2015 OK 54

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

DR. BRUCE PRESCOTT, JAMES HUFF, DONALD CHABOT, and CHERYL FRANKLIN,

Plaintiffs-Appellants,

v.

OKLAHOMA CAPITOL PRESERVATION COMMISSION,

Defendant-Appellee.

Case No. 113,332

FOR OFFICIAL PUBLICATION

ON APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY; STATE OF OKLAHOMA; HONORABLE THOMAS E. PRINCE

¶0 Oklahoma citizens challenged the placement of a Ten Commandments Monument on the grounds of the Oklahoma State Capitol under Article 2, Section 5 of the Oklahoma Constitution. The trial court entered summary judgment for the Defendant and denied injunctive relief. Citizens appealed, and we retained the case. We hold that the Ten Commandments Monument violates Article 2, Section 5 of the Oklahoma Constitution, is enjoined, and shall be removed.

DISTRICT COURT'S JUDGMENT REVERSED; MATTER REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION

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PER CURIAM

¶1 Oklahoma citizens Bruce Prescott, James Huff, and Cheryl Franklin (complainants) seek removal of a Ten Commandments monument from the Oklahoma Capitol grounds. The monument was a gift from another Oklahoma citizen and was placed on the Capitol grounds pursuant to a Legislative act that was signed by the Governor. While conceding that no public funds were expended to acquire the monument, complainants nonetheless maintain its placement on the Capitol grounds constitutes the use of public property for the benefit of a system of religion. Such governmental action is forbidden by Article 2, Section 5 of the Oklahoma Constitution.

¶2 The trial court ruled that the monument did not violate Article 2, Section 5 and entered a summary judgment denying complainants' request for an injunction. This Court reviews de novo the constitutional issue and the legal question resolved by the summary judgment. *Sw. Bell Tel. Co. v. Okla. State Bd.*

of Equalization, 2009 OK 72, ¶ 10, 231 P.3d 638, 641. Upon de novo review, the trial court's ruling is reversed.

¶3 In deciding whether the State's display of the monument in question violates Article 2, Section 5, the intent of this provision must be ascertained. *Draper v. State*, 1980 OK 117, ¶ 8, 621 P.2d 1142, 1145. Such intent is first sought in the text of the provision. *Id.* Words of a constitutional provision must be given their plain, natural and ordinary meaning. *Lepak v. McClain*, 1992 OK 166, ¶ 7, 844 P.2d 852, 854.

¶4 The text of Article 2, Section 5 states:

> § 5. Public money or property - Use for sectarian purposes.
>
> No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.

The plain intent of Article 2, Section 5 is to ban State Government, its officials, and its subdivisions from using public money or property for the benefit of any religious purpose. Use of the words "no," "ever," and "any" reflects the broad and expansive reach of the ban. *See Coffee v. Henry*, 2010 OK 4, ¶ 3, 240 P.3d 1056, 1057.

¶5 To reinforce the broad, expansive effect of Article 2, Section 5, the framers specifically banned any uses "indirectly" benefitting religion. As this Court has previously observed, the word "indirectly" signifies the doing, by an obscure,

circuitous method, something which is prohibited from being done directly, and includes all methods of doing the thing prohibited, except the direct means. *Haynes v. Caporal*, 1977 OK 166, ¶ 7, 571 P.2d 430, 433. Prohibiting uses of public property that "indirectly" benefit a system of religion was clearly done to protect the ban from circumvention based upon mere form and technical distinction.

¶6 In authorizing its placement, the Legislature apparently believed that there would be no legal impediment to placing the monument on the Capitol grounds so long as (1) the text was the same as the text displayed on the Ten Commandments monument on the grounds of the Texas State Capitol, and (2) a non-religious historic purpose was given for the placement of the monument. To be sure, the United States Supreme Court case of *Van Orden v. Perry*, 545 U.S. 677 (2005), ruled that the Texas Ten Commandments monument did not violate the Establishment Clause in the First Amendment to the United States Constitution. However, the issue in the case at hand is whether the Oklahoma Ten Commandments monument violates the Oklahoma Constitution, *not whether it violates the Establishment Clause*. Our opinion rests solely on the Oklahoma Constitution with no regard for federal jurisprudence. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). As concerns the "historic purpose" justification, the Ten Commandments are obviously religious in nature and are an integral part of the Jewish and Christian faiths.

¶7 Because the monument at issue operates for the use, benefit or support of a sect or system of religion, it violates Article 2, Section 5 of the Oklahoma Constitution and is enjoined and shall be removed.

DISTRICT COURT'S JUDGMENT REVERSED; MATTER REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION

¶8 Reif, C.J., Kauger, Watt, Winchester, Edmondson, Taylor, Gurich, JJ., concur.

¶9 Combs, V.C.J., Colbert, J., dissent.

2015 OK 50

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA ex rel. OKLAHOMA BAR ASSOCIATION,	)
Complainant,	) **O.B.A.D. No. 2024**
v.	) **S.C.B.D. No. 6223**
JAMES M. DEMOPOLOS,	)
Respondent.	) **FOR OFFICIAL PUBLICATION**

PROFESSIONAL DISCIPLINARY PROCEEDING

¶ 0 Respondent, a lawyer, pled guilty in the District Court of Oklahoma County to the crimes of obstructing a public officer, threatening to perform an act of violence involving or intended to involve serious bodily harm or death, and domestic abuse assault and battery. The Oklahoma Bar Association sought a post-conviction immediate suspension of Respondent's license to practice law and this Court issued an order of immediate suspension. Respondent sought and was provided a mitigation hearing held before a trial panel of the Professional Responsibility Tribunal. The panel recommended a six-month suspension with a deferred suspension of two years and one day while the Bar sought a suspension for two years. We hold that the appropriate discipline is a one-year suspension and an additional deferred suspension of one year with conditions upon Respondent's conduct and rehabilitation.

**INTERIM SUSPENSION PREVIOUSLY ORDERED:
RESPONDENT IS SUSPENDED FROM THE PRACTICE OF LAW FOR ONE YEAR COMMENCING ON FEBRUARY 2, 2015, WITH AN ADDITIONAL ONE-YEAR SUSPENSION UNTIL FEBRUARY 3, 2017, THAT IS DEFERRED UPON RESPONDENT'S COMPLIANCE WITH CONDITIONS;
RESPONDENT SHALL PAY COSTS WITHIN NINETY DAYS**

Loraine Dillinder Farabow, First Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

John W. Coyle, III, Coyle Law Firm, Oklahoma City, Oklahoma, for Respondent.

EDMONDSON, J.

¶ 1 The Respondent, a lawyer licenced to practice law in Oklahoma, pled guilty to three misdemeanors and the Bar Association sought to have his Bar license immediately suspended with a two-year suspension by commencing a proceeding authorized by Rule 7 of the Rules Governing Disciplinary Proceedings. We previously entered an order of interim suspension. After review of the record made before the trial panel of the Professional Responsibility Tribunal, we conclude that the appropriate discipline is a suspension of one year with an additional deferred professional suspension for one year conditioned upon Respondent's compliance with conditions relating to his conduct and rehabilitation.

¶ 2 A criminal Information was filed against the Respondent, James M. Demopolos, in the District Court for Oklahoma County.[1] One count was dismissed[2] and he pled guilty to violating: (1) 21 O.S. § 540, obstructing a public officer;[3] (2) 21 O.S. § 1378(B), threatening to perform an act of violence involving or intended to involve serious bodily harm or death;[4] and (3) 21 O.S. § 644(C), domestic abuse assault and battery.[5]

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[1] *State of Oklahoma v. James M. Demopolos*, CF-2014-3767, District Court of Oklahoma County.

[2] The first count of the Information alleged that Respondent had offered a bribe to the police officers in the form of money to release him from custody in violation of 21 O.S. § 381. The State moved to dismiss this Count and this Count was noted as dismissed in the Plea of Guilty.

[3] 21 O.S. § 540: "Every person who willfully delays or obstructs any public officer in the discharge or attempt to discharge any duty of his office, is guilty of a misdemeanor."

[4] 21 O.S. § 1378(B): "Any person who shall threaten to perform an act of violence involving or intended to involve serious bodily harm or death of another person shall be guilty of a misdemeanor, punishable upon conviction thereof by imprisonment in the county jail for a period of not more than six (6) months."

[5] 21 O.S. § 644(C): "Any person who commits any assault and battery against a current or former spouse, a present spouse of a former spouse, a former spouse of a present spouse, parents, a foster parent, (continued...)

Upon Respondent's guilty plea, the District Court deferred its two-year sentence until its review on January 6, 2017, and ordered Respondent to pay specific fines and costs. The court ordered he be placed under the supervision of the Oklahoma Department of Corrections and successfully complete a 52-week Batterers Intervention Program[6] with substance abuse testing.

¶ 3 A lawyer who has been convicted or has tendered a plea of guilty or nolo contendere pursuant to a deferred sentence plea agreement is subject to professional discipline when the crime demonstrates such lawyer's unfitness to practice law.[7] The clerk of any court in this State in which a lawyer is convicted or as to whom proceedings are deferred is required to "transmit certified copies of the Judgment and Sentence on a

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[5](...continued)
a child, a person otherwise related by blood or marriage, a person with whom the defendant is or was in a dating relationship as defined by Section 60.1 of Title 22 of the Oklahoma Statutes, an individual with whom the defendant has had a child, a person who formerly lived in the same household as the defendant, or a person living in the same household as the defendant shall be guilty of domestic abuse. Upon conviction, the defendant shall be punished by imprisonment in the county jail for not more than one (1) year, or by a fine not exceeding Five Thousand Dollars ($5,000.00), or by both such fine and imprisonment. Upon conviction for a second or subsequent offense, the person shall be punished by imprisonment in the custody of the Department of Corrections for not more than four (4) years, or by a fine not exceeding Five Thousand Dollars ($5,000.00), or by both such fine and imprisonment. The provisions of Section 51.1 of this title shall apply to any second or subsequent offense."

21 O.S. 2011 § 644 was amended by Laws 2014, c. 71 § 1, eff. Nov. 1, 2014, and the language of paragraph (C) does not appear to have been altered by the amendment. 2014 Okla. Sess. Laws, c. 71, § 1, pg. 233.

[6] The Victim Services Unit of the Office of the Oklahoma Attorney General provides services for persons who require domestic violence or sexual assault services through a domestic violence or sexual assault program; and for the purpose of providing this service a "'batterers intervention program' or 'batterers treatment program' means an agency, organization, facility or person who offers, provides or engages in the offering of counseling or intervention services to persons who commit domestic abuse." 74 O.S.2011 § 18p-1(D).

[7] 5 O.S.2011 Ch. 1, App. 1-A, Rules Governing Disciplinary Proceedings, Rule 7.1: "A lawyer who has been convicted or has tendered a plea of guilty or nolo contendere pursuant to a deferred sentence plea agreement in any jurisdiction of a crime which demonstrates such lawyer's unfitness to practice law, regardless of whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial, shall be subject to discipline as herein provided, regardless of the pendency of an appeal."

plea of guilty, order deferring judgment and sentence, indictment or information and judgment and sentence of conviction to the Chief Justice of the Supreme Court and to the General Counsel of the Oklahoma Bar Association within (5) days after said conviction."[8] The transmitted copies received by the Bar Association are filed in this Court by the Bar Association.[9] The Bar Association filed in this Court copies of the Information and Guilty Plea from Respondent's criminal case.

¶ 4 Upon receipt of the specified documents from a lawyer's criminal case, this Court enters an interim order of suspension that immediately suspends the lawyer from practicing law, and the lawyer is provided with an opportunity to show cause why the order of suspension should be set aside.[10] This Court entered an interim suspension order on February 2, 2015, and provided Respondent with an opportunity to object to the interim suspension and request a mitigation hearing before a trial panel of the Professional

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[8] 5 O.S.2011 Ch. 1, App. 1-A, Rules Governing Disciplinary Proceedings, Rule 7.2: "The clerk of any court within this State in which a lawyer is convicted or as to whom proceedings are deferred shall transmit certified copies of the Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and judgment and sentence of conviction to the Chief Justice of the Supreme Court and to the General Counsel of the Oklahoma Bar Association within five (5) days after said conviction. The documents shall also be furnished to the Chief Justice by the General Counsel within five (5) days of receiving such documents. Such documents, whether from this jurisdiction or any other jurisdiction shall constitute the charge and be conclusive evidence of the commission of the crime upon which the judgment and sentence is based and shall suffice as the basis for discipline in accordance with these rules."

[9] *State ex rel. Oklahoma Bar Ass'n v. Zannotti*, 2014 OK 25, ¶ 22, 330 P.3d 11, 16.

[10] 5 O.S.2011 Ch. 1, App. 1-A, Rules Governing Disciplinary Proceedings, Rule 7.3: "Upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and the judgment and sentence, the Supreme Court shall by order immediately suspend the lawyer from the practice of law until further order of the Court. In its order of suspension the Court shall direct the lawyer to appear at a time certain, to show cause, if any he has, why the order of suspension should be set aside. Upon good cause shown, the Court may set aside its order of suspension when it appears to be in the interest of justice to do so, due regard being had to maintaining the integrity of and confidence in the profession."

Responsibility Tribunal (PRT).[11] Respondent filed a waiver of his opportunity to object to the interim suspension, and he requested a mitigation hearing. A trial panel of the PRT held a mitigation hearing with Respondent being represented by counsel. After that hearing, both the Bar and Respondent filed their briefs in this Court addressing evidence at the hearing and legal argument concerning the appropriate professional discipline.

I. The Court's Rule 7 Review of Respondent's Conduct

¶ 5 This Court has exclusive original jurisdiction over Bar disciplinary matters.[12] Protecting the public and purification of the Bar are the primary purpose of disciplinary proceedings rather than punishment of the offending attorney.[13] In Bar disciplinary proceedings, this Court will conduct a *de novo* review of the record to determine if misconduct has occurred and what discipline is appropriate.[14] Pursuant to Rule 7.2 of the Rules Governing Disciplinary Proceedings (RGDP), Respondent's Guilty Plea constitutes conclusive evidence of the commission of the crimes that serve as the basis for professional discipline, and with the additional documents filed in this Court there is a sufficient record for our review of Respondent's Bar proceeding.[15]

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[11] *State ex rel. Oklahoma Bar Ass'n v. James M. Demopolos*, 2015 OK 5, S.C.B.D. No. 6223 (Feb. 2, 2015, Published in O.B.J. Only).

[12] *State ex rel. Oklahoma Bar Ass'n v. Givens*, 2014 OK 103, ¶ 8, 343 P.3d 214, 216-217, *State ex rel. Oklahoma Bar Ass'n v. Funk*, 2005 OK 26, ¶ 3, 114 P.3d 427, 430.

[13] *State ex rel. Oklahoma Bar Ass'n v. Chappell*, 2004 OK 41, ¶ 23, 93 P.3d 25, 31.

[14] *Givens*, 2014 OK 103, at ¶ 9, 343 P.3d at 217, citing *State ex rel. Oklahoma Bar Ass'n v. Soderstrom*, 2013 OK 101, ¶¶ 9-10, 321 P.3d 159, 160.

[15] See Rule 7.2 at note 8 *supra*; *Givens*, 2014 OK 103, at ¶ 9, 343 P.3d at 217; *State ex rel. Oklahoma Bar Ass'n v. Shofner*, 2002 OK 84, n. 1, 60 P.3d 1024, 1026 (although a lawyer may in the interest (continued...)

¶ 6 The evidence before the trial panel was that one Saturday evening in May of 2014, Respondent was verbally abusive and consuming alcohol. His condition caused his wife to leave their residence and spend the night with a relative. Upon her return the next morning she made a 911 telephone call seeking help because Respondent was drunk, verbally abusive, and physically abusive having hit her in her arm and head with his closed hand.

¶ 7 The police arrived and observed his intoxicated state. He made threats of physical violence against his wife in the presence of the police, including statements describing what he would do to her when he was no longer in custody. They noticed a bruise on his wife consistent with her complaint. The police sought identifying information from him and he responded with a contemptuous epithet. He admitted to the police that he had hit his wife. These facts served as a basis for three counts in the Information filed against him and his subsequent guilty pleas.

¶ 8 Although this Court's previous order of interim suspension is a determination that Respondent's admitted criminal conduct facially demonstrates his unfitness to practice law, we also examine *all of his conduct* in light the evidence submitted at the post-mitigation hearing for our determination of the proper professional discipline for Respondent.[16] There are two basic issues in this summary disciplinary proceeding: does the conviction demonstrate the lawyer's unfitness to practice law, and if so, what is the

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[15](...continued)
of explaining his or her conduct or by way of mitigating the discipline to be imposed submit evidence tending to mitigate the severity of discipline, a post-conviction disciplinary hearing will not relitigate the facts which gave rise to the criminal charges).

[16] *State ex rel. Oklahoma Bar Ass'n v. Wilcox*, 2014 OK 1, ¶ 45, 318 P.2d 1114, 1127.

proper professional discipline.[17] We do not adjudicate the existence of facts which gave rise to the criminal charges.[18]

¶ 9 In *Givens* we explained that "Violent acts in the form of domestic abuse demonstrate a lawyer's unfitness to practice law. We most recently found, '[a]s incidents of domestic ... abuse rise and become the focus of ... public attention, it becomes more incumbent on this Court to protect the public by sending a message to other lawyers that this misconduct is considered a serious breach of a lawyer's ethical duty and will not be tolerated.'"[19] Twenty-five years ago this Court discussed criminal convictions that demonstrate unfitness to practice law; and we noted language appearing in a Comment to one of our Rules of Professional Conduct *that was also cited recently in Givens*: ". . . Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. *Offenses involving violence*, dishonesty or breach of trust, or serious interference with the administration of justice are in that category."[20]

¶ 10 *A lawyer's guilty plea or criminal conviction for a violent act of domestic abuse is a violation of the Oklahoma Rules of Professional Conduct*, 5 O.S. Ch. 1, App. 3-

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[17] *State ex rel. Oklahoma Bar Ass'n v. Hart*, 2014 OK 96, ¶ 8, 339 P.3d 895, 898; *State ex rel. Oklahoma Bar Ass'n v. Wilcox*, 2014 OK 1, ¶ 45, 318 P.2d 1114, 1127, citing *State ex rel. Oklahoma Bar Ass'n v. Cooley*, 2013 OK 42, ¶ 11, 304 P.3d 453, 455.

[18] See note 15 *supra*, and citation to *Shofner*.

[19] *State ex rel. Oklahoma Bar Ass'n v. Givens*, 2014 OK 103, ¶ 11, 343 P.3d at 217 quoting *State ex rel. Oklahoma Bar Ass'n v. Zannotti*, 2014 OK 25, ¶ 24, 330 P.3d 11, 17.

[20] *State rel. Oklahoma Bar Ass'n v. Armstrong*, 1990 OK 9, 791 P.2d 815, 818 quoting Comment, 5 O. S. Supp.1988, Ch. 1, App. 3–A, Rule 8.4 (emphasis added). See note 21, *infra*, citing *Givens*, 2014 OK 103, ¶ 11, 343 P.3d at 217, and its reliance on Rule 8.4 and similar language found in current Rule 8.4, Comment 2.

A, Rule 8.4(b).[21] *Respondent's guilty plea for a violent act of domestic abuse merits professional discipline imposed by this Court.*

II. The Court's Rule 7 Review of Respondent's Conduct and Mitigation of Professional Discipline

¶ 11 The evidence at the mitigation hearing was that Respondent had practiced law since 1978 and had no previous complaints for professional discipline. Respondent had previously worked as an oil and gas title lawyer, and no allegations have been made that his conduct has injuriously affected a client. Respondent is currently employed as a landman, and he works on title examinations authored by his employer who is a lawyer. An affidavit was submitted to show that Respondent has been compliant with the Lawyers Helping Lawyers program. A lawyer testified concerning Lawyers Helping Lawyers and Respondent's participation in the program.

¶ 12 A lawyer testified that he became Respondent's sponsor in Alcoholics Anonymous (AA). He explained that Respondent had made progress in that program. The evidence shows that Respondent's continuous participation in AA had been for less than a year at the time the mitigation hearing occurred. Another lawyer testified that he had shared an office with, and rented an office to, Respondent for several years. He

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[21] *State ex rel. Oklahoma Bar Ass'n v. Givens*, 2014 OK 103, ¶ 11, 343 P.3d at 217, quoting O. R. P. C. Rule 8.4(b) and Comments 2 to Rule 8.4.

Rule 8.4, O. R. P. C. provides in part: "It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; . . . ."

Comment 2 to Rule 8.4 provides in part: "Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation."

stated that he had never seen him consume alcohol while working, or show any indication that alcohol had affected his practice of law.

¶ 13 The evidence at the mitigation hearing also included Respondent's previous chronic use of marijuana as well as his use of sedatives. Respondent successfully completed a thirty-day in-patient treatment program for substance abuse after his arrest. However, he had two relapses of consuming alcohol shortly after returning home after treatment, and these two events occurred approximately five months prior to the mitigation hearing. The evidence showed that immediately after the relapses he continued with attending his AA meetings and informed his AA sponsor of the events. The record shows that Respondent has not failed any of his post-conviction drug tests, and testimony shows that he has not used marijuana or sedatives after his in-patient treatment.

¶14 Testimony at the hearing included an incident that occurred eleven years earlier when Respondent had been drinking alcohol and was arrested after having a physical altercation with a male relative. No criminal charges were filed relating to this arrest.

¶ 15 Testimony at the hearing from both Respondent and his wife showed that Respondent had previously pushed, shoved, and slapped his wife when he was drinking alcohol. His wife's testimony shows that she is supportive of her husband, does not want him to lose his Bar license, and that she felt compelled to call the police because she needed help from someone to control Respondent or defuse the situation. She expressed her hope that the two of them could live in an alcohol-free environment. She testified that without alcohol consumption in the home they are kind to each other, there is no verbal or physical abuse present, and that they have been together for twenty-four years.

¶ 16 She stated that their future life as a married couple had to be based upon the absence of alcohol consumption in the home. She testified that she participated in Respondent's in-patient counseling sessions, attended AA meetings, and that she and Respondent were working on the issues as both a couple and as individuals. She testified that Respondent's mother, sister, two aunts, and an uncle had died during the previous five years and she thought that his increased alcohol consumption during this period was tied to what she perceived to be his depression concerning these events. She testified that during the last two years Respondent became angry when he was intoxicated. She testified that Respondent's consumption of alcohol occurred only at home.

¶ 17 In *Zannotti*, the lawyer pled nolo contendere to the misdemeanor crimes of domestic assault and battery and malicious injury to property. He received a two year deferred sentence by the District Court, and this Court imposed a two-year suspension from the practice of law. When determining discipline, this Court took into consideration the fact the trial court thought it was necessary to keep Zannotti in the criminal justice system for a full two years for the safety of the public.[22] In the present case, the District Court has Respondent being supervised by the criminal justice system for two years.

¶ 18 In *Soderstrom*, after a lawyer's plea of guilty for unlawful possession of a controlled substance, we suspended the lawyer for two years and a day.[23] We determined that his continued relapses with substance abuse adversely impacted his fitness to practice law, and a substantial period of sobriety was necessary before any request for

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[22] See the explanation of *Zannotti* in *State ex rel. Bar Ass'n v. Givens*, 2014 OK 103, ¶ 19, 343 P.3d at 218, citing *Zannotti*, 2014 OK 25 at ¶ 24, 330 P.3d 11.

[23] *State ex rel. Oklahoma Bar Ass'n v. Soderstrom*, 2013 OK 101, ¶ 13, 321 P.3d 159, 161,

reinstatement.[24] We do consider for the purpose of mitigation whether a lawyer's conduct has changed following medical and psychological treatment.[25] But we are concerned in the present case that Respondent's period of sobriety is less than a year after a pattern of alcohol and drug abuse that lasted for several years and that it became a factor in the domestic abuse.

¶ 19 In *Ijams*, the lawyer was sentenced on four misdemeanor counts, eluding a police officer, DUI-alcohol, operating a vehicle with defective equipment and obstructing a police officer.[26] In addition to his interim suspension, his license to practice law was suspended until the date of his completion of his deferred sentences, approximately one year after our pronouncement. We again considered the length of a lawyer's criminal sentence as one factor in arriving at the appropriate period of professional suspension to be imposed.[27]

¶ 20 Respondent's testimony included a statement of contrition and his humiliation and embarrassment that has arisen from his conduct. For the purpose of mitigating discipline we also determine whether a lawyer recognizes the adverse effect of his or her substance abuse and cooperates in the treatment for remedying the abuse.[28]

¶ 21 Respondent has shown his willingness to cooperate with treatment by his

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[24] See the explanation of *Soderstrom* in *State ex rel. Bar Ass'n v. Givens*, 2014 OK 103, ¶ 20, 343 P.3d at 218-219, citing *Soderstrom*, 2013 OK 101 at ¶ 12, 321 P.3d 159.

[25] *See, e.g., State ex rel. Oklahoma Bar Ass'n v. Busch*, 1998 OK 103, ¶ 50, 976 P.2d 38, 56 (we noted that the lawyer's conduct had not changed following his treatment when we concluded that his mitigation plea was unpersuasive).

[26] *State ex rel. Oklahoma Bar Ass'n v. Ijams*, 2014 OK 93, 338 P.3d 639,

[27] *Ijams*, 2014 OK 93, at ¶ 8, 338 P.3d at 642.

[28] *Ijams*, 2014 OK 93, at ¶ 8, 338 P.3d at 642.

continued participation in Lawyers Helping Lawyers, AA, and the Batterers Intervention Program, as well as his completed in-patient treatment program. Respondent's brief expresses a willingness to have random drug testing and if he fails any test to be immediately suspended, including the panel-recommended two-years-and-a-day suspension upon a failed test, which would then require any effort for professional reinstatement to comply with the requirements for a lawyer who has been disbarred.[29]

¶ 22 We note Respondent's emphasis in the record on his attendance at a Batterers Intervention Program, and the fact that he started the program before the trial court made it a condition of his deferred criminal sentence. We encourage his efforts in obtaining treatment. But while we have considered compliance with court-ordered conditions for the purpose of mitigating professional discipline, this Court *expects* a lawyer's compliance with a court order as a professional attribute and such compliance is not a *quid pro quo* for mitigation. A respondent's compliance with court orders, such as attendance and voluntary commencement in a treatment program, is merely one factor when we examine the record *for evidence of an actual change in attitude and conduct that the lawyer's treatment is designed to foster.*[30]

¶ 23 We note and appreciate the testimony of Respondent's wife and her candid assessments of their marital relationship and the current conduct of Respondent. We also note the testimony of Respondent's AA sponsor and his positive view of Respondent's

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[29] *State rel. Oklahoma Bar Ass'n v. Giger*, 2003 OK 61, n. 34, 72 P.3d 27, 40; *State ex rel. Oklahoma Bar Ass'n v. Wolfe*, 919 P.2d 427, 433 (Kauger, V.C.J., concurring, and joined by Watt, J.) ("A suspension from the practice of law for a period of two years and one day is tantamount to disbarment in that the suspended attorney must follow the same procedures for readmittance as would a disbarred counterpart.").

[30] See the explanation of *Soderstrom* in *Givens*, ¶ 20, that is cited in note 24 *supra*, and the reference to *Busch*, ¶ 50, that is cited in note 25 *supra*.

progress in AA. While we note that the evidence shows a link between Respondent's use of alcohol and his improper behavior, because of the recentness of his sobriety we are concerned with Respondent's resolve to *permanently* change his conduct. We have considered Respondent's absence of prior professional discipline.[31] We have also considered the District Court's two-year period of supervision by the Department of Corrections, although this factor is not controlling on the time a lawyer's professional license should be suspended.[32]

¶ 24 The Bar Association requests that the Court suspend Respondent from the practice of law for two years commencing on the date of his interim suspension. At the mitigation hearing, Respondent argued that no final suspension be imposed and that the order of interim suspension be lifted. Respondent's post-hearing brief argues that the trial panel's recommendation be approved.

¶ 25 Respondent's trial panel recommended that he receive a six-month suspension from the practice of law, combined with a deferred suspension of two years and one day, subject to his compliance with seven terms of probation. Six of the terms are:

(1) Respondent shall comply with all conditions of his court-imposed deferred sentence, including Department of Corrections probation supervision until released from his deferred sentence;

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[31] *State ex rel. Oklahoma Bar Ass'n v. Dobbs*, 2004 OK 46, ¶ 106, 94 P.3d 31, 70 (absence of prior discipline may be considered for mitigation of professional discipline).

[32] This Court has an *exclusive and nondelegable* power in regulating the practice of law and determining professional discipline for a lawyer. *State ex rel. Oklahoma Bar Ass'n v. Casey*, 2012 OK 93, ¶2, 295 P.3d 1096, 1098; *In re Spilman*, 2010 OK 70, ¶ 10, 240 P.3d 702, 709. A criminal sentence imposed *by a District Court* may not be used to control *this Court's* determination of an appropriate professional discipline for a lawyer.

(2) Respondent shall refrain from any and all use of alcohol, mind-altering substances or illegal drugs;

(3) Respondent shall sign and maintain a contact with Lawyers Helping Lawyers, and have weekly contact with his mentor;

(4) Respondent shall waive all questions of confidentiality and permit his sponsor at Lawyers Helping Lawyers to notify the General Counsel of the Oklahoma Bar Association in the event of any default by Respondent in the terms of the probation or deferred suspension;

(5) Respondent shall attend no less than three (3) AA sessions per week; and

(6) Respondent shall abide by the Rules of Professional Conduct.

The seventh condition is that Respondent shall be subject to random drug testing through an entity specified by the trial panel's recommendation, or by a similar service as directed by Lawyers Helping Lawyers, and the testing shall be at Respondent's expense, or through application for expense assistance through the Lawyers Helping Lawyers Foundation.

¶ 26 Recommendations of a PRT trial panel are advisory and not binding on this Court.[33] This Court adjudicates all issues of fact and law in a lawyer disciplinary proceeding.[34] However, our review of the record should not be considered as diminishing the importance of the PRT trial panel and its recommendations. A trial panel functions as this Court's hearing examiner and provides a procedural conduit for the record and legal arguments by making the matter ready for this Court's original *de novo* review of the

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[33] *State ex rel. Oklahoma Bar Ass'n v. Bradley*, 2014 OK 78, ¶ 23, 338 P.3d 629, 637; *State ex rel. Oklahoma Bar Ass'n v. Aston*, 2003 OK 101, ¶ 10, 81 P.3d 676, 678.

[34] *State ex rel. Oklahoma Bar Ass'n v. Mothershed*, 2011 OK 84, ¶ 48, n. 50, 264 P.3d 1197, 1215. *See also State ex rel. Oklahoma Bar Ass'n v. Zannotti*, 2014 OK 25, ¶ 4, 330 P.3d 11, 12 (stipulations inconsistent with the record are rejected upon *de novo* review).

case.[35] The lawyers and non-lawyers who serve on trial panels of the PRT[36] receive no compensation for their services,[37] and they provide an important public service to the Bar, this Court, and the People of the State of Oklahoma. We agree with the trial panel that Respondent should have both a suspension and a deferred suspension, but we disagree with the trial panel's recommended time for suspension.

¶ 27 In *Zannotti,* the respondent physically attacked a person with whom he had a previous dating relationship when the two of them met because respondent was "wanting to get back together."[38] His victim was traumatized and needed counseling and medication as a result of the assault.[39] She obtained a protective order against the respondent. When discussing discipline we noted that the respondent tried to shift responsibility for his conduct to his victim.[40] We imposed a two-year suspension of respondent's license to practice law.

¶ 28 In *Givens*, the intoxicated respondent physically attacked his fourteen-year-old son, and two years later struck him again after he had received a deferred criminal

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[35] *State ex rel. Oklahoma Bar Ass'n v. Mothershed*, 2011 OK 84, at ¶ 51, 264 P.3d at 1216.

[36] Three members of the PRT serve as members of a trial panel. RGDP, 5 O.S. Ch. 1, App. 1-A, Rule 6.6. The Professional Responsibility Tribunal is composed of twenty-one members, fourteen lawyers and seven non-lawyers, with this number subject to increase when necessary. RGDP, Rule 4.1. The lawyer members are appointed by the President of the Association subject to approval by the Board of Governors, and the non-lawyer members are appointed by the Governor of the State of Oklahoma. *Id.*

[37] RGDP, Rule 4.4: "The members of the Tribunal shall receive no compensation for their services, but shall be reimbursed for their travel and other reasonable expenses incidental to the performance of their duties."

[38] *State ex rel. Oklahoma Bar Ass'n v. Zannotti*, 2014 OK 25, ¶¶ 5-6 , 330 P.3d 11, 13.

[39] *State ex rel. Oklahoma Bar Ass'n v. Zannotti*, 2014 OK 25, ¶ 12, 330 P.3d 11, 14.

[40] *State ex rel. Oklahoma Bar Ass'n v. Zannotti*, 2014 OK 25, ¶ 19, 330 P.3d 11, 16 (Respondent's testimony . . . shows that Respondent has not accepted responsibility for his actions and undermines the testimony of his remorse."

sentence of eighteen months and court-ordered participation in a Batterers Intervention Program.[41] We noted the respondent's pattern of abuse, that he continued this pattern while on probation of his criminal sentence, and his continued substance abuse relapses while in a substance abuse program. We imposed a suspension of respondent's license for two years and one day.

¶ 29 In the present case, Respondent and his adult victim, his wife, have reconciled. They live together and she is helping him with his efforts to maintain sobriety. She attends meetings on alcoholism and wants their home to be without alcohol consumption. She did not seek or request a protective order and does not feel threatened by Respondent when he is sober. She testified that she loves her husband and that he is a loving husband when he is sober. She testified that no physical abuse has occurred since the events on the Sunday morning in May 2014. Respondent has not tried to shift to his wife any blame or responsibility for his physical abuse of her. Respondent has not violated a condition of his deferred criminal sentence. His drug tests have not shown any substance abuse. In a lawyer disciplinary proceeding, it is the duty of this Court to determine the appropriate level of discipline to be imposed, *based on the facts and circumstances of the case.*[42] We agree with the trial panel that these circumstances are different from those in both *Zannotti* and *Givens*.

¶ 30 However, Respondent did not limit his lack of self-control to his relationship with his wife. When the police asked him for identifying information he declined to provide

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[41] *State ex rel. Oklahoma Bar Ass'n v. Givens*, 2014 OK 103, ¶¶ 2-3, 343 P.3d at 215.

[42] *State ex rel. Oklahoma Bar Ass'n v. Weigel*, 2014 OK 4, ¶ 27, 321 P.3d 168, 177.

the information and responded with cursing and a derogatory epithet. His intoxicated tirade to the police included specific threats of harm against his wife. His opprobrious conduct reflects on him and the Bar. We conclude that Respondent should be immediately suspended from the practice of law for one year and that he should have an additional one-year deferred suspension with the seven conditions recommended by the trial panel and as specified herein.

¶ 31 This Court has imposed a final suspension of a lawyer's license with that suspension commencing from the date of a previous interim suspension of that lawyer.[43] Respondent's immediate one-year suspension commences on the date this Court issued an interim suspension of Respondent's Bar license, February 2, 2015. In addition to this one-year suspension until February 3, 2016, we conclude that Respondent should continue to be professionally monitored both during and after this one-year suspension with an additional one-year deferred professional suspension of his Bar license until February 3, 2017.

¶ 32 We treat the immediate one-year suspension of Respondent's Bar license as providing him the rule-specified opportunity to seek professional reinstatement on or after February 3, 2016.[44] The additional one-year deferred suspension is conditioned

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[43] *See, e.g., State ex rel. Oklahoma Bar Ass'n v. Givens*, 2014 OK 103, ¶ 24, 343 P.3d at 219 (suspension for two years and one day); *State ex rel. Oklahoma Bar Ass'n v. Wilcox*, 2014 OK 1, ¶ 56, 318 P.2d at 1130, (disbarred from the date of interim suspension); *State ex rel. Oklahoma Bar Ass'n v. Willis*, 1993 OK 138, 863 P.2d 1211 (suspension for 15 months commencing on the date of interim suspension).

Similarly, we have approved resignations from the Bar Association with pending professional discipline proceedings and given such with an effective earlier date when a showing was made that the lawyer was no longer able to practice law as of that date. *State rel. Oklahoma Bar Ass'n v. Perkins*, 1988 OK 65, 757 P.2d 825 (rule stated).

[44] 5 O.S.2011 Ch. 1, App.1-A, RGDP, Rule 11.8:

A lawyer who has been suspended for two (2) years or less upon disciplinary charges may resume

(continued...)

upon Respondent's continued compliance with the seven conditions of the trial panel specified herein and the one-year deferred suspension shall cease on February 3, 2017, provided that Respondent does not violate any condition of his deferred suspension.

III. Procedure for Implementing Respondent's Deferred Professional Suspension

¶ 33 A lawyer's criminal conviction furnishes clear and convincing evidence that the lawyer *committed the criminal acts* that are subsequently used to warrant professional discipline in the form of a suspension or deferred suspension of a Bar license.[45] However, in the context of imposing a deferred professional suspension of a license to practice law with conditions for the lawyer's future conduct, we are not concerned with facts used as evidence for the court's deferral of the suspension, but facts showing a violation of the conditions of the lawyer's deferred suspension. A similar circumstance occurs with revocation of a probation in a criminal case.[46] Revocation of a constitutionally protected

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[44](...continued)
practice upon the expiration of the period of suspension by filing with the Clerk of the Supreme Court an original and two (2) copies of an affidavit affirming that affiant has not engaged in the unauthorized practice of law or otherwise violated the rules of the Association or the terms of the affiant's order of suspension. The affidavit shall also describe all business or professional activities of the affiant and places of residence during the term of the suspension. No order of Court is necessary; however, material deletions or misrepresentations in the affidavit shall be grounds for subsequent discipline.

A copy of the affidavit shall be served on the General Counsel by the lawyer at the time of its filing, who may within sixty days file a separate disciplinary complaint with the Professional Responsibility Commission stating the lawyer during the suspension engaged in the unauthorized practice of law or other actions which would render the lawyer subject to discipline.

[45] *State ex rel. Oklahoma Bar Ass'n v. Offill*, 2014 OK 27, ¶ 3, 324 P.3d 406, 407; *State ex rel. Oklahoma Bar Ass'n v. Bernhardt*, 2014 OK 20, ¶ 29, 323 P.3d 222, 228. See *Shofner* at note 15 *supra*.

[46] *See Sonnier v. State*, 2014 OK CR 13, ¶ 13, 334 P.3d 948, 952 citing *Gagnon v. Scarpelli*, 411 U.S. 778, 781–82, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) and *Morrissey v. Brewer*, 408 U.S. 471, 488–89, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) ("In the context of parole and probation revocation (both judicial proceedings), the United States Supreme Court has confirmed that minimal due process is required, but declined to prescribe a particular procedure for those proceedings.") (parenthetical information in original).

liberty interest in a criminal probation case typically involves *the factual question whether the probationer has violated a condition of probation*,[47] and in the acceleration of a deferred sentence at an acceleration hearing "the court only makes a factual determination involving the existence of a violation of the terms of the deferred sentence."[48] The probationer whose probation is revoked by a judicial proceeding is entitled to notice of his or her alleged violations of probation.[49]

¶ 34 A lawyer accused of professional misconduct must also be afforded due process of law prior to suspension or revocation of the lawyer's licence to practice law.[50] A lawyer receives notice of any adverse claim that may be used to impose professional discipline.[51] General Counsel for the Bar must give notice to a lawyer that the Bar has filed a request with this Court for implementing a deferred suspension.[52]

¶ 35 We have previously required that the General Counsel of the Bar Association notify this Court when a lawyer's professional license probation has been violated, and this

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[47] *Black v. Romano*, 471 U.S. 606, 611, 105 S.Ct. 2254, 85 L.Ed.2d 636 (1985).

[48] *Hagar v. State*, 1999 OK CR 35, ¶ 10, 990 P.2d 894, 898.

[49] *Black v. Romano*, 471 U.S. at 612. *Cf. Sonnier v. State*, 2014 OK CR 13, ¶ 13, 334 P.3d 948, 952 citing *Tate v. State*, 2013 OK CR 18, ¶ 33, 313 P.3d 274, 283–84 (the Court of Criminal Appeals has stated in the context of judicial proceedings: "This Court has held that, in that context, a defendant must be 'sufficiently apprised' of the grounds on which probation or a suspended sentence is revoked.").

[50] *State ex rel. Oklahoma Bar Ass'n v. Mothershed*, 2011 OK 84, ¶ 56, 264 P.3d at 1218. *See Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) ("A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."); *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102, 83 S.Ct. 1175, 10 L.Ed. 244 (1963) (requirements of procedural due process must be met before a State can exclude a person from practicing law or from any other occupation in a manner or for reasons that contravene the Due Process Clause of the Fourteenth Amendment).

[51] *State ex rel. Oklahoma Bar Ass'n v. Bolusky*, 2001 OK 26, ¶ 8, 23 P.3d 268, 273.

[52] *In re Ruffalo*, 390 U.S. 544, 550, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

Court then implements the deferred suspension.[53] *That practice shall continue with General Counsel's notification filed in this Court showing (1) the Respondent has violated his probation, (2) a request that the Court immediately implement a deferred suspension, and (3) the General Counsel has provided notice to Respondent of the Bar's filing.*

¶ 36 We have previously stated that a deferred suspension would commence on the date the conditions of deferral or probation were violated by the lawyer.[54] Making the effective date of the suspension the same date of the lawyer's violation requires the lawyer to engage in professional self-policing. A lawyer has a duty to protect the interests of his or her clients from adverse circumstances arising from a professional suspension, including the Court implementing a deferred suspension.[55] This self-policing concept is also found in the procedure for a resignation pending professional discipline where we make a proper resignation effective on the date it was submitted to the Oklahoma Bar Association.[56] *The previous practice will continue that a deferred suspension will*

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[53] *State ex rel. Oklahoma Bar Ass'n v. Bernhardt*, 2014 OK 20, ¶ 31, 323 P.3d 222, 229.

[54] *State ex rel. Oklahoma Bar Ass'n v. Ijams*, 2014 OK 93, ¶ 10, 338 P.3d 639, 643; *State ex rel. Oklahoma Bar Ass'n v. Bernhardt*, 2014 OK 20, ¶ 31, 323 P.3d 222, 229.

[55] *See* 5 O.S.2011 Ch. 1, App. 3-A, Rule 1.3, states in part: "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."
See, e.g., State ex rel. Oklahoma Bar Ass'n v. Running, 2011 OK 75, ¶ 15, 262 P.3d 736, 740 ("Respondent has shown a repeated disregard of this Court's rules governing lawyers. He has been suspended three times for failure to pay bar dues. In the present case, he continued to practice law after suspension without notifying his clients or withdrawing from pending litigation, all in violation of Rules 1.3 and 9.1 RGDP, and Rule 5.5(a) RPC.").

[56] *State ex rel. Oklahoma Bar Ass'n v. Bourland*, 2001 OK 12, ¶ 14, 19 P.3d 289, 291 (explaining that an effective date of a resignation could be prior to the Court's order accepting the resignation; and also noting "the rule-mandated duties of a lawyer subject to final discipline, for example, notifying clients, withdrawing from proceedings, and notifying the Professional Responsibility Commission."); *State ex rel. Oklahoma Bar Ass'n v. Perkins*, 1988 OK 65, 757 P.2d 825, 827 ("The effective date of a resignation is upon filing the resignation
(continued...)

commence upon a respondent's violation of a condition of that suspension; however, the Respondent will be provided an opportunity to object to the General Counsel's request for implementing the deferred sentence.

¶ 37 A lawyer must be given an opportunity to object to implementation of a deferred professional suspension. A State may impose an interim suspension pending an opportunity for a prompt hearing that would definitely determine a fact that is used for deprivation of a state-created property right such as a professional bar licences where, for example, a State has an important interest in insuring the integrity of the practice of law carried on pursuant to that professional license.[57] An order of this Court implementing a deferred suspension of a lawyer's license to practice law because of a violation of the associated deferred-suspension conditions *must be based upon facts before this Court showing that the lawyer has actually violated the probation.*[58] This Court has a non-delegable role as a finder of facts that a respondent's conduct warrants the immediate implementation of a deferred suspension, *i.e.*, a violation has actually occurred and the suspension should thus be implemented.[59]

¶ 38 Upon General Counsel filing a notification seeking to implement Respondent's deferred suspension, *this Court will issue an interim order immediately*

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[56](...continued)
with the Executive Director.").

[57] *Barry v. Barchi*, 443 U.S. 55, 64-65, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979).

[58] *Schware v. Board of Bar Examiners*, 353 U.S. 232, 246-247, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) (A State could not, consistently with due process, refuse a lawyer a license to practice law on the basis of a finding that he was morally unfit when there was no evidence in the record).

[59] *State ex rel. Oklahoma Bar Ass'n v. Anderson*, 2005 OK 9, ¶ 15, 109 P.3d 326, 330 ("Our duty to review the facts to determine if an ethical violation occurred is non-delegable.").

implementing the deferred suspension effective the date of the alleged violation stated in General Counsel's notification, and providing Respondent an opportunity to show cause why the Court should not make the deferred suspension final.[60] Upon Respondent's filed waiver of his opportunity to respond or his failure to timely respond to the Court's order, a final order shall be entered implementing the deferred suspension. Upon Respondent's timely filed objection to the Bar's request, the Court will determine if the record is adequate for implementing the deferred suspension, whether the interim order implementing the suspension should be set aside, and take any other action that the Court deems appropriate.

¶ 39 Respondent is cautioned that should the General Counsel properly notify this Court of Respondent's failure to comply with one or more of the deferred-suspension conditions at any time prior to February 3, 2017, he is subject to this Court entering an interim order immediately imposing the one-year suspension. Respondent is cautioned that any future unprofessional conduct by him during his period of suspension and deferred suspension is subject to this Court imposing additional professional discipline when notice of his conduct is *properly brought to our attention by the OBA*.[61] If upon a violation of Respondent's deferred suspension, the Bar seeks to impose professional discipline *in addition to application of the one-year deferred suspension*, then the Bar should: (1) in the present Bar proceeding notify this Court of Respondent's violation for immediate

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[60] *Barry v. Barchi*, 443 U.S. at 64-65.

[61] *See, e.g., State ex rel. Oklahoma Bar Ass'n v. Moon*, 2013 OK 7, 295 P.3d 17 (during a deferred suspension of two years and one day a lawyer's additional acts of unprofessional conduct warranted disbarment). *Cf. State ex rel. Oklahoma Bar Ass'n v. Brewer*, 1989 OK 172, 794 P.2d 397, 399 (complaint of additional allegations of misconduct may be consolidated with reinstatement proceeding).

implementation of the deferred suspension in this proceeding, and (2) utilize the proper disciplinary procedure for the particular misconduct alleged against the Respondent, *e.g.*, the procedures specified in Rules 6, 7, or 10.[62]

IV. COSTS

¶ 40 In a proceeding pursuant to Rule 7 RGDP, we have imposed the costs of the proceeding on the lawyer receiving professional discipline.[63] In the context of a Rule 7 proceeding, we have noted that Rule 6.16 RGDP provides the costs of the investigation, record and disciplinary proceedings shall be surcharged against the disciplined lawyer, unless remitted for good cause by this Court.[64] Rule 6.16 requires the costs to be paid within ninety (90) days.

¶ 41 Respondent had notice that the costs of a Rule 7 proceeding could be imposed against him. No good cause for remission has been shown. The application of the Bar Association for assessing costs against the respondent in the amount of One-

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[62] See *Brewer*, 794 P.2d at 399, cited in note 61 *supra*, and the explanation in *Brewer* that when a disciplinary proceeding is pending, along with a reinstatement proceeding, and *new* allegations of professional misconduct are made by the Bar, they should be raised by filing an additional formal professional complaint with the Court followed by seeking available and appropriate procedural opportunities for consolidation to conserve judicial resources.

[63] *State ex rel. Oklahoma Bar Ass'n v. Ijams*, 2014 OK 93, ¶ 13, 338 P.3d 639, 643; *State ex rel. Oklahoma Bar Ass'n v. Wilburn*, 2010 OK 25, ¶ 13, 236 P.3d 79, 82; *State ex rel. Oklahoma Bar Ass'n v. Spradling*, 2009 OK 39, ¶ 10, 213 P.3d 570, 575.

[64] *State ex rel. Oklahoma Bar Ass'n v. Shofner*, 2002 OK 84, n. 3, 60 P.3d 1024, 1027 (citing Rule 6.16, RGDP).

5 O.S.2011 Ch. 1, App. 1-A, Rule 6.16: "The costs of investigation, the record, and disciplinary proceedings shall be advanced by the Oklahoma Bar Association (or the Professional Responsibility Commission, if provision therefor has been made in its budget). Where discipline results, the cost of the investigation, the record, and disciplinary proceedings shall be surcharged against the disciplined lawyer unless remitted in whole or in part by the Supreme Court for good cause shown. Failure of the disciplined lawyer to pay such costs within ninety (90) days after the Supreme Court's order becomes effective shall result in automatic suspension from the practice of law until further order of the Court."

Thousand Two-Hundred and Fifty-One dollars and Eighty cents ($1,251.80) is granted. The costs shall be paid by Respondent within ninety (90) of the date this opinion becomes final.

V. Conclusion

¶ 42 Respondent is suspended from the practice of law for one year commencing on February 2, 2105, with an additional one-year suspension that is deferred upon Respondent's compliance with the conditions of the deferral until February 3, 2017.

¶ 43 In the event that Respondent violates a condition of his deferred suspension, the General Counsel of the Bar Association shall notify this Court and request an immediate implementation of a one-year professional suspension against Respondent. In the event Respondent violates a condition of his deferred suspension, the effective date and commencement of the previously deferred one-year suspension shall be the date Respondent violated a condition of his deferred sentence.

¶ 44 Respondent is ordered to pays the costs of this proceeding in the amount of $1,251.80 within ninety days from the date this opinion is final.

¶ 45 REIF, C. J., KAUGER, WATT, WINCHESTER, EDMONDSON, COLBERT, GURICH, JJ., concur.

¶ 46 COMBS, V. C. J., TAYLOR, J., dissent.

¶ 47 TAYLOR, J., dissenting. I would suspend the Respondent for two years. He should not be allowed to practice law while on criminal probation.

2015 OK 51

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

RODNEY DUTTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 113,170**
	)	
THE CITY OF MIDWEST CITY, and THE STATE OF OKLAHOMA,	)	
	)	**FOR OFFICIAL PUBLICATION**
Respondents.	)	

APPLICATION FOR EXTRAORDINARY RELIEF

¶ 0 Petitioner sought an extraordinary writ in the Oklahoma Supreme Court and challenged his convictions in three criminal proceedings in the municipal court for The City of Midwest City. He also requested an alternative remedy that would compel the District Court to provide him with a new appeal of his convictions in the District Court. We assume original jurisdiction for the sole purpose of determining our jurisdiction to review Petitioner's allegations. We hold that the Court does not possess jurisdiction to either review the merits of Petitioner's cause of action challenging his municipal criminal convictions or compel the District Court to provide him with a new direct appeal of those convictions to the District Court.

ORIGINAL JURISDICTION ASSUMED IN PART AND DENIED IN PART AND ALL REQUESTS FOR EXTRAORDINARY RELIEF DENIED WITHOUT PREJUDICE TO PETITIONER SEEKING RELIEF IN THE APPROPRIATE COURT

Rodney Dutton, Midwest City, Oklahoma, Petitioner Pro se.

David F. Howell and J. Steven Coates, Midwest City, Oklahoma, for Respondent, City of Midwest City.

EDMONDSON, J.

¶ 1 We assume original jurisdiction on the question whether this Court has original jurisdiction to adjudicate both the merits of the claim or cause of action that the Dutton (or Petitioner) has pled in this Court and the associated remedies he requests. We

decline to assume original jurisdiction on either the merits of Dutton's cause of action or his requests for relief as pled by him in this Court.

¶ 2 Dutton pleads a cause of action challenging the correctness of a judgment and sentence in three municipal criminal matters. He seeks an adjudication on the legal correctness of these judgments and sentences in this proceeding, and in the alternative he requests an extraordinary remedy to compel the District Court to provide him a direct appeal of his municipal criminal convictions in the District Court. We conclude that the pled cause of action and remedy sought by him involve criminal matters that are not within the original jurisdiction of this Court. We conclude that Dutton's action in this Court should be dismissed without prejudice to him seeking appropriate relief in the proper court.

I. Pleadings of Dutton and The City of Midwest City

¶ 2 Dutton alleges that on April 15, 2013, he was convicted in the municipal court of the City of Midwest City, Oklahoma, of the charges of assault, public intoxication, and domestic assault and battery. He states that he was sentenced to thirty days in jail. He states that he was incarcerated for a felony charge on November 24, 2011, which was ultimately dismissed, and he "was released on his own recognizance on about March 7, 2013," and then transferred to the Midwest City jail for trial on his municipal charges. He alleges that he was released from the Midwest City jail on May 10, 2013. He states that while he was incarcerated on the felony charge he was represented by a "public defender."

¶ 4 He states that he filed three applications for post-conviction relief in the District Court after his release. He alleges that the District Court dismissed the applications for the reason that they should have been filed with the municipal court in Midwest City.

His application for this Court to assume original jurisdiction was filed on August 29, 2014, approximately one year and three months after his release.

¶ 5 Dutton alleges that he was denied his rights guaranteed by the Sixth Amendment to the U. S. Constitution. He states that he was denied counsel at trial and was not allowed to cross-examine witnesses. He alleges that he was denied his rights guaranteed by the Fourteenth Amendment to the U. S. Constitution. He states that he was denied (1) advance notice of the municipal charges against him, (2) a fair trial due to insufficient evidence, and an opportunity to cross-examine witnesses, (3) counsel for an appeal, (4) a direct appeal, (5) "out-of-time appeal," (6) an adequate post-conviction remedy, and (7) counsel for a post-conviction appeal. In his filing herein entitled "Motion to Provide Relief," he alleges that he was "denied his 6th and 14th Amendments rights to counsel and a fair trial and subsequently denied his right to an appeal of wrongful convictions by the city of Midwest City, Oklahoma."

¶ 6 Dutton alleges that shortly prior to his trial in municipal court he was provided with a written notice of one of the charges against him. He states that the judge refused his request to have a lawyer appointed for him. He states that after the City's prosecutor failed to appear for his trial, the judge questioned the witnesses and refused Dutton's request to cross-examine the witnesses.

¶ 7 Dutton alleges that the District Court of Oklahoma County:

> . . . has delayed and denied the Petitioner in his pursuit of relief in this matter . . . and while "the Oklahoma Court of Criminal Appeals provide him some relief at first and then declined to hear his appeal when the court reporter or court clerk failed to provide him a stamp-filed certified copy of the District Court's order dismissing two of his three post-conviction applications under the Oklahoma Court of Criminal Appeals own rules.

Application to Assume, Aug. 29, 2014, at pg. 2, material omitted.

Dutton's appendix of exhibits, and his other filings in this Court, fail to contain photocopies of any the orders allegedly issued by the District Court of Oklahoma County about which he complains. He alleges that he sought relief in the District Court by filing applications for post-conviction relief pursuant to Oklahoma's Post-Conviction Procedure Act, 22 O.S. 2011 §§ 1080 - 1089.

¶ 8 Dutton's Appendix does contain purported uncertified photocopies of orders issued by the Oklahoma Court of Criminal Appeals. Three orders, which show docket designations for post-conviction appeals, state that the Court of Criminal Appeals declines jurisdiction and dismisses the matters because Dutton failed to attach to his petition in error a certified copy of the District Court order being appealed, as required by the rules for the Court of Criminal Appeals.[1]

¶ 9 Dutton's Appendix also contains a purported photocopy of an order of the Court of Criminal Appeals dismissing his motion for the court to reconsider "declining jurisdiction of his post-conviction appeals from Oklahoma County." The court explains that a petition for rehearing that challenges the court's decision in post-conviction appeal is not allowed.

¶ 10 Midwest City's response states that Dutton's allegations relate to three different factual episodes resulting in a criminal prosecution for assault and battery on his wife, prosecutions for assault on a police officer and public intoxication, and then an arrest for felony possession of incendiary devices. He was released from jail, awaiting trial on the felony charge, and returned to the municipal jail for prosecution of the misdemeanors.

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[1] Appendix, Aug. 29, 2014, exhibit 5, page 3, orders of the Court of Criminal Appeals in *Dutton v. City of Midwest City*, Nos. PC 2014-0632, PC 2014-0633, and PC 2014-0634.

¶11 The response states that Dutton and his wife filed two civil rights actions pursuant to 42 U.S.C. § 1983, and claimed that his constitutional rights were violated by Midwest City and its officials in the context of Dutton's arrests, convictions, and sentence of incarceration. The federal court's order dismissing, in part, Dutton's claims lists the violations of constitutional rights as alleged by Dutton and his wife in the federal proceeding.

> Mr. Dutton's claims, construed liberally because of his pro se status, appear to be as follows: 1) a First Amendment violation, based upon an alleged retaliation for the comment he made while leaving the courtroom ["I'll see you in federal court."]; 2) a Fourth Amendment claim, based on his arrest and prosecution without probable cause; 3) denial of due process, in violation of the Fifth and Fourteenth Amendments; 4) denial of assistance of counsel, in violation of the Sixth Amendment; 5) an Eighth Amendment claim, based on failure to protect him from abuse by a fellow inmate; and 6) false imprisonment in violation of the Fourteenth Amendment. Further, both plaintiffs assert First and Fourteenth Amendment claims for loss of consortium and violation of their "right to pursue life and happiness together in their marriage and individually without wrongful interference by officials of [the] government."

Order, Jan. 3, 2014, at p. 3, *Rodney Dutton and Shirley Dutton v. City of Midwest City, et al.*, No. CIV-13-0911-HE, U. S. Dist. Crt., W. D. Okla., (explanation added).

The federal court concluded that the plaintiffs could not bring a 42 U.S.C. § 1983 action based upon allegations of an unconstitutional conviction when state law provided a means for challenging the conviction.[2] Midwest City states that Dutton's appeal to the U. S. Court of Appeals for Tenth Circuit was determined by that court to be premature due to Dutton's claims still pending before the federal District Court. Midwest City states that Dutton's claims against it remain pending in the federal court. Midwest City's appendix filed herein also contains uncertified photocopies of two orders by The District Court of Oklahoma

[2] The federal court based its conclusion on *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) and *Cohen v. Longshore*, 621 F.3d 1311 (10th Cir. 2010).

County dismissing, without prejudice, Dutton's applications for post-conviction relief.

¶ 12 Dutton filed a reply to the city's response. He states his innocence of the crimes for which he was convicted. He argues: (1) his municipal arrest was illegal, (2) the trial in the municipal court was not fair because he was not provided with an attorney, and (3) his municipal convictions are void because no record exists of the evidence used against him at the municipal trial. He also objects to the appearances made in this proceeding by two attorneys who filed a response for Midwest City. He requests that this Court "dismiss" these two attorneys from this proceeding.

¶ 13 In his reply, Dutton requests this Court adjudicate his convictions to be "invalid, null, and void" and to also grant the relief as set forth in his Application filed with this Court. In his Application to Assume Original Jurisdiction, he requests an order of this Court directing the District Court of Oklahoma County "provide him a direct appeal with appointed counsel from Midwest City Municipal Cases docketed as #2011-4369 - Domestic Violence, #2011–5808 - public intoxication, and #2011-5808 - assault and/or any other relief that is appropriately just."[3] Dutton also states he seeks an order "overturning, vacating, and barring" the municipal convictions, or alternatively the Court provide him with a direct appeal of his convictions in the District Court with appointed counsel.[4]

II. The Court's Original Supervisory Civil Jurisdiction

¶ 14 This Court issued an order and requested Midwest City brief the issue

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[3] Petitioner's Application to Assume Original Jurisdiction, Okla. Sup. Ct. No. 113,170 (Aug. 29, 2014) pp. 16-17.

[4] Petitioner's Motion to Provide Relief, Okla. Sup. Ct. No. 113,170 (Nov. 14, 2014) pp. 11-12.

whether this Court possesses jurisdiction to adjudicate the claims made by Petitioner.[5] The city's response argues that (1) the matter before this Court is criminal in nature, (2) "Petitioner has an adequate remedy available under the Post-Conviction Relief Act" (22 O.S. §§ 1080-1089), (3) the Court of Criminal Appeals has subject matter jurisdiction to review orders issued pursuant to the Post-Conviction Act, and (4) this Court should not exercise jurisdiction over Dutton's claims.

¶ 15 A court has a duty to inquire into whether it possesses jurisdiction over the subject matter of an action that has been brought before the court.[6] This Court has stated a similar rule in various contexts.[7] One application of this rule is found in explanations stating a court has an inherent power to adjudicate whether it possesses jurisdiction in the particular matter before that court,[8] and this Court has the constitutional duty to determine

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[5] Although The City of Midwest City is not a named party in the style of this proceeding as filed by Dutton, The City of Midwest City entered an appearance herein and we requested a response addressing Dutton's allegations. The Court also provided an opportunity for the District Attorney for Oklahoma County to file a response to Dutton's pleadings.

[6] *Sanders v. Oklahoma Employment Security Commission*, 1948 OK 116, 195 P.2d 272, 274 ("The question of the jurisdiction of the court over the subject matter of an action is properly raised by motion to dismiss for want of jurisdiction; even in the absence of such a motion, it is the bounden duty of the court to inquire into its own jurisdiction.").

[7] *See, e.g., Hall v. Geo Group, Inc.*, 2014 OK 22, ¶ 12, 324 P.3d 399, 404 (rule is stated in the context of appellate jurisdiction, and the opinion cites several of this Court's opinions, including a dissenting opinion by Opala, J., in a controversy where a party invoked statutory original jurisdiction, *In Re Oklahoma Boll Weevil Eradication Organization*, 1999 OK 1, ¶ 7, n. 22, 976 P.2d 1035, 1040).

[8] *See, e.g., Miller v. Fortune Insurance Co.*, 484 So.2d 1221, 1224 (Fla.1986) quoting 20 Am.Jur.2d Courts § 92 (1965) ("Of course, the trial court has jurisdiction to determine whether it has jurisdiction to grant relief. . . In any case where jurisdiction is a question, the court must have an opportunity to rule on the jurisdictional question, and thus all rules of jurisdiction inherently provide authority for the court to assume jurisdiction for the limited purpose of determining whether a basis exists for the court to proceed further. 'A court has the power and duty [*i.e.* has jurisdiction] to examine and to determine whether it has jurisdiction of a matter presented to it....'"); *Rosado v. Wyman*, 397 U.S. 397, 403, n. 3, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970) (in the context of federal courts, the High Court noted the truism that a court always has jurisdiction to determine its own jurisdiction); *Petrella v. Brownback*, 697 F.3d 1285, 1292 (10th Cir. 2012) (federal [Article III] courts have inherent jurisdiction to determine their jurisdiction).

whether a matter is within this Court's jurisdiction or within the jurisdiction of the Court of Criminal Appeals.[9]

¶ 16 Subject matter jurisdiction is the "power to deal with the general subject involved in the action"[10] or the nature of the cause of action and the relief sought.[11] The Court has explained that subject matter jurisdiction of a court is invoked by pleadings filed by a party with a court and which show that the court has power *to proceed in a case of the character presented, or power to grant the relief sought.*[12] Our inquiry requires us to examine the nature of Dutton's pled cause of action and the remedy he seeks in this Court and determine whether that cause of action and remedies for that action are within the jurisdiction of this Court.

¶ 17 The Legislature has authorized a municipality to create a municipal court not of record.[13] A municipal court not of record has original jurisdiction to hear and determine

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[9] The Oklahoma Supreme Court possesses jurisdiction to determine whether it or the Court of Criminal Appeals exercises jurisdiction in a particular controversy. Okla. Const. Art. 7 § 4: ". . . and in the event there is any conflict as to jurisdiction, the Supreme Court shall determine which court has jurisdiction and such determination shall be final." *See, e.g., Smith v. Oklahoma Dept. of Corrections*, 2001 OK 95, ¶ 7, 37 P.3d 872, 873 (The Oklahoma Supreme Court [and not the Court of Criminal Appeals] has jurisdiction "to decide jurisdictional conflicts between it and the Court of Criminal Appeals.").

[10] *Hobbs v. German–American Doctors*, 1904 OK 60, 78 P. 356, 357; *Glacken v. Andrew*, 1918 OK 20, 169 P. 1096, 1097.

[11] *Cooper v. Reynolds*, 77 U.S. (10 Wall.) 308, 316, 19 L.Ed. 931 (1870).

[12] *State ex rel. Oklahoma Bar Ass'n v. Mothershed*, 2011 OK 84, ¶ 47, 264 P.3d 1197, 1215; *State ex rel. Turpen v. A 1977 Chevrolet Pickup Truck*, 1988 OK 38, 753 P.2d 1356, 1359.

[13] 11 O.S.2011 § 27-101: "A municipality may create a municipal court, as provided in this article, which shall be a court not of record. This court may be created in addition to a municipal criminal court of record. References in Sections 27-101 through 27-131 of this title to the municipal court shall mean the municipal court not of record established under the authority of the provisions of this article."

prosecutions based upon an alleged violation of a municipal ordinance.[14] The City of Midwest City has a municipal court not of record.

¶ 18 A final judgment of a municipal court not of record may be appealed by filing a notice of appeal in both the municipal court and in the District Court in the county where the municipal government is located.[15] The notice of appeal is to be filed "within ten (10) days from the date of the final judgment" of the municipal court.[16] The appellate proceeding in the District Court is a trial de novo with a right to a jury trial in certain circumstances.[17] A District Court adjudicates an appeal from a final judgment of the municipal court not of record, and the form of the District Court's adjudication is a "final judgment or order of a

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[14] 11 O.S.2011 § 27-103: "The municipal court shall have original jurisdiction to hear and determine all prosecutions wherein a violation of any ordinance of the municipality where the court is established is charged."

[15] 11 O.S. 2011 § 27-129:

A. An appeal may be taken from a final judgment of the municipal court by the defendant by filing in the district court in the county where the situs of the municipal government is located, within ten (10) days from the date of the final judgment, a notice of appeal and by filing a copy of the notice with the municipal court. In case of an appeal, a trial de novo shall be had, and there shall be a right to a jury trial if the sentence imposed for the offense was a fine of more than Two Hundred Dollars ($200.00) and costs.

B. Upon conviction, at the request of the defendant, or upon notice of appeal being filed, the judge of the municipal court shall enter an order on the docket fixing an amount in which bond may be given by the defendant, in cash or sureties for cash in an amount of not less than One Hundred Dollars ($100.00) nor more than twice the amount of such fine. Bond shall be taken by the clerk of the court wherein judgment was rendered. Any pledge of sureties must be approved by a judge of the court.

C. Upon appeal being filed the judge shall within ten (10) days thereafter certify to the clerk of the appellate court the original papers in the case. If the papers have not been certified to the appellate court, the prosecuting attorney shall take the necessary steps to have the papers certified to the appellate court within twenty (20) days of the filing of the notice of appeal, and failure to do so, except for good cause shown, shall be grounds for dismissal of the charge by the appellate court, the cost to be taxed to the municipality. The certificate shall state whether or not the municipal judge hearing the case was a licensed attorney in Oklahoma.

D. All proceedings necessary to carry the judgment into effect shall be had in the appellate court.

[16] See note 15 *supra*, at 11 O.S.2011 § 27-129 (A).

[17] See note 15 *supra*, at 11 O.S.2011 § 27-129 (A). Section 27-129(A) was amended by 2015 Okla. Sess. Laws Ch. 2, § 1 (eff. Nov. 1, 2015), and which states in part that "... there shall be a right to a jury trial if the sentence imposed for the offense was a fine of more than Five Hundred Dollars ($500.00), plus costs, fees, and assessments."

District Court," and that final judgment or order of the District Court may be appealed to the Oklahoma Court of Criminal Appeals.[18]

¶ 19 The Oklahoma Constitution states that the appellate jurisdiction of the Oklahoma Supreme Court "shall be coextensive with the State and shall extend to all cases *at law and in equity*; except that the Court of Criminal Appeals shall have *exclusive appellate jurisdiction in criminal cases* until otherwise provided by statute...."Okla. Const. Art. 7 § 4 (emphasis added). We have explained that the Oklahoma Supreme Court lost its jurisdiction to provide appellate review of a judgment on a criminal cause of action upon creation of the Criminal Court of Appeals,[19] and we have recognized the exclusive jurisdiction of the Court of Criminal Appeals in criminal matters.[20] The statutes relating to municipal courts not of record and appeals to both a District Court and the Court of Criminal Appeals contain no provision for the Supreme Court to exercise appellate jurisdiction in these matters. Additionally, the Legislature has provided that "The Court of Criminal Appeals shall have exclusive appellate jurisdiction, coextensive with the limits of

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[18] 11 O.S. § 27-132: "An appeal may be taken to the Court of Criminal Appeals from the final judgment or order of a district court in an appeal from a final judgment of a municipal court in the same manner and to the same extent that appeals are taken from a district court to the Court of Criminal Appeals."

[19] *In re Opinion of the Judges*, 1909 OK 277, 105 P. 325, 326 (Court stated that if it once had any authority to express an opinion on the matter referred to it by the Governor concerning a request for an opinion on a judgment and sentence of death rendered in a District Court, the Supreme Court no longer had such authority because such would be vested in the Court of Criminal Appeals by the creation of that court).

[20] *In the Matter of M.B.*, 2006 OK 63, ¶¶ 8,13, 145 P.3d 1040, 1044, 1047 ("The Court of Criminal Appeals is a court of special and limited jurisdiction, with exclusive appellate jurisdiction only in criminal matters. . . Because the order involved here arose out of a criminal case, and there is a lack of any clear statutory authority providing otherwise, we determine that the Court of Criminal Appeals has jurisdiction over this appeal and transfer the cause."); *State ex rel. Henry v. Mahler*, 1990 OK 3, 786 P.2d 82, 86 ("Issues concerning the determination of the amount of punishment and questions regarding a prisoner's release from confinement are matters which are, without question, within the Court of Criminal Appeal's exclusive appellate jurisdiction over criminal cases. . . As the Court of Criminal Appeals has repeatedly stated, in a criminal case the 'essential part of the judgment is the punishment and the amount thereof.'") (material omitted).

the state, in all criminal cases appealed from the district, superior and county courts, and such other courts of record as may be established by law."[21] In *City of Elk City v. Taylor*, the Court of Criminal Appeals explained that a prosecution of a cause of action in a municipal court imposing criminal penalties of incarceration, fines, or both, is considered as a criminal cause of action.[22]

¶ 20 Dutton's pleadings fail to distinguish this Court's jurisdiction in civil matters from the jurisdiction of the Court of Criminal appeals when it adjudicates a criminal cause of action, *e.g.*, personal criminal liability, defenses thereto, and the imposition and execution of a criminal sentence. Secondly, his pleadings do not distinguish claims within the civil jurisdiction of this Court when they are based upon institutional deficiencies apart from a judicial adjudication of a criminal judgment and sentence in a particular case. Thirdly, Dutton does not distinguish our exercise of jurisdiction when the Court of Criminal Appeals has acted in *excess* of its authority. Fourthly, he does not show how his request is encompassed within other various circumstances where civil jurisdiction exists in this Court, although its exercise may involve a criminal proceeding in a different court.

¶ 21 The first distinction involves the issue defining civil and criminal matters for the purpose of defining a civil matter within this Court's supervisory civil jurisdiction and a criminal matter which is not. We have often explained that *if* a petitioner's claim is of such

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[21] 20 O.S.2011 § 40: "The Court of Criminal Appeals shall have exclusive appellate jurisdiction, coextensive with the limits of the state, in all criminal cases appealed from the district, superior and county courts, and such other courts of record as may be established by law."

[22] *City of Elk City v. Taylor*, 2007 OK CR 15, ¶ 9, 157 P.3d 1152, 1154 (In the context of an appeal from a District Court trial de novo appeal from the judgment rendered in a municipal court not of record, the court stated that "The prosecution in a municipal court for the violation of a city ordinance is a criminal matter as a finding of guilt carries with it criminal penalties, *i.e.*, incarceration or fines or both.").

a nature that it is normally reviewed by the Court of Criminal Appeals in a properly filed proceeding in that Court such as a direct appeal or post-conviction appeal, then the Oklahoma Supreme Court will not assume jurisdiction on that claim.[23] The scope of claims that are criminal-jurisdiction in nature *includes those previously brought by a criminal defendant when using the form of a common-law writ to challenge his or her criminal judgment and sentence.*[24] This is so because the Legislature created a post-conviction remedy that supplanted the common-law writs and redefined what post-conviction claims may be made.[25] Under the Constitution and statutes of Oklahoma, the Supreme Court, Court of Criminal Appeals, all other appellate courts and the District Courts have concurrent original jurisdiction to hear and determine a petition for a writ of habeas

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[23] *Carder v. Court of Criminal Appeals*, 1978 OK 130, 595 P.2d 416, 420 (Court determined that controversy was within the Supreme Court's appellate jurisdiction because the controversy was not subject to an appeal to the Court of Criminal Appeals from the District Court: "It is clear that this post-dispositional order of dismissal could not have been appealed by either party to the Court of Criminal Appeals."); *Jeter v. District Court of Tulsa County*, 1922 OK 140, 206 P. 831 (writ of prohibition to prevent trial on ground of double jeopardy denied because Supreme Court did not have jurisdiction to prevent the criminal prosecution); *In the Matter of M.B.*, 2006 OK 63, ¶ 14, 145 P.3d 1040, 1047 ("This case arises out of and relates to a criminal case involving a youthful offender . . . Because this appeal arose out of a criminal case, we determine that the Court of Criminal Appeals has exclusive jurisdiction."); *Herndon v. Hammond*, 1911 OK 159, 115 P. 775, 776 (the petitioner sought prohibition to restrain further proceedings in the county court on his trial for the offense of unlawfully selling certain intoxicating liquors, and the court denied the writ because of the exclusive appellate jurisdiction of the Court of Criminal Appeals). *Accord, State ex rel. Ikard v. Russell*, 1912 OK 425, 124 P. 1092, 1093 (Court assumed original jurisdiction, denied the writ, and stated that the proceeding was dismissed without prejudice to the petitioner presenting the issue to the Court of Criminal Appeals).

[24] *See State ex rel. Henry v. Mahler, supra*, note 20, observing that "As the Court of Criminal Appeals has repeatedly stated, in a criminal case the 'essential part of the judgment is the punishment and the amount thereof.'" *Cf. Lockett v. Evans*, 2014 OK 34, ¶ 5, 330 P.3d 488, 490 ("As concerns the scope of jurisdiction, neither the district court nor this Court has undertaken a review of the validity or terms of the judgments and sentences in the underlying criminal cases.").

[25] *Paxton v. State*, 1995 OK CR 46, 903 P.2d 325, 327 ("Prior to the enactment of the Post–Conviction Procedure Act, 22 O.S. §§ 1080–89, in 1970, the writs of habeas corpus and coram nobis were the means available to collaterally attack a conviction."); *Campbell v. State*, 1972 OK CR 195, 500 P.2d 303 (" . . . we hold that all such common law writs are no longer available and a statutory remedy [of 22 O.S. §§ 1080-1088] has supplanted them.").

corpus "by or on behalf of any person held in actual custody."[26] But "the traditional right to writs of habeas corpus in criminal cases has been incorporated into and amplified by Oklahoma's Post-Conviction Relief Act . . . and is therefore considered to be a criminal action" when used to challenge a criminal judgment and sentence.[27] Dutton's pleadings may not be construed as properly seeking declaratory relief against a criminal judgment.[28] In summary, when a petitioner files an application in this Court seeking a common-law extraordinary writ, that request does not transform a criminal matter into a civil matter, and we must examine the substantive nature of the petitioner's claims to determine whether the matter is criminal or civil.

¶ 22 Dutton claims that he was imprisoned without benefit of counsel, and that Midwest City failed to follow the U. S. Supreme Court opinion in *Argersinger v. Hamlin*, which guarantees counsel for indigent defendants imprisoned by municipal court process.[29] The Response by Midwest City states that *Argersinger* "appears to apply to municipal courts." Although we do not decide this issue, we must note: (1) The authority before us provided by both Dutton and the city indicates that a municipality's power to imprison an indigent person must be exercised in the context of providing that person counsel for the

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[26] *State v. Powell*, 2010 OK 40, ¶ 2, 237 P.3d 779, 780; Okla. Const. Art. 7 § 4.

[27] *State ex rel. Coats v. Hunter*, 1978 OK CR 57, 580 P.2d 158, 159 (referencing the Post-Conviction Relief Act, now codified at 22 O.S.2011 §§ 1080 - 1088). *See also Hinkle v. Kenny*, 1936 OK 582, 62 P.2d 621 (writ of habeas corpus denied because petitioner had remedy at law in the Criminal Court of Appeals, and the Legislature acting under the authority given by Article 7 had established a Court of Criminal Appeals and gave it exclusive appellate jurisdiction in criminal matters.).

[28] An action for a declaratory judgment will not lie "to launch an impermissible collateral attack upon the judgment and sentence in a criminal case." *Oklahoma State Senate ex rel. Roberts v. Hetherington*, 1994 OK 16, ¶ 1, 868 P.2d 708, 709.

[29] *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

process which results in his or her imprisonment;[30] and (2) Our Court of Criminal Appeals has applied *Argersinger v. Hamlin*, *supra*, for more than thirty years in criminal proceedings involving Oklahoma municipalities.[31] Dutton's action in this Court is a challenge to criminal convictions based upon his personal constitutional rights.[32] Challenges to a criminal judgment and sentence based upon personal constitutional rights possessed by a defendant in a criminal proceeding are claims that the Court of Criminal Appeals addresses every day, including a claim based upon the absence of a required

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[30] *Argersinger v. Hamlin*, *supra*; *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979); *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002); *United States v. Cousins*, 455 F.3d 1116, 1126 (10th Cir.2006). *See also Scott v. Illinois*, 440 U.S. 367, 373-374, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979) (The Court discussed *Argersinger* and stated its holding that the Sixth and Fourteenth Amendments to the United States Constitution require that no indigent criminal defendant be sentenced to a term of imprisonment unless he or she been provided with the right to assistance of appointed counsel).

[31] *Jackson v. City of Oklahoma City*, 1984 OK CR 57, 678 P.2d 725 (Court cited *Argersinger* when explaining that "appellant was not required to make a 'knowing and intelligent waiver' of counsel since there was no possibility of imprisonment."); *Murrah v. Oklahoma City*, 1980 OK CR 110, 620 P.2d 1335, 1337 ("In *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), the United States Supreme Court recognized that the right to counsel must extend to any trial in which there is to be any imprisonment.").

We also note that two authors have stated that in 1997 the State of New Jersey became the first state to enact legislation requiring every municipal court to have at least one municipal public defender *appointed by the governing body of the municipality* to represent an indigent defendant accused of an offense, which if convicted, would subject the defendant to imprisonment. Robert J. Martin and Walter Kowalski, "A Matter of Simple Justice": Enactment of New Jersey's Municipal Public Defender Act, 51 Rutgers L.Rev. 637, 676-677, 694 (1999).

[32] *See, e.g., Texas v. Cobb*, 532 U.S. 162, 171, n. 2, 121 S.Ct. 1335 1921 (2001) ("The Sixth Amendment right to counsel is personal to the defendant and specific to the offense."); *Marshall v. Rodgers*, ___ U.S. ___, 133 S.Ct. 1446, 1449, 185 L.Ed.2d 540 (2013) ("It is beyond dispute that '[t]he Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process' . . . [and] It is just as well settled, however, that a defendant also has the right to 'proceed without counsel when he voluntarily and intelligently elects to do so'" and the right to counsel is thus a personal right which may be waived for that proceeding.) (citations omitted); *Smith v. State*, 1971 OK CR 135, 483 P.2d 357, 358-359 ("*Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, 93 A.L.R.2d 733, established the rule that the right to counsel guaranteed by the Sixth Amendment was applicable to the states by virtue of the Fourteenth Amendment, making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one."); *Buck v. Dick*, 1911 OK 9, 113 P. 920, 921 (party's failure to point out in what manner he had been deprived of any rights guaranteed to him by the Sixth Amendment to the federal Constitution resulted in a waiver of that issue).

attorney for the criminal defendant.[33] This Court does not assume original supervisory jurisdiction on this type of claim.

¶ 23 The second distinction is when an alleged institutional deficiency is raised and the proper functioning of a governmental entity is to be adjudicated. These adjudications do not include an adjudication of the elements of a defendant's criminal offense, defenses, and personal rights a defendant possesses in his or her criminal proceeding as they relate to the criminal cause of action, judgment, or sentence. For example, in *State v. Lynch*, this Court properly assumed original jurisdiction to adjudicate the institutional and constitutional deficiency arising when attorneys who represented criminal defendants were unconstitutionally compensated.[34] Similarly, in *Sanders v. Followell*, the Court properly assumed original jurisdiction when a trial judge incorrectly applied a statute setting a lawyer's fee for representing a criminal defendant. The controversy adjudicated by this Court did not involve a part of the criminal cause of action, defenses thereto, or issues relating to the propriety or enforcement of a sentence upon a criminal judgment.[35]

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[33] *See, e.g., Hinsley v. State*, 2012 OK CR 11, 280 P.3d 354 (stating that although a defendant may waive his or her right to a jury trial, in this case the defendant's judgments and sentences were reversed on appeal upon the court's conclusion that the record was not sufficient to show a competent, knowing and intelligent waiver of that right); *Griffin v. State*, 1975 OK CR 173, 540 P.2d 1187 (although judgment and sentence had been satisfied, the application for post-conviction was not moot where petitioner sought to set aside conviction because he had not been advised of his right to counsel and knowingly and intelligently waived such right).

[34] *State v. Lynch*, 1990 OK 82, 796 P.2d 1150, 1152 ("We find that the present application of the compulsory court appointment system which requires lawyers to represent indigent defendants without a post-appointment hearing, and without providing adequate, speedy, and certain compensation for that representation may violate the Okla. Const. art. 2, § 7 and art. 5, § 51.").

[35] *Sanders v. Followell*, 1977 OK 143, 567 P.2d 84, 85 ("The determinative issue is whether a total of $2,500 in attorney fees is allowable per styled case, or whether $2,500 is allowable for each defendant represented under 21 O.S.1976 Supp. § 701.14.").

¶ 24 An additional example of this distinction is found in *Walters v. Ethics Commission*.[36] The litigation before this Court in *Walters* included both a supervisory writ proceeding and an appeal from the District Court.[37] In the supervisory writ proceeding, we issued a writ to prevent the District Court from reviewing any action of the Ethics Commission in making a referral of a matter under its investigatory power to a District Attorney.[38] A referral by the Commission was for the purpose of a prosecutor exercising discretion involving the institution of a criminal cause of action in the District Court. In the appeal, we explained the requirements for the proper functioning of the Ethics Commission and we addressed a party's specific claim that statutes were facially unconstitutional.[39] This party also brought a specific allegation concerning the Commission's application of statutes as to him, and we also addressed that claim *in the context of Ethics Commission proceedings that occur prior to institution of a criminal proceeding.*[40] On the issue whether the party's conduct at issue had been a criminal act, we declined to adjudicate that issue. We observed that the Commission's actions were preparatory to a criminal action being filed in a separate proceeding, and were not proper for adjudication at that time in either the District Court or this Court.[41] Justice Opala's concurring opinion, joined by Simms, J.,

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[36] *Walters v. Oklahoma Ethics Comm'n*, 1987 OK 103, 746 P.2d 172.

[37] *Walters*, 1987 OK 103, n. 1, 746 P.2d at 174.

[38] *Walters*, 1987 OK 103, 746 P.2d at 174, 178.

[39] *Walters*, 1987 OK 103, 746 P.2d at 174-175.

[40] *Walters*, 1987 OK 103, 746 P.2d at 177 (concluding that Walters was not denied procedural due process by the procedures before the Commission).

[41] *Walters*, 1987 OK 103, 746 P.2d at 178 (The Commission's determination to refer the matter to the District Attorney was "preparatory to further proceedings" and "when the appropriate authority brings charges (continued...)

explained that the Court appropriately reversed the District Court's order while addressing the issues concerning the proper procedure to be used by the Ethics Commission, and had also wisely abstained from addressing whether the party's conduct was a violation of a statute: "Because violators of the Act's pertinent provisions are liable to criminal penalties, . . . [and] the decision regarding criminal liability for one's conduct must always be left to the court with cognizance over the offense charged."[42] In summary, in *Walters* the Court distinguished between (1) a claim to adjudicate that a government entity was not functioning according to law and (2) a claim to adjudicate whether one or more elements to a criminal cause of action had been committed by a party to the proceeding. The present action requires the Court to determine if Dutton brought any type of proceeding other than a challenge to a criminal conviction, and we conclude that no request within our supervisory or superintending jurisdiction is made by him.

¶ 25 The third distinction involves our exercise of jurisdiction when the Court of Criminal Appeals has acted in *excess* of its authority in a particular case. For example, when the Court of Criminal Appeals acts in a controversy where no appellate jurisdiction is vested in that Court, then this Court may assume jurisdiction and delineate that Court's jurisdiction.[43] Dutton's purported photocopy of the order by the Court of Criminal Appeals

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[41](...continued)
against Walters for violations of the Act, the issue of the validity of the loans will come to life.").

[42] *Walters*, 1987 OK 103, 746 P.2d at 180, Opala, J., concurring, joined by Simms, J.

[43] *Carder v. Court of Criminal Appeals*, 1978 OK 130, 595 P.2d 416, 420 ("It is clear that this post-dispositional order of dismissal could not have been appealed by either party to the Court of Criminal Appeals. Having no appellate jurisdiction over the juvenile division of the District Court in such matters, the relationship of superior and inferior did not exist between that Court and the District Court in O-77-656 and the Court of Criminal Appeals had no authority to exercise in its issuance of the writ of prohibition.").

states that the court declines jurisdiction and dismisses his case because: "Petitioner failed to attach to the Petition in Error a certified copy of the District Court Order being appealed as required by . . . [the rules of the court]. As Petitioner has provided an insufficient record for review, this Court declines jurisdiction and dismisses the matter." Similarly, this Court has stated that filing the judgment appealed in this Court is a necessary predicate for appellate review, and its absence may result in a dismissal.[44] This Court has similarly dismissed a proceeding due to a party's failure to follow the rules of this Court.[45] No excess of jurisdiction appears on either the face of the order of the Court of Criminal Appeals or the record submitted by Dutton herein.

¶ 26 Fourthly, the Legislature has created civil claims as well as Supreme Court jurisdiction in certain matters although our exercise of jurisdiction may have an impact on a criminal proceeding,[46] and there are a few proceedings involving our appellate jurisdiction in matters which are related to a lower court criminal proceeding.[47] If the Legislature has

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[44] *Willitt v. ASG Industries*, 1978 OK 1, 572 P.2d 1296, 1297; *Johnson v. Johnson*, 1983 OK 117, 674 P.2d 539, 542.

[45] *See, e.g., Rugg v. Layton*, 1923 OK 647, 218 P. 660 (in an original proceeding for certiorari the proceeding was dismissed for the petitioner's failure to prepare, serve, and file a brief as required by the rules of the court).

[46] *See, e.g., Courtney v. State*, 2013 OK 64, ¶¶ 4-6, 307 P.3d 337, 340-341 (Oklahoma Supreme Court has civil *appellate* jurisdiction of a District Court order adjudicating actual innocence as an ancillary issue determined in a supplemental proceeding when that determination is part of a civil jurisdictional claim and made for the purpose of a party pursuing civil liability for wrongful conviction); *Hale v. Board of County Commissioners of Seminole County*, 1979 OK 158, 603 P.2d 761, 763 (we explained that although ouster proceedings could be instituted by grand jury accusation, 22 O.S.1971 §1182, by resolution of the board of county commissioners, 22 O.S.1971 § 1194, or by the Attorney General, 51 O.S.1971 § 94; judicial removal proceedings in all District Court proceedings for removal from office, *no matter how instituted*, the Supreme Court had exclusive jurisdiction on review and in original proceedings for a prerogative writ); 22 O.S. 2011 §§ 350-363 (Supreme Court's oversight and operation of Oklahoma's statutory multi-county grand jury).

[47] An example of a civil proceeding involving a related criminal proceeding is a forfeiture of an appearance bond in a criminal proceeding. *Dunn v. State*, 1917 OK 269, 166 P. 193 (Appeal from order (continued...)

properly created a legal cause of action as a civil jurisdiction matter then this Court has the constitutional and legislatively-mandated responsibility to recognize it as within the jurisdiction of this Court.[48] Dutton does not show how his request is encompassed within other various specific circumstances where civil original jurisdiction is exercised by this Court, although our exercise may involve or affect a lower court criminal proceeding.

III. Original Superintending Jurisdiction

¶ 27 Dutton filed pleadings in this Court invoking this Court's original jurisdiction. The Oklahoma Constitution vests this Court with original jurisdiction to issue extraordinary writs and a general superintending control over all inferior courts, agencies, commissions, and boards created by law.[49] The Court's supervisory writ jurisdiction over lower courts is not identical to this Court's superintending-control jurisdiction over all courts, agencies, commissions, and boards.[50] We have explained that "It is not always easy or necessary

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[47](...continued)
overruling motion to vacate a judgment of forfeiture upon appearance bond is civil and not criminal case, and lies to Supreme Court.); *Hargrove v. State, ex rel. Dennis*, 1964 OK CR 105, 396 P.2d 675, 676 (appearance bond forfeiture proceeding is a civil case, not a criminal case). *Cf. State v. Torres*, 2004 OK 12, 87 P.3d 572 (forfeiture of an appearance bond for a felony defendant appealed to the Supreme Court).

[48] In Oklahoma, a right to appeal from an exercise of judicial discretion *in cases of law and equity*, excluding criminal matters, is a constitutional right subject to legislative requirements for the manner invoking that appellate jurisdiction. Okla. Const. Art. 7 § 4; *Wells v. Shriver*, 1921 OK 122, 197 P. 460, 478-479. We need not address those circumstances where either the Legislature has authority to *exclude* a particular exercise of governmental power from the scope of this Court's reviewing authority or the various constitutional limits on that power of the Legislature.

[49] Okla. Const. Art. 7 § 4, provides in part that: "The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all Agencies, Commissions and Boards created by law."

[50] *Board of Commissioners of Harmon County v. Keen*, 1944 OK 243, 153 P.2d 483, 485 ("The jurisdiction to issue the named writs and the jurisdiction to exercise superintending control over inferior courts, while separate and distinct . . .are closely related."). *Cf. State ex rel. Freeling v. Kight*, 1915 OK 772, 152 P. (continued...)

to note the line of demarcation between the two."[51] Confusion between the two types of jurisdiction may arise because superintending-control jurisdiction is *usually* exercised by the use of writs of prohibition, mandamus and certiorari.[52] However, the form of our superintending-control remedial order is not limited to the specified constitutional writs.[53] The Court has used its superintending control when fulfilling its constitutional responsibilities in various contexts, such as supervising the practice of law pursuant to the Court's Art. 7 § 1 power,[54] enforcing rules of procedure for courts,[55] and deciding *publici juris* issues involving a serious conflict between different governmental agencies or

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[50](...continued)
362, 364 (superintending control over inferior courts is separate and in addition to the general *appellate* jurisdiction of the Supreme Court).

[51] *Board of Commissioners of Harmon County v. Keen*, 1944 OK 243, 153 P.2d at 485.

[52] *Ethics Comm'n v. Cullison*, 1993 OK, 850 P.2d 1069, 1072; *Board of Commissioners of Harmon County v. Keen*, 1944 OK 243, 153 P.2d at 485.

[53] *Ethics Comm'n v. Cullison*, 1993 OK, 850 P.2d 1069, 1073 ("... we have explained that this court's superintending control is not limited to the constitutionally specified writs of Okla. Const. Art. 7 § 4."); *Draper v. State*, 1980 OK 117, 621 P.2d 1142, 1147 (When the Attorney General argued that the Court had no superintending control jurisdiction over the act of the Attorney General in issuing an official Attorney General's Opinion, and opposing counsel argued that the issuance of an A. G. opinion was a quasi-judicial function within the Court's power to review, the Court explained that: "Even though the Attorney General may have exercised quasi-judicial powers in the interpretation of the statutes, and it is appropriate to issue a writ of prohibition to control the performance of judicial and quasi-judicial activities, we choose not to issue a writ of prohibition but rather determine the opinions to be invalid and of no effect.").

[54] The Oklahoma Constitution, Art. 7 § 1, vests "judicial power" in the Supreme Court and that vesting "gives it the right to regulate the matter of who shall be admitted to practice law before the Supreme Court and inferior courts, and also gives it the right to regulate and control the practice of law within its jurisdiction." *In re Integration of State Bar of Oklahoma*, 1939 OK 378, 95 P.2d 113, 114.

The Court's Art. 7 § 4 superintending power over "inferior courts" includes an authority to control and regulate the practice of law. *State v. Lynch*, 1990 OK 82, 796 P.2d 1150, 1163 (In the context of the Court's superintending power pursuant to Okla. Const. Art. 7 § 4 and its administrative power pursuant to Art. 7 § 6, the Court stated that it "is constitutionally vested with the power to control and regulate the practice of law in this State.").

[55] *State ex rel. Freeling v. Kight*, 1915 OK 772, 152 P. 362.

branches of government.[56] There is no clear legal right to a writ of superintending control and the issuance of such a writ is in the discretion of the Court.[57]

¶ 28 The Oklahoma Supreme Court has been granted statutory authority by the Legislature to issue orders of statewide application relative to procedures in and practices before the municipal courts and appeals therefrom, subject to the provisions of article 27 of the Municipal Code; and under its general superintending control of all inferior courts, it has the power and authority by and through the Chief Justice of the Supreme Court to call annual conferences of the judges of the municipal courts.[58] This statute is consistent with the Supreme Court's *civil* jurisdiction because it authorizes the Court to create procedures and practices of statewide application.

¶ 29 The type of corrective relief within the jurisdiction conferred by this statute is one to correct institutional deficiencies and not one to adjudicate individual proceedings determining criminal liability. Nowhere in the statute is this Court given the power to issue writs of either supervisory or superintending control to review an individual criminal proceeding in a municipal court. One reason for this is that the authority to issue writs to a municipal court not of record lies in the District Court, which court also has the statutory

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[56] *Ethics Commission v. Cullison*, 1993 OK, 850 P.2d 1069, 1073 ("We have in the past provided a remedy when a branch of state government brings a legal claim alleging that an 'intolerable conflict' exists with a co-ordinate branch of state government amounting to governmental gridlock.").

[57] *Butler v. Breckinridge*, 1967 OK 177, 442 P.2d 313, 318; *Board of Commissioners of Harmon County v. Keen*, 1944 OK 243, 153 P.2d 483, 485.

[58] 11 O.S.2011 § 27-131:
"The Supreme Court is authorized to issue orders of statewide application relative to procedures in and practices before the municipal courts and appeals therefrom, subject to the provisions of this article, and under its general superintending control of all inferior courts, shall have the power and authority by and through the Chief Justice of the Supreme Court, to call annual conferences of the judges of the municipal courts of Oklahoma to consider matters calculated to bring about a speedier and more efficient administration of justice."

appellate criminal jurisdiction over the municipal court criminal case.[59] Appeals from criminal convictions in municipal courts of record are filed with the Court of Criminal Appeals using the procedures authorized for appeals from district courts.[60] Although the Court of Criminal Appeals has no *general* superintending power over the lower courts, the writs it issues are in aid of its appellate jurisdiction,[61] and the scope of the relief afforded by those writs involves criminal matters. Because the Court of Criminal Appeals has exclusive appellate jurisdiction in criminal matters and jurisdiction to issue supervisory writs in aid of its appellate jurisdiction, that Court is the court which uses a writ power to supervise a *criminal matter in a criminal controversy or action* that is proceeding in the District Court.

¶ 30 Relief from a criminal judgment and sentence in a municipal court not of record lies in the municipal court, District Court, and Court of Criminal Appeals.[62] Dutton's

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[59] 11 O.S. 2011 § 27-128:
The district court in each county wherein a municipal court is established shall have the same jurisdiction to issue to the municipal court writs of mandamus, prohibition and certiorari as the Supreme Court now has to issue such writs to courts of record.

[60] 11 O.S.2011 § 28-128:
Appeals may be taken from a judgment or order of a municipal criminal court of record to the Court of Criminal Appeals in the same manner and to the same extent that appeals are now taken from the district courts to the Court of Criminal Appeals in criminal matters, and no appeals other than those herein provided shall be allowed.

[61] *Movants to Quash Multicounty Grand Jury Subpoena v. Dixon*, 2008 OK 36, ¶ 6, 184 P.3d 546, 548. *See State ex rel. Henry v. Mahler*, 1990 OK 3, 786 P.2d 82, 85 ("Where the Court of Criminal Appeals has no appellate jurisdiction it has no power to issue writs of prohibition and/or mandamus.").

[62] *See, e.g., Houghton v. City of Wewoka*, 1988 OK CR 86, 753 P.2d 933 (municipal courts not of record may utilize a process similar to that in the District Courts for curing a procedurally defective appeal), *overruled in part*, *Blades v. State*, 2005 OK CR 1, ¶ 5, 107 P.3d 607, 608, where the Court of Criminal Appeals stated that the same rule procedure applied to both the seeking of an out of time appeal from either an original sentencing or a revocation of sentences, and that the District Court serves the function of fact finding only, and the Court of Criminal Appeals would determine whether to grant an appeal out of time.

pleadings do not seek relief against an institution and the imposition of state-wide rules.[63] He seeks relief in the form of an order vacating his convictions or an order directing the District Court to provide him with a direct appeal of his municipal criminal convictions.

¶ 31 We have also used "superintending control" in the context of (1) issuing prohibition to prevent a trial court from denying a person's fundamental right of notice and an opportunity to be heard in a judicial proceeding,[64] and (2) noting the *publici juris* issue presented by a state-wide procedure for collecting jury fees as implemented by a particular District Court Clerk.[65] We have also assumed original jurisdiction to adjudicate "an arguable claim" that a violation of a federal constitutional right had occurred by application of specific state statutes.[66]

¶ 32 Dutton's claim is that he was imprisoned without the benefit of counsel appointed to represent him, and that he was denied a federal constitutional right. The constitutional grant of superintending control in this Court is not an unlimited power, but a power that is exercised within the definition of "judicial power" as vested in this Court by Article 7 of the Oklahoma Constitution. If a party files a pleading in this Court and

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[63] Because his pleadings do not raise this issue we need not address the type of factual support or record in an original jurisdiction proceeding that is needed for a request that the Court create court rules for state-wide application.

[64] *Muggenborg v. Kessler*, 1981 OK 66, 630 P.2d 1276, 1279.

[65] *Naylor v. Petuskey*, 1992 OK 88, 834 P.2d 439, 440 ("The issue in this original proceeding is whether the Court Clerk for the District Court of Oklahoma County, Oklahoma, may charge and collect the jury fee prescribed in 28 O.S.1991, § 152.1 more than one time before a jury trial is had in a pending action ...This novel controversy has statewide implications and accordingly is a matter of *publici juris*.").

[66] *Sharp v. Tulsa County Election Board*, 1994 OK 104, ¶ 4, 890 P.2d 836, 839 (In the context of assuming jurisdiction on "an arguable claim" that a violation of a constitutional right had occurred, this Court stated that it "has the authority to issue a writ of mandamus when the questions are *publici juris*, or when some unusual situation exists so that a refusal to exercise jurisdiction would work a great wrong or a denial of justice.").

requests a determination of his or her legal rights, then a *particular type* of Article 7 judicial power is invoked *in a particular context* and the Court acting on that pleading is functioning in the role of an "adjudicator" and not, for example, legislatively or administratively.[67] In summary, Dutton is asking the Court *to adjudicate a case.* In the exercise of our original supervisory or superintending jurisdiction, when we "adjudicate a case" we must possess both subject matter jurisdiction[68] and a justiciable controversy[69]

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[67] *Tweedy v. Oklahoma Bar Ass'n*, 1981 OK 12, 624 P.2d at 1052.

[68] The *focus* of a subject matter jurisdiction analysis is on the nature of the pled action in relation to the power of a court to adjudicate and grant relief in an action of that nature. The phrase *subject matter jurisdiction* refers to the power of a court to deal *with the general subject involved in the action or the nature of the cause of action*, and this jurisdiction is present when a court has *power to proceed in a case of the character presented. State ex rel. Oklahoma Bar Ass'n v. Mothershed*, 2011 OK 84, ¶ 47, 264 P.3d 1197, 1215 (subject matter jurisdiction is when a court has *power to proceed in a case of the character presented*, or *power to grant the relief sought*); *Hobbs v. German–American Doctors*, 1904 OK 60, 78 P. 356, 357 (jurisdiction of the subject-matter is the power to deal with the general subject involved in the action); *Glacken v. Andrew*, 1918 OK 20, 169 P. 1096, 1097 (same).

[69] Generally, the *focus* of a justiciability analysis is on the parties and the nature of their adverse legal interests in the particular pled controversy, and not on the nature of the pled cause of action as it relates to the power of the court to address that type of action. *See, e.g., Application of State ex rel. Dept. of Transportation*, 1982 OK 36, 646 P.2d 605, 608-609 ("Included within the rubric of 'justiciability' is a controversy which is (a) definite and concrete, (b) concerns legal relations among parties with adverse interests and (c) is real and substantial so as to be capable of a decision granting or denying specific relief.").

This *focus* on the interests of the parties has been present when we addressed a *justiciable controversy* in the context of declaratory relief and have said that justiciability is present when there is: (1) a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination. *Chrysler Corp. v. Clark*, 1987 OK 32, 737 P.2d 109, 110, quoting *Gordon v. Followell*, 1964 OK 74, 391 P.2d 242, 244.

District Courts possess "unlimited jurisdiction of all justiciable matters, except as otherwise provided in this Article . . . ." Okla. Const. Art. 7 § 7(a). *Reeds v. Walker*, 2006 OK 43, ¶ 11, 157 P.3d 100, 107. We need not perform a complete analysis of a District Court's unlimited subject matter jurisdiction based upon the concept of justiciability in Okla. Const. Art. 7§ 7, or compare such to the federal limitation of "judicial power" to "cases" and "controversies" by U. S. Const. Art. III; but we do note that (1) our Court has addressed a lack of subject matter jurisdiction as dependent upon an absence of justiciability, and (2) while subject matter jurisdiction and *constitutional justiciability* are not the same thing, they have a similar concept involving a constitutional power to adjudicate. *See, e.g., State ex rel. Southwestern Bel Tel. Co. v. Brown*, 1974 OK 19, 519 P.2d 491, 495 (although a District Court possesses subject matter jurisdiction over tort claims, with regard to the plaintiffs' tort action "the question is whether this is a justiciable controversy"); Katherine Mims Crocker, *Justifying A Prudential Solution to the Williamson County Ripeness Puzzle*, 49 Ga.L. Rev. 163, 201, n. 204 (2014) ("Under federal law, the concepts of justiciability and subject-matter jurisdiction can be seen

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as shown by the parties' pleadings; and our *adjudication* is limited by the parties pleadings[70] unless the scope of the adjudication is expanded by one of the few well-known exceptions. Additionally, this expanded adjudication in the context of an exercise of superintending control jurisdiction is itself circumscribed by the usual principles of law applicable to remedies, such as an alternate exclusive remedy defeating the exercise of such jurisdiction.[71] Examples of adjudicatory superintending control jurisdiction being dependent upon application of subject-matter and justiciability principles are found in opinions such as *Council on Judicial Complaints v. Maley*,[72] *Democratic Party v. Estep*,[73]

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[69](...continued)
as stemming from textually distinct sources, too. Constitutional justiciability doctrines derive from Article III's limitation of '[t]he judicial power' to 'cases' and 'controversies.'").

[70] Generally, the Court's *adjudicatory* judicial power in an original action is limited to the facts and issues framed by the pleadings and as amended by the partes' briefs in this Court. *La Bellman v. Gleason & Sanders, Inc.*, 1966 OK 183, 418 P.2d 949, 953 ("The jurisdiction of the trial court is limited to the particular subject matter presented by the pleadings, and any judgment which is beyond the issues framed by the pleadings and proof is in excess of the court's jurisdiction and is void."); *Oklahoma City v. Robinson*, 1937 OK 16, 65 P.2d 531, quoting *Gille v. Emmons*, 58 Kan 118, 48 P. 569, 570 (1897) in turn quoting *Munday v. Vail*, 34 N. J. Law 418, 422 (1871) ("A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard.").

[71] For example, one of the well-known exceptions occurs in a public-law controversy where the Court may grant corrective relief upon any applicable legal theory, raised by a party or *sua sponte*, when that theory is dispositive of the controversy and is supported by the record. *Lincoln Farm, L.L.C. v. Oppliger*, 2013 OK 85, n. 19, 315 P.3d 971, 977. But even when we have assumed jurisdiction "for the primary reason that the questions involved are *publici juris*" we will not issue a writ when an alternative adequate remedy exists. *State ex rel. Crawford v. Corporation Commission*, 1938 OK 455, 85 P.2d 288, 289. *Cf. Muskogee Fair Haven Manor Phase I, Inc. v. Scott*, 1998 OK 26, ¶¶ 1, 13, 957 P.2d 107, 108, 111-112 (Court held that due to adequate and exclusive legislatively prescribed judicial remedies afforded to taxpayers by the Ad Valorem Tax Code the District Court, a court of "unlimited original jurisdiction," "lacked subject matter jurisdiction" to entertain taxpayers' declaratory judgment action.).

[72] In *Council on Judicial Complaints v. Maley*, 1980 OK 32, 607 P.2d 1180, 1182, the Court explained that "We must first be satisfied that jurisdiction over this proceeding rests with this Court rather than the Court on the Judiciary." The Court concluded that the original action was properly before the Supreme Court instead of the Court on the Judiciary, and then invoked its superintending control as a basis for assuming jurisdiction and granting relief. *Id.*

[73] *Democratic Party of Oklahoma v. Estep*, 1981 OK 106, 652 P.2d 271, 272 (original jurisdiction assumed and writ denied due to lack of justiciability).

and *Ethics Commission v. Cullison*,[74] and more recent opinions such as *Coates v. Fallin*.[75]

¶ 33 Our superintending control jurisdiction is created by Article 7 §§ 1 and 4 of the Oklahoma Constitution and that jurisdiction must be construed in harmony with the constitutional exclusive jurisdiction in criminal matters that is vested in the Court of Criminal Appeals via enactments of the Legislature.[76] Dutton is requesting that we adjudicate the legality of his criminal convictions by an exercise of our superintending control in the context of this Court lacking a general constitutional power for appellate review of final judgments and sentences in criminal cases.[77] It is correct that the historic division between civil and criminal appellate-review jurisdiction has not been a rigid line and this Court and the Court of Criminal Appeals have had a shared responsibility in specific circumstances.[78] That shared responsibility has usually occurred because this Court has been required to

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[74] *Ethics Commission v. Cullison*, 1993 OK, 850 P.2d 1069, 1073, 1073-1074 (we resolved "inter-governmental legal claims within the discretionary superintending jurisdiction of this Court;" and one issue before us was "the appropriateness of that particular procedure or remedy [declaratory judgment] *for the particular justiciable controversy* . . . to afford a party a means to vindicate *a judicially cognizable interest*."), (emphasis and explanatory phrase added).

[75] *Coates v. Fallin*, 2013 OK 108, 316 P.2d 924 (we noted that until such time as a case or controversy or a justiciable issue is presented to this Court, we were without jurisdiction to rule further with regard to specific legislation).

[76] *In re Initiative Petition No. 314*, 1980 OK 174, 625 P.2d 595, 598-599 (provisions of the Constitution relating to the same question should be construed together and harmonized); *State ex rel. Blankenship v. Freeman*, 1968 OK 54, 440 P.2d 744, 752 (parts of our Constitution adopted by the people at the same time should be construed so as to permit both to stand and give force and effect to each, if they are susceptible of such construction.).

[77] *In re Opinion of the Judges*, 1909 OK 277, 105 P. 325, 326. *See also Buck v. Dick*, 1911 OK 9, 113 P. 920, 921 (we explained that appellate jurisdiction is exercised by revising the action of inferior courts, and remanding the cause for the rendition and execution of the proper judgment; and the Court of Criminal Appeals is the court exercising exclusive appellate jurisdiction and pronouncing the final appellate judgment in a criminal matter).

[78] *See, e.g., Hale v. Board of County Commissioners of Seminole County*, 1979 OK 158, n. 12, 603 P.2d 761, 763 (noting the then shared appellate review in juvenile delinquency matters and in direct contempt matters).

define a "criminal case" or matter for purpose of appellate review when the court for such review was not expressly stated in the statute,[79] or when a statutory scheme incorporates both criminal and civil matters or power,[80] or when we have explained *sui generis* proceedings and a shared appellate-review jurisdiction exists.[81] Dutton's controversy is not one within the shared responsibility of this Court and the Court of Criminal Appeals or a controversy where no appeal has been provided by statute.

¶ 34 The Court of Criminal Appeals is constitutionally vested with "exclusive appellate jurisdiction in criminal cases" as implemented by legislation.[82] The Legislature has provided an appellate procedure for an appeal from a municipal court to the District Court and then an appeal to the Court of Criminal Appeals. There is no appeal or writ of error from the Court of Criminal Appeals to this Court.[83] There is no doubt that this Court may correct a deficient statutory remedy in the context of an adjudication.[84] But

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[79] *See, e.g., State ex rel. Henry v. Mahler*, 1990 OK 3, 786 P.2d 82, 86 (the appellate review of a decision concerning an official's application of a statute involving an inmate's credit time for reduction of a sentence was a criminal matter because "in a criminal case the 'essential part of the judgment is the punishment and the amount thereof.'").

[80] *See, e.g., Movants to Quash Multicounty Grand Jury Subpoenas v. Powers*, 1992 OK 142, 839 P.2d 655, 656 (The authority of the multi-county grand jury extends to both the bringing of criminal indictments as well as accusations for removal and future determinations of whether this Court or the Court of Criminal Appeals has jurisdiction over matters brought on review concerning the grand jury must be made on a case-by-case basis.).

[81] Contempt proceedings are *sui generis*, *Henry v. Schmidt*, 2004 OK 34, ¶ 11, 91 P.3d 651, 654, and with appellate review lies in both the Supreme Court and the Court of Criminal Appeals, *State ex rel. Young v. Woodson*, 1973 OK 151, 519 P.2d 1357, 1358.

[82] *Jackson v. Freeman*, 1995 OK 100, 905 P.2d 217, 223 (the Court of Criminal Appeals is a legislative Court because of the powers expressly given to the Legislature to change it or abolish it.).

[83] *Carder v. Court of Criminal Appeals*, 1978 OK 130, 595 P.2d 416, 420 ("There is no appeal or proceeding in error from the Court of Criminal Appeals to this Court.").

[84] *Farris v. Cannon*, 1982 OK 88, n. 4, 649 P.2d 529, 531 ("Whenever an act of the legislature creates a remedy but does not prescribe the procedure for its pursuit, the court is duty-bound to fashion that procedure (continued...)

adjudicatory jurisdiction of appeals from Dutton's criminal convictions does not lie in this Court. Dutton may not circumvent the statutory appellate procedures by seeking appellate review of his criminal conviction in this Court.[85]

¶ 35 It is nothing new for this Court to examine the scope and effect of a party's requested relief to determine whether this Court is impermissibly intruding upon the jurisdiction of the Court of Criminal Appeals. For example, in *State ex rel. Henry v. Mahler*, the Department of Corrections was statutorily required to apply earned credit days towards a prisoner's sentence of incarceration. We explained that the scope of the statute in the controversy applied to alter a criminal judgment and sentence and was a matter within the exclusive jurisdiction of the Court of Criminal Appeals.[86] The issue of attorney representation of an indigent criminal defendant is a criminal matter by its nature, and thus proper for adjudication within a District Court criminal proceeding and appeal to the Court of Criminal Appeals.[87]

¶ 36 We conclude that Dutton's pleadings attempt to invoke an original supervisory or superintending adjudicatory jurisdiction of this Court for the purpose of providing him with an appellate review of his municipal criminal judgments and sentences, and we decline to assume original jurisdiction on such claims.

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[84](...continued)
which will best effectuate the intent of the enactment.").

[85] *Darnell v. Higgins*, 1926 OK 683, 255 P. 678, 679 (a common-law writ of certiorari may not be used as a substitute for an appeal, and a petitioner may not successfully invoke the Court's jurisdiction for a writ of certiorari when an appeal will lie from the challenged order).

[86] *State ex rel. Henry v. Mahler*, 1990 OK 3, 786 P.2d 82, 86.

[87] *See, e.g., Griffin v. State*, 1975 OK CR 173, 540 P.2d 1187 (although judgment and sentence had been satisfied, the application for post-conviction was not moot where petitioner sought to set aside conviction because he had not been advised of his right to counsel and knowingly and intelligently waived such right).

IV. Alternative Remedies

¶ 37 Dutton has ten filings in this supervisory proceeding.[88] None of these filings show that he is without remedies in the District Court or subsequent appeal to the Court of Criminal Appeals. More than forty years ago, the Court of Criminal Appeals stated that the Oklahoma Post-Conviction Relief Act (22 O.S. §§ 1080-1089) "contains no requirement that an applicant be in custody, under any form of restraint or supervision, or that the sentence be unsatisfied in any respect."[89] Dutton's release from confinement would appear to present no *theoretical* bar to seeking post-conviction relief.[90]

¶ 38 The orders are not before us, but we may take judicial notice of the dockets

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[88] Dutton filed: (1) Entry of Appearance (August 29, 2014); (2) Application to Assume Original Jurisdiction, (August 29, 2014); (3) An Affidavit in Support of Motion to Proceed In Forma Pauperis (August 29, 2014); (4) Motion to Appoint Counsel, (August 29, 2014); (5) Appendix of Citations of Authority and Exhibits, (August 29, 2014); (6) Proof of Service (August 29, 2014); (7) Motion to Provide Relief (Nov. 14, 2014); (8) Notice of Change of Contact Information (December 30, 2014); (9) Petitioner's Objections and Legal Argument, etc. (March 10, 2015); and (10) Petitioner's motion for evidentiary hearing, oral argument, and aid of counsel (April 17, 2015).

[89] *Battle v. State*, 1973 OK CR 424, 515 P.2d 269, 271, quoting *Luna v. State*, 1973 OK CR 389, 513 P.2d 1399.

[90] 22 O.S.2011 § 1080, states that:
Any person who has been convicted of, or sentenced for, a crime and who claims:
(a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;
(b) that the court was without jurisdiction to impose sentence;
(c) that the sentence exceeds the maximum authorized by law;
(d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
(e) that his sentence has expired, his suspended sentence, probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
(f) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;
may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence.

of District Courts.[91] In the three District Court actions, 2013-1619, 2013-1620, and 2013-1622, the first and last were "Dismissed without prejudice" and in 1620 its current status appears to be "pending." All of his applications for post conviction relief were filed with the docket designation "CV" for "Civil Misc.: OTHER - CIVIL NO DAMAGES <..DESCRIPTION." In two District Court orders filed in 1619 and 1622, Dutton was directed to seek relief from Midwest City. Dutton's application in this Court does not state any efforts on his part to seek relief in the municipal court for Midwest City as directed by the District Court of Oklahoma County.

¶ 39 The concept of an adequate remedy appears in several areas of the law with slightly different and overlapping meanings. In the context of creating a remedy and providing equitable relief, we have indicated that when a party has an action at law an equitable remedy will not be available.[92] Similarly, equity is not invocable when an adequate statutory remedy exists.[93] In the context of challenging a judgment, a statutory remedy will preclude a party from successfully invoking equity.[94] Of course, in these contexts the available remedies must be *adequate*, but adequacy is not measured by whether Dutton obtains the exact relief he desires, *i.e.*, his convictions are voided or he gets a new appeal in this proceeding. Adequacy of a remedy in this context is determined by whether the law provides a means for complete relief for a person with the type of

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[91] *Collier v. Reese*, 2009 OK 86, ¶ 8, 223 P.3d 966, 970.

[92] *Krug v. Helmerich & Payne, Inc.*, 2013 OK 104, ¶ 34, 320 P.3d 1012, 1022 ("a plaintiff may not pursue an equitable remedy when the plaintiff has an adequate remedy at law").

[93] *Muskogee Fair Haven Manor Phase I, Inc. v. Scott*, 1998 OK 26, ¶ 12, 957 P.2d 107, 111 ("a judge's powers in equity are not invocable when clear and adequate statutory remedies are available").

[94] *Denning v. Van Meter*, 1955 OK 18, 281 P.2d 758, 759-760.

claims Dutton is raising, *i.e.*, a *reasonable opportunity* to obtain the relief he seeks.

¶ 40 Generally, in the context of a civil proceeding *when* the federal constitution requires this State to provide an adequate remedy for a person claiming the denial of a federal constitutional right by the State, the *adequacy* of an available remedy at law is not measured by that particular party's eventual success on the merits of his or her litigation, but whether a person in that party's circumstances is provided with *a clear and certain opportunity* for obtaining *complete relief at law*.[95] For example, if a state exacts a tax in violation of the federal constitution, then it must provide an opportunity to recover those taxes because "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment."[96] But even in the context of a deprived federal constitutional right, a State may require a person to comply with a clear and certain state procedure when seeking a legal remedy for that deprived federal right.[97] Dutton's action raising

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[95] *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990) quoting *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285, 32 S.Ct. 216, 56 L.Ed. 436 (1912) ("To satisfy the requirements of the Due Process Clause, therefore, in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy,' . . . for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one."). The use of the negative phrase "not only a fair opportunity" combined with the disjunctive "but also a clear and certain remedy" shows that the opportunity of a remedy is not identical to the remedy being clear and certain.

[96] *Redbird v. Oklahoma Tax Commission*, 1997 OK 126, ¶ 10, 947 P.2d 525, 527 quoting *Carpenter v. Shaw*, 280 U.S. 363, 369, 50 S.Ct. 121, 74 L.Ed. 478 (1930).

We note that a federal constitutional requirement for a State court providing a remedy for a constitutional deprivation is not a rule of universal application. While Congress does *not* possess the power, under Article I of the U. S. Constitution, to subject nonconsenting States to private suits in their own courts, Congress may authorize private suits against nonconsenting States pursuant to the enforcement power of § 5 of the Fourteenth Amendment. *Alden v. Maine*, 527 U.S. 706, 756, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999).

[97] *Redbird v. Oklahoma Tax Commission*, 1997 OK 126, ¶ 11, 947 P.2d 525, 527-528; *Stallings v. Oklahoma Tax Commission*, 1994 OK 99, ¶ 15, 880 P.2d 912, 918.

federal constitutional claims does not exempt him from using available statutory or common-law proceedings to vindicate his claims. The District Court has stated that his applications for post-conviction relief were denied without prejudice to him seeking relief in the municipal court. Dutton has failed to show why he should not be required to pursue relief in accordance with state statutes and the orders of the District Court.

V. Motion for Counsel, Oral Argument and an Evidentiary Hearing

¶ 41 Dutton filed a motion requesting the Court appoint counsel to represent him in this proceeding. This Court has noted a right to counsel possessed by a defendant in a criminal prosecution, and that the right is expressly conferred by Art. 2 § 20 of the Oklahoma Constitution.[98] Dutton's proceeding in this Court does not subject him to either criminal fine or punishment, and it is not a criminal prosecution or a statutorily authorized direct appeal from his criminal judgments and sentences. His proceeding in this Court is not a statutorily authorized direct attack on his convictions, but a *collateral attack*[99] in a civil proceeding seeking an extraordinary superintending writ to review judgments based upon criminal causes of action that were rendered in criminal proceedings.

¶ 42 There is no doubt that the assistance of a legal practitioner is fundamental

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[98] *Towne v. Hubbard*, 2000 OK 30, n. 18, 3 P.3d 154, 159-160.

[99] A direct attack is an attempt to avoid or correct a judicial proceeding in some manner provided by law, such as by an appeal, or motion for new trial. *House v. Town of Dickson*, 2007 OK 57, n. 5, 193 P.3d 964; *In re Hess' Estate*, 1962 OK 74, 379 P.2d 851, 855, *appeal dismissed, cert. denied, Hess v. Kriz*, 375 U.S. 45, 84 S.Ct. 157, 11 L.Ed.2d 108 (1963).

A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law; that is, in some other way than by appeal, writ of error, certiorari, or motion for a new trial. *In re Hyde*, 2011 OK 31, ¶ 11, 255 P.3d 411, 414, *quoting State ex rel. Comm'rs of Land Office v. Corp. Comm'n*, 1979 OK 16, ¶ 9, 590 P.2d 674, 677.

to due process "in certain types of civil litigation, aspects of which are analogous to criminal proceedings."[100] We have concluded that legal authority *clearly demonstrates* that this Court has no authority in this collateral civil proceeding to either void Dutton's convictions or direct the District Court to provide him with an appeal of his criminal convictions. We note the District Court has denied his applications for criminal post-conviction relief without prejudice. We conclude that appointed counsel would not be of assistance in this proceeding and deny Dutton's application for appointed counsel.[101] Because we decline to assume original jurisdiction on the merits of Dutton's claims and because such relief is appropriate in a different court, we deny his motion for an oral argument and an evidentiary hearing.

V. Conclusion

¶ 43 We assume original jurisdiction solely on the issue of our jurisdiction to hear Dutton's claims. Dutton has failed to show that he lacks adequate remedies in either a municipal court or the District Court. We hold that the Court does not possess jurisdiction to either review the merits of Petitioner's cause of action challenging his municipal criminal convictions or compel the District Court to provide him with a new direct appeal of those convictions to the District Court. We conclude that Dutton's claims are criminal matters and we decline to assume original jurisdiction on his claims or grant him relief on them without

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[100] *Towne v. Hubbard*, 2000 OK 30, n. 18, 3 P.3d at 159.

[101] We also deny Dutton's motion for hearing and oral argument because the authorities clearly show that this Court has no authority to adjudicate the merits of Dutton's claims.

prejudice to him presenting them, in the proper court.[102]

¶ 44 COMBS, V. C. J., WATT, WINCHESTER, EDMONDSON, TAYLOR, and GURICH, JJ, concur.

¶ 45 REIF, C. J., KAUGER, and COLBERT, JJ., concur in result.

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[102] A limited adjudication on the question of jurisdiction is not an adjudication on the merits of the controversy. *State v. Herndon*, 365 Ark. 185, 226 S.W.3d 771, n. 3, 774 (2006), (and court distinguished the issue of "jurisdiction to determine jurisdiction," from "jurisdiction to hear the merits" of the controversy); *Slaton v. State*, 981 S.W.2d 208, 209 n. 3 (Tex.Crim.App.1998) ("The 'jurisdiction' to determine jurisdiction is the inherent authority of a court to decide whether documents filed with it invoke its jurisdiction. This differs from a court's jurisdiction to dispose of a case on the merits.").

2015 OK 56

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

MISTY DAWN FARGO and THE ESTATE OF JASON PATTERSON by and through MOTHER and PERSONAL REPRESENTATIVE NORMA PATTERSON,	)	
Plaintiffs/Appellants,	)	No. 111,416
vs.	)	
TERESA HAYS-KUEHN,[1]	)	FOR OFFICIAL PUBLICATION
Defendant/Appellee,	)	
and	)	
ANGELINE SANKEY and GINGER MERRILL,	)	
Defendants.	)	

CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION IV

¶0 Jason Patterson (Patterson), the driver of a motorcycle died at the scene, and his passenger, plaintiff/appellant, Misty Dawn Fargo (Fargo), sustained severe injuries when the motorcycle collided head on with a vehicle that entered their lane of traffic. Fargo and plaintiff/appellant, the Estate of Jason Patterson, by and through Mother and Personal Representative Norma Patterson, sued

[1] The Plaintiff filed the Petition spelling this defendant's name as "Treresa" Hays-Kuehn. Ms. Kuehn files all of her pleadings with the style as "Teresa" which appears to be the correct spelling of her name. For the purpose of this appeal, Ms. Kuehn's first name will be reflected as "Teresa".

defendant/appellee,Teresa Hays-Kuehn (Kuehn) and two other defendants [2] for negligence in failing to safely operate their respective vehicles. Kuehn, whose vehicle did not collide with the motorcycle, moved for summary judgment asserting that even if her actions were negligent, at most they created a condition and were not the proximate cause of plaintiffs' damages thereby relieving her of liability. The trial court sustained the motion and plaintiffs appealed. The Court of Civil Appeals affirmed finding Kuehn's actions were not the proximate cause of Plaintiffs' injuries and damages. We hold that whether Kuehn's actions were the proximate cause of the accident or merely a "condition" is a question for the trier of fact making summary adjudication inappropriate.

CERTIORARI PREVIOUSLY GRANTED;
COURT OF CIVIL APPEALS' OPINION VACATED;
DISTRICT COURT'S JUDGMENT REVERSED;
AND MATTER REMANDED FOR FURTHER PROCEEDINGS

Charles Gregory Smart, Tye H. Smith, CARR & CARR	For Plaintiff/Appellant, Misty Dawn Fargo,
Charles F. Alden, III, Mitzy G. Fryer	For Plaintiff/Appellant, Estate of Jason Patterson, by and through mother and Personal Representative, Norma Patterson,
Micheal L. Darrah, Hilary S. Allen, Durbin, Larimore & Bialick	For Defendant/Appellee, Teresa Hayes-Kuehn

[2] Plaintiffs later filed a Dismissal Without Prejudice against the other two defendants; R. Vol. 1 of 3 Tab 5, Dismissal Without Prejudice of Defendant Sankey Only, filed by Plaintiff, Fargo, March 24, 2011; R. Vol. 1 of 3 Tab 9, Dismissal Without Prejudice Only as to Defendant Ginger Merrill, filed by Plaintiffs Estate of Patterson and Fargo, July 12, 2012; R. Supp., Dismissal Without Prejudice, as to Sankey, filed by Plaintiff Estate of Patterson, June 12, 2012.

WATT, J.:

¶1 We granted certiorari in this matter to determine if facts relevant to the question of primary negligence are in dispute or whether uncontroverted facts result in conflicting inferences. We have carefully reviewed the merits of the summary judgment record in light of the heavy burden imposed on the moving party in a negligence action. Before a court may grant this definitive relief, it must clearly appear that the movant is entitled to judgment as a matter of law, viewing the proffered material in the light most favorable to the opposing party. [3] Summary judgment is unwarranted where, as in this matter, relevant facts are in dispute or where reasonable persons exercising fair and impartial judgment could differ. [4]

¶2 Drivers of motor vehicles have a duty to exercise due care in the operation of their vehicle. [5] Ginger Merrill ("Merrill"), whom plaintiffs dismissed from this suit, drove the only vehicle that collided with the motorcycle. Although Kuehn had no direct contact with Patterson or Fargo, whether she operated her vehicle with due care when she abruptly swerved into the motorcycle's lane without a

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[3] *In re Macfarline*, 2000 OK 87 ¶ 3, 14 P.3d 551; also see *Prudential Ins. Co. Of America v. Glass*, 1998 OK 52 ¶ 3, 959 P.2d 586.

[4] *In re Macfarline* and *Prudential Ins. Co. Of America,* see note 3, supra; *Jackson v. Jones*, 1995 OK 131 ¶5, 907 P.2d 1067.

[5] *Union Transp. Co. v. Lamb*, 1942 OK 13, 123 P.2d 660.

signal knowing Merrill was directly behind, is a question to be resolved by the fact finder . [6] The Oklahoma Highway Patrol ("OHP") Investigator determined the collision was created by Kuehn's inattention and failure to stop. However, the record contains disputed key facts and differing expert opinions. This case requires a factual inquiry of the conflicting evidence which leads to the formation of different inferences. Because more than one conclusion can be reached, this matter must be resolved by a jury. Upon *de novo* review, we hold the trial court erred in granting summary judgment and reverse.

FACTUAL AND PROCEDURAL HISTORY

¶3 On July 25, 2008, Jason Patterson died at the scene when the southbound motorcycle he was driving at highway speed impaled onto the front driver side windshield of Merrill's northbound vehicle after it crossed into Patterson's lane of traffic. Plaintiff, Fargo, a passenger on the motorcycle, was thrown from the motorcycle, receiving multiple injuries. Plaintiffs initially filed this action against Kuehn, Merrill and Angeline Sankey ("Sankey") for negligence in the operation of their respective vehicles, but later filed a dismissal without prejudice against Merrill and Sankey. Kuehn is the only remaining defendant in this matter.

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[6] *Id.* at ¶19.

¶4 The three defendants were all separately traveling northbound in succession at highway speeds, on a rural two lane highway. Vehicle 1 was driven by Sankey who slowed and then stopped at an intersection waiting for oncoming traffic to clear, including the motorcycle, before making a left turn. Kuehn, the driver of vehicle 2, a "larger" truck, did not slow down or stop behind Sankey. Instead, Kuehn continued at highway speed and passed Sankey on the left, crossing the centerline into the oncoming traffic lane. Both Sankey and her passenger describe Kuehn as "flying by" their truck and coming so close that they thought Kuehn was going to hit and take off their driver's side rear view mirror.

¶5 Merrill, in vehicle 3, was also driving at highway speed directly behind Kuehn. While Kuehn's larger truck remained in front of Merrill, blocking her view, Merrill was unable to see Sankey and thus, did not realize she was swiftly approaching a stopped vehicle. Without slowing or using a turn signal, Kuehn abruptly swerved left, at which time Merrill's view opened and she saw Sankey's stationary smaller truck. Attempting to avoid a collision, Merrill followed Kuehn into the oncoming lane to avoid hitting Sankey. Merrill could not see the rapidly approaching motorcycle, because Kuehn's "larger" truck blocked her view. When Kuehn swerved back into the northbound lane, Merrill became aware of the impending motorcycle and her efforts at evasive action failed. Merrill attempted to

swerve back into her lane of traffic to avoid the motorcycle, but instead hit Sankey's left rear panel and then the motorcycle.

¶6 When interviewed by OHP, Merrill described Sankey's vehicle as a "smaller truck" and that Kuehn was driving a "large truck". Merrill told OHP and testified in her deposition that she saw Sankey's truck as they drove out of town, but did not see it again until right before the accident because it was hidden by Kuehn's larger truck. Merrill is certain that Kuehn did not brake or signal immediately before making a sudden swerve into the oncoming traffic lane to pass Sankey. A span of seconds passed from the time that Kuehn entered the oncoming traffic lane to pass Sankey and the collision between the motorcycle and Merrill.

¶7 Three days after the accident, Kuehn explained to OHP she initially realized that Sankey was slowing, but as she got closer, she saw Sankey was stopped. Kuehn explained to OHP that if she had observed brake lights she would have stopped and that if she had seen a left turn signal, she would not have passed Sankey. However, she explained to OHP that she is not completely certain she did not see brake or turn signal lights on Sankey's truck. Kuehn said she passed Sankey because she did not know what Sankey was doing sitting in the middle of the north bound lane.

¶8 Seconds after passing Sankey, Kuehn heard a loud boom, then pulled over

and stopped. When she saw a collision had occurred, she backed her vehicle to the accident scene. Kuehn then walked over to Merrill sitting in her wrecked vehicle and apologized, stating Sankey had slammed on her brakes. Three years later in a deposition, Kuehn testified that she never saw the Sankey vehicle stop at the intersection and that Sankey's truck was actually moving when she passed it.

¶9 OHP collected data from Merrill's air bag module and the bulbs from the rear lights of the Sankey vehicle. Their analysis showed Merrill's brakes were activated prior to impact, with decelerating speeds ranging from 65 mph at five seconds prior to impact to 45 mph at one second prior to impact. OHP also determined from the physical evidence and testing that Sankey's left turn signal was activated at the time her vehicle was hit from behind.

¶10 OHP concluded the collision was created by the inattention and failure of Kuehn to reduce her speed for Sankey, and that Merrill was following too close behind Kuehn, not allowing enough distance to react to hazards in front of her. Even though Kuehn's vehicle did not physically collide with Sankey or with the motorcycle, OHP determined that Kuehn's actions were a direct cause of the accident. OHP recommended that charges of operating a motor vehicle at a speed greater than reasonable or proper for the conditions be filed against both Kuehn and Merrill.

SUMMARY JUDGMENT STANDARD

¶11 An order granting summary judgment in favor of Kuehn was filed on December 20, 2012. Plaintiffs appealed and the Court of Civil Appeals affirmed, finding at most (1) Kuehn's actions were a "condition", (2) it was not foreseeable that Merrill, who was following directly behind Kuehn, would follow into the oncoming traffic lane and hit the motorcycle injuring Patterson and Plaintiff Fargo and (3) that Kuehn's actions were not the proximate cause of Plaintiffs' injuries and damages. Plaintiffs appealed, urging the resolution of proximate cause was a question of fact for a jury to decide. We granted certiorari on February 3, 2015.

¶12 Summary judgments are disfavored and should only be granted when it is clear there are no disputed material fact issues. [7] This Court has consistently held that summary judgment should be denied where there are controverted material facts or if reasonable minds could reach different conclusions from the undisputed material facts. [8] The facts and inferences therefrom must be viewed in the light most favorable to the non moving party. [9] Thus all inferences must be viewed most favorably to plaintiffs in this matter.

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[7] *Seitsinger v. Dockum Pontiac, Inc.*, 1995 OK 29, 894 P.2d 1077, 1079.

[8] *In re Macfarline,* see note 3, supra.

[9] *In re Macfarline,* see note 3, supra.

DISCUSSION OF NEGLIGENCE AND PROXIMATE CAUSE INVOLVING MULTI VEHICLE TORT ACTIONS

¶13 The three necessary elements to a finding of negligence are (1) a duty owed by the defendant to protect plaintiff from injury (2) failure to fulfill that duty and (3) injuries to plaintiff proximately caused by defendant's failure to meet the duty.[10] In applying these principles to automobile negligence cases, we have long recognized that drivers have a duty to operate their vehicle with due care. [11] To fulfill this duty, a driver must do what a prudent person would do under the circumstances of each particular case. [12] Whether Kuehn's actions meet the standards of due care, is exclusively a question for the jury unless under the facts, reasonable minds could not differ. [13] Likewise, negligence is not actionable unless it is the proximate cause of the harm for which plaintiff seeks recovery. [14]

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[10] *Jackson v. Jones*, see note 4, supra.

[11] *Union Transp. Co. V. Lamb, ¶ 13,* see note 5, *supra.*, "Negligence comprehends a failure to exercise due care as required by the circumstances of the case; a failure to do what a person of ordinary prudence would have done under the circumstances or the doing of what such a person would not have done under the circumstances. A determination of the requirements of due care as the same should be exercised by an ordinarily prudent person rests in the first instance wtih the jury, and it is only where reasonable men would not differ or where the law definitely prescribes the standard of duty that the court may properly interfere with or ignore the determination of that fact-finding group."

[12] *Id.*

[13] *Union Transp. Co. V. Lamb,* ¶ 19, see note 5, *supra.*.

[14] *Jackson v. Jones*, see note 4, *supra.*

Proximate cause is always a question for the jury unless there is no evidence from which a jury could reasonably find a causal connection. [15]

¶14 We first address Kuehn's duty to drive her vehicle with due care. Although a number of important facts are undisputed, the reasonableness of Kuehn's actions must be viewed in light of steps taken by Sankey in stopping to make a left hand turn. It is undisputed that at the time Kuehn decided to cross into the oncoming traffic lane to pass Sankey, (1) Kuehn was aware that Sankey was stopped or stopping; (2) Merrill did not know that Sankey was stopped or stopping as her view was blocked by Kuehn's larger vehicle; (3) Kuehn did not reduce her speed of 60 mph, brake or signal before crossing into the south lane to pass Sankey; (4) Merrill was directly behind Kuehn; (5) Merrill did not see Sankey's stopped vehicle until Kuehn passed Sankey; (6) Kuehn was aware of the approaching motorcycle; (7) Merrill's view of the motorcycle was blocked by Kuehn's larger vehicle; (8) Seconds after Kuehn passed Sankey's vehicle, Merrill collided with the motorcycle; (9) Kuehn successfully passed Sankey.

¶15 Whether Kuehn acted reasonably cannot be answered without considering the actions of Sankey. There is disputed evidence and testimony surrounding (1) whether Sankey was stopped or stopping, (2) use of her brakes, (3) use of left turn

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[15] *Id.*

signal and (4) whether Sankey slammed on her brakes. In addition, we have consistently recognized that the size of the lead vehicle when it blocks the view of the following vehicle is a factor to weigh when determining whether the actions of a driver like Kuehn were reasonable under the circumstances. [16] Generally speaking, whether the lead vehicle breaches this duty by suddenly swerving, as Kuehn did, is a question for the jury. [17] It is impossible on this record to make a determination as a *matter of law* whether Kuehn's actions were reasonable. The question surrounding the primary negligence of Kuehn is one that rests soundly with the jury.

¶16 Next we consider the issue of proximate cause. Negligence is not actionable unless it proximately causes the harm for which liability is sought to be imposed. In a negligent tort case, it is generally a fact question for the jury. It becomes one of law *only* when there is *no evidence* from which a jury could reasonably find a causal nexus between the act and the injury. [18]

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[16] *Union Transp. Co. v. Lamb,* see note 5 supra., *Green v. Sellers, 1966 OK 65, 413 P.2d 522; Breno v. Weaver*, 1952 OK 407, 252 P.2d 487.

[17] *Green v. Sellers*, see note 16 supra., *Dirickson v. Mings*, see note 18 infra.; *Thompson v. Walton*, 1956 OK 173, 297 P.2d 1084.

[18] *Jackson v. Jones*, see note 4, *supra.*; also see *Thompson v. Presbytarian Hospital, Inc.*, 1982 OK 87, 652 P.2d 260; *Dirickson v. Mings*, 1996 OK 2 ¶ 9, 910 P.2d 1015, summary judgment is improper, and it is a question for jury whether parked car on side of road at night time was "condition" or proximate cause of plaintiff's collision and injuries.

¶17 It is *uncontroverted* that Kuehn without signaling or warning, entered the oncoming traffic lane to pass Sankey. It is also *uncontroverted* that Merrill followed Kuehn to avoid hitting Sankey, and that Merrill's view was obstructed by Kuehn's vehicle unable to see the approaching motorcycle until Kuehn moved back into her lane of traffic. One potential inference from these facts is reflected in the conclusion reached by OHP that the collision was created by the inattention and failure of Kuehn to reduce her speed for Sankey's slowed or stopped vehicle. Although this is not determinative of proximate cause, it demonstrates there is at least *some* evidence of a causal nexus between Kuehn's actions, the collision, and plaintiffs' damages, making summary judgment improper.

¶18 This Court has previously rejected an argument made in a multiple vehicle negligence case with *almost identical* facts where a co defendant without having a direct collision, like Kuehn, urged this Court to declare as a *matter of law* their actions represented a "condition" and not a "proximate cause" of the underlying injuries and damages, seeking judgment in their favor. [19] We have consistently held that where facts relevant to questions of primary negligence are in dispute, the issue must be presented to the jury. Likewise, whether the injuries flowing from the original negligence could have been foreseen is a question within the

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[19] *Jackson v. Jones*, see note 4, *supra.*

realm of fact and not law. [20] The resolution of whether Kuehn's actions were a proximate cause of plaintiffs' injuries is one within the sound discretion of the jury and is not a question of law.

¶19 This Court has continually held disputed factual determinations that require weighing the credibility of witnesses and the weight of testimony are to be left to the exclusive province of the jury. [21] A summary judgment cannot become a substitute trial by affidavit instead of a trial according to law.[22]

¶20 This Court expresses no view on whether Kuehn's actions constituted negligence. The directive is simply that the evidence before this Court contains disputed material facts as well as undisputed material facts that could lead to conflicting inferences. It is the long standing policy of our jurisprudence that such decisions rest solely and soundly with the trier of fact. Accordingly, the trial court erred when it entered summary judgment in favor of Kuehn.

CERTIORARI PREVIOUSLY GRANTED;
COURT OF CIVIL APPEALS' OPINION VACATED;
DISTRICT COURT'S JUDGMENT REVERSED;
AND MATTER REMANDED FOR FURTHER PROCEEDINGS

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[20] *Dirickson.* see note 18, *supra.*

[21] *Barnes v. Okla. Farm Bureau Mutual Ins. Co.,* 2000 OK 55 ¶ 3, 11 P.3d 162.

[22] *Malson v. Palmer Broadcasting Group*, 1997 OK 42 ¶ 11, 936 P.2d 940.

REIF, C.J., WATT, EDMONDSON, COLBERT, GURICH, JJ. – CONCUR

COMBS, V.C.J. (by separate writing), KAUGER, WINCHESTER, TAYLOR, JJ. – DISSENT

2015 OK 56

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

MISTY DAWN FARGO and THE ESTATE OF JASON PATTERSON by and through MOTHER and PERSONAL REPRESENTATIVE NORMA PATTERSON,	)	
Plaintiffs/Appellants,	)	
v.	)	No. 111,416
TERESA HAYS-KUEHN,	)	For Official Publication
Defendant/Appellee,	)	
and	)	
ANGELINE SANKEY and GINGER MERRILL,	)	
Defendants.	)	

COMBS, V.C.J., with whom WINCHESTER and TAYLOR, JJ., join, dissenting:

¶1 This cause concerns the potential tort liability of the driver of a motor vehicle involved in the events of a crash that killed the operator of a motorcycle and severely injured the passenger. The majority reaches the conclusion that summary adjudication is inappropriate because: 1) whether Appellee violated a duty of due care to Appellants when she passed a stopped vehicle is a question to be resolved by the trier of fact; and 2) whether Appellee's actions were the

proximate cause of the Appellants' damages or merely a condition is a question for the trier of fact. Because Appellee's general duty of due care did not extend to guarding against negligent acts of other drivers, I respectfully dissent.

¶2 The question of whether a defendant owes a duty of care to a plaintiff presents a question of law. *Lowery v. Echostar Satellite Corp.*, 2007 OK 38, ¶12, 160 P.3d 959; *Delbrel v. Doenges Bros. Ford, Inc.,* 1996 OK 36, ¶7, 913 P.2d 1318. The duty may arise from a set of circumstances which would require the defendant to foresee the particular harm to the plaintiff. *Lowery*, 2007 OK 38, ¶13. A majority of this Court recently reiterated the importance of foreseeability in establishing duty in a negligence action in *Wood v. Mercedes-Benz of Oklahoma City*, where we stated:

> "[o]ne of the most important considerations in establishing a duty is foreseeability. Foreseeability is critical as it determines (1) to whom a duty is owed and (2) the extent of the duty. A defendant owes a duty of care only to foreseeable plaintiffs. As for the extent of the duty, it too is determined in great part by the foreseeability of the injury. Whenever the circumstances attending a situation are such that an ordinarily prudent person could reasonably apprehend that, as the natural and probable consequences of his act, another person will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises."

2014 OK 68, ¶7, 336 P.3d 457 (quoting *Weldon v. Dunn*, 1998 OK 80, ¶11, 962 P.2d 1273 (citations omitted)).

¶3 The majority correctly states that drivers of motor vehicles have a general duty to exercise due care in the operation of their vehicles. However, the inverse is

also true: drivers may reasonably rely on the assumption that other drivers will also exercise due care. *See Griffeth v. Pound*, 1960 OK 133, ¶9, 357 P.2d 965. As the Court of Civil Appeals correctly determined, this Court has stated clearly that the driver of an automobile is not bound to anticipate negligence on the part of another driver, or that another driver will act in violation of the law. *Griffeth*, 1960 OK 133, ¶9.

¶4 The importance of a legal duty in any action for negligence can be summarized thusly:

> [a]ny actionable claim for negligence requires three fundamental elements: 1) the existence of a duty on the part of the defendant to protect the plaintiff from injury; 2) a breach of that duty by the defendant; and 3) injury to the plaintiff proximately resulting therefrom. *Berman v. Lab. Corp. of America*, 2011 OK 106, ¶16, 268 P.3d 68; *Smith v. Hines*, 2011 OK 51, ¶12, 261 P.3d 1139; *Scott v. Archon Group, L.P.*, 2008 OK 45, ¶17, 191 P.3d 1207. The threshold question in any negligence action is whether the defendant has a duty to the plaintiff. *Sholer v. ERC Mgmt. Group, LLC*, 2011 OK 24, ¶11, 256 P.3d 38; *Scott*, 2008 OK 45, ¶17; *Pickens v. Tulsa Metro. Ministry*, 1997 OK 152, ¶8, 951 P.2d 1079. The reason for this threshold question is that **there can be no negligence in the absence of a defendant's duty to the plaintiff.** *Scott*, 2008 OK 45, ¶17; *Tucker v. ADG, Inc.*, 2004 OK 71, ¶21, 102 P.3d 660; *City of Tulsa v. Harmon*, 1931 OK 73, ¶37, 299 P. 462. The question of whether a duty exists is properly a question of law for the court. *Bray v. St. John Health Sys., Inc.*, 2008 OK 51, ¶6, 187 P.3d 721; *Scott*, 2008 OK 45, ¶17.

Wood v. Mercedes-Benz of Oklahoma City, 2014 OK 68, ¶2, 336 P.3d 457 (Combs, J., dissenting).

¶5 Appellee possessed a duty to operate **her** vehicle with due care so as to not cause foreseeable harm to others, but not a duty to ensure everyone around her did the same. This Court rejected such an extension of foreseeability in *Griffith*. Appellee's general duty of due care cannot extend to ensuring that all other drivers near her also act with due care. The potential negligence of the vehicle travelling behind her was not foreseeable to Appellee, and therefore she owed no duty to guard against it as a matter of law. I would affirm the opinion of the Court of Civil Appeals.

2015 OK 52

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN RE MARRIAGE OF:	)	
	)	
RHONDA L. ALEXANDER,	)	
	)	
Petitioner/Appellant,	)	
	)	
v.	)	No. 112,579
	)	FOR OFFICIAL PUBLICATION
JOSEPH DEAN ALEXANDER,	)	
	)	
Respondent/Appellee.	)	

ON CERTIORARI TO THE COURT OF CIVIL APPEALS, DIV. I

¶0 Petitioner/Appellant, Rhonda L. Alexander's successors, Tiffany McClung and Lacey Hart, appeal from a trial court order granting a motion to dismiss by Joseph Dean Alexander, Respondent/Appellee, in a dissolution of marriage proceeding. Rhonda L. Alexander died after a trial court granted the divorce, but before a final decree of divorce had been entered. The Court of Appeals affirmed the trial court. This Court granted certiorari.

THE DECISION OF THE COURT OF CIVIL APPEALS IS VACATED, AND THE DECISION OF THE TRIAL COURT IS REVERSED AND REMANDED.

Scott A. Hester, HESTER SCHEM HESTER & DEASON, Edmond, Oklahoma, for Petitioner/Appellant,

Kenneth Dewbre, Ross Dewbre, DEWBRE & DEWBRE P.C., Oklahoma City, Oklahoma, for Respondent/Appellee.

WINCHESTER, J.

¶1 Both parties in this matter sought dissolution of their marriage on grounds of incompatibility. The wife informed the trial court that she was terminally ill and wanted to finalize the divorce before her death as she wished to leave her part of the estate to her daughters. The judge granted the parties the divorce, and filed a Court Minute memorializing his ruling. The judge signed and dated the Court Minute and the attorneys who represented the parties also signed. The judge included an order in the Court Minute for mediation to resolve property issues and further ordered that a journal entry be presented to the court within five days. However, the wife died before reaching a property settlement with the husband. No journal entry was filed.

¶2 The husband filed a motion to dismiss on the grounds that after the wife died, the trial court lacked jurisdiction to proceed with the dissolution of marriage action. The wife's successors filed a response objecting to dismissal of the action. The trial court granted the husband's motion to dismiss. On appeal, the Court of Civil Appeals affirmed the dismissal. This Court granted certiorari. The issue is whether a divorce, where both parties sought dissolution of their marriage, is effective at the time pronounced by the trial court even though property issues had not been settled and no journal entry had been filed. We hold that it is effective as explained in this opinion.

I. FACTS

¶3 Rhonda L. Alexander and Joseph Dean Alexander ("Appellee") married on May 5, 1973. After nearly forty years of marriage, on October 23, 2012, Ms. Alexander filed a Petition for Dissolution of Marriage on the ground of incompatibility. Appellee filed his Answer to the Petition on March 28, 2013, agreeing that the two were incompatible and that they should be granted a divorce.

¶4 On July 23, 2013, before the marital property had been divided, Ms. Alexander filed a Motion for a Grant of Divorce, wherein she explained she had been diagnosed with stage-four lung cancer and had only a short time to live. Appellee objected to this motion, arguing that statutory law requires the dissolution of marriage take place at the same time as the division of marital assets—thus the court should wait to grant the divorce until the property had been divided.

¶5 In Ms. Alexander's reply, she stated that she and Appellee had accumulated millions of dollars in properties during the marriage, most of which were titled under various corporations in Appellee's name. Additionally, she alleged that Appellee had withdrawn over $200,000 from an account titled solely in her name, and that Appellee was trying to force her into a quick settlement by delaying the divorce process so that she "may have to face the possibility of passing away before she can have her day in court."

¶6 At the hearing over the Motion for a Grant of Divorce on August 20, 2013, the judge pronounced in court that the two were "divorced from the other

henceforth." After granting the dissolution of marriage, the court memorialized the decision in a handwritten Court Minute, which the judge and both parties' attorneys signed, and filed it with the court clerk. The court ordered the parties to mediation within five days to resolve their property issues, and to present a journal entry to the court within ten days. Over the following weeks, neither party presented a journal entry to the court.

¶7 On October 10, 2013, Ms. Alexander passed away. Eight days later Appellee filed a motion to dismiss the action, claiming that the death of a party to a divorce proceeding abates the cause of action and deprives the trial court of jurisdiction. Ms. Alexander's successors, Tiffany McClung and Lacey Hart (collectively, "Appellants"), filed a Response. After various technical delays, the trial court granted Appellee's Motion to Dismiss and the Court of Civil Appeals affirmed. The matter now comes before this Court for review.

II. STANDARD OF REVIEW

¶8 When evaluating a motion to dismiss, this Court examines only the controlling law, taking as true all factual allegations together with all reasonable inferences that can be drawn from them. *Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶ 4, 270 P.3d 155, 157. Thus the standard of review before this Court is *de novo*. *Simonson v. Schaefer*, 2013 OK 25, ¶ 3, 301 P.3d 413, 414. *See also Tuffy's, Inc. v. City of Oklahoma City*, 2009 OK 4, ¶ 6, 212 P.3d 1158, 1163 (stating that the party moving for dismissal bears the burden of proof). Because courts may only hear cases over which they have jurisdiction, the

general rule that motions to dismiss are viewed with disfavor does not apply to cases in which the court finds it lacks jurisdiction. *H & En, Inc. v. Okla. Dept. of Labor*, 2006 OK CIV APP 70, ¶ 8, 136 P.3d 1070, 1071.

III. DISCUSSION

¶9 Was the divorce of the parties final at the time it was pronounced by the trial court, or must a journal entry be filed before the divorce becomes final?

A. The August 20th Decision was Enforceable Whether or Not it was an Appealable Judgment.

¶10 Generally speaking, a judgment[1] is "the final determination of the rights of the parties in an action." 12 O.S. 2011, § 681; Okla. Sup. Ct. R. 1.20(a). In order to constitute a judgment, a document memorializing such a "final determination" must at minimum contain four elements: (1) A caption setting forth the name of the court, the names and designation of the parties, the file number of the case, and the title of the instrument; (2) a statement of the disposition of the action, proceeding, or motion; (3) the signature and title of the court; and (4) any other matter approved by the court. 12 O.S. 2011, § 696.3(A). Additionally, the document must be filed with, and endorsed and dated by, the clerk of the court.

¶11 This Court held in *Corbit v. Williams*, 1995 OK 53, ¶ 8, 897 P.2d 1129, 1131, that some documents satisfying these requirements—specifically, documents titled as court minutes—do not constitute judgments. The document

[1] The Supreme Court Rules use "judgment" and "final order" interchangeably. Okla. Sup. Ct. R. 1.20 ("The term 'judgment' is synonymous with a final order for the purpose of these rules.").

at issue in *Corbit* was a form titled "Court Minute," which, as in the present case, contained all the elements required by § 696.3(A). *Corbit*, 1995 OK 53, ¶ 7, 897 P.2d at 1131. But even though the document satisfied those statutory requirements, the *Corbit* court held it was not a valid judgment. The Court explained that the legislature, through 12 O.S. 2011, § 696.2(D),[2] created a bright-line rule that a minute entry can never constitute a judgment, decree, or appealable order. *Corbit*, 1995 OK 53, ¶ 8-9, 897 P.2d at 1131. Any document titled "Court Minute" (or some similar title), therefore, cannot be a judgment even if it satisfies the requirements of § 696.3(A). *Id.* at ¶ 9. The advantage of this rule is that parties to a lawsuit do not have to speculate whether a minute order entered by the trial court was a final order from which point the time for appeal began to run.

¶12 Although a judgment is generally not "enforceable in whole or in part unless or until it is signed by the court and filed," Oklahoma law carves out an exception for divorce proceedings, where the adjudication of any issue shall be "enforceable when pronounced by the court." 12 O.S. 2011, § 696.2(E). This Court has long held that "entry of the written memorial upon the court's journal is not essential to the validity of the judgment, and failure to properly file a journal

[2] The provisions of 12 O.S. 2011, § 696.2(D) state in pertinent part:

> D. The following shall not constitute a judgment, decree or appealable order: A minute entry; verdict; informal statement of the proceedings and relief awarded, including, but not limited to, a letter to a party or parties indicating the ruling or instructions for preparing the judgment, decree or appealable order.

entry of judgment does not render judgment void." *Pellow v. Pellow*, 1985 OK 88, ¶ 10, 714 P.2d 593, 595. Because the district court in this case pronounced the dissolution of marriage in court on August 20, 2013, the divorce was enforceable at that time—ending the parties' marriage immediately.

¶13 An otherwise enforceable grant of divorce can be stayed, however, if a party appeals the decision within the statutory period. 43 O.S. 2011, § 127. Appellee claims that he initiated an appeal from the trial court's decision before his wife's death, and as a result the judgment was not final before she died. It is unclear precisely what action Appellee believes constituted an appeal of the trial court's decision. An appeal from a district court may only be commenced by: (1) filing a petition in error with the Clerk of this Court within the time prescribed in Rule 1.21; and (2) remitting the cost deposit provided by statute. Okla. Sup. Ct. R. 1.23. There is no evidence before this Court that Appellee filed an appeal of any kind, either in regard to the divorce itself or to the order to divide the property. The only action Appellee took to oppose the trial court's eventual decision was his August 13, 2013, Objection to Motion for a Grant of Divorce. But the trial court granted the Motion for Divorce on August 20th over Appellee's objection, and he did not renew his objection after the court pronounced its decision. Because Appellee never filed a petition in error with this Court, he did not initiate an appeal that would stay enforcement of the trial court's decision.

¶14 We reiterate, Appellee did not oppose the dissolution of the marriage; what he opposed in essence was the bifurcation of the divorce between the dissolution

of the marriage and the property settlement. The trial court and the Court of Civil Appeals relied upon *Whitmire v. Whitmire*, 2003 OK CIV APP 87, 78 P.3d 556, for their respective conclusions in deciding the case that is now before this Court. In *Whitmire* the facts are similar to those in the present matter. The husband died after the court announced the parties were divorced, but before a journal entry was filed. The wife, therefore, argued that the trial court lost jurisdiction over the matter. The Court of Civil Appeals held that because the husband died before the entry of the final decree of divorce, the trial court was without jurisdiction to later enter a final decree divorcing the parties. *Whitmire*, 2003 OK CIV APP 87, ¶ 1, 78 P.3d at 557. The dissent concluded that the *Whitmire* case was indistinguishable from *Chastain v. Posey*, 1983 OK 46, 665 P.2d 1179, where the challenge to the entitlement to a divorce was not raised until after the trial court had made an effective pronouncement of the divorce and dissolved the marriage. The dissent cited 12 O.S.2001, § 696.2(E)[3] that "'the adjudication of any issue' in a divorce case is 'enforceable when pronounced by the court.'" We agree and accordingly, we overrule *Whitmire.*

B. Oklahoma Law Allows Issues to be Bifurcated and Presented in Separate Proceedings in Dissolution of Marriage Actions.

¶15 As a procedural note, it is of no consequence that at the time of Ms. Alexander's death, the parties had not yet divided their marital property as

[3] That provision now codified at 12 O.S.2011, § 696.2(E) remains the same.

directed by the August 20th Court Minute. It is common for district courts to grant a divorce at one point in time but then reserve jurisdiction to address other pending issues—such as division of property or determinations as to custody or child support—at a later date. *See e.g.*, *Barnett v. Barnett*, 1996 OK 60, ¶ 2, 917 P.2d 473, 475; *Hibbard v. Hibbard*, 1952 OK 273, ¶ 4, 247 P.2d 504, 505 ("This court has repeatedly held that an action for divorce and for division of jointly acquired property presents two causes of action maintainable separately . . . .").

¶16 The last sentence of 12 O.S.2011, § 696.2(E) provides,

> "The time for appeal shall not begin to run until a written judgment, decree or appealable order, prepared in conformance with Section 696.3 of this title, is filed with the court clerk, regardless of whether the judgment, decree, or appealable order is effective when pronounced or when it is filed."

The dissolution of the marriage was effective when pronounced by the trial court, but would not have been appealable unless it had been properly filed.

¶17 The implications of this for proceedings in which a spouse dies before a journal entry is filed, is that a trial court may pronounce that the marriage is dissolved, effective immediately, but that decision is not appealable until it is filed. The decision has been made, but not memorialized. In the case at hand, the court sought to grant the divorce as soon as possible because Ms. Alexander had only a short time left to live. The fact that the parties did not divide their marital property before Ms. Alexander's death does not affect the finality of the August 20th grant of divorce.

CONCLUSION

¶18 The Oklahoma Pleading Code[4] states that our rules of procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." 12 O.S. 2011, § 2001. This provision echoes our state constitutional requirement that "right and justice shall be administered without sale, denial, *delay*, or prejudice." Okla. Const. art 2, § 6 (emphasis added). A party should not be denied enforcement of a valid judgment simply because she passes from this life. In this case, therefore, not to enforce the trial court's decision to grant the dissolution of marriage would be an injustice. We hold that the district court erred in dismissing this case for lack of jurisdiction and remand for the trial court to divide the property and take such further actions as are consistent with the views expressed in this opinion.

THE DECISION OF THE COURT OF CIVIL APPEALS IS VACATED, AND THE DECISION OF THE TRIAL COURT IS REVERSED AND REMANDED.

ALL JUSTICES CONCUR

[4] Although Title 12 of the Oklahoma Statutes is designated generally as "Civil Procedure," the beginning of Chapter 39 clarifies that "[t]he provisions of Sections 1 through 2027 of this title [Title 12] may be cited as the 'Oklahoma Pleading Code.'" 12 O.S. 2011, § 2001.

2015 OK 53

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SANDRA LADRA,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	No. 113,396
	)	FOR OFFICIAL PUBLICATION
NEW DOMINION, LLC, and SPESS OIL COMPANY, JOHN DOES 1-25,	)	
	)	
	)	
Defendants/Appellees	)	

APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY, HONORABLE CYNTHIA FERRELL ASHWOOD, DISTRICT JUDGE.

¶0 Sandra Ladra, Plaintiff/Appellant, suffered injuries from an earthquake while in her home located in Prague, Oklahoma. She subsequently sued the Defendants/Appellees, New Dominion, LLC, Spess Oil Company, and John Does 1-25, to recover damages for her personal injuries. The defendants responded to the complaint with motions to dismiss arguing the district court lacked jurisdiction because the Oklahoma Corporation Commission had exclusive jurisdiction over the claims. The district court granted the motions and dismissed the action. This Court retained the matter.

REVERSED AND REMANDED.

Larry K. Lenora, Gregory A. Upton, LENORA & UPTON, Chandler, Oklahoma; Scott E. Poynter, EMERSON POYNTER LLP, Little Rock, Arkansas, for the Plaintiff/Appellant.

Michael L. Darrah, E. Edd Pritchett, Jr., Katherine T. Loy, Timothy L. Martin, DURBIN, LARIMORE & BIALICK, Oklahoma City, Oklahoma, for the Defendant/Appellee Spess Oil Company.

Robert G. Gum, Bret A. Glenn, GUM, PUCKETT & MACKENCHNIE, L.L.P., Oklahoma City, Oklahoma, for the Defendant/Appellee New Dominion, LLC.

WINCHESTER, J.

¶1 This is a private tort action wherein Plaintiff/Appellant Sandra Ladra ("Appellant") seeks to recover from Defendants/Appellees New Dominion LLC, Spess Oil Company, and John Does 1-25 (collectively, "Appellees") compensatory and punitive damages for injuries proximately caused by Appellees' wastewater disposal practices. The Appellees moved to dismiss, arguing that the Oklahoma Corporation Commission had exclusive jurisdiction over the claims. The District Court of Lincoln County granted the motions and dismissed the action. This Court retained the matter. We hold that jurisdiction lies with the district court.

I. Facts

¶2 Appellees operate wastewater injection wells in and around Lincoln County, Oklahoma, as well as other wells in central Oklahoma. Since approximately 2009, Oklahoma has experienced a dramatic increase in the frequency and severity of earthquakes.

¶3 On November 5, 2011, Appellant was at home in Prague, Oklahoma[1] watching television in her living room with her family when a 5.0 magnitude earthquake struck nearby. Suddenly, Appellant's home began to shake, causing rock facing on the two-story fireplace and chimney to fall into the living room area. Some of the falling rocks struck Appellant and caused significant injury to

[1] Prague, Oklahoma is located in Lincoln County.

her knees and legs, and she was rushed immediately to an emergency room for treatment. She claims personal injury damages in excess of $75,000.

¶4 Appellant filed this action in the District Court of Lincoln County to recover damages from Appellees, alleging that their injection wells—by causing, *inter alia*, the Prague earthquake—were the proximate cause of Appellant's injuries. Appellees objected to the court's jurisdiction and moved to dismiss. The district court dismissed the case on October 16, 2014, explaining that the Oklahoma Corporation Commission ("OCC") has exclusive jurisdiction over cases concerning oil and gas operations. Appellant filed with this Court a Petition in Error seeking review of the district court's order.

II. Post-Appeal Issues

¶5 In her Petition in Error, Appellant attached a five-page explanation of the issues raised on appeal as Exhibit C. She included in that exhibit several arguments and authorities that she had not previously presented to the district court. As a result, Appellees have moved to strike most of the exhibit, arguing that it violates the rules for accelerated appeal.

¶6 Under the rules for accelerated appeal, no briefing shall be allowed unless ordered by the appellate court. Okla. Sup. Ct. R. 1.36(g). Instead, "[a]n appellate court shall confine its review to the record actually presented to the trial court." *Id.* It is evident, therefore, that a party shall not include new arguments or authorities—which would have the effect of briefing the issues—in her Petition in Error. When a party attempts to circumvent this rule, appellate courts should strike those parts of the petition that exceed the scope allowed by Rule 1.36(g).

See, e.g., *Simington v. Parker*, 2011 OK CIV APP 28, ¶ 6, 250 P.3d 351, 353-54; *O'Feery v. Smith*, 2001 OK CIV APP 142, ¶ 3, 38 P.3d 242, 244.

¶7 This Court has not ordered the parties to brief the issues. Because that exhibit contains arguments extrinsic to "the record actually presented to the trial court," we grant Appellees' motions to strike everything below the one-sentence heading at the top of Appellant's Exhibit C.

III. Standard of Review

¶8 A motion to dismiss is generally viewed with disfavor, and the standard of review before this Court is *de novo*. *Simonson v. Schaefer*, 2013 OK 25, ¶ 3, 301 P.3d 413, 414. When evaluating a motion to dismiss, this Court examines only the controlling law, taking as true all of the factual allegations together with all reasonable inferences that can be drawn from them. *Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶ 4, 270 P.3d 155, 157. The party moving for dismissal bears the burden of proof to show the legal insufficiency of the petition. *Tuffy's, Inc. v. City of Oklahoma City*, 2009 OK 4, ¶ 6, 212 P.3d 1158, 1163.

IV. Discussion

¶9 Oklahoma law vests in the OCC exclusive jurisdiction over "the exploration, drilling, development, production and operation of wells used in connection with the recovery, injection or disposal of mineral brines." 17 O.S. 2011, § 52. Consequently, only this Court has jurisdiction to review, affirm, reverse, or remand any action of the OCC. 9 OKLA. CONST., § 20.

¶10 The OCC's jurisdiction is limited solely to the resolution of public rights. *Morgan v. Oklahoma Corp. Comm'n*, 2012 OK CIV APP 31, ¶ 10, 274 P.3d 832,

836 (citing *Marathon Oil Co. v. Oklahoma Corp. Comm'n*, 1994 OK 28, ¶ 14, 910 P.2d 966, 969). That is, the OCC "is without authority to hear and determine disputes between two or more private persons or entities in which the public interest is not involved." *Rogers v. Quiktrip Corp.*, 2010 OK 3, ¶ 7, 230 P.3d 853, 857 (footnote omitted). See also *Morgan*, 2012 OK CIV APP 31, ¶ 10, 274 P.3d at 836; *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982) (observing that, at a minimum, to be deemed a public rights dispute, a case must arise between government and others). "The Commission, although possessing many of the powers of a court of record, is without the authority to entertain a suit for damages." *Rogers,* 2010 OK 3, ¶ 6, 230 P.3d at 857. Private tort actions, therefore, are exclusively within the jurisdiction of district courts. *Grayhorse Energy, LLC v. Crawley Petroleum Corp.*, 2010 OK CIV APP 145, ¶ 12, 245 P.3d 1249, 1254; *Tenneco Oil Co. v. El Paso Nat. Gas Co.*, 1984 OK 52, ¶ 21, 687 P.2d 1049, 1053-54.

¶11 A district court may not, however, levy a collateral attack "upon the orders, rules and regulations of the [OCC]." 52 O.S. 2011, § 111.[2] In *Nilsen v. Ports of*

[2] 52 O.S. 2011, § 111:

> No collateral attack shall be allowed upon orders, rules and regulations of the Commission made hereunder, but the sole method of reviewing such orders and inquiring into and determining their validity, justness, reasonableness or correctness shall be by appeal from such orders, rules or regulations to the Supreme Court. On appeal every such order, rule or regulation shall be regarded as prima facie, valid, reasonable and just. No court of this state except the Supreme Court, and it only on appeal, as herein provided, shall have jurisdiction to review, reverse, annul, modify or correct any order, rule, or regulation of the Commission . . . .

Call Oil Co., 1985 OK 104, ¶ 11, 711 P.2d 98, 101 n.5, we stated that "[a] collateral attack is an attempt to avoid, defeat, evade, or deny the force and effect of a final order or judgment in an incidental proceeding other than by appeal, writ of error, certiorari, or motion for new trial." A district court's power to inquire into the validity of an OCC order is limited to ascertaining if the OCC had jurisdiction to issue the order in the first place. *Pelican Prod. Corp. v. Wishbone Oil & Gas, Inc.*, 1987 OK CIV APP 74, ¶ 13, 746 P.2d 209, 212. Nevertheless, an OCC order "does not immunize the operator, or other parties connected to the pooling order, from lawsuits in the district courts." *Grayhorse*, 2010 OK CIV APP 145, ¶ 11, 245 P.3d at 1254. Rather, district courts simply cannot reverse, modify, or correct OCC orders. *Id.* (citing 52 O.S. 2011, § 111).

¶12 Appellant has pled a private cause of action in this matter.[3] She alleges that Appellees engaged in "ultrahazardous activities" that necessarily involve a risk of serious harm that cannot be eliminated by the exercise of utmost care; and that Appellees owed a duty to Appellant to use ordinary care and to not operate or maintain their injection wells in such a way as to cause or contribute to seismic activity. Whether Appellees are negligent or absolutely liable is a matter to be determined by a district court. *NBI Services, Inc. v. Ward*, 2006 OK CIV APP 20, ¶ 20, 132 P.3d 619, 626. The OCC does not have the authority to resolve these issues. *Kingwood Oil Co. v. Hall-Jones Oil Corp.*, 1964 OK 231, ¶ 9, 396 P.2d 510, 512. Appellees confuse the statutory grant of exclusive

[3] We are here concerned only with the district court's jurisdiction. We do not decide today whether Appellant's petition sufficiently stated a claim.

jurisdiction to the OCC to *regulate* oil and gas exploration and production activities in Oklahoma, with the jurisdiction to *afford a remedy* to those whose common law rights have been infringed by either the violation of these regulations or otherwise. *NBI Services, Inc.*, 2006 OK CIV APP 20, ¶ 21, 132 P.3d at 626. Because this case does not seek to reverse, review, or modify an OCC order, but simply seeks to recover damages, jurisdiction is proper in the district court.

V. Conclusion

¶13 Allowing district courts to have jurisdiction in these types of private matters does not exert inappropriate "oversight and control" over the OCC, as argued by the Appellees. Rather, it conforms to the long-held rule that district courts have exclusive jurisdiction over private tort actions when regulated oil and gas operations are at issue. See *Kingwood*, 1964 OK 231, ¶ 7, 396 P.2d at 513. Because the Appellant properly brought the action in the District Court of Lincoln County, we reverse and remand for further proceedings consistent with the views expressed in this opinion.

REVERSED AND REMANDED.

CONCUR: REIF, C.J., KAUGER, WATT, WINCHESTER, TAYLOR, COLBERT, GURICH, JJ.

NOT PARTICIPATING: COMBS, V.C.J., EDMONDSON, J.