He was sentenced to ten (10) years, all suspended, except for 26 weekends in jail. On December 3, 2018, the State filed an application to revoke Hernandez's suspended sentenced alleging a new offense of Threatening Acts of Violence and failure to attend the Court Assistance Program's Batterers Intervention Program. On February 21, 2019, the District Court of Oklahoma County, the Honorable Ray C. Elliott, District Judge, revoked Hernandez's suspended sentence in full. Hernandez appeals. The revocation of Hernandez's suspended sentence is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-1168 — Tressie Rose Shaffer, Appellant, was tried by jury for the crime of permitting child abuse by injury in Case No. CF-2017-399 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at eighteen months imprisonment. The trial court sentenced accordingly, allowed credit for time served and ordered twelve months of post-imprisonment supervision. From this judgment and sentence Tressie Rose Shaffer has perfected her appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

C-2019-671 — Petitioner Thomas Lloyd McQueary entered a blind plea of guilty in the District Court of Marshall County to two counts of Burglary in the Second Degree, After Former Conviction of Two or More Felonies in Case No. CF-2019-15. The Honorable Wallace Coppedge, District Judge, accepted McQueary's pleas and sentenced him to twenty-two years for each count. Judge Coppedge ordered the sentences to run consecutively. McQueary timely filed a motion to withdraw his pleas that was denied following a hearing. McQueary appeals the denial of that motion. Petition for a Writ of Certiorari is DENIED. The judgment and sentence of the District Court is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

F-2019-226 — Vincent Edward Byrd, Appellant, was tried by jury for the crime of Felon in

Possession of a Firearm, After Two or More Felony Convictions in Case No. CF-2016-9640 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment thirty years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Vincent Edward Byrd has perfected his appeal. AFFIRMED. Motion to supplement or for an evidentiary hearing is DENIED. Opinion by: Lumpkin, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., concurs in results; Hudson, J., concurs; Rowland, J., recused.

Thursday, May 14, 2020

F-2019-179 — Earnest J. Bradford Jr., Appellant, was tried by jury for the crime of Count 1, Assault and Battery with a Deadly Weapon; and Count 2, Felon in Possession of a Firearm,. Case No. CF-2018-9 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment, twenty years imprisonment on Count 1, and seven years imprisonment on Count 2. The trial court sentenced accordingly and ordered the sentences to run consecutively to one another. From this judgment and sentence Appellant appeals. Earnest J. Bradford Jr. has perfected his appeal. The judgement and sentence of the trial court is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

S-2019-567 — Appellee Jordan Wayne Strodder, was stopped by a Valley Brook Police Officer and given four municipal citations. He appeared in the Valley Brook Municipal Court for trial. Appellee argued in part that the Valley Brook officer did not have jurisdiction to stop and detain him as the alleged traffic violation occurred with the jurisdiction of Oklahoma City. This argument was rejected, and Appellee was found guilty of all charged offenses and sentenced to a fine of $2,065.00. At the conclusion of his trial, Appellee announced his intent to appeal. With the proper pleadings timely filed in the District Court of Oklahoma County, the matter was heard before the Honorable Cindy Truong, District Judge. Appellee's motion to quash and dismiss was granted with a finding that Valley Brook did not have jurisdiction to stop, detain, and arrest the Appellee. Thereafter, Valley Brook announced its intent to appeal the District Court's ruling. The ruling of the District Court granting the motion to suppress is AFFIRMED and the case is REMANDED to the District Court for further proceedings consistent with this opinion. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

C-2019-491 — Petitioner Kenneth Ray Johnstone, II appeals the denial of his motion to withdraw plea in the District Court of Kay County, Case No. CF-2017-59. Johnstone entered a negotiated plea of no contest to Unlawful Possession of a Controlled Dangerous Substance, After Former Conviction of Two or More Felonies (Count 1), Unlawful Possession of Drug Paraphernalia (Count 2), and Transporting an Opened Container of Beer (Count 3). The plea was accepted and pursuant to the plea agreement, Johnstone entered the Kay County Adult Drug Court Program. The State sought Johnstone's termination from drug court. The Honorable David R. Bandy, Associate District Judge, terminated Johnstone from drug court, and sentenced him on Count 1 to thirty-five years with the last ten years suspended and a $10,000.00 fine with $9,000.00 suspended plus costs. Johnstone filed a timely motion seeking to withdraw his no contest plea which was denied. Johnstone appeals. The Petition for a Writ of Certiorari is DENIED. The district court's denial of Petitioner's motion to withdraw plea is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., dissents; Lumpkin, J., concurs; Hudson, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Thursday, April 30, 2020

117,569 — Lyle L. Roggow, First Successor Trustee of the Virgil Roggow and Joleen Roggow Revocable Trust of 2012; Loren Wehrenberg; Janice Semrad, Trustee of the Janice E. Jindra Family Revocable Trust Dated February 10, 2011; Clifford R. Staude; Ricky Lyle Staude; Connie Louise Kimmel; Franklin John Staude; Ricky Lyle Staude, Connie Louise Kimmel & Franklin John Staude, Co-trustees of the Emalee Renee Staude Trust; Kathryn L. Mcgregor; Roberta L. Seaton; Robert Henry Wehrenberg; Merlan Jean Hoskins; Violet Yvonne Moeller; Bennie Ray Wehrenberg; Kenneth Wehrenberg; Tommy John Glazier; Erich Nathan Wehrenberg; Edward Lee Wehrenberg; and Karen Elaine Littlefield, Plaintiffs/Appellants, v. Alfred Teders; Ruth Ann Cassiday; Timberwolf Minerals, Llc; Longpoint Minerals, Llc; Sooner Mineral Investments, Llc; Peace United Church of Christ, A/k/a Loyal Evangelical Church, Inc.; Eagle Oil & Gas Co.; Staghorn Petroleum, Llc;

Chisholm Oil and Gas Operating, Llc; Wilmington Trust, National Association; Newfield Exploration Mid-continent, Inc.; the Unknown Successors of Briscoe Oil Operating Company, Inc., A/k/a Briscoe Oil Operating Co., Inc., a Dissolved Oklahoma Corporation; and the Unknown Successors of Amanda L. Staude, A/k/a Amanda Wehrenberg Staude, Deceased, Defendants/Appellees. Appeal from the District Court of Kingfisher County, Oklahoma. Plaintiffs/Appellants appeal from the trial court's summary judgment order quieting title to certain mineral interests and an oil and gas lease to various Defendants/Appellants. At issue is whether the temporary cessation of production from the subject mineral estate terminated Plaintiffs' term mineral interests. Plaintiffs own a 160 acre term mineral interest in Kingfisher County. The Warranty Deed originally conveying the subject property reserved for the grantors (Plaintiffs) the mineral interest for a period of "20 years from and after February 16, 1971, and so long thereafter as oil, gas and other minerals are produced." Most of Defendants claim, or have claimed, some reversionary ownership interest in the mineral estate. Defendant Chisholm Oil and Gas Operating, LLC, claims ownership of the oil and gas lease covering the property. From March 1, 1982, to May 13, 2014, the Gilmour No. 1 was the only producing well on the subject property. It is undisputed the well ceased producing any oil or gas for multiple periods in the secondary term. Pursuant to the dictates of *Ludwig v. William K. Warren Found.*, 1990 OK 96, 809 P.2d 660, Defendants are entitled to judgment as a matter of law. AFFIRMED. Opinion by Bell, P.J.; Goree, J., and Mitchell, J.(sitting by designation) concur.

117,598 – Donna Marie Cox, Plaintiff/Appellant, v. Letia Griffith Skinner, formerly known as Letia Tylene Griffith, Defendant/Appellee. Appeal from the District Court of Cleveland County, Oklahoma. Plaintiff/Appellant, Donna Marie Cox, appeals the district court's order denying her motion to vacate the court's earlier order granting the motion to dismiss filed by Defendant/Appellee, Letia Skinner. An attorney's failure to obtain service of process is not an irregularity of proceedings or an unavoidable misfortune pursuant to 12 O.S. §1031(3) and §1031(7). However, it could constitute good cause sufficient to avoid dismissal for failure to serve a party pursuant to 12 O.S. §2004 (I). The decisive fact is that Plaintiff never received notice of Defendant's motion to dismiss. As a result, the judgment was obtained by irregularity and the court abused its discretion by denying Plaintiff's motion to vacate it. Reversed. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

117,872 – Thomas Herman, Plaintiff/Appellant, v. State of Oklahoma, ex rel., Department of Public Safety, Board of County Commissioners of Oklahoma County, and Oklahoma County Sheriff, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Plaintiff/Appellant, Thomas Herman, appeals from the trial court's order dismissing his action against Defendants/Appellees, State of Oklahoma, ex rel. Department of Public Safety (DPS), and Board of County Commissioners of Oklahoma County, ex rel. Oklahoma County Sheriff's Office (Sheriff). Plaintiff sued DPS for wrongful arrest and Sheriff for unlawful detainment and negligent infliction of emotional distress. Plaintiff was stopped by an Oklahoma Highway Patrol trooper for an alleged faulty headlight. When the officer performed a routine warrant check, he found a Warrant out of New Jersey for a 2008 parole violator named "Thomas Herman," who was described as 4'9" tall and weighing 150 pounds; Plaintiff is 5'11" tall and weighs 225 pounds. Plaintiff alleges he told the trooper he was not the same person listed on the Warrant and he had been in Oklahoma since 2004. The trooper arrested Plaintiff on the Warrant and transported him to the Oklahoma County Jail, where Plaintiff continued to voice his objections about the Warrant. The following day, an Oklahoma County judge ordered Plaintiff released because the Warrant could not be verified as pertaining to Plaintiff. Plaintiff sued, but the trial court sustained both Defendants' dismissal motions. With respect to DPS, we hold 51 O.S. 2011 §155(3) cannot be so broadly construed "as to act as a complete bar to liability under any circumstances" or as to provide "blanket immunity to political subdivisions for any claim arising from law enforcement." Accordingly, we reverse the trial court's dismissal of Plaintiff's claim against DPS. We hold §155(25) shields Sheriff from liability for refusing to release Plaintiff from custody. Finally, although damages for mental suffering may be available where the traditional elements of negligence apply, we reiterate negligent infliction of emotional distress is not an independent tort. Plaintiff's claims against Sheriff were properly dismissed. AFFIRMED IN PART, RE-

VERSED IN PART. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

118,204 – In The Matter of The Adoption of M.R.R., a Minor Child, Joseph Richardson, Natural Father/Appellant, v. Matthew Wayne Miller and Jennifer Dawn Miller, Petitioners/Appellees. Appeal from the District Court of Tulsa County, Oklahoma. Petitioners/Appellees, Matthew Wayne Miller and Jennifer Dawn Miller husband and wife (Adoptive Parents), filed this proceeding to adopt the minor child, M.R.R., without the consent of the biological father, Natural Father/Appellant, Joseph Richardson (Father). M.R.R. qualifies as an Indian child as that term is defined in both the Oklahoma Indian Child Welfare Act (OICWA), 10 O.S. 2011 §40.2(2), and the Federal Indian Child Welfare Act (ICWA), 25 U.S.C. §1903(4). The Cherokee Nation has intervened in this proceeding, but has taken no further action. After a hearing, the district court held the child is eligible for adoption without Father's consent pursuant to 10 O.S. 2011 §7505-4.2(B) and (H). The court held for twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for adoption, Father failed to establish a substantial and positive relationship with the child and Father willfully failed to contribute to the child's support. After reviewing the record, this Court holds clear and convincing evidence supports the district court's determination that Father's consent to the adoption is unnecessary under §7505-4.2(B) and (H). The district court's order adjudicating child eligible for adoption without Father's consent is AFFIRMED. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

118,218 – In The Matter of The Adoption of G.D.S, a Minor Male Child, and A.R.S., a Minor Female Child, Hope Smith, Natural Mother/Appellant, v. Ira Yount Smith and Cathrine Ann Smith, Petitioners/Appellees. Appeal from the District Court of Woodward County, Oklahoma. In this adoption proceeding, Natural Mother/Appellant, Hope Smith, the biological mother of the minor children, G.D.S., born January 24, 2011, and A.R.S., born April 2, 2013, appeals from the district court's order denying her motion to vacate the order terminating her parental rights and authorizing the adoption to proceed without Mother's consent. Petitioners/Appellees, Ira Yount Smith and Catherine Ann Smith (Adoptive Parents), husband and wife, are the maternal grandparents and legal guardians of the minor children. Adoptive Parents filed a petition to adopt the minor children and to terminate Mother's parental rights, and the parental rights of Fletcher James Jaquez, the biological father of A.R.S. The biological father of G.D.S. is deceased. Mother sought to vacate the underlying district court order terminating Mother's parental rights and authorizing the adoption to proceed without Mother's consent. This order found notice of the hearing on the petitions to terminate Mother's parental rights and for adoption was served upon Mother and the service was proper and according to law. This order held Mother's consent to the adoption was unnecessary pursuant to 10 O.S. 2011 §7505-4.2(B)(1), because for twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for adoption, Mother willfully failed, refused or neglected to contribute to the support of the minor children. Specifically, the court held Mother is employed and fully capable of contributing to the support of the children as ordered in the July 31, 2015, order appointing co-guardians. Subsequently, the court found it was in the children's best interest to be adopted by Adoptive Parents and it entered a final decree of adoption. After reviewing the record, this Court holds Mother's right to due process was satisfied by the statutory notice of the proceeding personally served upon Mother. This Court further holds clear and convincing evidence supports the district court's determination that Mother's consent to the adoption is unnecessary pursuant to §7505-4.2(B)(1) and that it is in the children's best interest to be adopted by Adoptive Parents. This Court therefore holds the district court did not abuse its discretion in denying Mother's motion to vacate. Furthermore, this Court affirms the district court's order terminating Mother's parental rights and authorizing the adoption to proceed without Mother's consent, and the court's final decree of adoption. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

Tuesday, May 5, 2020

117,062 — Arrowhead Investment and Development Corporation, d/b/a Arrowhead South, Plaintiff, v. Donny M. Williamson, Defendant, and American Bank of Oklahoma, Third-Party Plaintiff/Appellee, v. Arrowhead Investment and Development Corporation, d/b/a Arrowhead South, and Donny M. Williamson, Third-Party Defendant. Appeal from the District Court

of Delaware County, Oklahoma. Honorable Robert G. Haney, Judge. Plaintiff/Third-Party Defendant/Appellant Arrowhead Investment and Development Corporation (Arrowhead) appeals from an order denying its motion to vacate a judgment entered in favor of Third-Party Plaintiff/Appellee American Bank of Oklahoma (Bank) and against Defendant Donny M. Williamson. Arrowhead obtained a default judgment against Williamson for unpaid boat repairs and then purchased the boat at the sheriff's sale. After the default judgment to Arrowhead was vacated, Bank intervened and obtained judgment against Williamson to foreclose on Bank's security interest in the boat. Arrowhead then sought an order vacating Bank's judgment against Williamson. In the order on appeal here, the trial court denied Arrowhead's motion to vacate Bank's judgment and directed Arrowhead to deliver the boat to Bank. Arrowhead had no interest in Bank's judgment against Williamson. We affirm. Opinion by Buettner, J.; Goree, J., concurs and Bell, P.J., dissents.

(Division No. 2)
Thursday, April 30, 2020

117,860 — Bank of America, N.A., Plaintiff/Appellee, v. Randy L. Lyon and Sonja Lyon, Defendants/Appellants, and Occupant of Premises; United States of America ex rel. Department of Housing and Urban Development; Capital One Bank (USA), N.A.; and Portfolio Recovery Associates, LLC, Defendants. Appeal from the District Court of Canadian County, Hon. Paul Hesse, Trial Judge. In this foreclosure proceeding, Randy L. Lyon and Sonja Lyon (collectively, Appellants) appeal from a judgment of the trial court granting summary judgment to Bank of America, N.A. (BANA) on its foreclosure action and on all of Appellants' counterclaims. Based on our review of the summary judgment record and applicable law, we conclude the trial court did not err in granting summary judgment to BANA on its petition for foreclosure and some of Appellants' counterclaims, and in awarding BANA a judgment of foreclosure. We, therefore, affirm the final order insofar as it awards summary judgment to BANA on the foreclosure action and some of the theories of liability asserted in Appellants' counterclaims, and affirm the foreclosure judgment. We further conclude, however, the trial court improperly awarded summary judgment to BANA on several of Appellants' theories of liability because questions of material fact remain concerning the theories of trespass, invasion of privacy, and intentional infliction of emotional distress. We therefore reverse that portion of the final order awarding summary judgment to BANA on those counterclaims and remand for further proceedings. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

Tuesday, May 5, 2020

117,486 — In Re The Marriage of: Aaron D. Compton, Petitioner/Appellant, v. Amy G. Compton, Respondent/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Thomas Riesen, Trial Judge. The petitioner, Aaron D. Compton (Husband) appeals the Decree entered on remand in a marriage dissolution action where Amy G. Compton (Wife) is respondent. This Court resolved the prior appeal in *Compton v. Compton*, Case Number 114,107 (*Compton 1*) and the mandate issued in that appeal. This is an appeal after a Decree was entered on remand of a first appeal. The first appeal directed that certain debts be reconsidered as marital debts and the marital estate recalculated accordingly. The issue on remand is whether the trial court adhered to the mandate and whether the result is fair and equitable. The trial court also awarded an additional attorney fee which is challenged in this appeal. One of the debts involved the cost of remodeling the parties' kitchen. Wife is obligated on this debt and was awarded the residence. The trial court assignment of this debt to Wife complies with the mandate in all respects and is affirmed. The other three debts were incurred in connection with the family business. Husband was the sole obligor for these debts. Wife is not obligated and the trial court and appellate court have so ruled and that is settled law of the case. However, Husband received a discharge of all four of these debts in bankruptcy, post-Decree and while the appeal was pending. The trial court, however, assigned these three debts to Wife. This resulted in her receiving substantial alimony in lieu of property, whereas in the original Decree she had to pay Husband such alimony in lieu of property. This Court concludes that because neither party has any legal obligation in this marriage to pay these three debts, the assignment of the debts to either results in a windfall to the recipient. Although these debts are not extinguished by bankruptcy, or otherwise, the legal status of the

parties is tantamount to the debts not being in existence. Therefore, the Decree on remand is modified to provide that these three debts are not assigned to either party. This results in a reduction of Wife's obligation to pay alimony in lieu of property. There is no transcript, or appropriate alternative, for the attorney fee hearing. In the absence of a record, the judgment is presumed correct and will not be disturbed. Therefore, the Decree on remand is affirmed as modified. MODIFIED AND AFFIRMED AS MODIFIED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

Thursday, May 7, 2020

117,747 — Lifetouch National School Studios, Inc., a Minnesota corporation, Plaintiff/Appellant, vs. Oklahoma School Pictures, L.L.C., an Oklahoma limited liability company, Bart Baker, an individual, and Nathan Dunn, an individual, Defendants/Appellees. Appeal from Order of the District Court of Oklahoma County, Hon. Aletia Haynes Timmons, Trial Judge. Appellant Lifetouch National School Studios, Inc. appeals the district court's order granting the motion to dismiss of Appellees Oklahoma School Pictures, L.L.C., Bart Baker, and Nathan Dunn. After review of the record and applicable law, we find that the district court erred in dismissing Lifetouch's claim of alter-ego liability against Oklahoma School Pictures. Appellant's theory of liability is not precluded by application of 12 O.S.2011 § 2019 (A) or claim preclusion. That portion of the order appealed is reversed and this case is remanded with instructions to allow the case to proceed on that theory of liability. The remainder of the district court's order is affirmed. AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division II, by Fischer, J.; Rapp, J., and Barnes, P.J., concur.

(Division No. 3)
Tuesday, April 28, 2020

117,790 — In the Matter of B.B., Deprived Child, Kevin Burns, Petitioner/Appellant, v. State of Oklahoma, Respondent/Appellee. Appeal from the District Court of Haskell County, Oklahoma. Honorable Brian C. Henderson, Judge. Petitioner/Appellant Kevin Burns (Father) appeals from the trial court's order terminating Father's parental rights to his son B.B. after a jury trial. On appeal, Father contends Respondent/Appellee the State of Oklahoma (the State) did not meet its burdens to show, by clear and convincing evidence, that he failed to correct the conditions that led to B.B.'s being adjudicated deprived and that termination of Father's parental rights was in B.B.'s best interest. Father also argues the State failed to meet its evidentiary burdens under the Indian Child Welfare Act (ICWA). Specifically, Father argues the State failed to show (1) through the testimony of a qualified expert witness, beyond a reasonable doubt, that continued custody by Father would likely cause serious emotional and physical damage to the minor child and (2) that active efforts were made to prevent the breakup of the Indian family. We AFFIRM. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Buettner, J., (sitting by designation) concur.

118,002 — In the Matter of N.C., A Deprived Child: State of Oklahoma, Appellee, v. Baptiste Boice, Appellant. Appeal form the District Court of Cleveland County, Oklahoma. After a jury trial, the trial court terminated the paternal rights of Respondent/Appellant Baptiste Boice, as to his minor child, N.C. On appeal, the father makes two allegations of error. First, he claims he was not provided effective assistance of counsel at trial. Second, he claims that the state failed to prove that his "continued custody" of N.C. was likely to result in serious emotional or physical damage to the child beyond a reasonable doubt, as he claims the Indian Child Welfare Act (ICWA) requires. Because we find that the father's counsel's performance was more than sufficient under the circumstances and that the referenced ICWA requirement does not apply in this case, we AFFIRM. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Buettner, J., concur.

118,412 — Richard Lynn Dopp, Plaintiff/Appellant, v. Don Kirkendall and Charles Kirkendall, Defendants/Appellees. Appeal from the District Court of Rogers County, Oklahoma. Honorable Sheila A. Condren, Trial Judge. Plaintiff/Appellant Richard Lynn Dopp (Plaintiff) appeals from an order denying his motion to reconsider the order granting the motion to dismiss of Defendants/Appellees Don Kirkendall and Charlie Kirkendall (Defendants). The underlying action relates to a previously filed case and appeal, which was dismissed for Plaintiff's failure to pre-pay filing fees required by 57 O.S. § 566.2. Plaintiff argues that the trial court erred in dismissing the case because it misapplied the savings statute and improperly dismissed the case. Opinion by Swinton, V.C.J.;

Mitchell, P.J., and Buettner, J., (sitting by designation) concur.

Tuesday, May 5, 2020

117,404 — Mark McCullough, Plaintiff/Appellee/Counter-Appellant, v. Rachelle Elaine Koczman, a/k/a Celia McCullough, a/k/a/ Elaint Scott, a/k/a Ann Riley McCullough, and other unknown aliases, Defendant/Appellant/Counter-Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Aletia Haynes Timmons, Judge. The defendant Rachelle Elaine Koczman appeals an award of $4,900 compensatory damages and $500 punitive damages to plaintiff Mark McCullough. Liability was determined earlier. The plaintiff counter-appeals from the same judgment, claiming the damages awarded were so inadequate as to be reversible error. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Buettner, J., (sitting by designation) concur.

(Division No. 4)
Tuesday, April 28, 2020

117,773 (Consolidated with Case No. 117,774) — In the Matter of The State of Oklahoma in the Interest of: A.C.L., Alleged Deprived Juvenile as Defined by the Laws of the State of Oklahoma, Alana Marie Landon and Joseph Foster Landon, Appellants, vs. State of Oklahoma ex rel. Department of Human Services, Appellee. Appeal from an order of the District Court of Rogers County, Hon. Terrell S. Crosson, Trial Judge, terminating the parental rights of Joseph Foster Landon (Father) and Alana Marie Landon (Mother) to their minor child, ACL. We are asked to review whether the State of Oklahoma proved its termination case by clear and convincing evidence and whether legal errors made by the trial court require reversal. After careful review of the record and applicable law, we conclude State showed by clear and convincing evidence that Mother's and Father's parental rights should be terminated. Finding no other error, we affirm. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

117,946 — In the Matter of S.T., Adjudicated Deprived Child, Amber Thompson, Appellant, vs. The State of Oklahoma, Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Lisa Davis, Trial Judge, terminating Amber Thompson's (Mother) parental rights to her minor child, ST, under 10A O.S.2011 and Supp. 2015, § 1-4-904(B)(5) (Mother failed to correct the conditions on the basis of which the minor child was adjudicated to be deprived). We conclude there is clear and convincing evidence in the record to support the trial court's decision Mother failed to correct the conditions of lack of proper parental care and guardianship and threat of harm. The trial court properly terminated Mother's parental rights to ST. The termination order is therefore affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

Thursday, April 30, 2020

116,857 — In re the Marriage of: Larry Alan Merrick, Petitioner/Appellee, vs. Cassie D. Merrick, Respondent/Appellant. Appeal from an Order of the District Court of Grady County, Hon. John E. Herndon, Trial Judge, in which Cassie D. Merrick (Wife) appeals various aspects of a divorce decree. We affirm the decisions of the district court, with the exception of the adjustment of $62,500 to account for damage/waste done to the marital home by Wife while it was in her possession. We find evidence sufficient to support the finding of damage/waste, but no evidence sufficient to support the district court's valuation in this matter. We therefore remand this matter for consideration of that valuation only, to provide an opportunity for the parties to present evidence as to the actual cost of repairing the damage. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, J.; Reif, S.J. (sitting by designation), and Wiseman, C.J., concur.

Tuesday, May 5, 2020

117,763 — Bobby J. Holmes, Plaintiff/Appellant, vs. Megan C. Harrison, Defendant/ Appellee. Appeal from an order of the District Court of Pottawatomie County, Hon. Dawson Engle, Trial Judge, modifying custody, visitation, and child support in regard to the parties' minor child. After reviewing the record and well-established legal precedent, we conclude the trial court decisions regarding modification of custody, visitation, and child support were not contrary to the weight of the evidence. No abuse of discretion having been shown, we affirm those decisions. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Rapp, J. (sitting by designation), concur.

117,282 — Sharla Jean Curtis, Plaintiff/Appellee, vs. Jennifer Diane Earls and Stanley B. Coleman, Defendants/Appellants, and F.N. Curtis, John Doe Earls (Spouse of Jennifer Diane Earls), Red River Valley Enterprises, LLC, Defendants. Appeal from an Order of the District Court of Bryan County, Hon. Mark Campbell, Trial Judge, denying Stanley B. Coleman (Coleman) and Jennifer Diane Earls' (Earls) motion to reconsider granting Sharla Jean Curtis (Curtis) default judgment. Under the facts presented, and given the strong public policy in this state of preferring decisions rendered on their merits rather than by default, we conclude the trial court erred in refusing to vacate the default judgment. Furthermore, and pursuant to *Burroughs v. Bob Martin Corp.*, 1975 OK 80, 536 P.2d 339, if there is doubt as to whether a default judgment should be vacated, "such doubt should be resolved in favor of a trial on the merits." We therefore reverse the trial court's order denying Coleman and Earls' motion to reconsider and remand the matter to the trial court for further proceedings consistent with our opinion. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Wiseman, C.J., and Reif, S.J. (sitting by designation), concur.

Thursday, May 7, 2020

118,132 — In the Matter of the Estate of Jay S. Ross, Deceased, Roscoe L. Williams, Appellant, vs. Timothy J. Ross, as Trustee of the Jay S. Ross and Katherine C. Ross Revocable Living Trust and Individually; Willa S. Johnson; and all Named Beneficiaries in said Trust, Appellees. Appeal from an Order of the District Court of Oklahoma County, Hon. Richard Kirby, Trial Judge, dismissing Roscoe L. Williams' petition seeking reformation of a trust. We conclude the district court properly found there was no basis at law to "reform" the Trust to make Williams a beneficiary. As such, his claims for reformation, claims based on his status as a beneficiary, and claims based upon fiduciary duty, fail. We find no error in the judgment of the district court, and affirm it. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Wiseman, C.J., and Hixon, J., concur.

118,189 — In the Matter of the Adoption of J.R.S., a Minor Child: Nathan Strasbaugh, Appellant, vs. Michael Scott Jager and Leasha Mashell Jager, Appellees. Appeal from an Order of the District Court of Cleveland County, Hon. Stephen W. Bonner, Trial Judge. Nathan Strasbaugh (Father) appeals from the trial court's determination that his consent was not required for the adoption of his natural child, JRS, and the subsequent grant of a petition for adoption of JRS by her stepfather and termination of Father's parental rights. The trial court's determination that Father's consent to adoption was not required was supported by clear and convincing evidence. Father did not challenge the trial court's finding that he failed to establish and/or maintain a substantial and positive relationship between July 27, 2017 and September 27, 2018. Father did not meet his burden to demonstrate that he took sufficient legal action, or any legal action, to establish that relationship. The trial court's determination that adoption was in JRS's best interests is also supported by clear and convincing evidence. We find no error and affirm the trial court's determination of March 8, 2019 that Father's consent to the adoption was not required, and affirm the trial court's grant of the adoption and termination of Father's parental rights by order of July 25, 2019. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Hixon, J.; Thornbrugh, P.J., concurs, and Wiseman, C.J., concurs in result.

118,071 — Henry R. Moore, Jr., Plaintiff/Appellant, vs. The City of Stillwater, a Municipal corporation; and The Stillwater Utilities Authority, a public trust, Defendants/Appellees. Appeal from an Order of the District Court of Payne County, Hon. Phillip Corley, Trial Judge, in which Plaintiff, Henry R. Moore, Jr., appeals the summary judgment of the district court that he cannot sue Defendants City of Stillwater and the Stillwater Utilities Authority to enforce a contract with those entities as a third-party beneficiary. Following our *de novo* review, we conclude the district court made a clear and extensive analysis of the issues and find it to be correct. The decision of the district court is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Wiseman, C.J., and Hixon, J., concur.

117,543 — In re the Marriage of: Brenda Kennedy, Petitioner/Appellee, vs. Jackie Kennedy, Respondent/Appellant. Appeal from an Order of the District Court of Latimer County, Hon. William D. Welch, Trial Judge, in which Husband, Jackie Kennedy, appeals various aspects of a divorce decree. On review, we find the court acted within the law and within its dis-

cretion on each of Husband's seven distinct allegations of error. We therefore find no error. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Wiseman, C.J., and Hixon, J., concur.

117,425 — Shawn Ryan Hall, Petitioner/Appellee, vs. Phillips Hall, Respondent/Appellant. Appeal from an Order of the District Court of Cleveland County, Hon. Lori A. Puckett, Trial Judge. Phillips Hall (Husband) appeals the property distribution and custody decisions of the district court in this divorce case. We find two errors in the district court's decision in this matter: 1) The court erred in finding a marital interest in Chapman-Hall LLC, and 2) the court erred in finding that $39,234 of the equity in the Nantucket property was Wife's separate property. We affirm the other decisions of the court, and remand for recalculation of the property division consistent with this decision. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Wiseman, C.J., and Hixon, J., concur.

ORDERS DENYING REHEARING
(Division No. 1)
Tuesday, May 5, 2020

117,158 — James Patrick Lesley, Jr., Plaintiff/Appellant, vs. David Prater, District Attorney of Oklahoma County, Defendant/Appellee. Appellant's Petition for Rehearing, filed April 1, 2020, is *DENIED*.

117,043 — Miller Valve and Controls, Inc., Plaintiff/Counter-Defendant, vs. Jedson Engineering, Inc., Defendant/Cross-Claimant/Cross-Defendant/Third-Party Plaintiff/Appellant/Counter-Appellee, and CP Kelco, Inc., Defendant/Counter-Claimant/Cross-Defendant, and Rexel, Inc., Elliott Roofing, LLC, Nabholz Industrial Services, and HIMIC Sales Corporation, Defendants/Counter-Claimants/Cross-Claimants/Cross-Defendants, and Logan and Company, Inc., and Elliott Electric Supply, Inc., Defendants/Counter-Claimants/Cross-Claimants/Counter-Defendants/Cross-Defendants/Third-Party Plaintiffs/Appellees/Counter-Appellants, and Elliott Electric Supply, Inc., Defendant/Counter-Claimant/Cross-Claimant/Counter-Defendant/Cross-Defendant/Third-Party Plaintiff, and Rachid Abdallah, John Vignale Lighthouse Electric, Inc., Fischer Pump & Valve Company, d/b/a Fischer Process Industries, Spirax Sarco, Inc., Shelby McDonald, and John H. Carter Co., Inc., Third-Party Defendants, and Young's Sheet Metal, Inc., and Brazeal Masonry, Inc., Intervenors. Defendant/Appellant/Counter-Appellee's Petition for Rehearing and Brief in Support of the Defendant/Appellant/Counter-Appellee Jedson Engineering, Inc., filed March 24, 2020, is *DENIED*.

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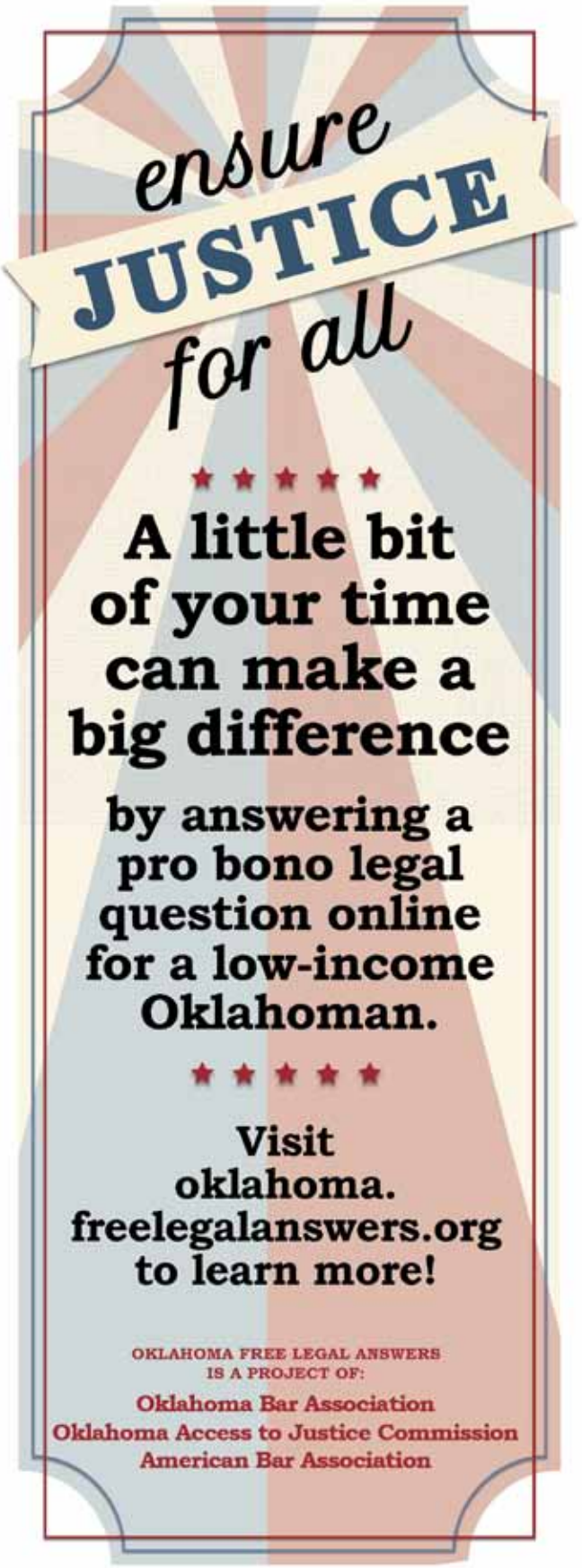

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