THE OKLAHOMA BAR
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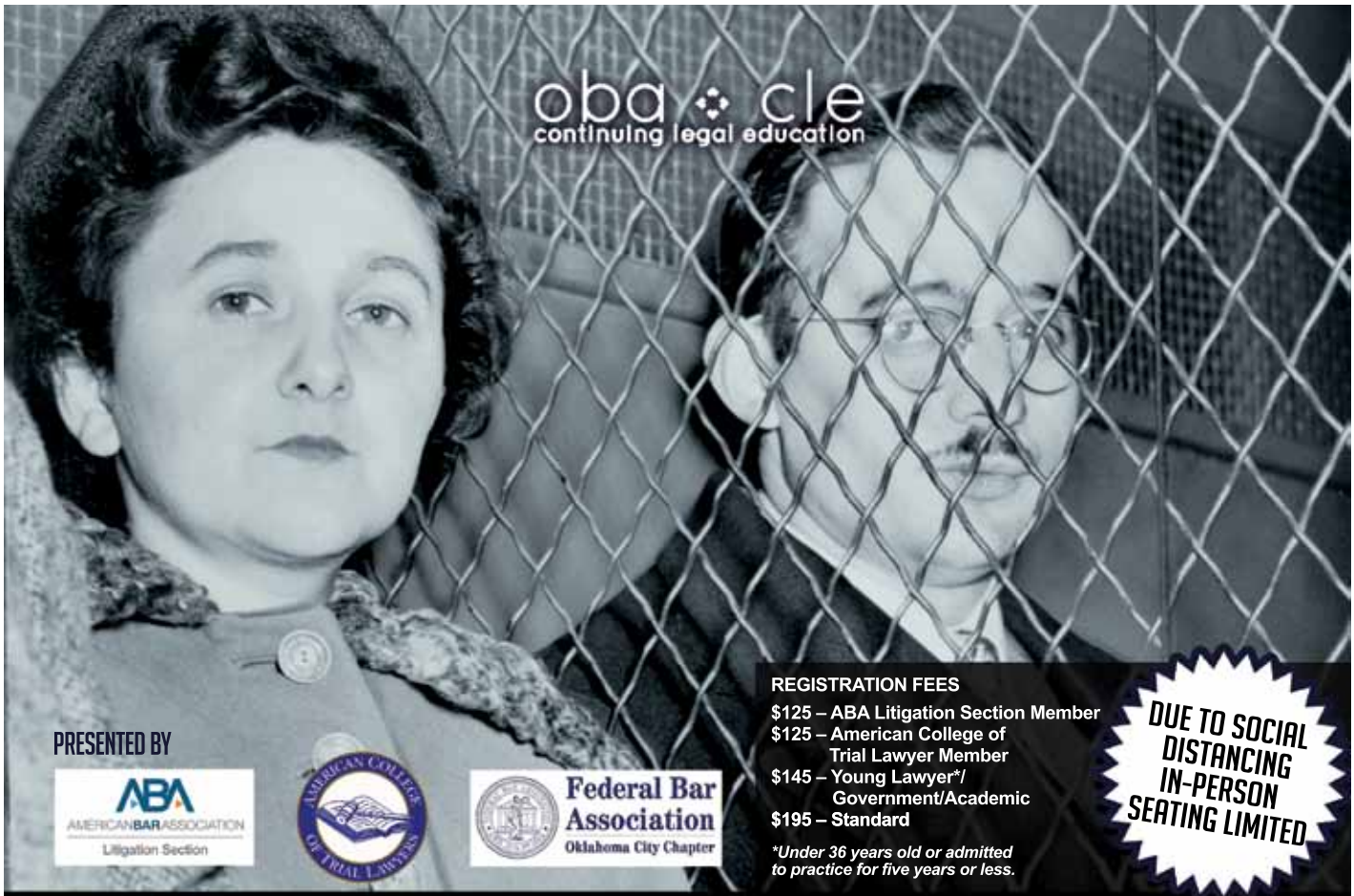
Court Issue



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THE OKLAHOMA BAR
Journal

Volume 91 – No. 11 – June 5, 2020

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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 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

SCAD-2020-45

RE: Publication of SCAD Orders 2020-22, 2020-27, 2020-28 and 2020-40

May 22, 2020

ORDER

The following four SCAD Orders are hereby ordered to be released for publication in the Oklahoma Bar Journal Only:

1. SCAD-2020-22, In Re: Establishment of Salary for a Shorthand Court Reporter with a Temporary Certificate, with public domain number 2020 OK 37;
2. SCAD-2020-27, Re: Suspension of Rule Section 7.2 of the Supreme Court Rules on Licensed Legal Internship, with public domain number 2020 OK 38;

3. SCAD-2020-28, Re: Reinstatement of Credentials of Registered Courtroom Interpeters, with public domain number 2020-OK 39;
4. SCAD-2020-40, In Re: Appointment of Members to the Judicial Ethics Advisory Panel, with public domain number 2020 OK 40.

The four SCAD Orders with the public domain numbers are attached.

DONE BY ORDER OF THE SUPREME COURT this 22nd DAY OF MAY, 2020.

/s/ Noma D. Gurich
Chief Justice

2020 OK 37

No. SCAD-2020-22. March 23, 2020

IN RE: Establishment of Salary for a Shorthand Court Reporter with a Temporary Certificate

ORDER

Pursuant to Article VII, Section 6 of the Oklahoma Constitution and 20 O.S. §106.3B(d) the salary for a shorthand court reporter holding a temporary certificate is established at the rate of 90% of the salary of an official court reporter employed by the courts. This rate supersedes the previous rate of 70%.

Should the base salary of an official court reporter increase, the salary of court reporter with a temporary certificate will increase accordingly.

As of the date of this Order, the salary amount is set at $38,169.00 annually. This salary rate shall become effective April 1, 2020.

DONE BY ORDER OF THE SUPREME COURT this 23rd day of March, 2020.

/s/ Noma D. Gurich
Chief Justice

ALL JUSTICES CONCUR

2020 OK 38

No. SCAD-2020-27. March 26, 2020

RE: Suspension of Rule Section 7.2 of the Supreme Court Rules on Licensed Legal Internship

ORDER

On March 16, 2020, the Supreme Court and the Court of Criminal Appeals entered SCAD Order No. 2020-24, which suspended the deadlines and procedures due to the COVID-19 Emergency declared by Governor Stitt on March 15, 2020. The Rules of the Supreme Court on Licensed Legal Internship, 5 O.S. Ch.1, App.6, §7.2 mandates that a Licensed Legal Intern working for a practicing attorney, district attorney, municipal attorney, attorney general or state governmental agency shall have at least 4 hours per month of in-court experience.

The Court determines that because of the emergency, the requirements of §7.2 are suspended. The Legal Intern Committee, the University of Oklahoma College of Law, Oklahoma City University School of Law, and University of Tulsa College of Law shall not suspend or revoke the license of any licensed legal intern solely for failure to attain the required number of in-court practice hours for the time period beginning March 16th, 2020, until the emergency period is concluded.

The Legal Intern Committee shall have authority to make further accommodations and grant temporary waivers to interns and law schools during the same period of time when such action is reasonably called for by the circumstances leading to the COVID-19 Emergency.

Done by order of the Oklahoma Supreme Court in conference this 23rd day of March, 2020.

/s/ Noma D. Gurich
Chief Justice

2020 OK 39

SCAD-2020-28. March 26, 2020

RE: Reinstatement of Credentials of Registered Courtroom Interpreters

ORDER

The Oklahoma Board of Examiners of Certified Courtroom Interpreters recommended to the Supreme Court of Oklahoma that the credential of Linda Manuel-Reyes be reinstated as she has complied with the continuing education requirements for 2019 and annual certificate renewal requirements for 2020 and has paid all applicable fees.

IT IS HEREBY ORDERED pursuant to 20 O.S., Chapter 23, App. 1, Rules 18 and 20, the

credential of Linda Manuel-Reyes be reinstated from the suspension earlier imposed by this Court.

DONE BY ORDER OF THE SUPREME COURT this 26TH day of March, 2020.

/s/ Noma D. Gurich
Chief Justice

2020 OK 40

SCAD-2020-40. May 11, 2020

In Re: Appointment of Members to the Judicial Ethics Advisory Panel

ORDER

Pursuant to SCAD-2020-35, the Rules of the Judicial Ethics Advisory Panel ("Panel"), Title 5 O.S. Chap1, App. 4D, the following individuals are appointed to serve on the panel effective immediately:

1) Edward Cunningham for a term ending on June 30, 2025;
2) Bill Hetherington, for a term ending on June 30, 2023;
3) April Sellers White, for a term ending on June 30, 2022;
4) Jerry Bass, to complete the unexpired term of Tom Landrith ending on June 30, 2022; and,
5) Allen McCall, for a term ending on June 30, 2022.

The duties and responsibilities of the panel are defined in SCAD-2020-35.

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

/s/ Noma D. Gurich
Chief Justice

ALL JUSTICES CONCUR

2020 OK 41

RE: Reinstatement of Credentials of Registered Courtroom Interpreters

SCAD-2020-46. May 22, 2020

ORDER

The Oklahoma Board of Examiners of Certified Courtroom Interpreters recommended to the Supreme Court of Oklahoma that the credential of the following interpreters:

Ana Arcivar

Lourdes Felix-Curet

Neryvete Reyes

be reinstated as they have complied with the continuing education requirements for 2019 and annual certificate renewal requirements for 2020 and all applicable fees have been paid.

IT IS HEREBY ORDERED pursuant to 20 O.S., Chapter 23, App. 1, Rules 18 and 20, the credential of the named interpreters be reinstated from the suspension earlier imposed by this Court.

DONE BY ORDER OF THE SUPREME COURT this 22nd day of May, 2020.

/s/ Noma D. Gurich
Chief Justice

2020 OK 42

WILLIAM B. SPARKS and DONNA SPARKS, Plaintiffs/Appellees, v. OLD REPUBLIC HOME PROTECTION COMPANY, INC., Defendant/Appellant, OLD REPUBLIC INTERNATIONAL and ALL SEASON'S HEATING AND AIR, LLC, Defendants.

Case Number: 115,789. May 27, 2020

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION NO. II

¶0 Plaintiffs are homeowners who brought suit against Old Republic Home Protection Company, Inc., for breach of contract and bad faith breach of contract of their home warranty policy. Defendant filed a motion to compel arbitration of the underlying dispute pursuant to a contractual provision requiring resolution of disputes through binding arbitration. Plaintiffs argued that mandatory arbitration provisions are prohibited by 12 O.S. 2011 § 1855 (D) in any contract that references insurance and this matter should proceed in district court. The court denied defendant's motion for arbitration. Defendant appealed from this interlocutory order and the Court of Civil Appeals affirmed the District Court. We granted certiorari to address the first impression question of whether this home warranty contract constitutes an insurance contract. We hold that the home warranty contract at issue meets the definition of an insurance contract.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF THE COURT OF CIVIL APPEALS VACATED; ORDER OF THE DISTRICT COURT AFFIRMED; CAUSE REMANDED FOR FURTHER PROCEEDINGS

Amy N. Bennett, John David Lackey, PAUL & LACKEY, P.C., Tulsa, Oklahoma, for Defendants/Appellants

Mark E. Bialick, R. Ryan Deligans, DURBIN LARIMORE & BIALICK, Oklahoma City, Oklahoma, and

David W. Little, LAW OFFICES OF DAVID LITTLE, Oklahoma City, Oklahoma, for Plaintiff/Appellee

OPINION

EDMONDSON, J.:

¶1 We granted certiorari to address the first impression questions of: (1) whether a home warranty plan meets the definition of an insurance contract, (2) and if it is insurance, whether a forced arbitration clause in such a contract is unenforceable under the Oklahoma Uniform Arbitration Act, (3) whether 12 O.S. 2011 § 1855 of the Oklahoma Uniform Arbitration Act is a state law enacted for the purpose of regulating insurance under the McCarran-Ferguson Act, 15 U.S.C. § 1012 (b), and (4) whether pursuant to the McCarran-Ferguson Act, does § 1855 preempt the application of the Federal Arbitration Act, 9 U.S.C. §§ 1 - 307? We answer all questions in the affirmative.

FACTS AND PROCEDURAL HISTORY

¶2 Donna Sparks purchased a policy from Old Republic Home Protection (ORHP) which included coverage for the repair or replacement cost of the home air conditioning system during the stated policy term. ORHP drafted this contract which included a provision that disputes between the parties would be resolved by arbitration under the Federal Arbitration Act. There is no evidence that this arbitration policy provision was independently discussed or negotiated between the parties. Almost six months after purchasing the coverage, the Plaintiffs alleged they suffered a covered loss. Specifically, Plaintiffs claimed that their home was extensively damaged as a result of problems that arose from faulty repair work to the air conditioning system. Plaintiffs notified ORHP when covered repairs were needed who then selected the repair company to be dispatched to their home. Plaintiffs alleged that ORHP engaged in a pattern and practice of using unqualified contractors to perform work and deliberately sought contractors who would opine little or no work was needed. ORHP did not directly perform the home repair services. Homeowners asserted that ORHP was negligent in the selection and hiring of the repair company, and thus ORHP is liable to the Plaintiffs for damage to their home. On July 7, 2016, homeowners filed a lawsuit against ORHP for breach of contract and bad faith breach of contract.

¶3 The contract is titled as an "Oklahoma Home Warranty." The contract identifies the following advantages of an Old Republic Home Warranty Plan:[1]

> ***Home Buyers***
>
> In an ideal world, buying a home should be one of the most memorable and rewarding experiences of your life. However, the headaches caused by a heating system failure or a broken refrigerator could taint those memories forever.
>
> **Safeguard your budget** against expensive system and appliance failures with an Old Republic Home Warranty Plan. . . .
>
> What would you pay *without* a home warranty? Potential out-of-pocket repair or replacement costs for major systems and appliances:

Item	**Repair/Replacement Cost without a Home Warranty**
Heating System	$318 - $3,911
Air Conditioning	$360 - $5,100
Water Heater	$384 - $2,331
Oven/Range	$325 - $2,487
Refrigerator	$294 - $1,904
Washer/Dryer	$230 - $1,112

The rate sheet reflects the respective premium for each of the three different levels of coverage offered, Standard, Ultimate and Platinum. On the bottom corner of this page also appears an insignia with "Old Republic ***Insurance*** Group."[2] Plaintiffs purchased the Platinum coverage and the "Declaration of Coverage" identifies the contract as a "home warranty."[3]

¶4 Initially, ORHP pled that it was an insurance company and that the agreement between

ORHP and the Plaintiffs was an "insurance" contract but later pled that it was *not* an insurance company and that this was simply a home service contract but *not insurance*. This change in position was reflected in an Amended Answer filed after the trial court's February 7, 2017 Order denying ORHP's motion to compel arbitration. There is no transcript of this hearing and no evidence in the record reflecting that ORHP obtained leave of court to file the Amended Answer. Homeowners did not file an objection to the amended pleading.

¶5 On February 8, 2017 the trial court filed a summary order stating ORHP's "motion to compel arbitration denied – motion to stay denied."[4] The trial court made no other findings and the order is silent on the reason for the denial. An appeal may be taken from an order denying a motion to compel arbitration. 12 O.S. 2011 § 1879 (A) (1).

¶6 ORHP filed a Petition in Error on February 23, 2017 urging that it was error for the district court to deny the Motion for Arbitration and Motion to Stay "given the contract between the parties pursuant to the Federal Arbitration Act (9 U.S.C. § 1, *et seq*.), the Oklahoma Uniform Arbitration Act (12 O.S. § 1851 *et seq*.), and applicable case law interpreting those statutes."[5] On appeal, ORHP argued as follows: (1) the FAA controlled this dispute, (2) the Oklahoma Uniform Arbitration Act is preempted by the FAA, (3) McCarran-Ferguson Act does not apply because "Old Republic and the Plaintiffs chose the law that governs all disputes (the FAA)." ORHP did not dispute that the McCarran-Ferguson Act gives individual states the right to regulate insurance or that "12 O.S. § 1855 (D) purports to regulate insurance in Oklahoma."[6] However, ORHP argued that the "McCarran-Ferguson Act can only apply when interpreting a contract that does not contain a choice of law agreement,"[7] and therefore, it was not relevant to any issue before this Court. ORHP cited no legal authority to support this last argument. The sole support offered by ORHP was simply that "the FAA is not reverse preempted by the McCarran-Ferguson Act because this Contract chooses the FAA to the exclusion of any contradictory laws."[8] We are not persuaded by statements without legal authority.

¶7 ORHP drafted the preprinted policy issued to the Plaintiffs. ORHP inserted all language regarding the FAA choice of law. Contrary to ORHP's argument, *Dean Witter Reynolds, Inc. v. Shear,* 1990 OK 67, ¶ 1, 796 P.2d 296 does not support the argument that the FAA must control as the "choice of law" chosen by the parties in the contract; it offers no useful guidance in this regard. Dean Witter obtained an arbitration award against its customer and then brought an action pursuant to the Oklahoma Uniform Arbitration Act to obtain an executable judgment. On appeal, Shear sought relief on the single contention that the arbitration and the choice-of-law clauses were void under a provision of the Oklahoma constitution. We refused to consider this argument because Shear failed to timely preserve this issue by proper response to the summary judgment filed by Dean Witter. For that reason we held that Shear "cannot now invoke Oklahoma law to test the validity of the arbitration clause of the State's fundamental law." *Dean Witter Reynolds,* 1990 OK 67, ¶ 7, 796 P.2d at 298. We *did not* hold, as urged by ORHP, that New York law and the arbitration clause applied because of the parties "choice of law" provision in the contract. Unlike the appellant in *Dean Witter Reynolds*, the Plaintiffs challenged the choice of law provision before the trial court, and this issue is fully preserved. We do not find *Dean Witter Reynolds* instructive on the issues before us.

¶8 ORHP further asserted that the application of 12 O.S. 2011 § 1855 conflicts with federal law, *ie.* the FAA, which should preempt any conflicting state law under the pronouncements of *Marmet Health Care Ct., Inc. v. Brown,* 565 U.S. 530, 132 S.Ct. 1201, 182 L.Ed.2d 42. In *Marmet,* the West Virginia court held that as a matter of public policy under West Virginia law, an arbitration clause in a nursing home agreement adopted prior to a negligent act shall not be enforced to compel arbitration. The state court went on to conclude that the FAA did not preempt the state public policy against predispute arbitration agreements as applied to claims for personal injury against a nursing home. The Supreme Court found that the FAA displaces a state law that prohibits outright the arbitration of a particular type of claim. *Id.*, 565 U.S. at 533, 132 S.Ct. at 1203. The *Marmet* court did not consider the reverse preemption granted to states under the McCarran-Ferguson Act for state law provisions relating to the business of insurance. For this reason, we do not find *Marmet* controlling.

¶9 Next ORHP argued that "home warranties" are really a 'home service contract' and

therefore this type of contract by statutory definition is not insurance pursuant to the Oklahoma Home Service Contract Act, 36 O.S. §§ 6750 - 6755. ORHP further argued, if this contract is not "insurance" then Section 1855 of the Oklahoma Uniform Arbitration Act would not apply, which exempts any contract that "references insurance" from the provisions of that Act. If the contract at issue was not one that referenced insurance, then the McCarran-Ferguson Act would not apply to reverse preempt the Federal Arbitration Act. Stated differently, the FAA would preempt any state law that would be in conflict and this matter should be ordered to arbitration. As more fully discussed below, we find the home warranty is insurance and we reject these contentions from ORHP.

¶10 On November 19, 2018 the Court of Civil Appeals affirmed the lower court's order, with one judge dissenting. The majority concluded that Oklahoma state law, the Uniform Arbitration Act, 12 O.S. 2011 §1855 (D) prevented the trial court from compelling arbitration because the contract "referenced insurance" within the meaning of this Act and further that the Oklahoma legislature did not intend to exempt contracts made pursuant to the Oklahoma Home Service Contract Act[9] (HSCA) and the Service Warranty Act[10] (SWA) from this provision in the Uniform Arbitration Act. We agree.

¶11 On Petition for Certiorari, ORHP argued that COCA erred and this matter presented a case of first impression on whether an arbitration clause in a "home protection plan" could be disregarded under the Federal Arbitration Act (FAA). In addition, ORHP urged that the decision by the COCA determining that the home warranty in this case is a contract that "references insurance," and calling home warranty agreements "insurance" : (1) departed from the accepted and usual course of judicial proceedings calling for this Court's power of supervision, (2) invaded the legislative prerogative and interpreted statutes contrary to the express language provided by the legislature, (3) deviated from federal and state case law by invalidating the choice of law clause in the contract, and the parties' agreement to utilize the Federal Arbitration Act, and (4) ignored the plain language of the home service contract statute declaring that "home service contracts are not insurance in this state."

¶12 Homeowners argued that the federal McCarran-Ferguson Act authorized the "reverse preemption" of the FAA in this instance. Because the FAA did not preempt relevant Oklahoma state law involving the regulation of insurance, Homeowners replied that the Court of Civil Appeals did not err in holding that § 1855 of the Oklahoma Uniform Arbitration Act barred the enforcement of arbitration in this matter. We agree.

¶13 We granted certiorari on May 28, 2019.

STANDARD OF REVIEW

¶14 ORHP urged that arbitration is the appropriate forum to resolve this matter. Homeowners disputed that ORHP was entitled to an order for arbitration under both Oklahoma law and federal precedent. As the party opposing the motion for arbitration, the Plaintiffs had the burden "to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue; an intention discernible from the statute's text or legislative history or an inherent conflict between arbitration and the statute's underlying purposes." *Thompson v. Bar-S Foods Co.*, 2007 OK 75 ¶ 8, 174 P.3d 567, 572.[11] The trial court's denial of a motion to compel arbitration is to be reviewed *de novo*. *Thompson*, 2007 OK 75, ¶ 9, 174 P.3d at 572.[12]

FEDERAL LAW: REVERSE PREEMPTION UNDER McCARRAN-FERGUSON ACT WITH STATE LAWS INVOLVED IN REGULATION OF INSURANCE

¶15 Generally speaking, the Federal Arbitration Act (FAA) preempts any state law limiting the enforcement of arbitration. *See, eg., Preston v. Ferrer,* 552 U.S. 346, 352-53, 128 S. Ct. 978, 169 L.Ed.2d 917 (2008). Preemption stems from the Supremacy Clause of the United States Constitution that insures federal law will prevail or "preempt" a conflicting state law. *Smith Cogeneration Mgmt., Inc. v. Corp. Comm'n,* 1993 OK 147, ¶ 21, 863 P.2d 1227, 1239. The foundation of ORHP's argument is grounded in the concept of preemption, namely that the FAA should have preempted § 1855 of the Uniform Arbitration Act to the extent it conflicted with the federal law, and the parties should have been ordered to arbitrate the claims. ORHP further urged that the COCA decision violated the Supremacy clause of the United States Constitution. However, ORHP's argument ignores the clear mandates of another federal law, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 - 1015, which bestows upon states *absolute authority* over matters relating to the regulation of insurance. *Minnieland Private Day School, Inc.*

v. Applied Underwriters Captive Risk Assur. Co., Inc., 867 F. 3d 449 (4th Cir. 2017). This Act and its implications must be understood in the context of the issues material to this matter.

¶16 The McCarran-Ferguson Act was enacted in 1945 following a decision by the Supreme Court holding insurance was subject to federal regulations under the interstate commerce clause shifting control away from the states. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). Prior to this decision, "it had been assumed ... that the issuance of an insurance policy was not a transaction in interstate commerce and that the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538-39, 98 S. Ct. 2923, 57 L.Ed2d 932 (1978). In response to *South-Eastern Underwriters,* Congress legislatively restored the States preeminent position with respect to the regulation of insurance through the adoption of McCarran-Ferguson. *See, U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 500, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993).

¶17 This Act specifically states that "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012. The landmark McCarran-Ferguson Act completely "transformed the legal landscape by overturning the normal rules of pre-emption. " *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 500, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993). McCarran-Ferguson "authorizes 'reverse preemption' of generally applicable federal statutes by state laws enacted for the purpose of regulating the business of insurance." *ESAB Grp. Inc. v. Zurich Ins. PLC,* 685 F.3d 376, 380 (4th Cir. 2012), *See also, Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 720 (5th Cir. 2009) (en banc), *cert. denied*, 562 U.S. 827, 131 S.Ct. 65, 178 L.Ed.2d 22 (2010).

¶18 Almost simultaneously with congressional efforts to insure the states' dominance with respect to insurance regulation, Congress was also moving to federalize arbitration policy. In 1925, Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, establishing a liberal federal policy in favor of arbitration in maritime and commercial contracts. ESAB, 685 F.3d at 380.[13] The interplay between these two acts is considered with regard to the resolution of the issues before this Court.

McCARRAN FERGUSON ACT: CONTRACTS REGULATING THE 'BUSINESS OF INSURANCE' ARE PROTECTED FROM PREEMPTION BY THE FAA

¶19 The Supreme Court of the United States has not yet spoken on the specific interplay between the McCarran-Ferguson Act and the FAA. However, the high court has made clear that the FAA policy in favor of arbitration may not be asserted to resolve a foundational challenge to the validity of an arbitration agreement. *Granite Rock Co. v. Int'l Bhd. of Teamsters,* 561 U.S. 287, 130 S.Ct. 2847, 177 L. Ed2d 567 (2010). The Court explained that the presumption of favoring arbitration is applied "only where it reflects, and derives its legitimacy from a *judicial* conclusion that arbitration of a particular dispute is what the parties intended *because their express agreement to arbitrate was validly formed* and (absent a provision clearly and *validly committing such issues to an arbitrator*) is *legally enforceable* and best construed to encompass that dispute. *Id.* 561 U.S. at 303, 130 S. Ct. 2847.

¶20 We acknowledge that by virtue of the Supremacy Clause, "we are governed by the decisions of the United States Supreme Court with respect to the federal constitution and federal law, and we must pronounce rules of law that conform to extant Supreme Court jurisprudence." *Hollaway v. UNUM Life Ins. Co. of America*, 2003 OK 90, ¶ 15, 89 P.3d 1022, 1027. Where the United States Supreme Court has not spoken on the direct issue, "we are free to promulgate judicial decisions grounded in our own interpretation of federal law." *Id.*

¶21 A number of federal courts who have considered the interplay between the FAA and the McCarran-Ferguson Act have held that state laws involving the business of insurance take precedence over the competing federal law, FAA favoring arbitration. *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance,* 867 F.3d 449, 454 (4th Cir. 2017).[14] The Fourth Circuit acknowledged that the FAA generally preempts a state law limiting the enforcement of arbitration agreements. The *Minnieland* court discussed that it agreed with the district court's conclusion that mandatory arbitration provisions in insurance contracts were void pursuant to Va. Code Ann. § 38.2-312. On appeal, there was no disagreement that this state law provision, which we

note is similar to the Oklahoma provision, reverse preempted the FAA.

¶22 Many other courts have concluded that state laws invalidating arbitration provisions in insurance contracts reverse preempt the FAA. *Am. Bankers ins. Co. of Fla. v. Inman*, 436 F.3d 490, 494 (5th Cir. 2006); *See also, Love v. Money Tree, Inc.*, 279 Ga. 476, 614 S.E.2d 47, automobile club memberships constituted insurance and the state law prohibiting arbitration in contracts of insurance was held to be a state law enacted for the purpose of regulating insurance, and thus, the McCarran-Ferguson Act precluded the FAA from preempting the conflicting state law; *State, Dept. of Transp. v. James River Ins. Co.*, 176 Wash.2d 390, 292 P.3d 118 (2013), state statute prohibiting any agreement in insurance contract which deprived court of jurisdiction against the insurer and void mandatory arbitration provisions constituted the business of regulating insurance, thereby shielding the state statute from preemption by the FAA under the McCarran-Ferguson Act.

¶23 In this matter, the judicial conclusion by the lower court was to deny ORHP's request for arbitration. The COCA then held that the state law, § 1855 which plainly exempts "contracts which reference insurance" from arbitration is a state law regulating the business of insurance. Accordingly, under the the McCarran-Ferguson Act, the state law must prevail over the federal law, the FAA; *ie.*, this state law enjoys the benefit of reverse preemption.

OKLAHOMA UNIFORM ARBITRATION ACT "SHALL NOT APPLY TO CONTRACTS WHICH REFERENCE INSURANCE"

¶24 Furthermore, for more than half a century, this Court has held that an insurance company's insertion of forced arbitration in an insurance contract deprived the insured of a judicial examination and determination of the issues and such policy provision was contrary to public policy and unenforceable. *Boughton v. Farmers Ins. Exch.*, 1960 OK 159, ¶ 13, 354 P.2d 1085, 1089. Boughton relied solely on the common law as Oklahoma had not yet enacted an arbitration statute.

¶25 After the adoption of our state Uniform Arbitration Act, we examined the predecessor to § 1855, 15 O.S. 1991 § 802 (A) (repealed 2006) which stated that the Act "shall not apply to ... contracts with reference to insurance except for those contracts between insurance companies." *Cannon v. Lane,* 1993 OK 40 , 867 P.2d 1235. In *Cannon*, we considered a binding arbitration provision in a health insurance contract and refused to enforce an order for arbitration because the contract between the parties "related to insurance" falling within this exception to the Act. We also noted that "under the authority of *Wilson, Boughton,* and 15 O.S. 1991 § 216, such a contract is void." 1993 OK 40, ¶ 11, 867 P.2d at 1239.

¶26 In 2006, the Act was recodified and 15 O.S. 1991 § 216 was replaced with the current law, 12 O.S. 2011 § 1855 (D) which provides:

> D. The Uniform Arbitration Act shall not apply to collective bargaining agreements and ***contracts which reference insurance,*** except for those contracts between insurance companies. (Emphasis added).

Next, we examine whether the contract "references insurance" and therefore is exempt from the Oklahoma Uniform Arbitration Act. ORHP urged that the contract could not be treated as insurance because by statute, "home service contracts are not insurance in this state." 36 O.S. 2011 § 6752 (9). We disagree with this conclusion on the basis of several factors. The contract drafted by ORHP is titled a "home warranty" and not a home service contract, and it is unclear whether § 6752 (9) has any application to the instant matter. This will be discussed in more detail. In addition, § 1855 (D) is broader than advocated by ORHP. Section 1855 does not state that the Uniform Arbitration Act shall not apply to insurance contracts, rather it exempts contracts which simply reference insurance as defined by this Court's extensive jurisprudence. Finally, we look more closely at the nature of the home warranty before us and examine its nature in light of guidelines from the Supreme Court of the United States, Oklahoma statutes defining "insurance," and the wisdom of other Courts.

HOME WARRANTY CONTRACTS ARE CONTRACTS THAT "REFERENCE INSURANCE"

¶27 We have previously noted the initial admission by ORHP that the contract at issue was "insurance" and it was an "insurance company." Following the trial court's denial of the motion for arbitration, ORHP filed an Amended Answer stating the policy at issue is *not* insurance and it is *not* an insurance company. There was no objection filed to this amended

response, and there is nothing in the record to reflect that ORHP obtained leave of court to file this amendment. It is evident from these contradictory pleadings that even ORHP was confused about whether the home warranty was insurance and if it was an insurance company.

¶28 The record before us reflects that the Old Republic International Corporation (ORI) Annual Review, 2015, listed ORHP as a subsidiary and a member of the company's "General Insurance Group" with "premiums written" in 2015 that exceeded two hundred million dollars ($200,000,000.00).[15] ORI also listed ORHP as one of its 27 "insurance companies"[16] and referred to ORHP as part of the "General Insurance Group" selling policies accounting for 5% of all premium volume for the entire parent company.[17] Although this information is not determinative of whether the plan before us is "insurance" it does reflect how the parent company considered and treated ORHP. Furthermore, the actual contract with the Plaintiffs has an insignia clearly printed on it "Old Republic Insurance Group."

¶29 ORHP solely drafted the contract and ORHP determined the use of all terms including the following references within the contract: "Oklahoma Home Warranty," and "Old Republic Home Warranty Plan."[18] ORHP did not include the term "home service contract" in the contract before this Court; in fact those words are noticeably absent. Under the Old Republic Home Warranty Plan, the Plaintiffs agreed to pay a predetermined premium and, in exchange, ORHP agreed to assume the risk of paying for the repair and/or replacement of specifically identified appliances as well as heating and cooling systems. Although ORHP designated the contract as a "home warranty," it argued that the contract should instead be treated or deemed to be a "home service contract" governed by the Oklahoma Home Service Contract Act (HSCA), 36 O.S. 2011 §§ 6751 *et seq*.

¶30 Before we discuss what application, if any, the HSCA has in this matter, we examine more closely the terms and effect of the "home warranty plan" drafted by ORHP and whether this contract is one that "references" insurance. We note that even ORHP has convincingly argued that the company's "home warranty plans are analogous to insurance." *See, Campion v. Old Republic Home Protection Co., Inc.*, 561 F.Supp.2d 1139, 1144, (S.D. Cal. 2012). In this California case, ORHP was facing an action filed under the Consumer Legal Remedies Act. In *Campion*, identical to the instant contract before us, the ORHP home warranty plan provided that covered systems and appliances that become inoperable during the contract term due to normal wear and tear will be repaired or replaced at the expense of ORHP or the plan holder would be provided with payment in lieu of repair or replacement. Under the home warranty plan, ORHP did not perform the services but rather maintained a network of independent contractors that it dispatched to a planholder's home to perform the service. The plaintiff in *Campion* unsuccessfully argued that the home warranty contracts fell under the consumer act because they were "service" contracts. ORHP advocated in the California case that the home warranty was ***not*** a service contract, but rather was insurance. The *Campion* court was swayed by ORHP's position and offered the following notable distinction:

> Defendant's home warranty plans are not contracts for repair or replacement services and Defendant does not itself provide these services. Instead the plans are designed to offer protection to home owners from potential future losses. The plans obligate Defendant to pay for the cost of the repair or replacement of covered systems and appliances that become inoperable due to normal wear and tear during the term of the contract. It is possible a claim may never be submitted and, thus, a homeowner may not receive any 'goods or services' under his or her plan. The home warranty plans provide for a transfer of risk that is not merely incidental, but rather is a central and relatively important element of the plans, and the relationship between Defendant and its plan holders and their respective obligations are consistent with the concept of 'insurance', as it is defined in the Insurance Code.

Campion, Id. at 1145-1146. The *Campion* court agreed with ORHP that the home warranty plan was consistent with the concept of insurance.

¶31 Likewise, ORHP's home warranty plan provides for the transfer of risk that is a central and important element of the plan. The plan reassured the Plaintiffs that this plan would "safeguard your budget against excessive system and appliance failures with an Old Republic Home Warranty Plan."

¶32 In *McMullan v. Enterprise Financial Group, Inc.*, 2011 OK 7, 247 P.3d 1173, we were asked to determine whether a 'vehicle service contract'

met the definition of an insurance contract. In concluding that it was "insurance," we relied on the guidance from the United States Supreme Court, *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 210, 228, 99 S.Ct. 1067, 59 L.Ed 2d 261 (1979) outlining the following necessary elements:

> ... The primary elements of an insurance contract are the spreading and underwriting of a policy holder's risk. It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it." (Citations omitted)

McMullan, 2011 OK 7, ¶ 11, 247 P.3d at 1178.

We also recognized that the *Royal Drug* court, quoting *Jordan v. Group Health Assn*, 71 App. D.C. 38, 107 F.2d 239 (1939) stated:

> Whether the contract is one of insurance or of indemnity there must be a risk of loss to which one party may be subjected by contingent or future events and an assumption of it by legally binding arrangement by another.

McMullan, 2011 OK 7, ¶ 12, 247 P.3d at 1178.

¶33 In *McMullan* we discussed that vehicle service contracts were written like insurance policies and that the "obvious purpose of a vehicle service contract is to protect the purchaser from the expenses associated with an unexpected mechanical breakdown or an expensive but necessary repair." *McMullan,* 2011 OK 7, ¶ 13, 247 P.3d at 1178. In concluding that the contract was "insurance" we reflected that the "purchaser pays a premium and buys an agreement to shift any potential hazard they may face to the vehicle service provider." *Id.* Likewise, the primary feature of the ORHP home warranty plan was to "safeguard [the Plaintiffs'] budget against expensive system and appliance failures with an Old Republic Home Warranty Plan."[19] The Plaintiffs paid a premium to be insured that they would not have to pay the full repair costs in the event a covered system, like the air conditioning needed repair or replacing. In fact, the contract specifically notes the range of potential costs in the event of a covered system failure. By purchasing this policy, the Plaintiffs were relieved of this potential liability and instead this potential cost shifted to ORHP. Following our analysis in *McMullan,* the ORHP contract before us meets all the hallmarks of an insurance policy. Furthermore, this is the very conclusion reached by the *Campion* court when reviewing the ORHP home warranty policy, and as argued by ORHP in that matter.

¶34 We do not agree with the conclusion of ORHP that the contract is governed by the Oklahoma Home Service Contract Act. The legislature stated the purpose of the Oklahoma Home Service Contract Act "is to create an independent legal framework within which home service contracts are defined, may be sold and are regulated in this state." 36 O.S. 2011 § 6751 (A). The very next section, §6752 subpart (9), has three sentences that need to be separately examined. The first sentence in this subpart states as follows:

> "Home service contract" or "home warranty" means a contract or agreement for a separately stated consideration for a specific duration to perform the service, repair, replacement or maintenance of property or indemnification for service, repair, replacement or maintenance, for the operational or structural failure of any residential property due to a defect in materials, workmanship, inherent defect or normal wear and tear, with or without additional provisions for incidental payment or indemnity under limited circumstances. 36 O.S. 2011 §6752 (9)

The next sentence is directed only to "home service contracts" and does not include a reference to "home warranty" and states:

> Home service contracts may provide for the service, repair, replacement or maintenance of property for damage resulting from *power surges or interruption and accidental damage from handling and may provide for leak or repair coverage to house roofing systems.*

The final sentence provides:

> *Home service contracts* are not insurance in this state or otherwise regulated under the Insurance Code. 36 O.S. 2011 § 6752 (9)

We take note that this final sentence *does not* state that home service contracts or *home warranties* are not insurance in this state or otherwise regulated under the Insurance Code. The exclusionary language, *ie. "not insurance,"* is limited solely to "home service contracts." Within this definition section, the legislature

provided a separate definition for "warranty" which states at § 6752 (11) as follows:

> "Warranty" means a warranty made solely by the manufacturer, importer or seller of property or services, including builders on new home construction, without consideration, that is not negotiated or separated from the sale of the product and is incidental to the sale of the product, that guarantees indemnity for defective parts, mechanical or electrical breakdown, labor or other remedial measures, such as repair or replacement of the property or repetition of services.

It is clear from this statutory scheme, that "home service contracts" are defined differently than a "home warranty." ORHP drafted this contract and identified this policy as a "home warranty" and never refers to this agreement as a "home service contract." We find that the Old Republic Home Warranty is not a home service contract as defined by this Act.

CONCLUSION

¶35 We hold that the Plaintiffs' home warranty plan meets the definition of insurance and as such is exempt from the Oklahoma Uniform Arbitration Act. We further hold that § 1855 of this Act is a state law enacted for the purpose of regulating insurance, and thus, the McCarran-Ferguson Act applies precluding the Federal Arbitration Act from preempting conflicting state law.

CONCUR: Gurich, C.J., Darby, V.C.J., Kauger, Edmondson, Colbert, and Combs, JJ., Reif, S.J. and Bass, S.J.

CONCURS IN RESULT: Winchester, J.

EDMONDSON, J.:

1. Record, Exhibit 2, Defendant Old Republic Home Protection Co., Inc.'s Motion to Stay and Compel Arbitration, and Brief in Support, *William B. Sparks and Donna Sparks, Plaintiffs v. Old Republic Home Protection Company, Inc., Defendant,* CJ-16-795, District Court of Cleveland County.

2. *Id.*

3. Record, Exhibit 3, Defendant Old Republic Home Protection Co., Inc.'s Motion to Stay and Compel Arbitration, and Brief in Support, *William B. Sparks and Donna Sparks, Plaintiffs v. Old Republic Home Protection Company, Inc., Defendant,* CJ-16-795, District Court of Cleveland County.

4. *William B. Sparks and Donna Sparks, Plaintiffs v. Old Republic Home Protection Company, Inc., Defendant,* CJ-16-795, District Court of Cleveland County, Summary Order, 2-8-17.

5. *William B. Sparks and Donna Sparks, Plaintiffs/Appellees, v. Old Republic Home Protection Company, Inc., Defendant/Appellant,* 115,789, Petition in Error.

6. *William B. Sparks and Donna Sparks, Plaintiffs/Appellees, v. Old Repu.blic Home Protection Company, Inc., Defendant/Appellant,* 115,789, Appellant's Brief in Chief.

7. *Id.*

8. *Id.*

9. Title 36 O.S. 2011 & Supp. 2012 §§ 6750-6755.

10. Originally in Title 36, but revised and renumbered in 2012 as 15 O.S. §§ 141.1-141.35.

11. Citing, *Bruner v. Timberlane Manor Ltd. Partnership*, 2006 OK 90, ¶ 22, 155 P.3d 16, 25, quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227, 107 S.Ct. 2332, 2337, 96 L.Ed.2d 185.

12. *See also, Fleming Companies, Inc. v. Tru Discount Foods*, 1999 OK CIV APP 18, 977 P.2d 367, *certiorari denied* (Feb. 10, 1999).

13. *See also, CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 132 S.Ct. 665, 181 L.Ed 2d 586.

14. *See also, Am. Bankers Ins. Co. Of Fla. v. Inman*, 436 F.3d 490, 494 (5th Cir. 2006), Mississippi statute prohibiting arbitration of disputes related to coverage provisions in personal automobile insurance policies reverse preempts the FAA; *Am. Health & Life Ins. Co. v. Heyward*, 272 F. Supp.2d 578, (D.S.C. 2003). South Carolina law prohibiting mandatory arbitration provisions in insurance contracts reverse preempts the FAA.

15. Record, Exhibit 3 to Plaintiffs' Objection to Defendant Old Republic Home Protection Company's Motion to Stay Order Pending Appeal.

16. *Id.*

17. Record, Exhibit 4 to Plaintiffs' Plaintiffs' Objection to Defendant Old Republic Home Protection Company's Motion to Stay Order Pending Appeal, Record.

18. Record, Exhibit B to Defendant Old Republic Home Protection Co., Inc.'s Motion to Stay and Compel Arbitration, and Brief in Support.

19. Record, Exhibit 2, Defendant Old Republic Home Protection Co., Inc.'s Motion to Stay and Compel Arbitration, and Brief in Support, *William B. Sparks and Donna Sparks, Plaintiffs v. Old Republic Home Protection Company, Inc., Defendant,* CJ-16-795, District Court of Cleveland County.

2020 OK 43

IN RE: INITIATIVE PETITION No. 426, STATE QUESTION No. 810 MARC MCCORMICK, LAURA NEWBERRY, ROGER GADDIS, and, CLAIRE ROBINSON DAVEY, Protestants/Petitioners, v. ANDREW MOORE, JANET ANN LARGENT and LYNDA JOHNSON, Respondents/Proponents.

Case Number: 118,685
As Corrected May 27, 2020

ORIGINAL PROCEEDING TO DETERMINE THE CONSTITUTIONAL VALIDITY OF INITIATIVE PETITION NO. 426, STATE QUESTION NO. 810

¶0 This is an original proceeding to determine the legal sufficiency of Initiative Petition No. 426, State Question No. 810. The petition seeks to create a new article to the Oklahoma Constitution, Article V-A, for the purpose of establishing the Citizens' Independent Redistricting Commission. The Petitioners filed this protest alleging the petition is unconstitutional because it violates Article 1, §2, the Equal Protection Clause and the First Amendment of the United States Constitution. Upon our review, we hold the Petitioners have not met their burden to show Initiative Petition No. 426 contains clear or manifest facial constitutional in-firmities. On the grounds alleged, the petition is

legally sufficient for submission to the people of Oklahoma.

INITIATIVE PETITION NO. 426, STATE QUESTION NO. 810 IS LEGALLY SUFFICIENT FOR SUBMISSION TO THE PEOPLE OF OKLAHOMA

Robert G. McCampbell and Travis V. Jett, GableGotwals, Oklahoma City, Oklahoma, for Petitioners.

D. Kent Meyers, and Melanie Wilson Rughani, Crowe & Dunlevy, Oklahoma City, OK, for Respondents.

COMBS, J.:

I. FACTS AND PROCEDURAL HISTORY

¶1 On October 28, 2019, the Respondents/ Proponents, Andrew Moore, Janet Ann Largent, and Lynda Johnson (Respondents), filed Initiative Petition No. 420, State Question No. 804 (IP 420), with the Secretary of State of Oklahoma. The initiative measure proposed for submission to the voters the creation of a new constitutional article, Article V-A, which would create the Citizens' Independent Redistricting Commission (Commission). IP 420 would vest the power to redistrict the State's House of Representatives and Senatorial districts, as well as Federal Congressional Districts, in this newly created Commission. IP 420 was challenged in two separate cases; *In re Initiative Petition No. 420, State Question No. 804*, 2020 OK 9, 458 P.3d 1088 and *In re Initiative Petition No. 420, State Question No. 804*, 2020 OK 10, 458 P.3d 1080. On February 4, 2020, this Court handed down its decisions in both matters. We held in 2020 OK 9 that IP 420 did not violate the single subject rule and we would not ad-dress the First Amendment issues due to uncertainty in federal jurisprudence, *i.e.*, IP 420 did not clearly or manifestly violate the First Amendment. We found the initiative petition was legally sufficient but did note it was troubling that the proposed opinion would prohibit a person from serving as a commissioner if they changed their party affiliation within the last four years preceding the appointment because this provision would apply a retroactive restriction **"well prior to the enactment."** *In re Initiative Petition No. 420, State Question No. 804,* 2020 OK 9, ¶33 n.17, 458 P.3d 1088. In the related opinion, we held the gist was insufficient and declared IP 420 invalid because it did not describe the true nature of the initiative petition which was "to curtail partisan gerrymandering" in the redistricting process. *In re Initiative Petition No. 420, State Question No. 804,* 2020 OK 10, ¶7, 458 P.3d 1080.

¶2 Two days later, February 6, 2020, the proponents of IP 420 filed a new initiative petition (Initiative Petition No. 426, State Question 810). The Secretary of State published the re-quired notice of the initiative petition on February 13, 2020. Initiative Petition No. 426 (IP 426) is nearly identical to IP 420. It creates a new constitutional article, Article V-A, which would create the Citizens' Independent Redistricting Commission (Commission). Like IP 420, it would vest the power to redistrict the State's House of Representatives and Senatorial districts, as well as Federal Congressional Districts, in this newly created Commission. Initiative Petition No. 426, like IP 420, requires the Commission's Secretary to gather information from the Department of Corrections about the home address of state and federal inmates and add this information to the Federal Decennial Census data so that incarcerated people can be counted in their home communities rather than place of incarceration. Sections 4(C)(2)(e) and 4(C)(3)(a) of IP 426. The provisions in IP 426 concerning the qualifications to be a commissioner differ from those in IP 420 and, arguably, are less restrictive than those found in IP 420. Section 4(B)(2)(a-f) of IP 426 provides for the qualifications of a commissioner. A member of the Commission shall have been continuously domiciled in this State for the five years immediately preceding the date of ap-pointment and shall not have changed their registered political affiliation in the four years immediately preceding the date of appointment or since the date the initiative petition was filed (February 6, 2020), whichever period is shorter.[1] In addition, in the five years immediately preceding the date of appointment to the Commission, the commissioner shall not: 1) have held, or have an immediate family member who has held, a partisan elective office at the federal, state or political subdivision level in this State,[2] 2) have registered, or have an immediate family member who has registered, as a lobbyist with the Federal Government or the State of Oklahoma,[3] 3) have held office or served as a paid staff member of a political party, or have an immediate family member who has held office or served as a paid staff member of a political party,[4] have been nominated, nor have an immediate family member who has been nominated, as a candidate for elective office by a political party in this State,[5]

have been an employee or paid consultant of the Oklahoma State Legislature or U.S. Congress, or have any immediate family members who have been an employee or paid consultant of the Oklahoma State Legislature or U.S. Congress.[6] The definition of "immediate family member" is less restrictive in IP 426. It provides that the term shall "refer to, with respect to an individual, a spouse, parent, sibling, or child (including step-parent, step-sibling, or step-child)." Section 4(A)(9) of IP 426. Initiative Petition No. 420 had also included "father-in-law, or mother-in-law" which is not part of IP 426's definition.

¶3 On February 28, 2020, the Protestants/Petitioners, Marc McCormick, Laura Newberry, Roger Gaddis, and Claire Robinson Davey filed their challenge to IP 426 pursuant to 34 O.S. § 8 (B). First, the Petitioners claim reallocation of prisoners to their home addresses for purposes of redistricting does not achieve population equality, is arbitrary, unsystematic, and would violate Article I, § 2 of the United States Constitution. In addition, not counting all "group quarters" identified in the Federal Decennial Census, such as, college students, nursing home residents, and residents of mental health facilities the same as prisoners would violate the Equal Protection Clause of the United States Constitution. Petitioners also challenge the constitutionality of provisions in IP 426 that place restrictions on who can be a commissioner.

II. STANDARD OF REVIEW

¶4 "The first power reserved by the people is the initiative...." Okla. Const. art. 5, § 2; *In re Initiative Petition No. 409, State Question No. 785,* 2016 OK 51, ¶2, 376 P.3d 250; *In re Initiative Petition No. 403, State Question No. 779*, 2016 OK 1, ¶3, 367 P.3d 472. With that reservation comes "the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature." Okla. Cost. art. 5, § 1; *In re Initiative Petition No. 409*, 2016 OK 51, ¶2; *In re Initiative Petition No. 403,* 2016 OK 1, ¶3. "The right of the initiative is precious, and it is one which this Court is zealous to preserve to the fullest measure of the spirit and the letter of the law." *In re Initiative Petition No. 382, State Question No. 729*, 2006 OK 45, ¶3, 142 P.3d 400. *See In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, ¶35, 838 P.2d 1. We have repeatedly emphasized both how vital the right of initiative is to the people of Oklahoma, as well as the degree to which we must protect it:

> Because the right of the initiative is so precious, **all doubt as to the construction of pertinent provisions is resolved in favor of the initiative. The initiative power should not be crippled, avoided, or denied by technical construction by the courts.**

In re Initiative Petition No. 403, 2016 OK 1, ¶3 (quoting *In re Initiative Petition No. 382*, 2006 OK 45, ¶3).

¶5 However, while the fundamental and precious right of initiative petition is zealously protected by this Court, it is not absolute. Any citizen can protest the sufficiency and legality of an initiative petition. *In re Initiative Petition No. 409*, 2016 OK 51, ¶2; *In re Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, ¶2, 164 P.3d 125. "Upon such protest, this Court must review the petition to ensure that it complies with the 'parameters of the rights and restrictions [as] established by the Oklahoma Constitution, legislative enactments and this Court's jurisprudence.'" *In re Initiative Petition No. 384*, 2007 OK 48, ¶2 (quoting *In re Initiative Petition No. 379, State Question No. 726*, 2006 OK 89, ¶16, 155 P.3d 32).

¶6 As to challenged initiative provisions, this Court has consistently confined our pre-election review under Section 8 of Title 34 of the Oklahoma Statutes to "clear or manifest facial constitutional infirmities." *In re Initiative Petition No. 358, State Question No. 658*, 1994 OK 27, ¶7, 870 P.2d 782. Accordingly, the Petitioners in this matter bear the burden of demonstrating the proposed initiative petition contains clear or manifest facial constitutional infirmities. *See In re Initiative Petition No. 403*, 2016 OK 1, ¶3; *In re Initiative Petition No. 362, State Question No. 669*, 1995 OK 77, ¶12, 899 P.2d 1145.

III. ANALYSIS

A. Reallocation of inmates to their home address is not clearly or manifestly unconstitutional.

¶7 The Petitioners argue reallocation of prisoners to their home addresses for purposes of redistricting does not achieve population equality, is arbitrary and unsystematic, and would violate both Article I, § 2 of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment. They assert the United States Census Bureau counts prisoners

in the decennial census at the place where they are incarcerated and they interpret opinions of the United States Supreme Court to prohibit adjusting this data.[7] IP 426 will count inmates for redistricting purposes at their last home address rather than where they are incarcerated. The redistricting scheme under IP 426 includes both congressional districts and state legislative districts. The Petitioners claims are based on alleged malapportionment. Two distinct personal interests are negatively impacted by malapportionment. The first is electoral equality, *i.e.*, the interest in having one's vote counted equally with that of others. *See Reynolds v. Simms*, 377 U.S. 533, 568 (1964) ("an individual's right to vote ... is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State."); *Calvin v. Jefferson Cty. Bd. of Commissioners*, 172 F. SupP.3d 1292, 1303-04 (N.D. Fla. 2016). The second is representational equality, the interest in being represented on an equal footing with one's neighbors. See Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969) ("Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives."); *Calvin*, 172 F.SupP.3d at 1304.

¶8 Supreme Court jurisprudence tolerates much less deviation in population equality for congressional districts than it does for state legislative districts. In *Wesberry v. Sanders,* the Supreme Court dealt with malapportionment of congressional districts. 376 U.S. 1 (1964). The Court held that while it may not be possible for states to draw congressional districts with mathematical precision, Art. I., § 2 of the United States Constitution requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 7-8, 18. Article I., § 2 provides in relevant part:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States... Representatives... shall be apportioned among the several States which may be included within this Union, according to their respective Numbers...

It establishes a "high standard of justice and common sense" for the apportionment of congressional districts: "equal representation for equal numbers of people." *Id.* at 18; *Karcher v. Daggett*, 462 U.S. 725, 730 (1983). Precise mathematical equality, however, may be impossible to achieve in an imperfect world; therefore, the "equal representation" standard is enforced only to the extent of requiring districts be apportioned to achieve population equality "as nearly as practicable." *Wesberry*, 376 U.S. at 7-8, 18; *Karcher*, 462 U.S. at 730. The "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. *Kirkpatrick v. Preisler,* 394 U.S. 526, 530-31 (1969). Therefore, for congressional districts, Art. I., § 2, "permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Id.* at 531.

¶9 *Karcher* discusses the two basic questions that shape such litigation over congressional apportionment. First, the court will consider whether the population differences among the congressional districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. *Karcher,* 462 U.S. at 730-31. The parties challenging the apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. *Id.* However, if the challengers can establish the population differences were not the result of a good-faith effort to achieve equality, the State bears the burden of proving that each significant variance between congressional districts was necessary to achieve some legitimate goal. *Id.* at 731.

¶10 In *Karcher,* the small deviations between the congressional districts were based on numbers that excluded perceived flaws in the census data. The deviation between the largest district and the smallest district was less than one percent (1.0%), however, the district court determined the redistricting plan was not unavoidable despite a good-faith effort to achieve absolute equality. *Karcher*, 462 U.S. at 729. It rejected the argument that the deviation was lower than the statistical imprecision of the decennial census and therefore was the functional equivalent of mathematical equality. *Id.* The Court held there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I., § 2 **without justification**. *Id.* at 734. Absolute population equality is the paramount objective of apportionment **only in the case of congressional districts**. *Id.* at 732-33. "[T]he national legislature outweighs the

local interests that a State may deem relevant in apportioning districts for representatives to state and local legislatures." *Id.* at 733. The *de minimis* line chosen by the appellants was based on the "inevitable statistical imprecision of the census" which gives an illusion of rationality and predictability. *Id.* at 735. The Court found two problems with this choice. First, it noted, the census systematically undercounts actual population but to what extent is not known. *Id.* Second, the mere existence of statistical imprecision does not make small deviations among the congressional districts the functional equivalent of equality. *Id.* The undercounting varies from place to place but the fact there is undercounting does not render meaningless the differences in population between congressional districts as determined by uncorrected census counts. *Id.* at 738. The census data provides the only reliable, albeit less than perfect, indication of the districts real relative population levels. *Id.* A district with a larger census count can be said with certainty will be larger than one with a smaller census count and this is sufficient for decision making. *Id.* Because the census represents the best population data available it is the only basis for good-faith attempts to achieve population equality and attempts to explain population deviations on the basis of flaws in census data must be supported **with a precision not achieved here.** *Id.* If a State attempts to use a measure other than total population or to correct the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner. *Id.* at 732 n.4. The Court affirmed the district court's ruling which held the reapportionment plan was unconstitutional. *Id.* at 744.

¶11 Unlike congressional districts, the basis for preventing the ills of malapportionment on the state and local level is found in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[8] The Supreme Court first held, in *Baker v. Carr,* that state legislative apportionment challenges were justiciable under the Fourteenth Amendment and would no longer be perceived as non-justiciable political questions. 369 U.S. 186, 237 (1962).[9] When drawing state and local legislative districts, jurisdictions are permitted to deviate somewhat from perfect population equality. *Evenwel v. Abbot,* 136 S.Ct. 1120, 1124 (2016). This may be done to accommodate traditional districting objectives, among them, preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness. *Id.* The Court noted the "safe harbor rule" for state and local districts: "[w]here the maximum population deviation between the largest and smallest district is less than 10% the Court has held, a state or local legislative map presumptively complies with the one-person, one-vote rule." *Id.* Although there have been many disputes over what is a permissible deviation from perfect population equality, there has been much fewer disputes on what population base jurisdictions must equalize. *Id.* In *Burns v. Richardson,* the Court acknowledged it had previously held both houses of a bicameral state legislature must be apportioned substantially on a population basis. 384 U.S. 73, 91. However, "the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured." *Id.* The Court had previously left open the question of what "population" was being referred to. *Id.* It found its previous decisions did not suggest "the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured." *Id.* at 92. *Evenwel,* noted *Burns* was a rare occasion where a jurisdiction relied upon registered-voters of districts for the basis of its apportionment plan. *Evenwel*, 136 S.Ct. at 1124. It also found jurisdictions have equalized total population measured by the census in a majority of cases, **but seven States had notably adjusted those census numbers in a meaningful way**.[10] *Id.*

¶12 The Petitioners allege, for purposes of apportioning both congressional and state legislative districts, the state must use the census data as provided by the United States Census Bureau which counts incarcerated persons at the place where they are incarcerated. Their argument is largely based on the *Kirkpatrick* and *Karcher* opinions. They assert using any other address than where the census counts incarcerated persons is arbitrary and would violate Art. I., § 2 of the United States Constitution. However, we disagree with their assertion based upon federal jurisprudence, statements of the Census Bureau, and actions by other states.

¶13 In *Fletcher v. Lamone,* African American residents of Maryland sued state officials challenging the newly implemented apportionment plan. 831 F. SupP.2d 887, 891 (D. Md. 2011), aff'd, 567 U.S. 930 (2012). Several plans had been proposed to create three instead of two largely African American congressional districts. Those proposals did not make it into the final plan which kept the status quo that retained only two largely African American districts. The plaintiffs asserted a malapportionment claim based upon a violation of Art. I., § 2 of the United States Constitution. *Id.* at 892-93. This claim concerns Maryland's "No Representation Without Population Act." *Id.* at 893. The Act requires for purposes of drawing local, state, and congressional districts, inmates of state or federal prisons located in Maryland must be counted as residents of their last known residence before incarceration. *Id.* The Act was created in 2010 to prevent the distortional effects of counting prisoners in predominantly white districts where the prisons are located rather than in African American areas where a majority of prisoners had come from. *Id.* Prior to the Act, residents of districts where prisons were located were able to elect the same number of representatives despite in reality having comparatively fewer voting-eligible members of the community. *Id.* An issue that concerns representational equality, *i.e.*, residents of districts with prisons were systematically "overrepresented" compared to other districts. *Id.*

¶14 In analyzing the Art. I., § 2 based claim the court found:

> Article I, § 2 provides that the members of the House of Representatives are to be chosen "by the People of the several States." U.S. Const. art. I, § 2. As interpreted by the Supreme Court, this provision mandates that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8, 84 S.Ct. 526, 11 L. Ed.2d 481 (1964). "[T]he 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality." *Kirkpatrick v. Preisler,* 394 U.S. 526, 530-31, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969). "Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." *Id.* States do not have unlimited discretion in performing the calculations required to meet the "One Person, One Vote" standard. In *Kirkpatrick* and again in *Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983), the Supreme Court concluded that because the census count represents the "'best population data available,' it is the only basis for good-faith attempts to achieve population equality." *Karcher*, 462 U.S. at 738, 103 S.Ct. 2653 (internal citation omitted) (quoting *Kirkpatrick*, 394 U.S. at 528, 89 S.Ct. 1225).

Fletcher, 831 F.SupP.2d at 894. Like the Petitioners in the present case, the plaintiffs in *Fletcher* relied mainly on the *Kirkpatrick* and *Karcher* cases and asserted the only population number that could be used for determining congressional districts was that generated by the Census Bureau and Maryland's decision to adjust this number was unconstitutional. *Id.*

¶15 The *Fletcher* court disagreed and found the plaintiffs had not read these cases in their full context. *Id.* A full reading of these cases show they require a state to use census data as a *starting point* but they do not hold that a state may not modify this data to correct perceived flaws. *Id. Kirkpatrick* and *Karcher*, however, require a state that uses a measure other than total population or to "correct" the census figures must do so in a manner that is not haphazard, inconsistent, or conjectural. *Id.* The court noted in *Karcher* the New Jersey redistricting plan at issue was rejected not because the state used adjusted census data, but because it failed to perform its adjustments systematically. *Id.* The statements in *Karcher* suggest a "State may choose to adjust the census data, so long as those adjustments are thoroughly documented and applied in a nonarbitrary fashion and they otherwise do not violate the Constitution." *Id.*, at 894-895.

¶16 The court also found a majority of courts to consider this issue have similarly concluded *Kirkpatrick* and *Karcher* did not bar the use of adjusted census data. *Id.*, at 895. In *City of Detroit v. Franklin*, the Sixth Circuit held:

> The Court in *Karcher* did not hold that the states must use census figures to reapportion congressional representation. The Supreme Court merely reiterated a well-established rule of constitutional law: states are required to use the "best census data available" or "the best population data available" in their attempts to effect pro-

> portionate political representation. Nothing in the constitution or *Karcher* compels the states or Congress to use only the unadjusted census figures.

4 F.3d. 1367, 1374 (6th Cir. 1993) (quoting *City of Detroit v. Franklin,* 800 F.Supp. 539, 543 (E.D.Mich.1992)); *Id.* The court also quoted *Senate of State of Cal. v. Mosbacher*, wherein the Ninth Circuit stated in dicta "[i]f the State knows that the census data is unrepresentative, it can, and should, utilize noncensus data in addition to the official count in its redistricting process." 968 F.2d 974, 979 (9th Cir.1992); *Id.*

¶17 Even the United States Census Bureau condones the reallocation of prisoners to other locales. *Fletcher* found the Census Bureau only counts prisoners at the place of incarceration for pragmatic and administrative reasons, not legal ones. *Fletcher,* 831 F.SupP.2d at 895. Because of the extensive coordination with correctional facilities and the cost of that process, the Census Bureau was unwilling to undertake the effort to count prisoners at a place other than where they were incarcerated. *Id.*, at 895-96. The court found "[f]or the 2010 census, the Bureau released its population data for prisoners and other inhabitants of 'group quarters' early to enable States to 'leave the prisoners counted where the prisons are, delete them from redistricting formulas, or assign them to some other locale." (quoting *So, How Do You Handle Prisons?*, Director's Blog, U.S. Census Bureau (March 10, 2010), *http://blogs.census.gov/directorsblog/2010/03/so-how-do-you-handle-prisons.html*.). The court in *Calvin* also recognized this. It found that the Census Bureau acknowledges counting prisoners at the place of incarceration could potentially present problems, and that some state and local governments might want to adjust census data to remove or relocate prisoners to their pre-prison residences. *Calvin,* 172 F.SupP.3d at 1297.

¶18 *Fletcher,* next, ruled on whether the process used in Maryland for the counting of prisoners was systematic, not arbitrary, as demanded by *Karcher*. *Fletcher,* 831 F.SupP.2d at 896. The court determined the Maryland Department of Planning (MDP) undertook and documented a multistep process by which it attempted to identify the last known address of all individuals in Maryland's prisons. *Id.* This information was then used to make the relevant adjustments to the data it received from the Census Bureau. *Id.* The court found "[t]his process is a far cry from the 'haphazard, inconsistent, or conjectural' alterations the Supreme Court rejected in *Karcher*." The court in *Calvin* even suggested that including prisoners in districts only where prisons were located was arbitrary, not the reverse. *Calvin*, 172 F.SupP.3d. at 1323 ("any population arbitrarily included in a population base, no matter how small, works an unconstitutional dilution of others' rights."). The process for counting prisoners in IP 426 is like the process used by the MDP in *Fletcher*.[11]

¶19 As mentioned, the United States Supreme Court recognizes that jurisdictions have equalized total population measured by the census in a majority of cases, but seven States had notably adjusted those census numbers in a meaningful way. *Evenwel,* 136 S.Ct., at 1124. Since *Evenwel* was decided (2016), at least one state has enacted law requiring census data to be revised in order to count inmates in the block, block group and census tract where they were a resident before incarceration rather than where they are counted in the census (place of incarceration). Assembly Bill No. 450 (AB 450 (2019)) was passed by the Nevada Legislature (composed of the Assembly and the Senate) and was later approved by the Governor on May 29, 2019. Section 6 of AB 450 requires the Director of the Department of Corrections to compile the last known residential address of each offender immediately before they were sentenced to imprisonment in a facility or institution. Section 9 of AB 450 requires the State Demographer to use this information and revise the census data to include those inmates at their prior residence for apportionment purposes. Sections 3 and 7 of AB 450 require the State Demographer to use this revised population count to apportion legislative and congressional districts, respectively.

¶20 Next, the Petitioners argue IP 426 singles out one "group quarters" subcategory from the census for different treatment and this "exceeds the discretion allowed to states under the Equal Protection Clause." Petitioners' Brief at 9. Other "group quarters" residents include such categories as college students, persons living in nursing homes or mental hospitals, and military. Petitioners assert adjusting prisoner census data and not adjusting the data for other "group quarters" categories violates the Equal Protection Clause when applied to redistricting the state legislature. Normally, such equal protection claims are based upon electoral equality or representational equality challenges. Here Petitioners seem to be arguing these other

"group quarters" categories have a right to be treated identically. However, this argument appears to be a reiteration of their argument that census data cannot be adjusted, which it seems clear from the above discussion, is not correct. Regardless, an equal protection analysis requires strict scrutiny of a legislative classification only when such classification impermissibly interferes with the exercise of a fundamental right, such as, the right to vote, right of interstate travel, rights guaranteed by the First Amendment, or right to procreate, or operates to the peculiar disadvantage of a suspect class, such as, one based upon alienage, race, or ancestry. *Hendrick v. Jones*, 2013 OK 71, 9, 349 P.3d 531. Unless a classification warrants some form of heightened review, the Equal Protection Clause only requires the classification rationally further a legitimate state interest. *Id.* This lower threshold is identified as the rational-basis test. *Id.* Here, we are not dealing with any suspect classes and therefore we use a rational basis test. The Respondents explain that the rational basis for reallocating prisoners to their home community rather than place of incarceration is to prevent "prison gerrymandering" *i.e.*, the systematic transfer of a large non-voting population from urban, disproportionately minority regions to rural, disproportionately white regions of the state where prisons are located. Respondents' Brief at 2-3. This type of gerrymandering "inflates the political power of the area where the prison is located, and deflates the political power in the prisoners' home communities." *Id.* n.1; Petitioners' App. C at 5527. Such actions could affect the representational equality between prison districts and non-prison districts. In addition, the categories the Census Bureau has defined as "group quarters" are not all similarly situated. Both courts in *Fletcher* and *Calvin* recognized the unique differences of prisoners from other populations included in the "group quarters" definition. In Fletcher the court stated:

> [P]laintiffs' argument on this point implies that college students, soldiers, and prisoners are all similarly situated groups. This assumption, however, is questionable at best. College students and members of the military are eligible to vote, while incarcerated persons are not. In addition, college students and military personnel have the liberty to interact with members of the surrounding community and to engage fully in civic life. In this sense, both groups have a much more substantial connection to, and effect on, the communities where they reside than do prisoners.

Fletcher, 831 F.SupP.2d at 896. *Calvin* found that the prisoners were situated differently with respect to the "true denizens" of the county in question "in every way that matters for representative democracy" and "[t]reating them alike makes little if any sense." *Calvin*, 172 F.SupP.3d at 1323.

¶21 We find the Respondents have established a rational basis for correcting any representational equality issues by eliminating "prison gerrymandering" and IP 426 does so by adjusting prisoner census data in a systematic way. The reallocation of prisoners under IP 426 does not clearly or manifestly violate either Article I, § 2 of the United States Constitution or the Equal Protection Clause of the Fourteenth Amendment. Once prisoners are reallocated to their pre-incarceration communities new congressional and state legislative districts can be drawn.[12] How such districts will be drawn and how equal they will be in total population numbers, for congressional districts at least, has not yet occurred and is premature for this Court to consider. Nor do we find any merit in Petitioners' equal protection argument concerning treatment of "group quarters" categories.

B. The restrictions in IP 426 on who can be a commissioner are not clearly or manifestly unconstitutional.

¶22 The Petitioners assert various restrictions on who can be a commissioner in IP 426 are unconstitutional. They raise their First Amendment challenges in the previously mentioned case concerning IP 420 to the provisions in IP 426;[13] specifically, the provision in Section 4(B)(2)(a) of IP 426 which requires a commissioner to not have changed his or her party affiliation in the four years immediately preceding the date of appointment to the Commission or since the date the IP 426 was filed, whichever is shorter. This time, the claim is based upon an equal protection analysis quoting from our opinion in *Hendricks v. Jones* "[a]n equal protection analysis requires strict scrutiny of a legislative classification only when such classification impermissibly interferes with the exercise of a fundamental right, such as...rights guaranteed by the First Amendment." 2013 OK 71, ¶9, 349 P.3d 531; *See Gladstone v. Bartlesville Independent School Dist. No. 30,* 2003 OK 30, ¶9, 66 P.3d 442. The provision in IP 426, they

allege, interferes with the exercise of fundamental First Amendment rights, namely, freedom of association protected by the First and Fourteenth Amendment ("The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom" *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986)). Later, in their brief, they also claim the provision violates their First Amendment rights because it is an "unconstitutional condition of employment and denial of government benefit" citing *Elrod v. Burns,* 427 U.S. 347, 372 (1976).

¶23 Petitioners also appear to contend that because 34 O.S. §8 was amended in 2009[14] to specifically require this Court to review constitutional claims at this stage of the initiative process we should hear and decide all of their constitutional claims and essentially abandon our jurisprudence of determining only those constitutional claims that show "clear or manifest facial constitutional infirmities." *See In re Initiative Petition No. 420, State Question No. 804*, 2020 OK 9, ¶14, 458 P.3d 1088. Although, our review of constitutional issues at this stage may no longer be discretionary, we still require the Petitioners to prove that alleged constitutional infirmities are clear or manifest. We stand by our jurisprudence that only in the clearest cases does this Court believe it is warranted to interfere with the people's basic right to vote on important issues by a holding of constitutional infirmity. *See In re Initiative Petition No. 360, State Question No. 662*, 1994 OK 97, ¶11, 879 P.2d 810. The constitutional right of the initiative is precious and all doubt should still be resolved in favor of the initiative. *See In re Initiative Petition No. 403*, 2016 OK 1, ¶3, 367 P.3d 472. This constitutional power reserved to the people of this State[15] should not be crippled, avoided, or denied by technical construction by the courts. *Id.*

¶24 Petitioners First Amendment challenges were previously addressed in *In re Initiative Petition No. 420, State Question No. 80*4, 2020 OK 9, ¶¶27-33, 458 P.3d 1088. We noted the Supreme Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997), determined "there is no bright line that separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms. Nor is it clear at this stage what basis for review is appropriate, *i.e.*, one based upon conditional hiring decisions or one based upon the *Anderson-Burdick* framework." *In re Initiative Petition No. 420, State Question No. 804,* at ¶33. Although we determined under our discretionary authority we would decline to reach this challenge at this stage of the initiative process, we made a review of the constitutional challenge and essentially determined it was not clearly or manifestly unconstitutional. *Id.* This was not based, as Petitioners appear to assert, upon having a plaintiff with standing to pursue this issue, but was based upon the fact it is unclear from federal jurisprudence what test to apply. The Respondents also note the Supreme Court has validated as a legitimate state goal similar time restrictions to prohibit changing one's party for partisan reasons. In *Rosario v. Rockefeller,* the Court affirmed New York's delayed-enrollment scheme which required, in order to participate in a primary election, one must enroll with a party before the preceding general election. 410 U.S. 752, 761 (1973). The Court agreed with the lower court that "[a]llowing enrollment any time after the general election would not have the same deterrent effect on raiding for it would not put the voter in the unseemly position of asking to be enrolled in one party while at the same time intending to vote immediately for another." *Id.* at 761-62. We find nothing has changed our opinion on this point to make this issue clearly and manifestly unconstitutional today.

¶25 Another challenge concerns one of the Petitioners, Laura Newberry, who is the spouse of a former State Senator, Dan Newberry. Senator Newberry resigned from the State Senate on June 6, 2017, to pursue a senior management position. Section 4(B)(2)(b) of IP 426 prohibits a person from serving on the Commission if they or an immediate family member has held a partisan elective office at the Federal, State or political subdivision level in the five years immediately preceding the date of appointment to the Commission. The definition of "immediate family member" includes a spouse. Section 4(A)(9) of IP 426. Since Laura Newberry's husband was a State Senator approximately three years ago, she would be prohibited from serving on the first Commission created by IP 426. The Petitioners assert Laura Newberry's right to equal protection of the laws is being violated by this provision. They assert under a rational basis scrutiny a classification must "rationally further a legitimate state interest." *Hendricks,* 2013 OK 71 at ¶9. The prohibition of a former elected official's spouse, they claim, is arbitrary and irrational.

¶26 In *Hendricks* we held an equal protection analysis requires strict scrutiny of a legislative classification when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class, such as, one based on alienage, race or ancestry. *Id.* The Equal Protection Clause only requires the classification rationally further a legitimate state interest if this heightened review is unwarranted. *Id.* Here, the Petitioners do not allege Laura Newberry is part of a suspect class. They argue under the holding in *Eisenstadt v. Baird,* the Supreme Court has held the Equal Protection Clause is violated when unmarried persons are treated differently from married persons. 405 U.S. 438, 454-55 (1972). IP 426 restrictions prohibit a spouse of an elected official from becoming a commissioner within a certain time limit but does not apply to an ex-spouse. *Eisenstadt* concerned a lecturer, who apparently was not a doctor or pharmacist, that was convicted of a crime for giving away contraceptives to a presumably single woman at Boston University. *Id.* at 440. Massachusetts law only allowed a doctor or pharmacist to prescribe contraception for the prevention of pregnancy to married persons. *Id.* at 442. The First Circuit granted Baird's federal writ of habeas corpus and remanded with directions to discharge Baird. *Id.* at 440. The appellate court had concluded the statutory goal was to limit contraception in and of itself which was a purpose that conflicted with fundamental human rights under *Griswold v. Connecticut,* 381 U.S. 479 (1965). The Supreme Court affirmed. It held that the statute viewed as a prohibition on contraception per se, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment. *Eisenstadt,* 405 U.S. at 443. The State could not consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons because in each case **the evil**, as perceived by the State, **would be identical**, and the underinclusion would be invidious. *Id.* at 454. The Court held "by providing dissimilar treatment for married and unmarried persons **who are similarly situated**, . . . violate[s] the Equal Protection Clause." *Id.* at 454-55 (emphasis added).

¶27 In the present matter, IP 426's temporary prohibition on spouses of elected or former elected officials serving on the Commission is not a fundamental human right nor is Laura Newberry a member of a suspect class. The rational basis for any of the time limited restrictions on being a commissioner is to "curtail partisan gerrymandering" in the redistricting process. *See In re Initiative Petition No. 420, State Question No. 804*, 2020 OK 10, ¶7, 458 P.3d 1080. For this purpose, it cannot be said that a spouse of an elected official is similarly situated to a former spouse of an elected official. A spouse of a current or former elected official shares financial interests as well as influence gained from the political career of the current or former elected official, whereas, an ex-spouse would logically not have that same level of connection or interest. The restrictions on being a commissioner do not have to be perfect but must be rational. It is certainly rational to temporarily exclude current and former elected officials and their families from participating in the electoral line drawing process to further the purpose of curtailing partisan gerrymandering in the redistricting process.

¶28 Additionally, certain provisions of the Oklahoma Constitution currently prohibit immediate family members from serving on particular bodies. In 1967, State Question 447, a legislative referendum, was passed by a vote of the people and created Article 7B of the Oklahoma Constitution. Section 3 of Article 7B created the Judicial Nominating Commission composed of thirteen members (it currently has fifteen members). A majority of the members of the Commission are not allowed to be licensed to practice law in Oklahoma and other members of this majority are not allowed to be licensed in any state. In 2009, another legislative referendum, SJR 27, was passed by the legislature and sent to a vote of the people as State Question 752. It passed on November 2, 2010, and amended Okla. Const. art. 7B, §3, to include a prohibition from serving in the majority of positions on the Commission for such persons who have an immediate family member that is licensed to practice law in any state.[16]

¶29 We hold, that under a rational basis test the goal of curtailing partisan gerrymandering in the redistricting process is legitimately supported by the temporary restrictions on membership in the Commission. We do not find that Laura Newberry has been denied equal protection of the laws nor is this membership restriction clearly and manifestly unconstitutional. For the same reasons, we also do not find Petitioner's assertion concerning a "paid consultant" to be clearly and manifestly unconstitutional. Section 4(B)(2)(f) of IP 426 prohibits a person from serving on the Commission if in the last five

years prior to appointment they or an immediate family member were an employee or a paid consultant of the Oklahoma State Legislature or the U.S. Congress. Petitioners, without citing any authority, claim the inclusion of "paid consultant" is overbroad because it would, for example, include persons working on the Capitol restoration project. However, it appears obvious why such a provision was included. It is not difficult to see that a person who has benefitted financially from the Oklahoma State Legislature or the U.S. Congress might be influenced by such bodies. The prevention of such influence in the line drawing process is rational and is at the core of IP 426.

¶30 Lastly, the Petitioners assert the "retroactivity problem" which was noted by this Court in *In re Initiative Petition No. 420, State Question No. 804,* 2020 OK 9, ¶33 n.17, 458 P.3d 1088. In that opinion we said in a footnote:

> [I]t is troubling that the proposed petition would appear to prohibit a person from serving as a commissioner if that person had changed their party affiliation within the last four years preceding the appointment. The appointment, by its terms, would exclude anyone who might have changed their party affiliation **well prior to the enactment of the proposed amendment** thus applying a retroactive restriction.

Id. (emphasis added). The above mentioned provision in IP 420 was amended in IP 426. It now provides that a person would be prohibited from serving on the Commission if they had changed their party affiliation within the four years immediately preceding the date of appointment to the Commission or **since the date IP 426 was filed** (February 6, 2020), **whichever is shorter**. Petitioners assert this new provision still prohibits persons from serving on the Commission who changed their party affiliation after IP 426 was filed and before publication was made. What Petitioners are calling a retroactivity problem is based upon the restriction occurring upon the filing of the proposed measure rather than on the date of its enactment, wherein a period of time would have elapsed to put people on notice of the provision prior to it taking effect. Respondents assert that although the Secretary of State published the required notice of the initiative petition on February 13, 2020, newspapers published an article concerning the refiling of the initiative petition immediately after it was filed. In our previous footnote we noted a four-year retroactive period was concerning because it was "well prior to the enactment of the proposed amendment." *Id.* Although the Proponents of IP 426 did not write the restriction from the period of its enactment but rather the date of its filing, the period has been greatly reduced. This Court has repeatedly recognized the validity of retroactive effects of legislation. Although statutes are presumed to operate prospectively, that presumption is rebutted where the purposes and intention of the Legislature to give a retrospective effect are expressly declared or are necessarily implied from the language used. *Wickham v. Gulf Oil Corp.*, 1981 OK 8, ¶13, 623 P.2d 613. Petitioners' only cited authority is the mentioned footnote expressing our concern with the previous version of this restriction in IP 420. They cite no legal authority in support of their argument that this revised restriction is unconstitutional. Claims to error for which there is no support in argument and authority are deemed abandoned. *Hadnot v. Shaw,* 1992 OK 21, ¶7, 826 P.2d 978; *See Fent v. Contingency Review Board*, 2007 OK 27, ¶22, 163 P.3d 512 ("We need not consider challenges that are not rested on convincing argument firmly supported by legal authority."). As with the other challenged restrictions in IP 426, we do not find this revised restriction on serving on the Commission is clearly or manifestly unconstitutional.

IV. CONCLUSION

¶31 In order to protect the constitutional and precious right of the people of this state to propose laws and constitutional amendments, a challenger to an initiative petition still bears the burden of demonstrating the proposed initiative petition contains clear or manifest facial constitutional infirmities. *See In re Initiative Petition No. 403,* 2016 OK 1, ¶3; *In re Initiative Petition No. 362, State Question No. 669*, 1995 OK 77, ¶12, 899 P.2d 1145. An original jurisdiction challenge at this stage of the initiative process is realistically one made with short time constraints and a limited record. Ignoring this burden would only promote strategic delays to thwart such proposed measures from receiving a meaningful election. We hold the Petitioners have not met this burden to show the provisions of IP 426 contain clear or manifest facial constitutional infirmities. The time period for filing an application for rehearing is hereby shortened to five business days from the date on which this opinion is filed. *See* Okla.Sup. Ct.R. 1.13.

INITIATIVE PETITION NO. 426, STATE QUESTION NO. 810 IS LEGALLY SUFFICIENT FOR SUBMISSION TO THE PEOPLE OF OKLAHOMA

¶32 Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Combs, JJ., and Reif, S.J., concur.

¶33 Kane and Rowe, JJ., dissent.

¶34 Colbert, J., recused.

COMBS, J.:

1. IP 420 applied this restriction only to the four years immediately preceding the appointment which, as mentioned, this Court expressed concern about the length of the period of retroactivity.

2. This is identical to IP 420.

3. IP 420 also included registered local lobbyists.

4. This is identical to IP 420.

5. This provision is limited to nominations in this State. IP 420 left it open to any nominations.

6. This provision is different from IP 420. Initiative Petition 420 only provided that the commissioner not have been an employee of the state legislature during this period.

7. The Petitioners rely heavily on *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969) and *Karcher v. Daggett*, 462 U.S. 725 (1983).

8. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

9. The case concerned alleged vote dilution caused by the retention of legislative districts drawn more than half a century prior. 369 U.S. 186, 189-195 (1962). The Court noted much had changed in the population of Tennessee since the last 1901 Apportionment Act. *Id.*, at 192.

10. Although it is not clear from the following references whether they apply to both congressional as well as state and local districting, footnote 3 of the Opinion provides:

> The Constitutions and statutes of ten States – California, Delaware, Hawaii, Kansas, Maine, Maryland, Nebraska, New Hampshire, New York, and Washington – authorize the removal of certain groups from the total-population apportionment base. *See* App. to Brief for Appellees 1a-46a (listing relevant state constitutional and statutory provisions). Hawaii, Kansas, and Washington exclude certain non-permanent residents, including nonresident members of the military. Haw. Const., Art. IV, § 4; Kan. Const., Art. 10, § 1(a); Wash. Const., Art. II, § 43(5). See also N.H. Const., pt. 2, Art. 9 – a (authorizing the state legislature to make "suitable adjustments to the general census ... on account of nonresidents temporarily residing in this state"). California, Delaware, Maryland, and New York exclude inmates who were domiciled out-of-state prior to incarceration. Cal. Elec.Code Ann. § 21003(5) (2016 West Cum. Supp.); Del.Code Ann., Tit. 29, § 804A (Supp.2014); Md. State Govt.Code Ann. § 2 – 2A – 01 (2014); N.Y. Legis. Law Ann. § 83 – m(b) (2015 West Cum. Supp.). The Constitutions of Maine and Nebraska authorize the exclusion of noncitizen immigrants, Me. Const., Art. IV, pt. 1, § 2; Neb. Const., Art. III, § 5, but neither provision is "operational as written," Brief for United States as Amicus Curiae 12, n. 3.

11. The Commission's Secretary is required to gather information from the Department of Corrections about the home address of state and federal inmates and add this information to the Federal Decennial Census data so that incarcerated people can be counted in their home communities rather than place of incarceration. Sections 4(C)(2)(e) and 4(C)(3)(a) of IP 426.

12. *Fletcher* also acknowledged that once Maryland had adjusted the census figures it drew its districts as equally as possible. *Fletcher,* 831 F.SupP.2d at 895.

13. Although the petitioners in this case are different, Roger Gaddis is one of the Petitioners in this and in a very recent case with similar First Amendment issues that were raised and rejected by this Court concerning an almost identical initiative petition (IP No. 420); *In re Initiative Petition No. 420, State Question No. 804*, 2020 OK 9, 458 P.3d 1088.

14. 2009 Okla.Sess.Laws c. 318, §1. New language was added to subsection B of 34 O.S. §8 providing "any citizen of the state may file a protest as to the constitutionality of the petition . . .".

15. Article 5, Section 1, of the Oklahoma Constitution provides: "The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature."

16. Interesting enough, Laura Newberry's husband, then State Senator Dan Newberry, voted "Yea" to pass SJR 27 with these immediate family member restrictions (Oklahoma State Senate, Fifty-Second Legislature, 4th Reading, May 19, 2009).

2020 OK 44

IN RE: INITIATIVE PETITION No. 426, STATE QUESTION No. 810 ELDON MERKLIN and CLAIRE ROBINSON DAVEY, Protestants/Petitioners, v. JANET ANN LARGENT, ANDREW MOORE and LYNDA JOHNSON, Respondents/ Proponents.

Case Number: 118,686. May 27, 2020

ORIGINAL PROCEEDING TO DETERMINE THE SUFFICIENCY OF THE GIST OF INITIATIVE PETITION NO. 426, STATE QUESTION NO. 810

¶0 This is an original proceeding to determine the legal sufficiency of the gist of Initiative Petition No. 426, State Question No. 810. The petition seeks to create a new article to the Oklahoma Constitution, Article V-A, for the purpose of establishing the Citizens' Independent Redistricting Commission. The Petitioners filed this protest alleging the gist of the petition is insufficient. Upon review, we hold the gist of the petition is legally sufficient.

THE GIST OF INITIATIVE PETITION NO. 426, STATE QUESTION NO. 810 IS LEGALLY SUFFICIENT

Robert G. McCampbell and Travis V. Jett, GableGotwals, Oklahoma City, Oklahoma, for Petitioners.

D. Kent Meyers, and Melanie Wilson Rughani, Crowe & Dunlevy, Oklahoma City, OK, for Respondents.

COMBS, J.:

I. FACTS AND PROCEDURAL HISTORY

¶1 On October 28, 2019, the Respondents/ Proponents, Andrew Moore, Janet Ann Largent, and Lynda Johnson (Respondents), filed Initiative Petition No. 420, State Question No. 804 (IP 420), with the Secretary of State of Okla-

homa. The initiative measure proposed for submission to the voters the creation of a new constitutional article, Article V-A, which would create the Citizens' Independent Redistricting Commission (Commission). IP 420 would vest the power to redistrict the State's House of Representatives and Senatorial districts, as well as Federal Congressional Districts, in this newly created Commission. IP 420 was challenged in two separate cases. *In In re Initiative Petition No. 420, State Question No. 804*, 2020 OK 10, 458 P.3d 1080, certain protestants challenged the gist of the proposition found at the top of the signature sheet. On February 4, 2020, this Court held the gist was insufficient and declared IP 420 invalid because it did not describe the true nature of the initiative petition which was to curtail partisan gerrymandering. *Id.*, ¶¶6-7, 11.

¶2 Two days later, February 6, 2020, the proponents of IP 420 filed a new initiative petition (Initiative Petition No. 426, State Question 810). The Secretary of State published the required notice of the initiative petition on February 13, 2020. Initiative Petition No. 426 (IP 426) is nearly identical to IP 420. It creates a new constitutional article, Article V-A, which would create the Citizens' Independent Redistricting Commission (Commission). Like IP 420, it would vest the power to redistrict the State's House of Representatives and Senatorial districts, as well as Federal Congressional Districts, in this newly created Commission. It provides how a Panel will be selected which will then review applications to be a commissioner and a process for how those commissioners are chosen (§4(A)(7) and §4(B)(4)(b), (f) & (g) of IP 426); it provides a process for approving a redistricting plan (§4(E)(1) of IP 426) and a "Fallback Mechanism" if the Commission does not approve a plan (§4(F) of IP 426); it also provides certain criteria the Commission shall seek to maximize compliance when creating a redistricting plan (§4(D)(1)(c) of IP 426).

¶3 On February 28, 2020, the Protestants/Petitioners, Eldon Merklin and Claire Robinson Davey filed their challenge to the gist of IP 426 pursuant to 34 O.S. § 8 (B).[1] Mr. Merklin was also a petitioner in *In re Initiative Petition No. 420, State Question No. 804*, 2020 OK 10, ¶11, 458 P.3d 1080. The Petitioners claim the gist of IP 426 is affirmatively inaccurate, omits significant details concerning the voting requirements on a redistricting plan as well as details on one of the several criteria used in creating a redistricting plan. They ask this Court to hold the gist of IP 426 is insufficient based upon these claims.

II. STANDARD OF REVIEW

¶4 "The first power reserved by the people is the initiative...." Okla. Const. art. 5, § 2; *In re Initiative Petition No. 409, State Question No. 785*, 2016 OK 51, ¶2, 376 P.3d 250; *In re Initiative Petition No. 403, State Question No. 779*, 2016 OK 1, ¶3, 367 P.3d 472. With that reservation comes "the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature." Okla. Cost. art. 5, § 1; *In re Initiative Petition No. 409*, 2016 OK 51, ¶2; *In re Initiative Petition No. 403*, 2016 OK 1, ¶3. "The right of the initiative is precious, and it is one which this Court is zealous to preserve to the fullest measure of the spirit and the letter of the law." *In re Initiative Petition No. 382, State Question No. 729*, 2006 OK 45, ¶3, 142 P.3d 400. *See In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, ¶35, 838 P.2d 1. We have repeatedly emphasized both how vital the right of initiative is to the people of Oklahoma, as well as the degree to which we must protect it:

> Because the right of the initiative is so precious, **all doubt as to the construction of pertinent provisions is resolved in favor of the initiative. The initiative power should not be crippled, avoided, or denied by technical construction by the courts.**

In re Initiative Petition No. 403, 2016 OK 1, ¶3 (quoting *In re Initiative Petition No. 382*, 2006 OK 45, ¶3).

¶5 However, while the fundamental and precious right of initiative petition is zealously protected by this Court, it is not absolute. Any citizen can protest the sufficiency and legality of an initiative petition. *In re Initiative Petition No. 409*, 2016 OK 51, ¶2; I*n re Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, ¶2, 164 P.3d 125. "Upon such protest, this Court must review the petition to ensure that it complies with the 'parameters of the rights and restrictions [as] established by the Oklahoma Constitution, legislative enactments and this Court's jurisprudence.'" *In re Initiative Petition No. 384*, 2007 OK 48, ¶2 (quoting *In re Initiative Petition No. 379, State Question No. 726*, 2006 OK 89, ¶16, 155 P.3d 32).

¶6 The gist of an initiative petition is required by 34 O.S. 2011, § 3, which provides in pertinent part: "[a] simple statement of the gist of the proposition shall be printed on the top margin of each signature sheet." The gist is required to be in "simple language" and should inform "a signer of what the measure is generally intended to do." *In re Initiative Petition No. 363, State Question No. 672*, 1996 OK 122, ¶20, 927 P.2d 558. Each signature sheet is attached to a copy of the initiative petition and is therefore available for review by any potential signatory. *Id.* The two combined form what is called the "pamphlet." *Id.* The gist must be short and because it will appear at the beginning of every page of the petition it can contain "no more than a shorthand explanation of a proposition's terms."[2] *In re Initiative Petition No. 362, State Question No. 669*, 1995 OK 77, ¶10, 899 P.2d 1145. It need not contain the more extensive requirements for ballot titles contained in 34 O.S. Supp. 2018, § 9. *Id.* This Court described the importance of the gist and ballot title, as well as the requirements, in *In re Initiative Petition No. 344, State Question No. 630*, where we explained:

> [T]he statement on the petition [the gist] and the ballot title must be brief, descriptive of the effect of the proposition, not deceiving but informative and revealing of the design and purpose of the petition. The limitations ... are necessary to prevent deception in the initiative process.... The voters, after reading the statement on the petition and the ballot title, should be able to cast an informed vote.

1990 OK 75, ¶14, 797 P.2d 326. In *McDonald v. Thompson*, we noted ballot titles have specific statutory requirements that are more stringent than a gist because a ballot title is all a voter will see in the voting booth. 2018 OK 25, ¶10, 414 P.3d 367. Whereas, a potential signatory, at this stage of the process, may review the text of the petition itself to answer any questions or provide further details not found in the gist contained on the signature sheet. *Id.*

¶7 This Court further explained in detail how the gist of an initiative petition should be evaluated in *In re Initiative Petition No. 409*, where we stated:

> This Court has long held that the purpose of the gist, along with the ballot title, is to "prevent f*raud, deceit*, or *corruption* in the initiative process." The gist "'should be sufficient that the signatories are at least put on notice of the changes being made,'" and the gist must explain the proposal's effect. The explanation of the effect on existing law "does not extend to describing policy arguments for or against the proposal." The gist "need only convey the practical, not the theoretical, effect of the proposed legislation," and it is "'not required to contain every regulatory detail so long as its outline is not incorrect.'" "We will approve the text of a challenged gist if it is 'free from the taint of misleading terms or deceitful language.'"

2016 OK 51, ¶3 (footnotes omitted) (quoting primarily *In re Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, 164 P.3d 125). Because the purpose of the gist is to prevent fraud, deceit or corruption in the initiative process, any alleged flaw created by an omission of details in the gist must be reviewed to determine whether such omission is critical to protecting the initiative process. *In re Initiative Petition No. 363*, 1996 OK 122, ¶¶18-20. "The sole question ... is whether the absence of a more detailed gist statement ... without more, perpetuates a fraud on the signatories." *Id.* ¶19.

III. ANALYSIS

¶8 IP 426 is essentially a refiling of IP 420 which happened almost immediately after this Court determined the gist statement in IP 420 was insufficient. *In re Initiative Petition No. 420, State Question No. 804*, 2020 OK 10, ¶11, 458 P.3d 1080. Although there are some differences between the two proposed measures they are nearly identical and were submitted by the same proponents. In *In re Initiative Petition No. 420, State Question No. 804*, this Court determined the gist statement, through its omissions, failed to alert potential signatories about the true nature of the proposed measure which was to curtail partisan gerrymandering. *Id.*, ¶¶7, 11. The gist in IP 420 was as follows:

> This measure adds a new Article V-A to the Oklahoma Constitution. This new Article creates the Citizens' Independent Redistricting Commission and vests the power to redistrict the State's House of Representative and Senatorial districts, as well as its Federal Congressional Districts, in the Commission (rather than the Legislature). The Article sets forth qualifications and a process for the selection of Commissioners, a Special Master and a Secretary. It also sets

> forth a process for the creation and approval of redistricting plans after each Federal Decennial Census. In creating the redistricting plans, the Commission must comply with certain criteria, including federal law, population equality, and contiguity, and must seek to maximize compliance with other criteria, including respect for communities of interest, racial and ethnic fairness, respect for political subdivision boundaries, political fairness, and compactness. The Article creates a fallback mechanism in the event that the Commission cannot reach consensus on a plan within a set timeframe. It also sets forth procedures for funding and judicial review, repeals existing constitutional provisions involving legislative districts, codifies the number of state House of Representative and Senatorial districts, and reserves powers to the Commission rather than the Legislature.

Id., 5. We determined this gist: 1) did not mention the selection process and composition of the Commission; 2) did not provide enough information concerning the qualifications of the commissioners; and 3) failed to make any mention of the criteria the Commission was to avoid in making a redistricting plan, such as, the omission from consideration of "[t]he political affiliation or voting history of the population of a district." *Id.*, ¶¶7-8. We held a simple and brief statement mentioning these components was necessary to inform a potential signatory about the true nature of the measure. *Id.* Justice Winchester concurred specially, and also found fault with the gist because it did not mention the role of this Court in the redistricting process. *Id.*, ¶2 (Winchester, J., concurring).

¶9 The Respondents appear to have adequately addressed these concerns when they filed IP 426. The gist statement of IP 426 is as follows:

> This measure adds a new Article to the Oklahoma Constitution, intended primarily to prevent political gerrymandering. The Article creates a Citizens' Independent Redistricting Commission, and vests the power to redistrict the state's House, Senatorial, and federal Congressional districts in the Commission (rather than the Legislature). The 9-member Commission will consist of 3 members from each of 3 groups, determined by voter registration: those affiliated with the state's largest political party; those affiliated with its second-largest party; and those unaffiliated with either. Commissioners are not elected by voters but selected according to a detailed process set forth by the Article: in brief, a panel of retired judges and justices designated by the Chief Justice of the Oklahoma Supreme Court will choose pools of approximately 20 applicants from each group, then randomly select 3 Commissioners from each pool. The Article sets forth various qualifications for Commissioners, Special Master, and Secretary, intended to avoid conflicts of interest (*for example*, they cannot have changed party affiliation within a set period, and neither they nor their immediate family may have held or been nominated for partisan elective office or served as paid staff for a political party or as a registered lobbyist in the last five years). It also sets forth a process for the creation and approval of redistricting plans after each federal Decennial Census, including, among other things, a method for counting incarcerated persons, public notice, and open meeting requirements. In creating the plans, the Commission must comply with federal law, population equality, and contiguity requirements, and must seek to maximize respect for communities of interest, racial and ethnic fairness, political fairness, respect for political subdivision boundaries, and compactness (in order of priority), without considering the residence of any legislator or candidate or a population's political affiliation or voting history except as necessary for the above criteria. The Article creates a fallback mechanism by which the state Supreme Court, using a report from the Special Master, will select a plan if the Commission cannot reach the required level of consensus within a set timeframe. It also sets forth procedures for funding and judicial review, repeals existing constitutional provisions involving legislative districts, codifies the number of state House and Senatorial districts, and reserves powers to the Commission rather than the Legislature. Please review attached Petition for further details.

Petitioners' Appendix to Application and Petition to Assume Original Jurisdiction and Review the Gist of Initiative Petition No. 426, Ex. A. The Petitioners contend, however, this gist statement is affirmatively inaccurate, omits an explanation of the Commission's voting requirements

on a redistricting plan, and omits any information on what political fairness means.

A. The gist statement is not affirmatively inaccurate.

¶10 The Petitioners assert the gist is inaccurate because it states the Chief Justice of the Oklahoma Supreme Court will designate a Panel that will be involved in choosing pools of applicants to be a commissioner. They contend, this is inaccurate because §4(B)(4)(b) of IP 426 states the Panel members will be "selected by random drawing." The gist of IP 426 provides: "in brief, a panel of retired judges and justices designated by the Chief Justice of the Oklahoma Supreme Court will choose pools of approximately 20 applicants from each group, then randomly select 3 Commissioners from each pool." Section 4(B)(4)(b) of IP 426 states:

> No later than December 15 of 2020, and no later than December 1 of each subsequent year ending in zero, **the Chief Justice of the Oklahoma Supreme Court shall designate a Panel to review the applications.** The Panel shall consist of three Judges or Justices who have retired from the Oklahoma Supreme Court or the Oklahoma Court of Criminal Appeals or the Oklahoma Court of Civil Appeals, and who are able and willing to serve on the Panel, **selected by random drawing**. If fewer than three state appellate Judges or Justices who are able and willing to serve have been identified, then the Chief Justice shall appoint a retired Oklahoma Federal District Court Judge who accepts such appointment. (emphasis added).

Petitioners propose that an accurate statement in the gist would be: "[A] randomly selected panel of retired judges and justices ~~designated by the Chief Justice of the Oklahoma Supreme Court~~ will choose pools of approximately 20 applicants from each group, then randomly select 3 Commissioners from each pool." Petitioners Brief at 5.

¶11 The Petitioner, Eldon Merklin, raised a similar issue in *In re Initiative Petition No. 420, State Question No. 804*, 2020 OK 10, 458 P.3d 1080, however, it dealt with the differences between §4(A)(7) and §4(B)(4)(b) of IP 420 and not just the language in §4(B)(4)(b) *i.e.*, "designate" and "selected by random drawing."[3] In their Reply Brief, the petitioners in that case claimed the provisions of §4(A)(7) and § 4(B)(4)(b) of IP 420 were "self-contradictory." Reply Brief (118,406) at 1. Section 4(A)(7) of IP 420 explained "'Panel' shall refer to the group of retired Judges and Justices **chosen by the Chief Justice of the Oklahoma Supreme Court** to oversee the creation of the Commission." *Id.* However, §4(B)(4)(b) provides... "The Panel shall consist of three [retired] Judges or Justices . . . who are able and willing to serve on the Panel, **selected by random drawing**." *Id.* The petitioners also noted the gist in IP 420 "makes no mention of the issue at all." *Id.* at 2. The petitioners determined the remedy for all their challenges was "straightforward and is simply resolved by Proponents: refile with a new gist. (They may choose to resolve the conflict between IP 420, § 4(A)(7) and IP 420, § 4(B)(4)(b) as well.)." *Id.* at 3. In that case, the apparent conflict was with the word "chosen" in §4(A)(7) of IP 420 and the words "selected by random drawing" in §4(B)(4)(b) of IP 420. In our opinion, we addressed this concern with these two sections and agreed they created an inconsistency in the petition and should be clarified. We determined:

> The petition requires a Panel to be designated by the Chief Justice consisting of retired Justices and appellate judges. **Sections 4(A) (7) and 4(B)(4)(b) of IP 420**. The Panel will review the applications for the Commission and select some of the commissioners. Section 4(B)(4)(b) of IP 420 also states that the Panel will be selected by random drawing. We agree with the Petitioners that this creates an inconsistency in the petition and should be clarified. (emphasis added).

In re Initiative Petition No. 420, State Question No. 804, 2020 OK 10, ¶7. Although the language used was "designated" rather than "chosen" or even chosen/designated, the opinion cites both sections of IP 420 in the context of the arguments made by the petitioners in their Reply Brief.

¶12 In drafting IP 426, the Respondents addressed the issue of the alleged conflicting terms. Section 4(A)(7) no longer uses the word "chosen" and now reads: "'Panel' shall refer to the group of retired Judges or Justices involved in the selection of Commissioners pursuant to Section 4(B)(4)." In addition, the gist now mentions the Panel selection process. The Respondents assert that neither the gist nor the petition now use the offending word "chosen" which they concede arguably might forgo any type of randomness in the Panel selection process.

Respondents' Brief at 6. They contend, the term "designate" and "selected by random drawing" are not in conflict in §4(B)(4)(b) of IP 426. The Chief Justice of the Supreme Court will designate the retired Judges and Justices "who are able and willing to serve on the Panel." However, the "selected by random drawing" provision may never come into play. For instance, if only two retired Judges or Justices are able and willing to serve, then §4(B)(4)(b) requires the Chief Justice to "appoint a retired Oklahoma Federal District Court Judge who accepts such appointment." In that situation there would be no random drawing. It is clearly not inaccurate to say the Chief Justice designates these retired Judges and Justices. In fact, the language suggested by the Petitioners would be inaccurate. Their suggested language makes no mention of the Chief Justice's role in the selection process and leaves the potential signatory to believe all Panel members will be randomly selected. That is clearly not the case. In *In re Initiative Petition No. 420, State Question No. 804*, we held "[a]lthough the selection process need not be detailed, a simple statement concerning the selection and composition of the Commission is critical here to inform a potential signatory of the true nature of the petition." 2020 OK 10, ¶7. We find the Respondents sufficiently addressed those concerns in IP 426.

B. The information in the gist statement concerning the vote for approving a redistricting plan is sufficient.

¶13 Section 4(E)(1) of IP 426 concerns the vote count for approval of a redistricting plan. It provides:

> 1. Approval or Rejection of Plans. Each Commissioner has one vote. An affirmative vote of at least six (6) of the nine (9) Commissioners is required to approve a Plan, including at least one (1) Commissioner affiliated with each of the two (2) largest political parties in the state and one (1) Commissioner who is unaffiliated with either of the two largest political parties in the state.

If the Commission cannot approve a State House of Representative, Senatorial, or Federal Congressional redistricting plan within one hundred and twenty (120) days of the release of the Federal Decennial Census Data, then a "Fallback Mechanism" takes effect wherein the Oklahoma Supreme Court shall approve a plan consistent with the process and criteria set out in IP 426. §4(F) of IP 426. The Petitioners assert the gist does not reveal that "[t]he Commission can approve a redistricting plan only if (a) six of the nine commissioners approve, and (b) at least one Commissioner from each of the three Groups (Largest Party, Second Largest Party, and Unaffiliated) approves." Petitioners' Brief at 9. They speculate that the Oklahoma Supreme Court will be more involved in the redistricting process due to the vote count being more than a majority vote and voters deserve to know in the gist that the Commission cannot approve a redistricting plan with a simple majority vote, which they surmise, would ordinarily be the case.

¶14 In *In re Initiative Petition No. 420, State Question No. 804*, several Justices had concerns that merely stating the new Article would "create[] a fallback mechanism" in the gist, without more, was insufficient to explain the Court's role in the proposed redistricting process. 2020 OK 10, ¶3 (Winchester J., concurring). The Respondents heeded these concerns when drafting the gist of IP 426 which now states, in relevant part, "[t]he Article creates a fallback mechanism by which the state Supreme Court, using a report from the Special Master, will select a plan if the Commission cannot reach the **required level of consensus** within a set timeframe." (emphasis added).

¶15 In addressing challenges to omissions in a gist statement, "[t]he sole question . . . is whether *the absence of a more detailed gist statement* . . . without more, perpetuates a fraud on the signatories." *In re Initiative Petition No. 363, State Question No. 672*, 1996 OK 122, ¶19, 927 P.2d 558. *"The measure's gist is not required to contain every regulatory detail so long as its outline is not incorrect." Id.*, ¶20. Title 34 O.S. 2011, § 3, only requires the gist to be a "simple statement" and we have held it should inform a signer of what the measure is **generally** intended to do. *Id.* The gist statement should also be "free from the taint of misleading terms or deceitful language." *Id.* The Petitioners assert it is critical to add to the gist statement the detailed voting requirements in order to inform the potential signatory of the true nature of the petition, *i.e.*, the high likelihood the Supreme Court will be called upon to adopt the redistricting plan based upon these "super majority" voting requirements. Petitioners' Brief at 10. Whether or not this Court will be required to adopt a redistricting plan is mere specula-

tion at this stage. This Court has previously declined to engage in speculation in our consideration of the validity of a gist. *In re Initiative Petition No. 409, State Question No. 785,* 2016 OK 51, ¶6 n.15, 376 P.3d 250; *In re Initiative Petition No. 358, State Question No. 658*, 1994 OK 27, ¶12, 870 P.2d 782. IP 426's gist statement clearly states this Court will select a plan if the Commission cannot reach the "required level of consensus" within a set timeframe. This statement is not misleading and informs the potential signatory in a simple statement that a certain "level of consensus" will be required by the Commission to vote on a redistricting plan, *i.e.*, a vote that might not be composed of a mere majority of the commissioners. Therefore, as to this matter, we do not find the absence of more detail in this already very lengthy gist statement perpetuates a fraud on the potential signatories.

C. The gist statement's short mention of redistricting criteria is sufficient.

¶16 Section 4(D)(1)(c) of IP 426 provides:

> c. The Commission shall also seek to maximize compliance with each of the following criteria, set forth in the following order of priority:
>
> i. Communities of Interest. Districts shall minimize the division of communities of interest to the extent practicable. A Community of Interest is defined as an area with recognized similarities of interests, including but not limited to racial, ethnic, economic, social, cultural, geographic, tribal, linguistic, or historic identities. Communities of interest shall not include common relationships with political parties, officeholders, or political candidates.
>
> ii. Racial and Ethnic Fairness. No redistricting Plan should be drawn to have the effect of denying or abridging the equal opportunity of racial or ethnic minority groups to participate in the political process or to diminish their ability to elect representatives of their choice, whether alone or in coalition with others.
>
> iii. Political Fairness. No Plan should, when considered on a statewide basis, unduly favor or disfavor a political party. Undue favor to a political party shall be determined using the proposed map, data from the last ten years of statewide elections, and the best available statistical methods on identifying inequality of opportunity to elect.
>
> iv. Districts shall respect the geographic integrity of political subdivision boundaries to the extent preceding criteria have been satisfied.
>
> v. Compactness. A draft Plan should be compact to the extent preceding criteria have been satisfied.

The gist statement mentions all these criteria. It provides:

> In creating the plans, the Commission must comply with federal law, population equality, and contiguity requirements, and must seek to maximize respect for **communities of interest, racial and ethnic fairness, political fairness, respect for political subdivision boundaries, and compactness** (in order of priority), without considering the residence of any legislator or candidate or a population's political affiliation or voting history except as necessary for the above criteria. (emphasis added).

¶17 The Petitioners single-out one of these criteria, "political fairness," and ask this Court to find the gist insufficient because the mere mention of political fairness in their view, without more explanation, does not inform a potential signatory of what the measure is generally intended to do. Petitioners' Brief at 14. They assert, political fairness has been found to have many meanings by the United States Supreme Court and some mention in the gist is needed to determine what type of political fairness the petition would implement. In *Rucho v. Common Cause*, voters in North Carolina and Maryland challenged their States' congressional districting maps as being unconstitutional partisan gerrymandering. 139 S.Ct 2484 (2019). The Court determined that "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation" *i.e.*, reapportioning district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be. *Id.* at 2499. However, "[f]airness may mean a greater number of competitive districts" which seek "to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates." *Id.* at 2500. The Court noted "[d]eciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not

legal." *Id.* Any decision on what is fair in this context would be an "'unmoored determination' of the sort characteristic of a political question beyond the competence of the federal courts." *Id.* (citation omitted).

¶18 As the Supreme Court determined, there are many visions of what fairness means in an apportionment context. IP 426's definition of political fairness provides that no plan should unduly favor or disfavor a political party and this will be determined using the proposed map, data taken from the last ten years of statewide elections, and best available statistical methods on identifying inequality of opportunity to elect. Petitioners acknowledge the definition of political fairness in the petition relies upon the term "undue favor" which is defined as the "inequality of opportunity to elect." Petitioners' Brief at 12-13. However, they argue that even this language is not in the gist. Although, the Supreme Court found federal courts were not appropriate for interpreting such fairness issues, the Commission here is the appropriate body to make such interpretations. Respondents contend the definition leaves a certain amount of leeway for the Commission to interpret in order to implement its provisions.

¶19 The gist needs to inform a potential signatory in a simple statement of the measure's true nature. *In re Initiative Petition No. 420, State Question No. 804*, 2020 OK 10, ¶7. The gist states its purpose is to prevent political gerrymandering and, as mentioned, presents details on the subjects this Court was concerned about in *In re Initiative Petition No. 420, State Question No. 804*. The gist provides that in creating the redistricting plans certain criteria will be used. Political fairness is only one of the many criteria mentioned in the gist and body of the petition. The gist puts a potential signatory on notice that the Commission will seek to maximize political fairness as well as the other criteria. The details on this criterion are found in the petition. A detailed description of this one criterion is not necessary to be placed in the gist. In *In re Initiative Petition No. 384*, we held a gist was insufficient. 2007 OK 47, ¶3, 164 P.3d 125. In our analysis, we noted the proponents had "cut and paste[d]" into the gist the definition of "classroom instructional expenditures" in "mind-numbing detail" but did not do this for other definitions. *Id.*, ¶12. This we found "resulted in a gist that, at once, contains too much and not enough information." *Id.* We noted, "[i]t may not be necessary to define either "classroom instructional expenditures" or "operational expenditures" with the same kind of detail used by the Proponents in this gist, but the inclusion of one overly detailed definition without any definition of the other term creates an imbalance at odds with the purpose of the gist." *Id.*, ¶12 n.4.

¶20 We hold, this very lengthy gist provides sufficient information and addressed our concerns in *In re Initiative Petition No. 420, State Question No. 804*. Including the details of only one of the redistricting criteria without others creates the same problems this Court recognized in *In re Initiative Petition No. 384*. The Petitioners would require too much of the gist of this initiative petition. *See In re Initiative Petition No. 362 State Question 669*, 1995 OK 77, ¶10, 899 P.2d 1145.[4] The time period for filing an application for rehearing is hereby shortened to five business days from the date on which this opinion is filed. *See* Okla.Sup.Ct.R. 1.13.

THE GIST OF INITIATIVE PETITION NO. 426, STATE QUESTION NO. 810 IS LEGALLY SUFFICIENT

¶21 Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Combs, Kane, Rowe, JJ., and Reif, S.J., concur.

¶22 Colbert, J., recused.

COMBS, J.:

1. "Any citizen can protest the sufficiency and legality of an initiative petition." *In re Initiative Petition No. 409, State Question No. 785*, 2016 OK 51, ¶2, 376 P.3d 250 (quoting *In re Initiative Petition 384*, 2007 OK 48, ¶2, 164 P.3d 125).

2. Indeed it must be short as a practical matter because each signature sheet wherein the gist must be placed will also contain twenty numbered lines for signatures. Title 34 O.S. Supp. 2015, §2.

3. The provisions of §4(B)(4)(b) are the same in both IP 420 and IP 426.

4. Therein, we held:

> Some Protestants complain that the gist of the proposition fails to adequately explain the proposition. These Protestants contend that the gist of the proposition fails to explain the extent of the changes that would actually be made. Protestants would require too much of the gist of an initiative petition. The gist of a proposition, which is required by law to appear at the top of each signature page, need only contain "a simple statement of the gist of the proposition." 34 O.S. Supp. 1992 § 3. The gist need not satisfy the more extensive requirements for ballot titles contained in 34 O.S. Supp. 1994 § 9. *In re Initiative Petition No. 347, State Question No. 639*, 813 P.2d 1019, 1026 (Okla. 1991); *In re Initiative Petition No. 341, State Question No. 627*, 796 P.2d 267, 274 (Okla. 1990). The gist of a proposition must be short. As it must appear at the beginning of every page of the petition, it can contain no more than a shorthand explanation of a proposition's terms. This Initiative's gist explained that the proposition would limit annual increases in property taxes, establish a vote of the people to increase them, and define procedures for increasing them. This was sufficient. The statement of the Initiative's gist satisfies 34 O.S. Supp. 1992 § 3.

2020 OK 45

IN RE: STATE QUESTION NO. 805, INITIATIVE PETITION NO. 421. THEODIS MANNING and GENE RAINBOLT, Petitioners/Proponents, v. MICHAEL ROGERS, OKLAHOMA SECRETARY OF STATE, in his Official Capacity, Respondent.

Case Number: 118,774. May 26, 2020

ORDER

¶1 Original jurisdiction is assumed. *Fent v. Contingency Review Bd.*, 2007 OK 27, ¶11, 163 P.3d 512 (the Court may assume jurisdiction in a *publici juris* controversy where there is an urgency and need for a judicial determination). The extraordinary relief sought by Proponents of Initiative Petition 421, State Question 805 is granted.

¶2 Okla. Const. Art. 5, § 2 provides that the first power reserved by the people is the initiative. Respondent's integral role and non-discretionary duties with respect to the initiative process are plainly set forth in the Constitution. Under Okla. Const. Art. 5, § 3, initiative petitions "shall be filed with the Secretary of State." *See also* Okla. Const. Art. 5, § 4. When initiative petitions submitting a proposed measure to the people for their ratification or rejection are offered to the Secretary of State for filing, "it is his duty to file same." *Threadgill v. Cross*, 1910 OK 165, ¶5, 109 P. 558, *distinguished on other grounds by In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, 838 P.2d 1 (noting there is no controversy about the nature of this duty and there can be none).

¶3 Pursuant to 34 O.S. Supp. 2015, § 8(G), proponents of a referendum or initiative petition may terminate the circulation period any time during said period by certifying to the Secretary of State (1) the petitions have been filed with the Secretary of State, (2) no petitions are in circulation, and (3) proponents will not circulate any more petitions. Proponents have tendered for filing the signed petitions in the instant cause. Therefore, pursuant to the text of the statute, Respondent "shall begin the counting process." *Id.*

¶4 While the signature-gathering deadline was temporarily halted, or tolled, by Respondent on March 18, 2020, with the approval of the Governor under the latter's emergency powers pursuant to the statewide COVID-19 emergency, this does not alter Proponent's statutory rights under 34 O.S. Supp. 2015, § 8(G). The circulation period began, but it has not ended, and thus we are still within the circulation period. *In re Initiative Petition No. 397, State Question No. 767*, 2014 OK 23, ¶9, 326 P.3d 496 (goal of statutory construction is to ascertain legislative intent from a plain and ordinary reading of the statute).

¶5 The Court notes Respondent has expressed concerns that commencing the signature-counting process amid the COVID-19 Pandemic and current state of emergency will present practical difficulties. There is also the foremost desire and duty to protect the safety and welfare of all of those involved in the process. In this regard, beginning in mid-March, the Governor issued Executive Orders authorizing state agencies to make necessary emergency acquisitions to fulfill the purpose of the emergency declaration, and requiring the promulgation of emergency rules necessary to respond to the emergency.

¶6 Based on the materials provided, the Court finds Respondent has not established the signature-counting process cannot be performed in an efficient manner, while also taking the necessary safety precautions for those involved. The Court is not convinced Respondent would be unable to procure the tools to carry out the signature-counting process. To this end, the Court notes Proponents have of-fered to secure a suitable facility (where social distancing guidelines are more capable of being observed) at their own expense. The duties imposed upon the Secretary of State regarding the initiative and referendum is ministerial, and is mandatory. *Norris v. Cross*,1909 OK 316, syll., 105 P. 1000.

¶7 Accordingly, a Writ of Mandamus is hereby issued directing the Respondent to accept for filing the signed petitions for Initiative Petition 421, State Question 805, within ten (10) calendar days of this Order, and to thereafter begin and complete the signature-counting process expeditiously.

¶8 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 26TH DAY OF MAY, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

Kane and Rowe, JJ., dissent;

Winchester, J., not voting;

Colbert, J., not participating.

2020 OK 46

RE: Revocation of Credentials of Registered Courtroom Interpreters

SCAD-2020-47. June 1, 2020

ORDER

On March 1, 2020, this Court suspended the certificates of several Registered Courtroom Interpreters for failure to comply with the continuing education requirements for calendar year 2019 and/or with the annual certificate renewal requirements for 2020. *See* 2020 OK 15 (SCAD 2020-18).

Pursuant to the Executive Order 2020-07 (as amended), the Chief Justice, authorized that all interpreters, whose licenses were suspended on March 1, 2020, for failure to comply with the renewal requirements for 2020 be given until **May 15, 2020** to comply.

The Oklahoma Board of Examiners of Certified Courtroom Interpreters has advised that the interpreters listed below continue to be delinquent in complying with the continuing education and/or annual certificate renewal requirements, and the Board has recommended to the Supreme Court, the revocation of the credential of each of these interpreters, effective May 15, 2020, pursuant to 20 O.S., Chapter 23, App. II, Rules 18 and 20.

IT IS THEREFORE ORDERED that the credential of each of the Registered Courtroom Interpreters named below is hereby revoked effective May 15, 2020.

Alejo Benito
Luis Licona
Edna Cervantes
Angelica Lopez-Drain
Esperanza Darling
Consuelo Reynoso
Elizabeth Esquivel
Cynthia Santiesteban

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

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR

2020 OK 47

RE: Revocation of Certificates of Certified Shorthand Reporters

SCAD-2020-48. June 1, 2020

ORDER

On March 1, 2020, this Court suspended the certificates of several Certified Shorthand Reporters for failure to comply with the continuing education requirements for calendar year 2019 and/or with the annual certificate renewal requirements for 2020. See 2020 OK 16 (SCAD 2020-19).

Pursuant to the Executive Order 2020-07 (as amended), the Chief Justice, authorized that all court reporters, whose licenses were suspended on March 1, 2020, for failure to comply with the renewal requirements for 2020 be given until **May 15, 2020** to comply.

The Oklahoma Board of Examiners of Certified Shorthand Reporters has advised that the court reporters listed below continue to be delinquent in complying with the continuing education and/or annual certificate renewal requirements, and the Board has recommended to the Supreme Court, the revocation of the certificate of each of these court reporters, effective May 15, 2020, pursuant to 20 O.S., Chapter 20, App. I, Rules 20(c) and 23(d).

IT IS THEREFORE ORDERED that the credential of each of the Certified Shorthand Reporters named below is hereby revoked effective May 15, 2020.

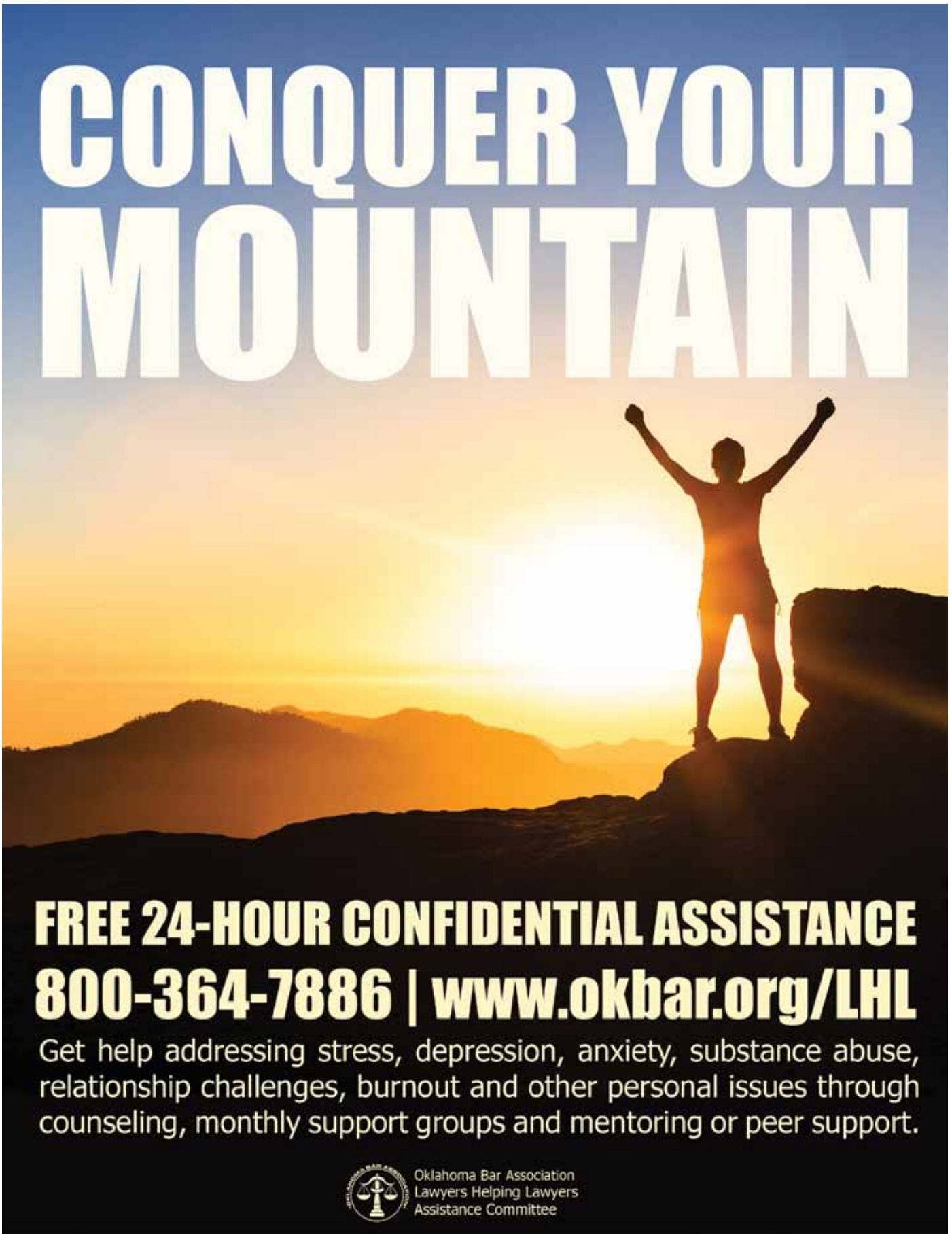
Shawna Austin
Tessa Neighbors
Molly Cook
David Parsons
Missy Craig
Debra Soukup
Rita Hejny
Kimberly Wilson Kaufman

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

/s/ Noma D. Gurich
CHIEF JUSTICE

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

Rowe, J., not voting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Applicants for July 2020 Oklahoma Bar Exam

The Oklahoma Rules of Professional Conduct impose on each member of the bar the duty to aid in guarding against the admission of candidates unfit or unqualified because of deficiency in either moral character or education. To aid in that duty, the following is a list of applicants for the bar examination to be given July 28-29, 2020.

The Board of Bar Examiners requests that members examine this list and bring to the board's attention in a signed letter any information which might influence the board in considering the moral character and fitness to practice of any applicant for admission. Send correspondence to Cheryl Beatty, Administrative Director, Oklahoma Board of Bar Examiners, P.O. Box 53036, Oklahoma City, OK 73152.

EDMOND

Andrea Adum
Kaitlin Nicole Allen
Mitchel Phillip Allen
Matthew Scot Andrus
Talor Michelle Black
William Scott Blocker
Norma Gabriela Cossio
Rebecca Elizabeth Davis
Dale Hance Dilbeck III
Hannah Marie Fields
Britton Lindsey Hobbs
Andra Quinn Holder
Katelyn Darr Kirk
Riley William Lissuzzo
Haley Jo Maynard
Elke Chantal Meeus
Ashton Bailey Poarch
Madeline Elaine Sawyer
Sajida Shahjahan
Tiffani Jordan Shipman
Marjon Jacqueline Creel Stephens
Matthew Taylor Wellman

NORMAN

Caleb Josiah Anthony
Guy Stuart Barker
Jacob Parker Black
Ryan Daniel Brown
Joshua Itzaeh Castro
Allison Brooke Christian
Andrew Jonathan Chwick
Joshua Henry Cole
Sawmon Yousefzadeh Davani
Brennan Allen Davis
Travis Kale Dennis
Rachel Ellen Diggs
Evan James Edler
Alyssa Lea Erwin
Taylor Jordan Freeman Peshehonoff
Kchristopher Bonard Griffin
Wade Kendricks Hairrell
Matthew Arthur Hall
Garet Lee Holland
Alisha Rene Hounslow
Joshua Robert Jacobson
Mandy Marie James
Natalie Marie Jester
Jourdan Lenard Johnson
Andrew Alexander Kirby
Amos Teah Kofa
Maeve Patricia Lindsey
Elizabeth Anne Low
Justin Mitchell Mai
Nicholas Andrew Marr
Matthew Thomas Nieman
Jesse Steven Ogle
Opeoluwa Bolanle Omololu-Adegbuyi
Thomas Justin Pfeil
Anthony Lewellyn Purinton
Mary Nahz Rahimi
Jonathan Lloyd Rogers
Laurie Lea Schweinle
Grant Patrick Scowden
Steven Blake Smith
Eric Lee Strocen
Justin Evan Tharp
Veronica Jane Threadgill
Grayson Powell Walker
Joseph D Weiss
Mitchell William Wells
Fox Yitzchak Simon Peter Whitworth
Alexander Philip Wilkison

OKLAHOMA CITY

Kelsey Alison Baldwin
Ameen Y. Behbahani
Nicholas Anthony Bonfiglio
Brittany Gayle Brignac
Gunner Zaine Cy Briscoe
Ann Michelle Butler
Britney Maria Carattini
Victoria Anna Carrasco
Zachary Alexander Carson
Aleena Navid Chaudry

Madeline Grace Craig
Alauna Faith Crawford
Evan James Crumpley
Justin Lee Franklin Cullen
Shannon Jeane Desherow
Ryan Leigh Dobbs
Madison Marie Doughty
Ana Deisy Escalera
Michael Martin Flesher
Elizabeth Grace Fudge
Thomas Lee Grossnicklaus
Whitney Elizabeth Guild
Austin Levi Hamm
Andrew Scott Hiller
Jordan Ann Howell
Eric Andrew Hughes
Clarence Joe Hutchison
William Olson Jewell
Karson Joseph Katz
Courtney Danae Keeling
Bryan Edward King
Jared Alan King
Brandon Edward Koelzer
Robert Baxter Lewallen
Lisa Leigh Lopez
Madalynn McCall Martin
Beatrize Martinez
William Morgan Maxey
Mary Irene McMahan
Armando Gabriel Melendez
Noelle Cherie Moorad
Isaac Keith Morris
Nina Desiree Mottwiler
Hunter Christian Musser
Leilah Kathryn-Rose Naifeh
Amy Michelle Oliver
Daniel Randolph Ashby Page
Jade Montana Pebworth
Jacquelyne Karie Phelps
Carmany Jin-Joo Phillips
James Ryan Reynolds
Brissa Rodriguez Rosa
Elizabeth Vail Salomone
Dillan Mark Savage
Matthew Curtis Shelton
Heather Suzanne Sizemore
Anam Sohail
Anastacia Rachelle Speed
Jackson Dalton Stallings
Shelby Jo Stansberry
Mylin Alexander Stripling
Alan Michael Taylor
Taylor Elizabeth Thompson
John Wilson Toal
Madeline Mary Vasquez
William Andrew Calloway Wilcoxen
Robert Austin Williams
Kendra Michelle Wills
Victoria Rose Wilson
Lauren Suzanne Winslow

TULSA

Alex Abraham Alabbasi
Leland Dwayne Ashley Jr.
Lindsey Marie Atchley
Maurits Gerardus Boon Van Ostade
Baylor Cole Boone
Bria Renee Brehm
Zander Bartholomew Chonka
Robert James Clougherty III
Arianna Leigh Cole
Diana Elena Cupps
James Linden Curtis
Eric A DiGiacomo
Chelsea Lee Fiedler
Kaitlin Iris Forest
Benjamin Newcomb Frizzell
James Tanner Frye
Joshua Scott Gage
Blake Howard Gerow
Caitlin Alicia Getchell
Jonathan Chase Gordon
Abby Jennifer Donnie Gore
Kelsey Marie Harrison
Elijah Jed Johnson
Kaia Kathleen Kaasen Kennedy
Jakob Ryan Lancaster
Victoria Sue LeftHand
Ian Patrick Leitch
Mitchell Edward Lovett
Hannah Weidner Lunsford
Colleen Lilah McCarty
Mitchel Kevin McIlwain
Paige Catherine Miller
Jennifer Leigh Mills
Sofia Miranda
Margaret Louise Munkholm
Michael Speight Olson
Gena Simone Pollack
Pierre DeAnte Robertson
Rhylee D'shea Sanford
Anna Mckenna Sanger
Timothy John Schaefer
Casey Dean Strong
John Harold Trentman
Emily Rebekah Turner
Nikky Lychia Xiongxtoyed
Stephen Eric Yoder II
Danielle Paige Young

OTHER OKLAHOMA CITIES AND TOWNS

Hollie Dannette Alexander Ochelata
Rayna Marie Alexander, Prague
Aston McNeill Armstrong, Vian
Hayley Lynn Arthur, Yukon
Carolina Maria Attaway Guthrie
Kaylind Nichole Baker, Owasso
Brennan Thomas Barger, Purcell
Samuel David Barlass, Adair
Logan Phillips Blackmore, Bixby
Cassandra Michelle Bosch Broken Arrow
Tanner Brett Boyd, Weatherford
Krystal Brooke Browning Duncan
Caitlin Grace Campbell, Durant
Timothy Williams Carignan Purcell
Jonathan David Casey Claremore
MaryJoy Esclanda Chuba Broken Arrow
Shelby Elizabeth Clark, Moore
Akayna Marie Cobbs, Bethany
Shannon Cecilia Conner Arcadia
Makayla Shane Coppedge Shawnee
Jessica Dawn Cox, Choctaw
Meagan Cherise Crockett-Edsall, Piedmont
Kirstine Leigh Currier, Ardmore
Ryan Glen Curry, Collinsville
Alan Bruce Davidofsky, Yukon
Brian James Deer, Stillwater

Charlie Cheyenne DeWitt, Atoka
Jessica Lee Dice, Madill
Courtney Nicole Driskell Owasso
Levon Danner Eudaley, Bethany
Stacy Nichole Fuller, Owasso
Heath William Garwood Broken Arrow
Tyler Allen Gilmore Broken Arrow
Chase William Gooch, Moore
Kelli Jane Goodnight, Moore
Marci Jean Gracey, Purcell
Chase Addison Grant, Moore
Miranda Lea Harris, The Village
Abigael Jonette Hood, Guthrie
Markayla Belle Hornung Broken Arrow
Ridge Cooper Howell Council Hill
Whitney Nicole Humphrey Owasso
Matthew William Irby, Purcell
Emily Nicole Isbill, Bethany
Nekanapeshe Peta James Wagoner
Jarred Lucas Jennings Broken Arrow
Sarah Elizabeth Johnson, Rose
Jesse Conner Kovacs, Owasso
Reese Dalton Larmer Ponca City
Lena Anastasia Mahoney Broken Arrow
Angel Nicole Marchese, Lawton
Melissa Pierre Martin, Yukon
Daryan Paige Martinez Midwest City
Kendall Lynn McCoy, Park Hill
Andrew Collier Mihelich Collinsville
Jaron Tyler Moore, Pauls Valley
Colleen Mary Morris, Owasso
Amber Mequel Morton Fort Gibson
Phelicia Ann Morton, Okmulgee
Justin Benjamin Neal, Choctaw
Ledger Wade Newman Broken Bow
Cole Patrick Nimmo, Ponca City
Seth Ward Paxton, Moore
Tara Morgan Penick, Yukon
Nocona Louise Pewewardy Lawton
Sarah Elizabeth Ramsey, Yukon
Eric Dale Ranney, Piedmont
Cody Austin Reihs, Piedmont
Brandon Lee Rogers, Glenpool
Robert Earl Rozell, Chandler
Magdalena Anna Rucka, Yukon
Patricia Ann Scott, Jones
Lyndi Jan Steverson, Tuttle
Emilee Ann Stinemetz, Moore
Melanie Rachel Stratemeier The Village
Gabriel Merritt Sweat, Cache
Olivia Kay Terry, Broken Arrow
Melissa Dawn Thompson-Terrel Yukon
Gregory Louis Van Ness, Yukon
CyRinda Rachelle Wadley Washington
John Wessley Watson Claremore
Houston Dillard Wells, Catoosa
Sierra Lauren White, Woodward
Allyson Leigh Wilcox, Duncan
Clair Dawn Wood, Bartlesville

OUT OF STATE

Ashtyn Taelor Anders Arlington, TX
James Edward Blaise Tomball, TX
Jaycee McKenzie Booth Amarillo, TX
Hester Anne Brown, Dallas, TX
Joseph Tali Byrd Albuquerque, NM
Jared Levi Cannon Dunnellon, FL
Ashley Nicole Cash Granbury, TX
Kasey Kyle Fagin, Fairview, TX
Timothy Leo Finkenbinder Kissimmee, FL
Tali Gires, Los Angeles, CA
Thomas Patrick Goresen Jr. Austin, TX
Sarah Rebecca Herrera Kansas City, MO
Joshua David Huckleberry Paradise Valley, AZ
Joy Elizabeth Jackson Cave Springs, AR
Harriet Day Blackwell Jett Atlanta, GA
Chase Logan Johnson Denver, CO
Vivek Anand Kembaiyan Philadelphia, PA
Kyle Joseph Kertz, Dallas, TX
Jaleesa Cira Komolafe, Tyler, TX
Michelle Kruse, Rowlett, TX
Dakota Gibb Lamb, Liberal, KS
Ryan Alexander Less Grosse Ile, MI
Garrett Dwayne Lessman Boston, MA
Ryan Kyle Loewenstern Amarillo, TX
Kaitlin Ann Logan Wimmer Omaha, NE
Victor Gabriel Martin Fayetteville, AR
Jason Elliot Mewhirter Topeka, KS
Rachel Brooke Morefield Austin, TX
Darrell Paul Mori, Plano, TX
Mark David Myers Coronado, CA
Jared Henry Needham Fort Smith, AR
Doreen Ameku Nelson Humble, TX
Anissa Elaine Paredes St. Louis, MO
Cassandra Lafaye Romar Beaumont, TX
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Justin Wayne Stevenson McKinney, TX
Duy Khuong Tran, Allen, TX
Nicole Monet Vafeades Los Angeles, CA
Laura Mason Waddill Richardson, TX
Matthew Travis Williams Midland, TX

2020 OK CR 5

STANLEY VERNON MAJORS, Appellant, v. THE STATE OF OKLAHOMA, Appellee

No. F-2018-230. May 21, 2020

ORDER DENYING REQUEST TO ABATE APPEAL AND REMANDING CAUSE FOR FURTHER PROCEEDINGS

¶1 On May 18, 2018, Appellant Majors, by and through counsel, filed a Petition in Error appealing his conviction in Tulsa County District Court Case No. CF-2016-4516. Majors was found guilty by a jury of Count 1, Murder in the First Degree; Count 2, Possession of a Firearm after Felony Conviction; Count 3, Malicious Intimidation/Harassment; and Count 4, Threatening an Act of Violence. The District Court of Tulsa County, the Honorable Sharon Holmes, District Judge, sentenced Majors to consecutive terms of life imprisonment without the possibility of parole for Count 1; ten (10) years imprisonment for Count 2; one (1) year in jail for Count 3; and six (6) months in jail for Count 4. Majors' Brief-in-Chief, under a final extension of time, was due for filing no later than October 16, 2018.

¶2 On October 1, 2018, counsel for Majors, Richard Couch, Assistant Public Defender, filed a "Motion to Abate [Appeal] Due to Death of Appellant" in the above-referenced matter. Counsel alleged that Majors died on September 12, 2018, while an inmate at the Oklahoma State Penitentiary. Attached to the abatement motion was an affidavit from counsel indicating that he was advised of Majors' death on September 27, 2018, by the Oklahoma Attorney General's office. Counsel's motion seeks abatement of Majors' appeal.

¶3 On October 17, 2018, this Court issued an order directing a response. The parties were to address current Oklahoma practice, law and procedure governing abatement, as well as the procedures currently utilized by other jurisdictions. The parties were also instructed to address the following questions:

1. Upon the death of a defendant should the Court proceed with the appeal and render a final opinion addressing the merits of the appeal?
2. If the Court does abate the appeal, should the abatement be limited to the appellate proceeding, or should the underlying conviction be abated as well?

Briefs were subsequently filed with this Court. Majors' motion to abate appeal is **DENIED**.

¶4 It has long been the practice of this Court that when an appellant died pending the determination of an appeal, the appeal and the underlying conviction were abated. This is referred to as abatement *ab initio*. The cause was remanded to the trial court with directions to abate the underlying judgment and sentence and to enter an order documenting that the appeal had been dismissed. *See Oklahoma v. Felts*, 1937 OK CR 181, 74 P.2d 125; *Nott v. State*, 1950 OK CR 63, 218 P.2d 389; *Wilson v. State,* 1947 OK CR 98, 184 P.2d 634. Oklahoma's current use of abatement *ab initio* mirrors the procedure adopted by nearly all federal courts.[1] *Durham v. United States,* 401 U.S. 481 (1971).[2] Since Oklahoma confers a right of appeal via statute, a criminal conviction is not final until the conclusion of the direct appeal. *Benham v. Plotner,* 1990 OK 64, ¶ 5, 795 P.2d 510, 512.

¶5 While the majority of States abate appeals *ab initio*, some States abate only the pending appeal, leaving the underlying conviction intact. Other States allow the appeal to proceed, each according to its individual rules, practices and procedures. Alabama requires a deceased appellant's pending appeal to be dismissed. The trial court is then ordered to enter a notation in the trial court record acknowledging that while the conviction removed the defendant's presumption of innocence, the conviction was neither affirmed nor reversed because the defendant died while the appeal was pending.[3] Colorado abates the entire case *ab initio* unless the underlying conviction was the result of a guilty plea.[4] Several jurisdictions allow either the State or a personal representative to file a motion to substitute the personal representative as the appellant, allowing the appeal to continue, generally when a miscarriage of justice is alleged.[5] Of these States, Alaska, Maryland, and Washington dismiss the appeal but not the underlying conviction if no motion for substitution is timely filed.

¶6 Various approaches are taken by the remaining States. Some abate appeals based upon procedures promulgated by court rules;[6] others resolve abatement issues based upon the nature of the claimed error presented on appeal.[7] North Dakota has only addressed abatement in a post-conviction proceeding, allowing the underlying conviction to remain intact.[8] New York has abated appeals and underlying convictions *ab initio* in some instances and abated only the pending appeal in others.[9] At least two States have no published opinions on the issue of abatement.[10] In short, abatement procedures vary widely among the fifty States.

¶7 Oklahoma has no statutory or constitutional provision defining a course of action to be taken when a defendant dies pending resolution of a direct appeal in a criminal matter. After reviewing the briefs of the parties and the various procedures and approaches taken by the individual States in addressing the abatement issue, this Court will no longer abate appeals *ab initio*.

¶8 We adopt the following abatement procedure. Upon the filing of a motion to abate a pending appeal, this Court will issue an order allowing the personal representative of the deceased appellant's estate thirty (30) days in which to petition this Court to proceed with and finalize the pending appeal. The petition must establish a showing of good cause as to why the appeal should not be dismissed. Notice shall be provided to all counsel of record. If this Court determines good cause has been shown by the petitioning party, the appeal will proceed to its conclusion. If this Court rejects the personal representative's petition challenging dismissal of the appeal, or if no petition is filed within the thirty (30) day time limitation, the appeal will be dismissed.

¶9 Upon dismissal of the appeal, the trial court shall make note in the district court file that the defendant's conviction removed his presumption of innocence. The notation shall further state that the defendant's conviction was appealed, but was neither affirmed nor reversed because the defendant died while the matter was pending. The defendant's underlying conviction will no longer be dismissed based solely upon his or her death.[11]

¶10 **IT IS THEREFORE THE ORDER OF THIS COURT** that proceedings in the above-styled and numbered appeal do not **ABATE**. **NOTICE** is hereby given to the personal representative of the estate of **STANLEY VERNON MAJORS**, Appellant in Oklahoma Court of Criminal Appeals Case No. F-2018-230, styled *Stanley Vernon Majors v. The State of Oklahoma*, allowing the personal representative thirty (30) days from the date of this order to file a petition in this Court showing good cause why Majors' pending appeal should not be dismissed. If no petition seeking continuation of the appeal is filed within thirty (30) days of the date of this order, the pending appeal shall be dismissed.

¶11 The Clerk of this Court is directed to transmit a copy of this Order to the Court Clerk of Tulsa County; the District Court of Tulsa County, the Honorable Sharon Holmes, District Judge; all counsel of record, and the personal representative of Stanley Vernon Majors.

¶12 **IT IS SO ORDERED**.

¶13 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 21st day of May, 2020.

/s/ DAVID B. LEWIS,
Presiding Judge

/s/ DANA KUEHN,
Vice Presiding Judge

/s/ GARY L. LUMPKIN, Judge

/s/ ROBERT L. HUDSON, Judge

/s/ SCOTT ROWLAND, Judge

ATTEST:
John D. Hadden
Clerk

HUDSON, J., SPECIALLY CONCURS

¶1 I specially concur with today's ruling denying the motion of defense counsel to abate the present appeal. Today's decision marks a long-overdue change in our jurisprudence, one in which the revisionist history of the past is rejected. We have for many years employed a policy of abatement *ab initio* to dismiss both the pending appeals *and* convictions of appellants who died prior to our resolution of his or her direct appeal. Our previous approach treated the trial proceedings leading to a conviction, like the verdict itself, as inconsequential events that could be expunged as though they never happened. *Cf. United States v. Estate of Parsons*, 367 F.3d 409, 413 (5th Cir. 2004) (en banc) (under the doctrine of abatement *ab initio*, "the appeal does not just disappear, and the case is

not merely dismissed. Instead, everything associated with the case is extinguished, leaving the defendant 'as if he had never been indicted or convicted.'"). This despite the significant investment of scarce judicial resources leading to the trial verdicts, not to mention the ordeal for all involved with the trial process itself – most notably crime victims, the jurors and the defendant's family who are unwitting participants in this process.

¶2 That approach was wrong. The proceedings below, like the convictions and sentences imposed, were real. The Dissent agrees the doctrine of abatement *ab initio* should be modified but disagrees with our decision to allow a personal representative to petition this Court to continue with the appellant's appeal. The Dissent urges that continuance of the appeal is outside the scope of our duties as an appellate court. But if the dispensation of justice in a criminal case is not part of our duties, what is?

¶3 An appellant's family should have the opportunity to carry out a convicted relative's quest for exoneration by continuing with a pending direct appeal. It will no doubt be a rare occasion when a family takes the time, trouble and expense of petitioning this Court through a personal representative to continue with a direct appeal. But this is about more than just wrongful death lawsuits and money judgments in civil court. Rather, this is about a family's right to at least attempt restoration of the good name, reputation and standing in the community of their dead relative. Such actions are appropriate when the appellant's family resolutely believes an injustice has occurred. Even if it is as "rare as hen's teeth" for a family to avail itself of this right, they should have that opportunity as these considerations may far outlive the appellant and have a lasting effect on the appellant's family and community.

¶4 The Oklahoma Constitution recognizes "[t]he courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice." Okla. Const. art. 2, § 6. Today's decision falls well within these considerations by granting the Court discretion to consider a petition by a defendant's personal representative to continue with a pending appeal. I therefore specially concur.

KUEHN, V.P.J., Dissenting:

¶1 The doctrine of abatement *ab initio*, though deserving modification, need not be entirely upended. I agree with the majority that the doctrine should be altered to allow the defendant's conviction to stand. I disagree with the majority's decision to continue a dead defendant's appeal. Instead of continuing the appeal, it should be abated. Upholding the conviction affirms the valid conviction of a lower court and prevents a legally convicted defendant from being deemed innocent. Abating the appeal provides finality, ends a moot claim and preserves already sparse judicial resources.

¶2 Once the defendant dies, the continuance of his appeal serves no cognizable function of this appellate court; it is simply outside the scope of this Court's duties. Victims may prefer an appellate decision for use in civil litigation. Defendant's family may want an appellate decision to clear the defendant's name. In each case before this Court, our responsibility is to the State and people of Oklahoma to litigate and resolve an appeal for a living defendant. Resolutions for parties affected by the abatement of an appeal exist in law, but they do not exist in this Court.

¶3 I would uphold the conviction of the lower court and abate the appeal. This expeditiously concludes a moot appeal and preserves the integrity of lower courts' decisions. I dissent.

LEWIS, P.J.

1. The Second Circuit, Third Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Seventh Circuit, Eighth Circuit, Ninth Circuit, Tenth Circuit, Eleventh Circuit, and D.C. Circuit all follow this procedure. We have found no published opinions on this issue from the First Circuit.

2. In *Dove v. United States*, 423 U.S. 325 (1976), the Supreme Court eliminated the *Durham* rule for petitions in error but not for appeals of right.

3. *Wheat v. State*, 907 So. 2d 461 (Ala. 2005).

4. *People v. Lipira*, 621 P.2d 1389 (Colo. App. 1980).

5. *State v. Carlin*, 249 P.3d 752 (Alaska 2011); *Thompson v. State*, 503 S.W.3d 62 (Ark. 2016); Ark. R. App. P. Crim. Rule 1(c); *State v. Makaila*, 897 P.2d 967 (Haw. 1995); *Surland v. State*, 895 A.2d 1034 (Md. 2006); *Gollott v. State*, 646 So. 2d 1297 (Miss. 1994); *Brass v. State*, 325 P.3d 1256 (Nev. 2014); *State v. McGettrick*, 509 N.E.2d 378 (Ohio 1987); *State v. Webb*, 219 P.3d 695 (Wash. 2009).

6. *State v. Hemenway*, 302 P.3d 413 (Or. 2013); ORAP 8.05.

7. *State v. Gartland*, 694 A.2d 564 (N.J. 1997); *Commonwealth v. Bizzaro*, 535 A.2d 1130 (Pa. 1987).

8. *State v. Dalman*, 520 N.W.2d 860 (N.D. 1994).

9. Compare *People v. Mintz*, 20 N.Y.2d 753 (N.Y. 1967) (holding that appellant's death during a pending appeal "requires that the judgement of conviction be vacated"), with *People v. Parker*, 71 N.Y.2d 887 (N.Y. 1988) (dismissing the appeal but not the underlying conviction).

10. We have found no published opinions on the issue of abatement from Vermont or West Virginia.

11. Clarification of the procedure for perfecting these types of appeals will be set out in a separate order for publication in revision this Court's *Rules*.

2020 OK CR 6

IN RE: ADDITION OF A NEW RULE TO THE RULES OF THE COURT OF CRIMINAL APPEALS)

Case No. CCAD-2020-1. May 21, 2020

ORDER ADOPTING NEW PROCEDURAL RULE IN THE COURT OF CRIMINAL APPEALS

¶1 We find that a Rule should be adopted by this Court to acknowledge the abatement procedure set forth in *Majors v. State*, 2020 OK CR 5, ¶¶ 8, 9, ____ P.3d _____. Pursuant to Section 41 of Title 20 and Section 1051 of Title 22 of the Oklahoma Statutes, we hereby add, adopt, and promulgate this new Rule of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), set forth as follows:

Section III. PERFECTING AN APPEAL IN THE COURT OF CRIMINAL APPEALS

Rule 3.17 Motion to Abate Appeal

A. Procedure. If a defendant dies while his or her appeal is pending before this Court, the personal representative of the deceased defendant's estate may petition this Court to finalize the appeal. *See Majors v. State*, 2020 OK CR 5, __ P.3d __.

1. Petition of Personal Representative. Upon the filing of a motion to abate a pending appeal, this Court shall issue an order allowing the personal representative thirty (30) days to petition this Court. The petition must show good cause as to why the pending appeal should proceed.

2. Dismissal. If no petition is filed within thirty (30) days of this Court's order, or the petition does not establish good cause, the appeal will be dismissed.

   a. If the appeal is dismissed, the trial court shall make note in the district court file that the defendant's conviction removed his presumption of innocence. The notation shall further state that the conviction was appealed, but was neither affirmed or reversed because the defendant died while the appeal was pending.

¶2 **IT IS THEREFORE ORDERED ADJUDGED AND DECREED** that this Rule shall become effective on the date of this order.

¶3 **IT IS SO ORDERED**.

¶4 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 21st day of May, 2020.

/s/ DAVID B. LEWIS,
Presiding Judge

/s/ DANA KUEHN,
Vice Presiding Judge
Dissent - see my dissent in *Majors v. State* 2020 OK CR 5

/s/ GARY L. LUMPKIN, Judge

/s/ ROBERT L. HUDSON, Judge

/s/ SCOTT ROWLAND, Judge

ATTEST:
John D. Hadden
Clerk

2020 OK CR 9

CHRISTOPHER ALLEN WALL, Appellant, v. STATE OF OKLAHOMA Appellee

Case No. F-2018-567. May 21, 2020

SUMMARY OPINION

LUMPKIN, JUDGE:

¶1 Appellant Christopher Allen Wall was tried by jury and found guilty of Endeavoring to Manufacture a Controlled Drug (Count I) (63 O.S.2011, § 2-408) and Possession of a Controlled Drug (Count II) (63 O.S.Supp.2012, § 2-402) both counts After Former Conviction of Two or More Felonies, in the District Court of Tulsa County, Case No. CF-2016-3548. The jury recommended as punishment forty (40) years in prison in Count I and twelve (12) years in prison in Count II, with a $10,000.00 fine in each count. The trial court sentenced accordingly, ordering the sentences to be served consecutively. It is from this judgment and sentence that Appellant appeals.

¶2 Appellant raises the following propositions of error in support of his appeal:

I. The trial judge erred by allowing evidence of a prior conviction to be used as "identity" evidence and common scheme or plan evidence.

II. The evidence was insufficient to convict Appellant of the charge of Endeavoring to Manufacture.

III. The evidence was insufficient to prove that Appellant possessed methamphetamine.

IV. Evidentiary Harpoons deprived Appellant of a fair trial and due process of law.

V. The officer rendered an improper expert opinion.

VI. The trial court erred by admitting evidence about red phosphorous when no red phosphorous was found in this case.

VII. Prosecutorial misconduct deprived Appellant of a fair trial.

VIII. Ineffective assistance of counsel deprived Appellant of a fair trial and due process of law.

IX. The sentences were excessive.

X. Cumulative error deprived Appellant of a fair trial.

¶3 After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence no relief is warranted.

¶4 In Proposition I, Appellant contends the trial court erred in admitting evidence that in 2000 he operated a methamphetamine lab out of his home. The trial court admitted the evidence under the identity exception to the rule against admission of other crimes evidence under 12 O.S.2011, § 2404(B). Appellant argues on appeal that the evidence was improperly admitted as it does not prove his identity as the operator of the methamphetamine lab in the present case.

¶5 In admitting the evidence, the trial judge explained that he determined the identity exception was the most appropriate exception because of defense counsel's argument that Appellant had no knowledge of the working methamphetamine lab found in the detached garage of the home he shared with his parents, and that it was others who were coming and going from the garage who were actually manufacturing the methamphetamine. In light of Appellant's timely objection, our review of the trial court's admission of the evidence is for an abuse of discretion. *Marshall v. State*, 2010 OK CR 8, ¶ 24, 232 P.3d 467, 474. An abuse of discretion is a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Id.*

¶6 "The general rule is that, when an accused is placed on trial, he is to be convicted by evidence that shows him guilty of the offense charged and not of other offenses not connected with the charged offenses." *Williams v. State*, 2008 OK CR 19, ¶ 36, 188 P.3d 208, 218-219. "Evidence that a defendant committed other crimes, however, is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." *Id.* Title 12 O.S.2011, § 2404(B) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

¶7 "Identity can be proven by a highly peculiar method of committing a crime." *Williams,* 2008 OK CR 19, ¶ 37, 188 P.3d at 218-219, citing *Driskell v. State,* 1983 OK CR 22, ¶ 25, 659 P.2d 343, 349. "[T]he identity exception . . . 'requires unique similarities between the crimes amounting to a 'signature'". *Neloms v. State*, 2012 OK CR 7, ¶ 14, 274 P.3d 161, 164. "Identity is the more appropriate label for . . . signature evidence because distinctive methods of operation are indicative of who perpetrated the crime." *Williams,* 2008 OK CR 19, ¶ 37, 188 P.3d at 219, quoting *Welch v. State*, 2000 OK CR 8, ¶ 11, 2 P.3d 356, 366.

¶8 However, the terms "signature crimes" or "signature evidence" do not require that the crimes be identical in all respects but merely that they share unique or unusual aspects from which one might reasonably infer that both were committed by the same person. *See U.S. v. Porter,* 881 F.2d 878, 887 (10th Cir. 1989) ("evidence of another crime need not be identical to the crime charged, but need only be similar and share with it 'elements that possess 'signature quality'"). In *Pickens v. State,* 1988 OK CR 35, 751 P.2d 742, without using the term "signature crime", this Court found sufficient similarities where both robberies were committed just across the county line, using the same weapon and mask, stating:

> We find that the evidence of the Tulsa County robbery was admissible to prove

the identity of the perpetrator or a common scheme or plan which embraces the commission of two or more crimes so related to each other that proof of one tends to establish the other.

1988 OK CR 35, ¶ 3, 751 P.2d at 743.

¶9 Similarly, where evidence from one crime shows up at another scene, proof of the former might be probative in proving identity as to the latter crime, even though no highly peculiar method of carrying out the crimes is present. *Williams*, 2008 OK CR 19, ¶ 39, 188 P.3d at 219.

¶10 This proposition presents a unique legal challenge to our ability to interpret the identity exception set out in § 2404(B) in such a manner that the exception does not swallow the rule. In an *in-camera* hearing, the trial judge compared the 2000 offense to the current case, reviewing a long list of similarities in the implements and ingredients between the 2016 lab and the 2000 lab before determining the evidence was admissible under the identity exception.

¶11 During its case-in-chief, the State presented testimony from Forrest Smith, a member of the Narcotics Team of the Sand Springs Police Department in 2000. He testified that he assisted in the execution of a search warrant at Appellant's residence in January 2000. Smith said that ingredients and materials were found which showed an operational methamphetamine lab using the red phosphorous method of cooking. He gave a partial listing of the items found in the operating lab.

¶12 Smith testified that he had no involvement in the investigation into the 2016 lab, but he could state that based upon his review of the evidence, it did not involve the red phosphorous method but was a "one-pot shake-and-bake method" of cooking the methamphetamine. He said that technology in methamphetamine production had changed over time and the red phosphorous method was no longer commonly seen. He said there were currently at least 20 different methods of manufacturing methamphetamine and that the "one-pot" method was now the most commonly seen.

¶13 Also testifying for the State was Detective Kimura of the Sand Springs Police Department. He testified that during his investigation into the lab found in 2016, all the ingredients and materials necessary for an operational methamphetamine lab were present. Det. Kimura explained that the ingredients and materials showed that the "one-pot shake-and-bake method" was being used to make the methamphetamine, and not the red phosphorous method.

¶14 The use of the identity exception must be narrowly construed to conform to the rule set out in § 2404(B) and our case law. Here, the similarities between the 2000 lab and the 2016 lab were not sufficient to establish a signature or distinctive method of committing the crime of manufacturing methamphetamine. The evidence merely showed two different instances of clandestinely making methamphetamine, each using the recipe and method in common use at that particular point in history. Therefore, the trial court abused its discretion in admitting evidence of the 2000 offense under the identity exception.

¶15 However, we find the evidence of the 2000 lab was properly admissible under the knowledge exception to the other crimes prohibition. Appellant claimed he had no knowledge that the tools and materials discovered in the garage where he operated his granite business could be used to manufacture methamphetamine. Evidence that he operated a methamphetamine lab in the past was relevant to prove his knowledge of the use and purposes of the tools and materials found in his garage in 2016. See 12 O.S.2011, § 2401 (relevant evidence is any evidence "having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

¶16 Additionally, the error in this case was harmless as the evidence of the 2000 lab did not have a substantial influence on the outcome, or leave this Court with grave doubts as to whether it had such an effect. *See Simpson v. State*, 1994 OK CR 40, ¶ 37, 876 P.2d 690, 702. As discussed in Proposition II, sufficient evidence, apart from the 2000 offense, was presented to show that Appellant was the person operating the methamphetamine lab. Regarding evidence of the 2000 offense, Appellant admitted on the witness stand that in 2000 he pled guilty to the offense of manufacturing methamphetamine. He also admitted that he knew how to make methamphetamine.

¶17 We take this opportunity to emphasize that the focus is on the similarities of the facts when comparing cases for the purpose of using prior acts to establish the identity exception to

the rule. The prosecution is prohibited from merely putting into evidence a prior conviction and then arguing, "he did it then so he must have done it this time." The exception requires the examination of the facts in each case and trial judges should act as a gatekeeper to the evidence before allowing it to the jury.

¶18 Under the circumstances in this case, we find the State's evidence of the 2000 offense did not have a substantial influence on the outcome of the trial and no relief is warranted. This proposition is denied.

¶19 In Proposition II, Appellant challenges the sufficiency of the evidence supporting his conviction for endeavoring to manufacture methamphetamine. He argues that the State's reliance on his mere proximity to the lab, officers' suspicions, and the fact that he had a prior conviction for manufacturing methamphetamine was insufficient to prove that he knowingly and intentionally endeavored to manufacture methamphetamine.

¶20 We review Appellant's challenge to the sufficiency of the evidence supporting his conviction in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Mitchell v. State*, 2018 OK CR 24, ¶ 11, 424 P.3d 677, 682. In reviewing sufficiency of the evidence claims, this Court does not reweigh conflicting evidence or second-guess the decision of the fact-finder; we accept all reasonable inferences and credibility choices that tend to support the verdict. *Id.* "The credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts." *Rutan v. State,* 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849.

¶21 The State's evidence was much more than that characterized by Appellant. Two witnesses placed Appellant in the garage housing the lab and actively participating in the manufacturing process. Experienced police officers testified that all of the ingredients and implements necessary for an operating methamphetamine lab were present, including the distinctive odor and freshly manufactured product. Appellant's claimed ignorance of the lab, despite his admission that everything in the garage belonged to him and was part of his granite business, was rightly found by the jury to be less than credible. *See Bland v. State*, 2000 OK CR 11, ¶ 29, 4 P.3d 702, 714. Reviewing the evidence in the light most favorable to the State, we find any rational trier of fact could have found Appellant guilty of endeavoring to manufacture methamphetamine beyond a reasonable doubt. This proposition is denied.

¶22 In Proposition III, Appellant challenges the sufficiency of the evidence supporting his conviction in Count II for unlawful possession of methamphetamine. He argues there was no evidence that he actually possessed any of the methamphetamine found in his bedroom.

¶23 Possession of illegal drugs can be actual or constructive, *Hill v. State*, 1995 OK CR 28, ¶ 34, 898 P.2d 155, 166, joint or single. *Miller v. State*, 1978 OK CR 54, ¶ 8, 579 P.2d 200, 202. This is a case of constructive possession as the illegal drugs were not found on Appellant's person. Constructive possession can be established through circumstantial evidence proving a defendant knows of the presence of the drugs and has the power and intent to control their disposition or use. *Hill,* 1995 OK CR 28, ¶ 34, 898 P.2d at 166. A defendant's knowledge and intent can be proved by circumstantial evidence. *Id.* However, mere proximity to the illegal drug is not sufficient to sustain the State's burden of proof. *Id.* Proof of knowing possession of drugs is often solely circumstantial, and thus requires that guilt be determined through a series of inferences. *Johnson v. State*, 1988 OK CR 246, ¶ 6, 764 P.2d 530, 532. Even in the absence of proof of possession and exclusive control, constructive possession may still be proven if "there are additional independent factors showing [the accused's] knowledge and control." *Id.* Such independent factors may consist of "incriminating conduct by the accused, ... or any other circumstance from which possession may be fairly inferred." *Id.*

¶24 Here, there were sufficient independent factors indicating Appellant's knowledge and control of the methamphetamine found in his bedroom. Reviewing the evidence in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that Appellant was in possession of the methamphetamine found in his bedroom. *See Smith v. State*, 1985 OK CR 40, ¶ 9, 698 P.2d 482, 485 (sufficient evidence of joint, constructive possession to sustain conviction). Accordingly, this proposition is denied.

¶25 In Proposition IV, Appellant contends he was denied a fair trial by the interjection of

several evidentiary harpoons. An evidentiary harpoon occurs when an experienced police officer makes a voluntary, willfully jabbed statement injecting other crimes, which is both calculated to prejudice, and is actually prejudicial to, the rights of the defendant. *Martinez v. State,* 2016 OK CR 3, ¶ 60, 371 P.3d 1100, 1115.

¶26 The first alleged harpoon was met with an objection and request for a mistrial. After hearing argument, the trial court overruled the objection, denied the motion for mistrial, but admonished the jury not to consider the challenged testimony. This admonishment cured any error. *Hager v. State,* 1983 OK CR 88, ¶ 9, 665 P.2d 319, 323.

¶27 The remaining two alleged harpoons were not met with contemporaneous objections. Therefore, our review is for plain error. *See Soriano v. State*, 2011 OK CR 9, ¶ 41, 248 P.3d 381, 398. Under the plain error test set forth in *Simpson v. State,* 1994 OK CR 40, 876 P.2d 690, we determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id. See also Jackson v. State,* 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121; *Levering v. State,* 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. We find no error and thus no plain error in either response by Sgt. Willits. This proposition is denied.

¶28 In Proposition V, we find no error, and thus no plain error in testimony by Sgt. Willits that based upon his review of the evidence, a resident at the house had been manufacturing methamphetamine. *See Soriano,* 2011 OK CR 9, ¶ 41, 248 P.3d at 398. Sgt. Willits' testimony was based on his training and experience. Police officers are allowed to give opinion testimony based on their training and experience. *Andrew v. State,* 2007 OK CR 23, ¶ 80, 164 P.3d 176, 196, overruled on other grounds, *Williamson v. State,* 2018, OK CR 15, 422 P.3d 752.

¶29 In Proposition VI, Appellant argues the trial court erred in admitting evidence of red phosphorous when red phosphorous was not an issue in the case. Appellant asserts the trial was full of references to red phosphorous, yet he fails to cite to any such references in the record. Appellant's failure to cite portions of the record where the alleged error can be found waives the allegation for appellate review under Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020). *Logsdon v. State*, 2010 OK CR 7, ¶ 41, 231 P.3d 1156, 1169-70.

¶30 In Proposition VII, Appellant contends that he was deprived of a fair trial by the prosecutor: 1) injecting her personal opinion of guilt; 2) misstating the law; 3) vouching for the credibility of prosecution witness Kristopher Hill; 4) invoking societal alarm; 5) misrepresenting the facts; and 6) casting aspersions on defense counsel. We evaluate alleged prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel. *Sanders v. State*, 2015 OK CR 11, ¶ 21, 358 P.3d 280, 286. We will reverse the judgment or modify the sentence only where grossly improper and unwarranted argument affects a defendant's rights. *Id.* Relief will be granted on claims of prosecutorial misconduct only where the prosecutor committed misconduct that so infected the defendant's trial that it was rendered fundamentally unfair, such that the jury's verdicts should not be relied upon. *Id.*

¶31 The majority of the numerous statements and arguments now challenged on appeal were not met with contemporaneous objections at trial. Therefore, our review is for plain error under the test set forth above. *See Malone v. State,* 2013 OK CR 1, ¶ 40, 293 P.3d 198, 211. We have thoroughly reviewed Appellant's claims of prosecutorial misconduct and find the majority of the comments were properly based on the evidence. Regarding comments made in closing argument, we have long allowed counsel for the parties a wide range of discussion and illustration in closing argument and counsel enjoy a right to discuss fully from their standpoint the evidence and the inferences and deductions arising from it. *Sanders*, 2015 OK CR 11, ¶ 21, 358 P.3d at 286. Comments made in closing argument are not evidence, *Smith v. State*, 1986 OK CR 158, ¶ 25, 727 P.2d 1366, 1372, and the jury in this case was so informed. The jury was also properly instructed not to let sympathy, sentiment or prejudice enter into their deliberations. Any errors in the prosecutor's arguments do not rise to the level of plain error and do not warrant relief.

¶32 Of the two remaining challenged comments met with objections, one instance is

described by Appellant as expression of the prosecutor's personal opinion of guilt. In that instance, the objection was sustained. This ruling cured any error. *Young v. State*, 2000 OK CR 17, ¶ 50, 12 P.3d 20, 37.

¶33 The remaining instance is described by Appellant as improperly invoking societal alarm. The objection in this instance was properly overruled as the comment did not meet the criteria of a statement invoking societal alarm. The comment did not imply that the jury should make an example of Appellant in order to deter others or mention other crimes committed by other persons and not attributable to the defendant. *See McElmurry v. State,* 2002 OK CR 40, ¶ 151, 60 P.3d 4, 34.

¶34 A review of the record and Appellant's claims of prosecutorial misconduct show that the prosecutor's conduct was not so improper or prejudicial as to have infected the trial so that it was rendered fundamentally unfair. While certain statements by the prosecutor may have exceeded the bounds of proper comment, we cannot find that whether considered individually or cumulatively they were so prejudicial as to deny Appellant a fair trial. *See Childress v. State*, 2000 OK CR 10, ¶ 31, 1 P.3d 1006, 1014. As the prosecutor's misconduct did not determine the verdict or result in a miscarriage of justice, no relief is warranted. *Pack v. State*, 1991 OK CR 109, ¶ 17, 819 P.2d 280, 284, citing 20 O.S. § 3001.1. This proposition is denied.

¶35 In Proposition VIII, Appellant claims he was denied the effective assistance of counsel by counsel's failure to object to two of the evidentiary harpoons and to several instances of prosecutorial misconduct. Appellant makes no further argument but directs us to his arguments in Propositions IV, V, and VII.

¶36 The failure to argue how counsel's omissions rendered his performance ineffective, the failure to cite any supporting case law, and the failure to cite relevant portions of the record waives this claim for appellate review. *See* Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020).

¶37 In Proposition IX, Appellant contends the trial court's failure to run his sentences concurrently resulted in an excessive sentence and warrants a downward modification of his sentence. This Court will not modify a sentence within the statutory range unless, considering all the facts and circumstances, it shocks our conscience. *Pullen v. State,* 2016 OK CR 18, ¶ 16, 387 P.3d 922, 928; *Gomez v. State*, 2007 OK CR 33, ¶ 18, 168 P.3d 1139, 1146; *Rea v. State,* 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. Appellant's sentences of 40 years in Count I and 12 years in Count II were within permissible statutory range.

¶38 Prison sentences are to run consecutively unless the trial judge, in his or her discretion, rules otherwise. 22 O.S.2011, § 976. *See also Neloms,* 2012 OK CR 7, ¶ 35, 274 P.3d at 170. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Id.* The trial court's decision to run the sentences consecutively was not an abuse of discretion as it did not result in an excessive sentence. No modification of the sentence is warranted.

¶39 In Proposition X, Appellant argues the accumulation of errors denied him a fair trial. This Court has held that a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Engles v. State,* 2015 OK CR 17, ¶ 13, 366 P.3d 311, 316; *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732. None of the errors raised by Appellant warrant relief. Therefore, we find no relief is warranted by the accumulation of errors.

¶40 Accordingly, this appeal is denied.

DECISION

¶41 The **JUDGMENT and SENTENCE is AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY
THE HONORABLE WILLIAM LAFORTUNE,
DISTRICT JUDGE

APPEARANCES AT TRIAL

Steven Vincent, P.O. Box 701765, Tulsa, OK 74170, Counsel for the Defense

Steve Kunzweiler, District Attorney, Ray Penney, Danny Levy, Asst. District Attorneys, 500 S. Denver, Ste. 900, Tulsa, OK 74103, Counsel for the State

APPEARANCES ON APPEAL

Lisbeth L. McCarty, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Mike Hunter, Attorney General of Oklahoma, William R. Holmes, Theodore M. Peeper, Asst. Attorneys General, 313 N.E. 1st St., Oklahoma City, OK 73105, Counsel for the State

OPINION BY: LUMPKIN, J.
LEWIS, P.J.: Concur in Result
KUEHN, V.P.J.: Concur in Result
HUDSON, J.: Concur
ROWLAND, J.: Concur

KUEHN, V.P.J., CONCURRING IN RESULT:

¶1 I agree that Appellant's convictions and sentences should be affirmed, but disagree with the analysis of Proposition I. Appellant claimed he did not know that there was a red-phosphorus methamphetamine lab at his home. The State sought to introduce evidence that, in 2000, Appellant operated a shake-and-bake methamphetamine lab in his garage. The trial court inexplicably admitted this evidence to show identity under 12 O.S.2011, § 2404(B). The Majority feels compelled to reformulate the "identity" exception – in fact, it appears to make the exception less stringent – but at the end of the day, concludes that the evidence at issue here *still* does not pass that test. I do not quarrel with the Majority's explanation on identity exception, but fail to see the necessity of laying new groundwork, creating a complexity where none exists.

¶2 The trial proceeding itself holds the answer; the prosecutor argued that the evidence should be admitted not for identity, but to show knowledge. This is correct. I believe the evidence was clearly admissible to show knowledge under § 2404(B). 12 O.S.2011, § 2404(B); *Tafolla v. State*, 2019 OK CR 15, ¶ 11, 446 P.3d 1248, 1256. The trial court reached the correct result, but for the wrong reason. Because the result was right, I would not find the trial court abused its discretion in admitting the evidence. *McClendon v. State*, 1989 OK CR 29, ¶ 7, 777 P.2d 948, 951. Since I would neither find error, nor conduct a harmless error analysis, I do not join in the Majority's finding that admission of the evidence was harmless.

¶3 I am authorized to state Presiding Judge Lewis joins in this separate opinion.

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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In Memoriam

Daryl G. Alphin of Tulsa died Mar. 24. He was born Jan. 22, 1959. Mr. Alphin received his J.D. from the TU College of Law in 1997. He opened his own practice in 2006 before joining ConocoPhillips in 2013. Mr. Alphin returned to private practice in 2015.

Harry Edwinn Brown Jr. of Oklahoma City died May 11. He was born May 31, 1930. Mr. Brown received his J.D. from the OU College of Law in 1959 and while studying there, was chosen by the dean to accompany former President Truman on his tour of the campus. He opened his own law practice shortly after passing the bar. He worked closely with the reapportionment cause in Oklahoma during his career, which focused on oil and gas law. Memorial contributions may be made to the Oklahoma State Firefighter's Museum, Attn: OSFM Expansion in honor of Harry E. Brown Jr., 2716 NE 50 St., Oklahoma City, 73111.

Kevin Donelson of Oklahoma City died Apr. 3. He was born Nov. 15, 1961, in Dumas, Texas. Mr. Donelson received his J.D. from the OU College of Law in 1988 and joined Fellers, Snider, Blankenship, Bailey and Tippens. He served as president of the firm for nine years. He also served as an administrative law judge for the Oklahoma Department of Labor and on the OBF executive committee. Memorial contributions may be made to the Kevin Donelson Memorial Fund, c/o SWOSU Foundation, 100 Campus Drive, Weatherford, 73096 or online at givetoswosu.com.

Richard Brooks Douglass of Carrollton, Texas, died May 9. He was born Sept. 28, 1963, in Norman. Mr. Douglass received his J.D. from the OCU School of Law and also had an MBA from OCU and an MPA from Harvard Kennedy School of Government. He was elected to the Oklahoma Senate in 1990 and served as a senator for Oklahoma City for 12 years.

Edward William Dzialo Jr. of Norman died Apr. 5. He was born June 3, 1948, in Monterey, California. **He served in the U.S. Army from 1968 to 1973 as an artillery officer and aviator.** Mr. Dzialo received his J.D. from the OCU School of Law in 1978. He spent over 40 years with the firm of Godlove, Mayhall, Dzialo and Dutcher. Memorial contributions may be made to St. Thomas More Catholic Church in Norman.

James Weyman Ely Jr. of Claremore died May 15. He was born Mar. 2, 1949, in Kingsville, Texas. Mr. Ely moved to Oklahoma in 1971 when he transferred to TU. He received his J.D. from the TU College of Law in 1991. Before joining the Rogers County District Attorney's office, he worked for Scarth & Rahmeier and the Legal Services of Northeast Oklahoma. He relocated to Nebraska in 2011 and established a private practice. Mr. Ely was elected Boone County Attorney, serving from 2015 until 2018. He returned to Claremore in 2019 after being diagnosed with cancer to be near his son. Memorial contributions may be made to CASA of Northeast Oklahoma, 658 S. Lynn Riggs Blvd., Claremore, 74017.

Joseph C. Fallin of Tulsa died Apr. 19. He was born Nov. 11, 1946. Mr. Fallin received his J.D. from the OU College of Law in 1972. He was named Advocate of the Year in 2005 by the Oklahoma Department of Rehabilitation Services and served as president of the Oklahoma Council of the Blind for several terms. Memorial contributions may be made to the Oklahoma Council of the Blind at P.O. Box 1475, Oklahoma City, 73101 or to Jeri's House at P.O. Box 14192, Tulsa, 74159.

Renee Young Faulkenberry of Tulsa died Mar. 31. She was born Jan. 11, 1973, in Tulsa. She received her J.D. from the TU College of Law in 2002 and immediately began working for Kivell, Rayment & Francis as a foreclosure attorney. Ms. Faulkenberry joined Legal Aid Services of Oklahoma as a hotline attorney in 2006.

Richard A. Hammarsten of Oklahoma City died Apr. 8. He was born June 28, 1950, in Richfield, Minnesota. Mr. Hammarsten received his J.D. from the TU College of Law. He worked for numerous bank trust departments across the country and spent his last years working as the internal trust auditor for BancFirst.

Ira "D.D." Hayes of Muskogee died Mar. 31. He was born Nov. 4, 1947, in Muskogee. **Mr Hayes served in the**

Army Reserves from 1970 to 1975. He received his J.D. from the TU College of Law in 1974. In 1980, Mr. Hayes argued before the U.S. Supreme Court and won. Throughout his career, he served as a police legal advisor and the as the city attorney for Muskogee. He opened his own firm in 2001. Memorial contributions may be made to the First Baptist Church Muskogee Renovation Fund.

James Kirk Huse of Tulsa died Apr. 25, 2019. He was born Nov. 7, 1955. Mr. Huse received his J.D. from the TU College of Law in 1982.

Judge Arlene Johnson of Nichols Hills died May 12. She was born Sept. 1, 1940, in Ramsey, Minnesota. Judge Johnson received her J.D. from the OU College of Law in 1971. She was appointed to the Oklahoma Court of Criminal Appeals in 2005 by Gov. Brad Henry.

Danny Gene Lohmann of Aline died Mar. 28. He was born Sept. 20, 1954, in Alva. Mr. Lohmann graduated from Alva High School in 1972 and received his J.D. from the OCU School of Law in 1992. He worked for the Oklahoma Indigent Defense System for over 15 years and was a prosecutor for nearly five years. He began his private practice in 2012 and remained there until his retirement. Memorial contributions may be made to Zion Lutheran Church Evangelism Fund, the Lutheran Hour Ministries or the American Cancer Society in Oklahoma.

Thomas H. May of Rockport, Texas, died Mar. 31. He was born Jan. 28, 1936, in Odessa, Texas. **Mr. May served in the Air Force National Guard.** He received his J.D. from the TU College of Law in 1962 and went into private practice before serving as the district attorney for Ottawa and Delaware counties. He retired in 2003 and returned to private practice.

Martin "Marty" Weeks of Norman died Mar. 24. He was born Dec. 4, 1954 in Oklahoma City. Mr. Weeks received his J.D. from the OU College of Law in 1991. He moved to Washington, D.C. in 2007 to work for a law firm. While there, Mr. Weeks earned a LL.M. from George Mason University. He then joined the U.S. Patent Office before returning to Norman in 1973 to work remotely until his retirement in January 2020.

Kasper James Weigant of Gresham, Oregon, died Mar. 30. He was born Jan. 30, 1950, in Portland. Mr. Weigant received his J.D. from the TU College of Law in 1984 and went to work for the Social Security Administration in Houston. He worked as a senior attorney for the SSA for 25 years. Memorial contributions may be made to the Friends of Multnomah County Shelter Animals at friendsof multcopets.org or the Providence Portland Medical Foundation.

Judge Lee R. West of Oklahoma City died Apr. 24. He was born Nov. 26, 1929. He graduated from Antlers High School in 1948 and began studying at OU. **Judge West served as a lieutenant in the U.S. Marine Corps during the Korean conflict.** He attended the OU College of Law and went on to teach there as well as at Harvard Law School. Judge West served as chairman of the U.S. Civil Aeronautics Board as a district judge for the state courts of Oklahoma. He held the position of district judge for the U.S. District Court for Western Oklahoma for nearly 40 years after being appointed by President Jimmy Carter. Memorial contributions may be made to the OU Foundation and the OU College of Law Dean's Fund.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, May 21, 2020

M-2018-1237 — Richard Luke Cornforth, Appellant, appeals from his misdemeanor Judgment and Sentence entered after a jury trial before the Honorable Geary L. Walke, Special Judge, in Case No. CM-2015-3708 in the District Court of Oklahoma County. Appellant was convicted of Violation of a Victim Protective Order, misdemeanor, and was sentenced to a term of three months in the Oklahoma County Jail and a $500.00 fine. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs: Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Recuses.

F-2019-78 — Avery Lloyd Franks, Appellant, was tried by jury for the crime of Felon in Possession of a Firearm, After Former Conviction of Two or More Felonies (Count 2), in Case No. CF-2018-1292, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment twelve years imprisonment and a $5,000.00 fine. The Honorable Tracy Priddy, District Judge, sentenced accordingly and ordered credit for time served and imposed various costs and fees. From this judgment and sentence Avery Lloyd Franks has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs in Results; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-1117 — Donald Ray Cowans, Appellant, was tried by jury for the crime of Murder in the First Degree, in Case No. CF-2017-809, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment life imprisonment. The Honorable William LaFortune, District Judge, sentenced accordingly. From this judgment and sentence Donald Ray Cowans has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs in Results; Lumpkin, J., Concurs; Rowland, J., Concurs.

C-2019-234 — Petitioner Russell Hugh Lynn Eckiwaudah, appeals the denial of his motion to withdraw plea in the District Court of Caddo County, Case No. CF-2017-36. Eckiwaudah entered a negotiated plea of guilty to resolve two cases. In Case No. CF-2017-36, he pleaded guilty to Operating a Motor Vehicle at a Speed Not Reasonable (Count 1) and to Driving without a Driver's License (Count 2). In Case No. CF-2017-169, he pleaded guilty to Possession of Controlled Dangerous Substance – Methamphetamine. The Honorable David A. Stephens, Special Judge, accepted Eckiwaudah's pleas and, pursuant to the plea agreement, set off sentencing for Eckiwaudah to complete twelve months of inpatient drug and alcohol treatment. The court held a sentencing hearing after Eckiwaudah failed to complete his treatment program and sentenced him to ten days imprisonment and a $100.00 fine for speeding, a $50.00 fine for driving without a license and ten years imprisonment and a $500.00 fine for drug possession. The court suspended all but the first eight years of the ten year prison sentence. Eckiwaudah filed a timely *pro se* Application to Withdraw Guilty Plea that Judge Stephens denied. Eckiwaudah 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., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2019-295 — Xavier Ri-Chard Dixon, Appellant, was tried by jury for the crime of Second Degree Murder, Case No. CF-2017-5001 in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment 10 years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Xavier Ri-Chard Dixon has perfected his appeal. Judgement and Sentence is AFFIRMED, Mandate is ORDERED. Opinion by: Lumpkin, J; Lewis, P.J., concurs; Kuehn, V.P.J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

F-2018-1185 — Appellant Eddie Lopez was tried and convicted by jury for the crime of Murder in the First Degree in the District Court of Tulsa County, Case No. CF-2017-3785. In accordance with the jury's recommendation the trial court sentenced Appellant to life imprisonment. From this judgment and sentence

Eddie Lopez has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur; Hudson, J.: concur; Rowland, J.: concur.

F-2019-262 — On August 23, 2017, Appellant Angela Mercy Alcorn Navarro entered a plea of guilty in Okfuskee County District Court in Case Nos. CF-2016-147 and CF-2017-40. The trial court withheld a judgment of guilt and deferred proceedings. On November 7, 2017, the State filed applications to accelerate in both cases. Appellant stipulated to both and was admitted to the drug court program. On February 22, 2019, the State filed an application to terminate Appellant's participation in drug court. Following a March 26, 2019, hearing the trial court terminated Appellant's participation in drug court and sentenced pursuant to her drug court plea agreement. Appellant appeals. The termination is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J.: Concur; Lumpkin, J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

Thursday, May 28, 2020

F-2019-164 — Curwin Daryl Black, Appellant, was tried by jury for three counts of child sexual abuse after conviction of two or more felonies in Case No. CF-2016-1128 in the District Court of Oklahoma County. The jury returned a verdict of guilty and set punishment at forty years imprisonment on each count. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Curwin Daryl Black has perfected his appeal. The judgment and sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs in part and dissents in part; Lumpkin, J., specially concurs; Hudson, J., concurs; Rowland, J., concurs.

RE-2019-382 — Appellant Richard Allen Horn entered a plea of no contest on April 26, 2018 to Knowingly Concealing Stolen Property in Sequoyah County District Court Case No. CF-2017-703. He was convicted and sentenced to seven years imprisonment, with all time suspended. The State filed a Motion to Revoke Suspended Sentence on November 26, 2018. Following a revocation hearing, the trial court revoked Appellant's suspended sentence in full. The revocation is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., concur; Kuehn, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

F-2019-200 — Appellant Twila Nicole Few was tried and convicted by jury for the crime of Counts I and III, Lewd Molestation in the District Court of Pontotoc County, Case No. CF-2018-115. In accordance with the jury's recommendation the trial court sentenced Appellant to 75 years imprisonment on each count and ordered the counts to run consecutively. From this judgment and sentence Twila Nicole Few has perfected her appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur in results; HUDSON, J.: concur; Rowland, J.: concur.

F-2019-454 — Appellant Bradford Allen Fisher entered a guilty plea to a charge of Two or More Bogus Checks Together Over Felony Limit of $500 in Okmulgee County Case No. CF-2015-167. Sentencing was deferred for ten (10) years. On that same date, Fisher pled guilty to a count of False Personation (Count 1), Possession of a Controlled Dangerous Substance (Count 2), and Unlawful Possession of Drug Paraphernalia (Count 3) in Okmulgee County Case No. CF-2015-169. For Counts 1 and 2, sentencing was deferred ten (10) years. For Count 3, sentencing was deferred one (1) year. On August 10, 2017, the State filed an Application to Accelerate Deferred Judgment in both cases alleging Fisher violated numerous terms and conditions of probation. At the acceleration hearing, the District Court of Okmulgee County accelerated Fisher's deferred sentences. Fisher appeals the acceleration of his deferred sentences. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2019-473 — Appellant Christopher Eugene Johnson was tried and convicted by jury for the crimes of Possession of Methamphetamine with Intent to Distribute, After Conviction of Two or More Felonies (Count 1) and Driving with a Suspended License (Count 3) in the District Court of Tulsa County, Case No. CF-2018-3592. In accordance with the jury's recommendation the trial court sentenced Appellant to 22 years and a $10,000 fine on Count 1, and a fine on Count 3. From this judgment and sentence Christopher Eugene Johnson has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J., concur; Lumpkin, J.: concur in results; Hudson, J.: concur; Rowland, J.: concur.

F-2019-29 — Appellant Shelby Dwaine Maier was tried and convicted by jury for the crimes of Count I – Misdemeanor Domestic Assault and Battery, and Count II – Child Abuse by Injury, after former conviction of two or more felonies, in the District Court of McClain Coun-

ty, Case No. CF-2017-200. In accordance with the jury's recommendation the trial court sentenced Appellant to one year in county jail on Count I and to 20 years imprisonment on Count II. From this judgment and sentence Shelby Dwaine Maier has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur in part/dissent in part; Hudson, J.: concur; Rowland, J.: concur in results.

COURT OF CIVIL APPEALS
(Division No. 1)
Tuesday, May 12, 2020

117,024 — Norris Auto Sales, LLC, an Oklahoma limited liability company; Firris Birris Kline, an individual; T.J. Norris, an individual, Plaintiffs/Appellees/Counter-Appellants, v. Zurich American Insurance Company and Universal Underwriters Insurance Company, Defendants/Appellants/Counter-Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Patricia G. Parrish, Trial Judge. Zurich American Insurance Company and Universal Underwriters Insurance Company (Zurich) appeal a judgment on a jury's verdict for $4,000,000 for breach of the duty of good faith and fair dealing, plus $4,000,000 for punitive damages. Norris Auto Sales, LLC; T.J. Norris; and Firris Birris "Mike" Kline (collectively referred to as NAS) counterappeal the district court's denial of their motions to grant a declaratory judgment and for an award of attorney fees pursuant to 36 O.S. §3629. We reverse the judgment because the jury was improperly instructed on the law of *respondeat superior.* Opinion by Goree, J.; Bell, P.J., dissents and Buettner, J., concurs.

Tuesday, May 19, 2020

116,270 — In Re The Marriage of: Deborah Odez Hicks, Petitioner/Appellant, v. Andrew Junior Hicks, Respondent/Appellee, and Beau Williams, Real Party in Interest/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Barry L. Hafar, Judge. Deborah Hicks, Appellant, seeks review of the district court's July 11, 2017 order denying Hicks' Petition to Vacate the court's earlier decision granting injunctive relief to Hicks' former attorney Beau Williams, Appellee/Real Party in Interest. We affirm the order of the district court. AFFIRMED. Opinion by Bell, P.J.; Buettner, J., concurs and Goree, J., dissents.

117,175 — Bela D. Csendes and Shirley A. Csendes, Plaintiffs/Appellants/Counter-Appellees, v. Warren Hock, Linda Hock, Franklin Allen and Circle "V" Ranch Estates, Defendants/Appellees/Counter-Appellants, and Virginia Lynn Allen, Defendant/Appellee. Appeal from the District Court of Pittsburg County, Oklahoma. Honorable James D. Bland, Judge. This appeal arises from a judgment entered after a bench trial concerning breach of covenant, breach of contract and other claims between neighbors in a small subdivision abutting Lake Eufaula. Plaintiffs/Appellants/Counter-Appellees, Bela and Shirley Csendes, sued to enforce certain covenants and restrictions, to set aside a homeowners association and amendments, for breach of fiduciary duty and for declaratory judgment. Defendants/Appellees/Counter-Appellants, Warren and Linda Hock, Franklin Allen (and his then-wife, Defendant Virginia Allen) and the Circle "V" Ranch Estates Homeowners Association (HOA), filed counterclaims concerning the community boat dock. Among other things, the trial court determined all of the parties violated the Circle "V" Ranch Estates covenants and restrictions to such extent that they have largely been abandoned. The trial court also found the HOA was validly created, but lacked the authority to bring the claims it asserted. The court issued a declaratory ruling regarding the boat docks, found no party was entitled to monetary relief and concluded each party was responsible for their own attorney fees. Both sides appeal. The evidence supports a finding that articles 2 and 4 of the original covenants were habitually and substantially violated by residents of the subdivision. The trial court did not err by considering the abandonment defense. The weight of the evidence supports a finding the HOA was not created in violation of the original covenants, but was created by a unanimous vote of the Lot owners in 2005. Ample evidence supports the trial court's ruling that Plaintiffs violated covenants and restrictions. The trial court's ruling that Mr. Csendes contributed to the commission of some of the Defendants' violations is supported by the weight of the evidence and the trial court did not err in applying the "unclean hands" theory. Franklin Allen, as a joint tenant with an undivided interest in the whole of both Lots 5 and 6, was authorized to cast ballots for those lots in favor of the 2017 amendment without the participation of his co-joint tenant, Virginia Allen. The trial court did not err in finding the 2017 amendments, including the "grandfathering" provision, substantively valid. The evidence

does not prove the Hocks' and Allens' driveways violate the plat dedication. The trial court's decision regarding boat dock electricity is not against the weight of the evidence. Defendants' argument that Plaintiffs' claims are frivolous will not be considered on appeal. The trial court did not err or abuse its discretion in declining to award either party attorney fees. AFFIRMED. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

118,436 — Alana Knight and Gail Brazle, Plaintiffs/Appellants, v. H.W. Perry, Jr., Rachael R. Perry, David R. Babbit, Lynne R. Babbit, Larry L. Fisher, Trustee of the Larry L. Fisher Linda Fisher Living Trust dated February 11, 2016, Dennis Patrick and Cinda Patrick, Defendants/Appellees. Appeal from the District Court of Canadian County, Oklahoma. Honorable Paul Hesse, Judge. Plaintiffs/Appellants Alana Knight and Gail Brazle (collectively, "Appellants") appeal from summary judgment granted to Defendants/Appellees H.W. Perry, Jr., Rachael R. Perry, David R. Babbit, Lynne R. Babbit, Larry L. Fisher, Trustee Of The Larry L. Fisher Linda Fisher Living Trust Dated February 11, 2016, Dennis Patrick, and Cinda Patrick (collectively, "Appellees") in Appellants' action to reform deeds and quiet title to minerals. The record shows disputes of material fact. We reverse and remand for trial. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

Wednesday, May 20, 2020

116,990 — Country Equipment and Used Trucks, L.L.P., Appellant, V. Mike Armstrong, Personal Representative of the Estate of Ruby Ellen Meyer Deceased, Appellee. Appeal from the District Court of Mcclain County, Oklahoma. Honorable Charles Gray, Trial Judge. Country Equipment and Used Trucks, L.L.P. (Appellant) appeals the probate court's order in favor of Mike Armstrong, Personal Representative of the Estate of Ruby Meyer (Appellee) nullifying the sale of a tractor which was property of the estate. Appellee was not a bona fide purchaser because at the time it purchased the tractor it had notice that Ruby Meyer was the owner, that she was deceased, and there was an estate. Appellee waived its Title 58 O.S. §1(D) objection to personal jurisdiction and service of process. AFFIRMED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

117,663 — Malgorzata Bujnowski, Petitioner, v. Multiple Injury Trust Fund and the Workers' Compensation, Respondents. Claimant/Appellant, Malgorzata Bujnowski, appeals the three-judge panel's order affirming the decision of the trial court denying her claim for permanent total disability against the Multiple Injury Trust Fund/Appellee. The order is not insufficiently detailed to permit meaningful review under the rule in *Dunkin v. Instaff Personnel,* 2007 OK 51, 14 P.3d 1075. It is neither against the clear weight of the evidence nor impermissibly reliant upon the opinion of the Court's Independent Medical Examiner. SUSTAINED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

117,910 — Horace Hill, Petitioner, v. Multiple Injury Trust Fund and the Oklahoma Workers' Compensation Court of Existing Claims. Respondent Horace Hill, Claimant/Petitioner, seeks review of an order of the three-judge panel affirming the trial court order denying permanent total disability benefits against the Multiple Injury Trust Fund, Respondent. The Court's order, concluding that the combined injuries do not constitute permanent total disability, is sustained by the evidence that Claimant did not have an obvious apparent injury to his right leg. SUSTAINED. Opinion by Goree, J.; Buettner, J., concurs and Bell, P.J., dissents.

Thursday, May 21, 2020

118,358 — Amber Beffer, Plaintiff/Appellant, v. Harley Hollan Companies, Inc., d/b/a Harley Hollan Roll-Offs; Poly Hernandez; and Kenneth O. Matthew, Defendants/Appellees. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Caroline Wall, Judge. Plaintiff/Appellant Amber Beffer (Beffer) appeals the grant of summary judgment in favor of Defendants/Appellees Harley Hollan Companies, Inc., d/b/a Harley Hollan Roll-Offs (Company), Poly Hernandez (Hernandez) and Kenneth O. Matthews (Matthews) (collectively "Defendants"). Beffer asserted claims for negligence against Defendants for the placement of a roll-off dumpster in a public street without a permit. Beffer collided her vehicle with the dumpster and sought recovery from Defendants for resulting injuries. Holding that Beffer failed to establish Defendants' actions as the proximate cause of her injuries, the trial court granted summary judgment in favor of Defendants. Beffer appeals. Because Beffer cannot establish Defendants' placement of the dumpster as the direct cause of the collision, Defendants were entitled to judgment as a matter of law and we affirm. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

Friday, May 22, 2020

117,562 — Billy Ray Reeves, Petitioner/Appellant, V. The State of Oklahoma, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Trevor Pemberton, Judge. Petitioner/Appellant, Billy Ray Reeves, appeals from the trial court's order rejecting his application for deregistration as a sex offender on the ground he does not qualify for such relief under 57 O.S. Supp. 2014 §583(E). Reeves was convicted of a sex crime in 2005 and given a five (5) year deferred sentence. Pursuant to the then-applicable provisions of the Oklahoma Sex Offenders Registration Act (SORA), 57 O.S. §581 et seq., Reeves was required to register as a sex offender for ten (10) years from the date of completion of his sentence (through March 8, 2020). After SORA was amended in 2007, DOC assigned Reeves a "Level 1" designation. However, in *Starkey v. Oklahoma Dep't of Corrections,* 2013 OK 43, 305 P.3d 1004, the Court held the SORA level assignments were to be applied prospectively only. DOC then removed Reeves' assignment level and advised him by letter that his registration end date had changed back to March 8, 2020. In May 2018, Reeves filed the instant application for relief pursuant to §583 (E), which allows certain Level 1 sex offenders to petition the court for SORA deregistration. The trial court held Reeves does not qualify for deregistration under §583(E), but did not address the State's statute of limitations defense. We hold Reeves' cause of action accrued when he received notice of his modified assignment level in 2014. Because his application for deregistration was not filed within two (2) years after he received such notice, it was untimely under 12 O.S. Supp. 2017 §95(A)(3) and should have been dismissed. AFFIRMED. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

118,570 — GHP Asset Company, LLC, a Florida Limited Liability Company, Plaintiff/Appellee, Lisa A. Roberts, Occupant of Premises, Defendant/Appellant, and Clement D. Roberts, Jr.; United States of America, ex rel. The Department of Treasury, Internal Revenue Service; and State of Oklahoma, ex rel. The Oklahoma Tax Commission, Defendants, and Clement Denoya Roberts III; Brandon Joseph Roberts; Racheal Roberts; the Heirs, Personal Representatives, Devisees, Trustees, Successors and Assigns of Clement D. Roberts, Jr., Deceased; the Unknown Successors of Clement D. Roberts, Jr., Deceased; and the Spouse of Lisa A. Roberts, If Married, Additional Defendants. Appeal from the District Court of Canadian County, Oklahoma. Honorable Paul Hesse, Trial Judge. Defendant/Appellant, Lisa Roberts, appealed summary judgment in favor of Plaintiff/Appellee, GHP Asset Company, LLC in this mortgage foreclosure action. Appellant proposes there is a factual question about whether the statute of limitations, 12A O.S. §3-118(a), barred the action which was commenced more than 6 years after the promissory note was accelerated. We observe there was no written notice of acceleration as required by the note and the bank's instruction during a phone call to "pay in full" pertained to the amount of the monthly payment, not an acceleration of the entire principal of the note. AFFIRMED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

(Division No. 2)
Tuesday, May 12, 2020

118,446 — In the Matter of E.Q., Alleged Deprived Child, Shana Potts, Natural Mother/Appellant, v. State of Oklahoma, Appellee. Appeal from an Order of the District Court of Cleveland County, Hon. Stephen J. Bonner, Trial Judge. Shana Potts (Mother) appeals the denial of her motion to revoke her consent to the termination of her parental rights to her child, E.Q. After review of the entire Record, this Court concludes that Mother did not establish that she could revoke her voluntary relinquishment of her parental rights on grounds of fraud, duress or violation of her constitutional rights. The decision of the trial court to deny Mother's motion to revoke her voluntary relinquishment of her parental rights is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

Monday, May 18, 2020

118,030 — John M. Haid and Ann W. Haid, Trustees of the John and Ann Haid Trust, dated December 15, 2015, Plaintiffs/Appellants, vs. Jesse Kingfisher, Full-blood Cherokee Indian Roll No. 3635; the foregoing if living, and if deceased his Heirs, Executors, Administrators, Personal Representatives, Devisees, Trustees, Successors and Assigns, both immediate and remote, whether known or unknown; and The Estate of R.E. Crow, Jr., deceased, Roberta Crow, Personal Representative, and The Heirs, Executors, Administrators, Personal Represen-

tatives, Devisees, Trustees, Successors and Assigns, both immediate and remote, whether known or unknown of Cleydia Vora Brown Crow a/k/a Cleta Crow, deceased; and of Bobby Crow a/k/a Bobbie Crow, deceased; and Fred Chamberlain and Lila Chamberlain, husband and wife, Defendants/Appellees. Appeal from an Order of the District Court of Delaware County, Hon. Barry Denney, Trial Judge. The plaintiffs, John M. Haid (Haid) and Ann W. Haid Trustees (Trustees) of the John and Ann Haid Trust (Haid Trust), appeal the trial court's denial of their motion for summary judgment and the grant of the motion for summary judgment of the defendant, counterclaimant, cross-claimant Fred Chamberlain (Chamberlain). Chamberlain's wife, Lila Chamberlain, is a named defendant and, as ruled by the trial court, granting Chamberlain's summary judgment necessarily resolves the Trust's claim against her. Trustees also appeal the motion for summary judgment filed by the defendant, counterclaimant, Roberta Crow (Crow) as personal representative of the Estate of R. E. Crow, deceased. As ruled by the trial court, the summary judgments also necessarily dispose of Trustee's claim against the heirs, successors, devisees, administrators, personal representatives, and trustees, known and unknown of Cleydia Vora Brown Crow, a/k/a Cleta Crow (Cleydia Crow) and Bobby Crow, a/k/a Bobbie Crow (Bobby Crow). Jesse Kingfisher, a named defendant, is alleged to be the original allottee and is apparently named as a part of Trustees' quiet title action. This claim is also resolved by the judgment. The trial court's order includes a finding pursuant to 12 O.S.2011, § 994(A). This appeal proceeds under the provisions of Okla.Sup.Ct.R. 1.36,12 O.S. Supp. 2019, ch. 15, app. 1. The elements of fraud on the part of Haid in his dealings with Roberta Crow to obtain quitclaim deeds from her covering the land that is the subject of this action are established so that summary judgment for Roberta Crow cancelling such deeds is affirmed. This means that the Haid Trust has no basis for any claim against Chamberlain or his wife because this claim is premised upon the conveyance from Roberta Crow to Queen, and from Queen to the Haid Trust. Therefore, summary judgment for Chamberlain is affirmed and the case is remanded with instructions to dismiss the action against Lila Chamberlain, if the trial court has not already done so. SUMMARILY AFFIRMED AND REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

Tuesday, May 19, 2020

118,031 (companion with 118,032) — Gerrie Lynn Cook, Petitioner/Appellee, vs. Casey Wayne Cook, Defendant/Appellant. Appeal from an Order of the District Court of Canadian County, Hon. Charles Gass, Trial Judge. This protective order case arises from an incident in which Gerrie Lynn Cook (Petitioner) and her husband allegedly suffered physical harm at the hands of their son, Casey Wayne Cook (Defendant). Defendant seeks review of the district court's order finding "a Final Order of Protection is necessary to protect [Petitioner] from domestic abuse, stalking, or harassment." We are unpersuaded by Defendant's arguments that consideration of the Petitioner's protective order petition is procedurally barred and that there was insufficient evidence to support the trial court's order. Therefore, we affirm the trial court's order granting a protective order in favor of Petitioner. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

118,032 (companion with 118,031) — Calvin W. Cook, Petitioner/Appellee, vs. Casey Wayne Cook, Defendant/Appellant. Appeal from an Order of the District Court of Canadian County, Hon. Charles Gass, Trial Judge. This protective order case arises from an incident during which Petitioner/Appellee Calvin W. Cook (Husband) and his wife allegedly suffered physical harm at the hands of their son, Defendant/Appellant Casey Wayne Cook (Defendant). Husband's wife is the appellant in the companion appeal. Defendant appeals from the trial court's order finding "a Final Order of Protection is necessary to protect [Husband] from domestic abuse, stalking, or harassment." We are unpersuaded by Defendant's arguments that consideration of Husband's protective order petition is procedurally barred and that there was insufficient evidence to support the trial court's order. Therefore, we affirm the trial court's order granting a protective order in favor of Husband. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

Friday, May 22, 2020

118,124 — In the Matter of S.S. and K.S., Alleged Deprived Children: James Smith, Appellant, v. State of Oklahoma, Appellee. Appeal from the District Court of Seminole County,

Hon. Timothy Olsen, Trial Judge. In this termination of parental rights proceeding, James Smith (Father) appeals from the district court's order, upon a jury verdict, terminating his parental rights to his minor children, K.S. and S.S. Father asserts on appeal that various procedural and other errors require reversal of the court's order. Father asserts eight propositions raising errors concerning improper procedure, exclusion of evidence, and State's failure to meet its burden regarding Father's failure to correct the conditions that led to the children's deprived adjudication. Based on our review of the record on appeal and the applicable law, we conclude the trial court did not err in entering its order terminating Father's parental rights upon the jury's verdict for the grounds of time in foster care, incarceration, and failure to correct the conditions that led to the deprived adjudication and in finding that it is in the best interests of the children that Father's rights be terminated. However, we further conclude State has not proven by clear and convincing evidence that Father's failure to provide court-ordered child support within the relevant period was willful; therefore, the trial court's order terminating Father's parental rights on that ground is an abuse of discretion and we modify the order by removal of that ground for termination. Accordingly, we affirm the order of termination as modified. AFFIRMED AS MODIFIED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

(Division No. 3)
Thursday, May 14, 2020

117,575 — Joseph Womble, Petitioner/Appellant, v. Joe Allbaugh, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Trevor Pemberton, Judge. The Plaintiff, Joseph Womble appeals from an order dismissing his Petition for a Writ of Mandamus. Womble is an inmate in the custody of the Oklahoma Department of Corrections (DOC). The Defendant, Joe Allbaugh, was the DOC Director. Womble asserted two claims for relief: first, the DOC has violated state law by taking more than 50% of the deposits in his inmate trust account to pay "legal co-pays and/or medical co-pays" in violation of 57 O.S. §549(B)(1); and second, the DOC's final agency order violated 75 O.S. §312 in not including findings of fact and conclusions of law. DOC challenged Womble's claims by filing a motion to dismiss for failure to state a claim upon which relief can be granted under 12 O.S. §2012(B)(6). DOC's motion was granted. AFFIRMED. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Goree, J. (Sitting by designation), concur.

118,299 — FARMER'S GRAIN COMPANY, Plaintiff/Appellee, v. D & S TRANSPORT & CONSTRUCTION, L.L.C., formerly D & S OILFIELD SERVICES, L.L.C.; and KASSI SHULTZ, Individually, Defendants/Appellants. Appeal from the District Court of Grant County, Oklahoma. Honorable Jack Hammontree, Judge. Defendants/Appellants, D&S Transport & Construction L.L.C. and Kassi Shultz, appeal the district court's July 30, 2019 order granting "partial summary judgment" on the basis of liability in favor of Plaintiff/Appellee, Farmer's Grain Company, and awarding "the principal amount of damages," $17,187.41, plus interest against Defendants/Appellants. Appellee, Farmer's Grain Co., filed its Petition on April 30, 2018 alleging D&S Transport & Construction L.L.C. defaulted on an open account and owed in excess of $14,388.78, plus interest. Farmer's Grain alleged Shultz signed the open account as guarantor and was personally liable for the damages based on her guarantor status. Farmer's Grain filed its motion for summary judgment and brief in support on March 11, 2019. Appellants/Defendants appeal the July 30, 2019 order. For the following reasons, we reverse the summary judgment order of the district court and remand for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Goree, J. (Sitting by designation), concur.

118,300 — FARMER'S GRAIN COMPANY, Plaintiff/Appellee, v. D & S TRANSPORT & CONSTRUCTION, L.L.C., formerly D & S OILFIELD SERVICES, L.L.C.; and KASSI SHULTZ, Individually, Defendants/Appellants. Appeal from the District Court of Grant County, Oklahoma. Honorable Jack Hammontree, Judge. Defendants/Appellants, D&S Transport & Construction L.L.C. and Kassi Shultz, appeal the district court's July 30, 2019 order granting "partial summary judgment" on the basis of liability in favor of Plaintiff/Appellee, Farmer's Grain Company, and awarding "the principal amount of damages," $28,903.32, plus interest against Defendants/Appellants. Appellee, Farmer's Grain Co. filed its Petition on April 30, 2018, alleging D&S Transport & Construction L.L.C. defaulted on an open account

and owed in excess of $24,224.37, plus interest. Farmer's Grain alleged Shultz signed the open account as guarantor and was personally liable for the damages based on her guarantor status. Farmer's Grain filed its motion for summary judgment and brief in support on March 11, 2019. Appellants/Defendants appeal the July 30, 2019 order. For the following reasons, we reverse the summary judgment order of the district court and remand for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Goree, J. (Sitting by designation), concur.

Thursday, May 21, 2020

117,320 — Joint Technology, Inc., Plaintiff/appellee/counter-appellant, V. Michael Corum, Defendant/appellant/counter-appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard Ogden, Judge. Defendant/Appellant/Counter-Appellee Michael Corum (Corum) appeals from the trial court's order awarding him $19,495 in attorney fees and costs after Corum obtained a favorable appellate ruling in the breach of contract action filed by Plaintiff/Appellee/Counter-Appellant Joint Technology, Inc. (Joint Technology). In this second appeal, Corum contends the court abused its discretion by reducing his attorney's lodestar fee. Joint Technology counter-appeals, arguing the court erred as a matter of law by awarding attorney fees pursuant to 12 O.S. 2011 §936. We find Corum was entitled to an attorney fee award. We further find the court's award was reasonable and within its discretion. The court's order is AFFIRMED. Opinion by Mitchell, P.J.; Bell, P.J. (Sitting by designation), and Goree, J. (Sitting by designation), concur.

117,364 — The Bank of New York Mellon F/k/a the Bank of New York as Successor Trustee for Jp Morgan Chase Bank, N.A., as Trustee for the Benefit of the Certificate holders of Popular Abs, Inc. Mortgage Pass-through Certificates Series 2005-5, Plaintiff/appellee, V. Jeremie Thomas, as Personal Representative of the Estate of Mary A. Brooks, Deceased, Defendant/appellant, and Mary A. Brooks, Aka Mary Ann Brooks, Deceased, Spouse, If Any, of Mary A. Brooks, Doe, Occupant, Raymond Thomas, Sr. Unknown Heirs, Successors and Assigns of Mary A. Brooks, Defendants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Trevor Pemberton, Judge. The trial court granted summary judgment to a bank in a mortgage foreclosure action. The homeowner appeals the trial court's finding that the bank was the entity with the authority to enforce the note at the outset of the litigation. Because we find that the bank evidenced the requisite authority to enforce the note at the time of the filing of the first amended petition, which cured any potential defect in its initial filing, we AFFIRM. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Goree, J. (Sitting by designation), concur.

117,932 — JAMES DUNLAP, Petitioner, v. MULTIPLE INJURY TRUST FUND and THE WORKERS' COMPENSATION COMMISSION Respondents. Petitioner James Dunlap (Claimant) appeals from an order of the Workers' Compensation Commission (the Commission) affirming the Administrative Law Judge (ALJ)'s finding that Claimant was not permanently totally disabled (PTD) as a result of the combination of his work-related injuries and thus was not eligible for PTD benefits from Respondent Multiple Injury Trust Fund (MITF). Claimant contends there was not substantial competent evidence to support the Commission's findings. He further argues it was error for the ALJ and the Commission to deviate from the findings of the independent medical examiner. We find the Commission's decision is not clearly erroneous in view of the reliable, material, probative and substantial competent evidence. Further, because we find no errors of law and the Commission's order sets forth extensive findings of fact and conclusions of law adequately explaining its decision, we AFFIRM UNDER OKLAHOMA SUPREME COURT RULE 1.202(D), 12 O.S. 2011, CH. 15, APP. 1. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Goree, J. (Sitting by designation), concur.

Friday, May 22, 2020

117,542 — In Re The Marriage of Lowe: Julie B. Lowe, Petitioner/Appellee, v. James B. Lowe, III, Respondent/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Patricia G. Parrish, Trial Judge. After succeeding in a post-divorce custody battle, the appellant/father filed a motion for attorneys' fees and costs. He based his claim on both 43 O.S. §112(D)(2), arguing that he was the prevailing party under that statute and therefore entitled to an award of fees, as well as 43 O.S. §110(E), which leaves the question of fees and costs to the discretion of the trial court. The trial court found §112(D)(2) inapplicable because the father did not bring the

action pursuant to §112(D)(1). However, the trial court did award the father a portion of his requested fees and all of his costs under §110(E). The father appeals, arguing (1) that the trial court's failure to apply §112(D)(2) was erroneous, and (2) that the trial court's fee award was inadequate under §110(E). We AFFIRM. Opinion by Mitchell, P.J.; Bell, P.J., concurs and Buettner, J., concurs in result.

(Division No. 4)
Tuesday, May 12, 2020

117,657 — DLJ Mortgage Capital, Inc., Substituted Plaintiff/Appellee, v. Annetta J. Beeler, a/k/a Annetta Beeler a/k/a Annetta Jean Beeler, Defendant/Appellant, and John Doe, her spouse, if married; Occupants of the Premises; Aames Capital Corporation f/k/a Aames Funding Corporation; Associates First Capital Corporation, a Delaware Corporation Successor by Reason of Merger with Associates Financial Services Company, Inc., Successor by Reason of Merger with Associates Financial Services Company of Oklahoma, Inc.; Arvest Bank; and Danny Beeler, Defendants. Appeal from an Order of the District Court of Tulsa County, Hon. Caroline Wall, Trial Judge. Annetta J. Beeler appeals a grant of summary judgment in favor of DLJ Mortgage Capital, Inc. (DLJ) in this mortgage foreclosure action. Beeler asserts the original plaintiff did not have standing to bring the foreclosure suit in 2005. After a de novo review of the record, we conclude the evidence clearly establishes the original plaintiff failed to show it had standing at the time it commenced the foreclosure proceeding. Accordingly, the district court lacked jurisdiction to adjudicate the foreclosure, including substituting NationsCredit or DLJ as plaintiff or granting DLJ summary judgment. The journal entry of judgment is therefore reversed and the matter remanded for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

Thursday, May 14, 2020

117,140 (Consolidated with Case No. 117,402) — Stephanie Annette Shrum, Petitioner/Appellee, vs. Leslie Paul Shrum, Respondent/Appellant. Appeal from an Order of the District Court of Texas County, Hon. Ryan D. Reddick, Trial Judge. Leslie Paul Shrum (Husband) appeals from post-divorce decree orders entered by the trial court on May 24, 2018 and August 30, 2018. The parties dispute the terms of their Settlement Agreement. Because the trial court did not address this issue and make findings of fact or conclusions of law on the issue of the parties' intent, the essential elements of their Agreement, or the contested portion thereof, the matter must be remanded to the trial court for further proceedings. Accordingly, the May 24, 2018 order is affirmed, but the August 30, 2018 order is reversed and the matter remanded to the trial court for further proceedings consistent with our opinion. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

117,944 — Jessica Diane Smith, Plaintiff/Appellee, vs. Harris S. Smith, II, Successor Trustee of the Harris S. Smith Family Trust; Andrew T. Smith; and Adam Smith, Defendants/Appellants. Appeal from an Order of the District Court of Carter County, Hon. Thomas S. Baldwin, Trial Judge, entering a temporary injunction prohibiting Harris S. Smith II, Successor Trustee of the Harris S. Smith Family Trust (Trustee) from disposing of trust assets following a proceeding at which the court also required Trustee's counsel to accept service of process on behalf of the Trust. We find no error of law in the trial court's decision. The court did not abuse its discretion, and we affirm its decision entering a temporary injunction restraining Trustee from disposing of Trust assets until further order of the court. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Wiseman, C.J., and Hixon, J., concur.

Wednesday, May 20, 2020

118,082 — Dorreen Janice Curry, Plaintiff/Appellant, vs. St. Francis Hospital and Ralph T. Boone, M.D., Defendants/Appellees, and Executor of the Estate of Karl Detwiler, M.D., Defendant. Appeal from an Order of the District Court of Tulsa County, Hon. Daman H. Cantrell, Trial Judge. Doreen Janice Curry (Curry) appeals the trial court's order granting summary judgment to Saint Francis Hospital (SFH) and Ralph T. Boone, M.D. (Boone) on her medical negligence claims. This Court previously considered an appeal of an order dismissing Curry's claims and determined they were time-barred in *Curry v. St. Francis Hosp., et al., (Curry I),* Appeal No. 116,704. The Court reversed and

remanded for consideration of whether Curry should be granted leave to amend her petition. Upon remand, the trial court granted leave to amend. This subsequent appeal concerns the grant of summary judgment on claims asserted in the Amended Petition based on the two-year statute of limitations. Curry relied on the same claims on summary judgment which the Court determined to be barred by the two-year statute of limitations in her previous appeal. She did not identify any additional fact or allegation which supported tolling the statute of limitations. As in the previous appeal, the undisputed material facts demonstrated Curry had express knowledge of her claims in 2011, six years before the underlying action was filed. We affirm the trial court's May 28, 2019 Order Granting Summary Judgment and Final Journal Entry of Judgment. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

118,236 — Robert Dennis Prescott and Donna Prescott, Plaintiffs/Appellants, vs. DCP Operating Company, LP, a foreign limited liability company, Board of County Commissioners of Logan County, Defendants/Appellees, and Kevin Lewis Carnes, Defendant. Appeal from orders of the District Court of Logan County, Hon. Phillip C. Corley, Trial Judge, granting summary judgment in favor of DCP Operating Company, LP, and the Board of County Commissioners of Logan County. We address whether DCP and Board are entitled to judgment as a matter of law in this negligence action. "[T]o avoid trial for negligence, defendants must establish through unchallenged evidentiary materials that, even when viewed in a light most favorable to plaintiffs, no disputed material facts exist as to any material issues and that the law favors defendants." *Iglehart v. Board of Cnty. Comm'rs of Rogers Cnty.*, 2002 OK 76, ¶ 9, 60 P.3d 497. Because material issues of fact remain in dispute, we conclude the summary judgments in favor of DCP and Board must be reversed and the case remanded for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

117,415 — Moore Primary Care, Inc., Plaintiff/Appellee, vs. Phoenix Thera-Lase Systems, LLC, Defendant/Appellant. Appeal from Order of the District Court of Cleveland County, Hon. Jeff Virgin, Trial Judge. Defendant appeals from a judgment in favor of Plaintiff, arising from breach of an agreement to buy back a medical laser MPC purchased from Defendant. The trial court's determination that Defendant entered into and breached an agreement to buy back the laser from Plaintiff was reasonably supported by evidence and free from reversible error. We affirm the trial court's Order of August 31, 2018, awarding judgment to Plaintiff. AFFIRMED. Opinion from Court of Civil Appeals, Division IV by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

Thursday, May 21, 2020

118,176 — Allen Contracting, Inc. and Shell Construction Company, Inc., Plaintiffs/Appellants, vs. The Oklahoma Department of Transportation and The Cummins Construction Company, Inc., Defendants/Appellees. Appeal from an Order of the District Court of Oklahoma County, Hon. Cindy H. Truong, Trial Judge. Allen Contracting, Inc. and Shell Construction Company, Inc. (referred to collectively or separately as Allen) appeal the district court's dismissal of their claims with prejudice for lack of subject matter jurisdiction and denial of Allen's request to transfer the action in lieu of dismissal. We find that the district court erred in its order of July 24, 2019, and reverse and remand with directions to transfer this matter to Grady County. REVERSED AND REMANDED WITH DIRECTIONS. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

ORDERS DENYING REHEARING
(Division No. 3)
Friday, May 22, 2020

118,412 — Richard Lynn Dopp, Plaintiff/Appellant, vs. Don Kirkendall and Charles Kirkendall, Defendants/Appellees. Appellant's Petition for Rehearing, filed May 14, 2020, is *DENIED*.

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NORMAN BASED LAW FIRM IS SEEKING SHARP, MOTIVATED ATTORNEYS for fast-paced transactional work. Members of our growing firm enjoy a team atmosphere and an energetic environment. Attorneys will be part of a creative process in solving tax cases, handle an assigned caseload and will be assisted by an experienced support staff. Our firm offers health insurance benefits, paid vacation, paid personal days and a 401K matching program. No tax experience necessary. Position location can be for any of our Norman, OKC, or Tulsa offices. Submit resumes to Ryan@PolstonTax.com.

NORMAN BASED FIRM IS SEEKING A SHARP AND MOTIVATED ATTORNEY to handle HR-related matters. Attorney will be tasked with handling all aspects of HR-related items. Experience in HR is required. Firm offers health/dental insurance, paid personal/vacation days, 401(k) matching program and a flexible work schedule. Members of our firm enjoy an energetic and team-oriented environment. Position location can be for any of our Norman, OKC or Tulsa offices. Submit resumes to justin@polstontax.com.

GROWING TECHNOLOGY COMPANY in Oklahoma searching for an individual with 5+ years of legal experience in a mid to large size law firm or in-house legal department to assume position as Assistant/Associate General Counsel. This corporate attorney will report to the General Counsel and will be responsible for contracts as well as compliance and regulatory matters. The successful candidate will provide counsel on business laws including those in the areas of privacy and technology. Company provides a full compensation and benefit package along with cutting edge work. Technology background a plus but not a requirement. Our employees are aware of this solicitation. Apply in confidence to Box 1002, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

THE OKLAHOMA BAR ASSOCIATION HEROES program is looking for several volunteer attorneys. The need for FAMILY LAW ATTORNEYS is critical, but attorneys from all practice areas are needed. All ages, all counties. Gain invaluable experience, or mentor a young attorney, while helping someone in need. For more information or to sign up, contact 405-416-7086 or heroes@okbar.org.

POSITIONS AVAILABLE

THE HOUSING AUTHORITY OF THE CITY OF TULSA is currently hiring for a General Attorney. They will assist Chief Legal Officer with real estate and transactional matters for our agency. This General Attorney will possess strong contract and property law knowledge as well as skills and experience in drafting business and real estate transaction agreements. This position may be called upon to assist with litigation matters as well. Position requires a bachelor's degree in business or a closely related area and a law degree from an accredited school of law. Must have 4+ years of experience. Must possess a valid license to practice law in Oklahoma. Salary: $55,685 - $62,900 + Full Benefits including 11% company contribution to 401(k). Apply at www.tulsahousing.org/career-opportunities/.

LOST WILLS

ANYONE WHO DRAFTED A WILL AND/OR ANY ESTATE PLANNING DOCUMENTS FOR COYOTE JOHNSON AND/OR RAMONA POWELL JOHNSON of Tulsa, OK, please contact Maureen Johnson at 918-584-4724 or mjohnson@frasierlaw.com.

CLASSIFIED INFORMATION

REGULAR CLASSIFIED ADS: $1.50 per word with $35 minimum per insertion. Additional $15 for blind box. Blind box word count must include "Box ___," Oklahoma Bar Association, PO Box 53036, Oklahoma City, OK 73152."

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LIVE WEBCAST

THURSDAY,
JUNE 9, 2020
2 - 3 P.M.

MCLE 1/1

FACULTY:
Amy Wood, Psy.D.
Falmouth, Massachusetts

Stay up-to-date and follow us on

TO REGISTER GO TO WWW.OKBAR.ORG/CLE

DEALING WITH DIFFICULT PEOPLE

STRATEGIES FOR MANAGING TRICKY PERSONALITIES WITH GREATER COMMAND -- WITHOUT LOSING YOUR COOL.

OVERVIEW:
Attorneys often interact with clients, colleagues and other individuals who can really test patience and push buttons. This seminar will focus on strategies for managing tricky personalities with greater command -- without losing your cool.

Specifically, you will learn how to engage the following people in more rational, productive conversations:

- **Upset clients who become increasingly overwhelmed as you try to explain.**
- **Colleagues who are ultra-certain of their point of view, and become combative when you try to present yours.**
- **Negative clients and colleagues who drain your energy.**
- **Manipulative people who can't be trusted.**
- **Abusers who attempt to harass you.Anybody else in your professional or personal life who you may have trouble getting through to, collaborating with, or gaining cooperation from.**

TUITION: $105

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DEFENDING THE DUI-DRUG CASE

FRIDAY,
JULY 24, 2020
9 A.M. - 2:50 P.M.

Emerson Hall, Oklahoma Bar Center

DUE TO SOCIAL DISTANCING
IN-PERSON SEATING LIMITED

MCLE 6.5/1

PROGRAM PLANNER:
Sonja Porter, *"The DUI Diva"*
Sonja Porter Attorney at Law, PLLC

LIVE WEBCAST AVAILABLE

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PROGRAM DESCRIPTION:
DUI-drug cases, especially those involving prescription drugs or medical marijuana, pose different challenges for the defense attorney. Our speakers will talk about Field tests, DRE's, blood tests, saliva tests, and what it actually means to be "under the influence" of a particular drug, especially in a "per se" state. Finally, we will talk about the latest in driver's license issues and any pending legislation.

TOPICS INCLUDE:

- **The A, B, C's of SFTS, ARIDE, & DRE**
- **Drugs in the Blood Analysis Explained**
- **Understanding the Effects of Drugs in the Blood**
- **Defending the DUI Drug case**
- **Cross-Examination of the ARIDE Officer**
- **DUI Law Updates**
- **Ethics**

TUITION: Early-bird registration by July 17, 2020 is $150.00 and $175.00 thereafter. Walk-ins are $200.00. Members licensed 2 years or less may register for $75 for the in-person program (late fees apply. All programs may be audited (no materials or CLE credit) for $50 by emailing ReneeM@okbar.org to register.