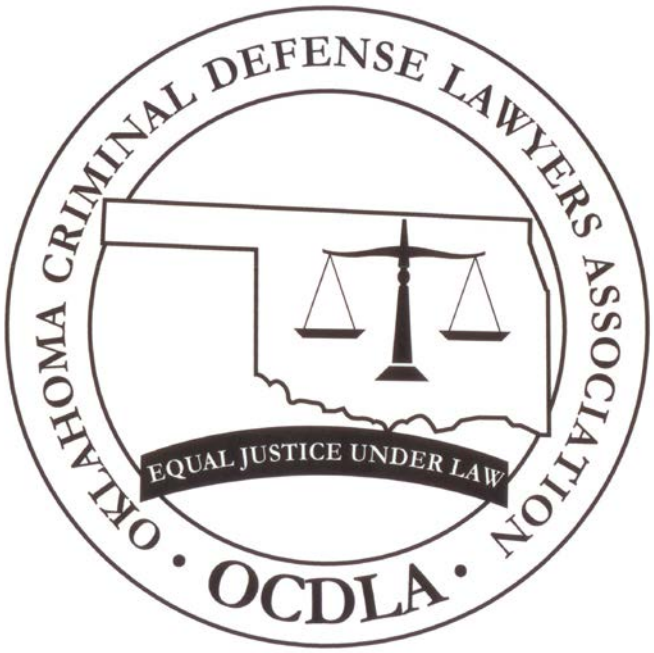
THE GAUNTLET

The Law Journal of the

OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION



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FALL 2016

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THE GAUNTLET

To confront: (1) To throw down the Gauntlet; (2) To take up the Gauntlet

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The *Oklahoma Criminal Defense Lawyers Association* (OCDLA) distributes over five hundred (500) copies of *The Gauntlet* to OCDLA members, law schools, law libraries and law professors. OCDLA and its members provide over seventy (70) hours of Continuing Legal Education (CLE) each year and publish *My Little Green Book*. *The Gauntlet* is a peer-reviewed journal. All articles are reviewed by members of the OCDLA prior to publication; however, the articles do not necessarily reflect the views of the OCDLA. Please send any comments regarding *The Gauntlet* to **ocdla @ bdp@for-the-defense.com.**

OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION

PRESENTS

Federal Law: An Overview of Racketeering (Incl. State) And The Trial That Follows

5 HOURS CLE (*including 1 of ethics)

DECEMBER 16TH 2016

H&H SHOOTING SPORTS

400 N. Vermont Avenue, Oklahoma City, OK 73108

Agenda

9:30-10:00	**Registration & Welcome** *Al Hoch, Jr. OCDLA President*
10:00-10:50	**Racketeering Overview and History (State & Federal)** *William Campbell, Oklahoma City*
11:00-11:50	**State Racketeering Practice** *William Campbell, Oklahoma City*
Lunch	***Provided By 4U Café, Included in cost of seminar***

Nuts & Bolts: Federal Criminal Practice 101

Moderator: Ruth Addison, Crowe & Dunlevy, Tulsa

1:00-1:50	**Appellate Proceedings, Supervised Release, and Revocations** *Andre Caldwell, Crowe & Dunlevy, Oklahoma City*
2:00-2:50	**Pretrial Procedures, Motions, Discovery and Trial Procedure*** *Sanford C. Coats, Crowe & Dunlevy, Oklahoma City*
3:00-3:50	**Grand Juris, Arrests, Indictments, and Arraignments** *Thomas Snyder, Crowe & Dunlevy, Oklahoma City*

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LETTER FROM THE PRESIDENT

Welcome to our latest issue of the Gauntlet. In lieu of the usual format, we are privileged to have two superb articles submitted by John Echols. Both are ready for use in defense of all of our cases and we are fortunate that John has provided us such thorough research to use as we work to assist our clients.

I wish to express our sincere appreciation to John for all of the time and effort that went into the preparation of these articles. Additionally, all of us know of the answers that are contributed to the list serve on a regular basis by John and it is these contributions by him and many others that make our practices much more effective. The most recent example of this is the outstanding results in DUI representation which were made possible by the work of so many of our DUI stars. Then they shared this information to benefit all of our clients. Thank you all for your great work and help to all of us.

Some of our members, such as Bruce Edge, John Hunsucker and Brian Morton had to also take time to correct the media misconceptions about what the court decisions meant to the state as a whole. I am proud of all of our members who daily work not only represent the accused, but also work to keep the public informed and also many others who spend their time and talent to persuade the legislature and others of the need for sensible criminal laws.

We also have many talented writers who we would appreciate your submissions also. The Gauntlet is a peer reviewed publication and we are always looking for articles such as these by John that will assist everyone in their representation of defendants. Occasional satire may also be published. For those wishing to present articles, please contact Brandon Pointer. Articles should relate to some area of representation of criminal defendants and will be reviewed by our publication committee prior to presentation in the Gauntlet.

As noted above, one of the most significant benefits of membership in OCDLA is the access to the list serve and the information provided to everyone whenever there is a question asked. The time for renewal of memberships is fast approaching. For those who want to take the deduction for this year, contact Brandon Pointer to renew early.

I also want to encourage everyone who has upcoming trials throughout the state to post if you are willing to help mentor others and allow them to second chair your case. Not only do you get to help others improve their practice, but you also get someone to assist you at trial. A win-win for everyone. We will soon work to set up some more coordinated effort to allow for this to occur.

In closing, thank you one and all for your continued fight to protect and preserve the rights of the accused. A personal note to all Marines, Happy 241st.

ALBERT J. HOCH, JR., President, OCDLA

ENFORCING THE PERSONAL AND FUNDAMENTAL RIGHT TO A MEANINGFUL PRELIMINARY HEARING

From Statehood to 1994, Oklahoma defendants basked in the unfettered right to call witnesses, present evidence, and challenge the state's case in a fully adversarial preliminary hearing. Unfortunately, since 1994, the Legislature has done its best to undermine the once mighty preliminary hearing, reducing it to a fool's errand. This memorandum lays the bedrock foundation for a return to preliminary hearings worthy of our Oklahoma Bill of Rights.

Page References

THE BASICS

1. The Bill of Rights of the Oklahoma Constitution guarantees every person charged with a felony by Information the right to a lawful preliminary hearing.

> No person shall be prosecuted criminally in courts of record for felony or misdemeanor otherwise than by presentment or indictment or by information. **No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination**. Prosecutions may be instituted in courts not of record upon a duly verified complaint.

Ok Const., Article 2, §17. [1]

2. A lawfully conducted preliminary hearing is an integral stage of a felony prosecution, and is a prerequisite to jurisdiction for arraignment and trial in the District Court. OK. CONST., Art. 2, §§ 17 and 20.

> **Under the constitutional provision the precedent fact that a preliminary examination has been had or waived constitutes the jurisdictional basis for a prosecution for a felony by information in the district court**, and, even though the examining magistrate failed to indorse his finding and order on the preliminary information, the district court had jurisdiction to order that a proper indorsement [*sic*] as prescribed by the statute be made. The [page 377] finding and order of the magistrate made upon the preliminary examination and entered on his docket was sufficient to confer jurisdiction on the district court.

Williams v. State, 1911 OK CR 314, 6 Okl.Cr. 373, 376-377, 118 P. 1006. See also, *Tucker v. State*, 1913 OK CR 149 [syllabus], 9 Okl.Cr. 587, 132 P. 825, *Stamper v. State*, 1923 OK CR 165, 25 Okl.Cr. 324, 326, 220 P. 67. *Nicodemus v. District Court of Oklahoma County*, 1970 OK CR 83, ¶13, 473 P.2d 312. *Harper v. District Court of Oklahoma County*, 1971 OK CR 182, ¶¶ 12-13, 484 P.2d 891. *Cleek v. State*, 1987 OK CR 278, ¶6, 748 P.2d 39. *Allen v. District Court of Washington County*, 1990 OK CR 83, ¶17, 803 P.2d 1164.

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[1] Unless otherwise noted, all further **boldface** and *italics* and [bracketed text] contained within quotations have been added by the author.

3. A preliminary hearing is governed by the Rules of Evidence. 12 O.S. §§ 2101, *et seq*.. *Howell v. State*, 1994 OK CR 62, ¶17, 882 P.2d 1086.

4. Among the fundamental constitutional rights specifically protected in a preliminary hearing are, without limitation:

   a. the right to counsel, including appointed counsel for indigents. *Cleek v. State*, 1987 OK CR 278, ¶¶ 6, 11-14, 748 P.2d 39;

   b. the right to call witnesses for the purpose of, *inter alia*, preserving relevant testimony and discovering what testimony will be used by the State at trial. *Beaird v. Ramey*, 1969 OK CR 195, ¶8, 456 P.2d 587;

   c. the right to confrontation. *Lafortune v. District Court of Tulsa County*, 1998 OK CR 65, ¶11, 972 P.2d 868 and *State v. Roley*, S-2005-702 [unpublished[2]];

   d. the right to present evidence in defense of the State's allegations. *Beaird*, at ¶7, *Lafortune* and *Roley*, *Id*.;

   e. the right to challenge in court identification. *Hunt v. State*, 1988 OK CR 38, ¶11, 751 P.2d 747, *McLaughlin v. District Court*, 1996 OK CR 11, ¶12, 915 P.2d 919;

   f. the right to suppress the fruits of an illegal arrest, *Mathes v. State*, 1976 OK CR 163, ¶14, 552 P.2d 415 and *Hightower v. State*, 1983 OK CR 162, ¶18, 672 P.2d 671;

   g. the right to suppress the fruits of an illegal search and/or seizure. *Day v. Freeman*, 1990 OK CR 35, ¶3, 792 P.2d 1193 and *Hyde v. Hutchison*, 1971 OK CR 162, ¶¶ 6-8, 483 P.2d 766; and,

   h. the right to suppress the fruits of involuntary and/or unlawful custodial interrogations. *Prejean v. State*, 1977 OK CR 47, ¶6, 560 P.2d 223.

5. A Preliminary Hearing Magistrate has a duty to resolve all questions of law properly before the Court. *Hyde v. Hutchison*, 1971 OK CR 162, ¶¶ 4, 8, 483 P.2d 766. *Holt v. State*, 1973 OK CR 38, ¶8, 506 P.2d 561.

6. A ruling by a Preliminary Hearing Magistrate must be based exclusively on evidence admitted under the Rules of Evidence. 12 O.S. §§ 2101, *et seq*.. *Howel v. State*, 1994 OK CR 62, ¶17, 882 P.2d 1086.

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[2] Available online: http://cocaunpub.oids.ok.gov/coca/RoleyMR.pdf.

7. The preliminary hearing and related rights conferred upon the defendant by Oklahoma's Constitution and statutes create liberty interests protected and guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. *Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S.Ct. 2227 (1980). *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). *Vitek v. Jones*, 445 U.S. 480, 488-489, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552. *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 93. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484.

THE CONSTITUTIONAL RIGHT TO A MEANINGFUL PRELIMINARY HEARING IS BOTH FUNDAMENTAL AND PERSONAL

8. The right to a meaningful preliminary hearing is a personal right of the defendant, not the State, and it is the only path to subject matter jurisdiction in the District Court:

> "No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination." **Held, that under the constitutional provision the precedent fact that a preliminary examination has been had or waived constitutes a jurisdictional basis for a prosecution on information in the district court**.

Williams v. State, 1911 OK CR 314, 6 Okl.Cr. 373, 118 P. 1006 [Syllabus]

> 1. ... Section 17, Bill of Rights, prescribes: "No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination." **Held that, under the constitutional provision, the precedent fact that a preliminary examination has been had or waived constitutes the jurisdictional basis for a prosecution on information in the superior court**. It is the fact that there was a preliminary examination, or a waiver thereof, ...

Tucker v. State, 1913 OK CR 149, 9 Okl.Cr. 587, 132 P. 825 [Syllabus]

> 3. **The constitutional provision**, article 2, § 17, that "no person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such examination," **is for the benefit of an accused** and which, by express terms of the Constitution, he may waive.

Ex parte Robinson, 1935 OK CR 17, 56 Okl.Cr. 404, 41 P.2d 127 [Syllabus]

> … This constitutional provision is for the benefit of an accused. **It is in the nature of a personal privilege under which he may insist upon a preliminary examination before he can be put upon his trial or called upon to answer an information** but by its express terms he may waive this right.

Ex parte Owen, 1946 OK CR 74, 82 Okl.Cr. 415, 420, 171 P.2d 868 [citations omitted]

> 1. Indictment and Information-Right of Accused to Waive Preliminary Examination. **The constitutional provision** (Art. 2, § 17, Okla. Const.) that no person shall be prosecuted for a felony by information without having had a preliminary examination **is in the nature of a personal privilege for the benefit of the accused** which may be waived by him.

Ex parte Musgrave, 1948 OK CR 131, 88 Okl.Cr. 192, 201 P.2d 272 [Syllabus]

> ¶8 … **A preliminary hearing is conducted for the benefit of the accused. Beaird v. Ramey, 456 P.2d 587, 589 (Okl.Cr. 1969). It is to serve as a means of discovery for the defendant** [841 P.2d 600] **and not as a substitute for trial**. Hampton v. State, 501 P.2d 523, 527 (Okl.Cr. 1972).

Harris v. State, 1992 OK CR 74, 8, 841 P.2d 597.

Legislation Fortified
And Illuminated The
Constitutional Guarantee

9. When construing constitutional provisions, statutes impinging constitutional rights are strictly construed:

> 4. Any law seeking to limit rights protected by constitutional prohibition of unreasonable searches and seizures should be strictly construed.

Fowler v. State, 1945 OK CR 34, 80 Okl.Cr. 80, 157 P.2d 223. [Syllabus]

> [¶3] ... Constitutional provisions should receive a broader and more liberal construction than is applied to statutes. The rule of construction of a statute is the intention of the Legislature. In construing constitutional provisions the question is not so much what the convention meant which framed the Constitution, but the supreme and controlling question is what the people whose votes adopted and placed the Constitution in force intended.

Scribner v. State, 1913 OK CR 131, ¶3, 9 Okl.Cr. 465, 467, 132 P. 933.

10. We determine the meaning and scope of these constitutional rights according to the original intent of the people who adopted the Bill of Rights:

> ... Constitutional provisions should always receive a broader and more liberal construction than statutes. The rule of construction of a statute is the intention of the Legislature. In construing constitutional provisions the supreme question is, **What did the people whose votes adopted and placed the Constitution in force intend?**

Caples v. State, 1909 OK CR 130, 3 Okl.Cr. 72, 78, 104 P. 493.

11. In 1910 our Legislators, many of whom had helped write the 1907 Constitution, codified their understanding of the meaning of the constitutional right to a preliminary hearing, including the right of the defendant to use compulsory process to present witnesses.

> At the examination the magistrate must, in the first place, read to the defendant the complaint on file before him. **He must, also, after the commencement of the prosecution, issue subpoenas for any witnesses required by the prosecutor or the defendant.**

22 OS §257, R.L. 1910.

12. The same may be said of §258, which also traces its roots to 1910.

> First. The **witnesses must be examined in the presence of the defendant, and may be cross-examined by him**, On the request of the county attorney, or of the defendant, **all the testimony must be reduced to writing** in the form of questions and answers and signed by the witnesses, or the same may be taken in shorthand and transcribed without signing, and in both cases filed with the clerk of the district court, by the examining magistrate … .

22 OS §258, R.L. 1910.[3]

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[3] §258 was amended in 1913 and again in 1961. These amendments made a few stylistic adjustments, correcting typographical errors and conforming the language to newer terminology. Two substantive changes were made in 1913. First, language in the 1910 version's second part making it a felony for the county attorney to call witnesses in violation of the statute was stricken. Second, a new fourth part was inserted providing that complaints filed within 3 days of the convening of a grand jury or during the pendency of a grand jury do not require a preliminary hearing if an indictment is returned; the former fourth part was then renumbered as the fifth part. The 1961 amendment extended the District Attorney's authority to permit the filing and prosecution of an Information even though a Grand Jury was at that time in session.

13. The predecessor to today's §259 completed the statutory troika implementing Article 2, Section 17:

> When the examination of the witnesses on part of the State is closed, **any witnesses the defendant may produce must be sworn and examined**.

22 OS §259, R.L. 1910.

14. The same year these statutes were enacted, our Court of Criminal Appeals recognized that these laws implementing constitutional rights served as important restatements of the constitutional preliminary hearing guaranteed by Article 2, Section 17:

> The provision of Procedure Criminal, above quoted, is intended as a legislative declaration of what is and what is not a reasonable and proper delay in bringing an accused person to trial in respect to his constitutional right aforesaid. **The authorities uniformly hold that such statutes are enacted for the purpose of enforcing the constitutional right, and that they constitute a legislative construction or definition of the constitutional provision.**

Eubanks v. Cole, 1910 OK CR 138, 4 Okl.Cr. 25, 42, 109 P. 736. [citations omitted]

Two Questions,
Written In Stone

15. The jurisdictional questions to be answered by a preliminary hearing magistrate have always consisted of two elements: 1) proof of the violation of a criminal statute; and, 2) proof of probable cause that the charged defendant committed the established crime:

> ¶6 It is well conceded that a preliminary hearing is not a trial to determine the guilt of accused, but only **the two issues: "Was a crime committed, and is there reasonable cause to believe the defendant committed said crime."** …

Beaird v. Ramey, 1969 OK CR 195, ¶6, 456 P.2d 587.

> ¶8 Although the State is not required to present evidence at the preliminary examination which would be sufficient to support a conviction, Matricia v. State, 726 P.2d 900 (Okl.Cr. 1986), **it must establish that a crime was in fact committed and that there is**

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22 OS §258, R.L. 1910, § 5674; Amended by Laws 1913, c. 68, p. 106, § 1; Amended by Laws 1961, p. 235, § 1, eff. October 27, 1961.

> **probable cause to believe that the defendant committed the crime**. These two elements of the test are supported by entirely different proof requirements.
>
> ¶9 When considering whether or not a crime has been committed, the State is required to prove each of the elements of the crime. State v. Rhine, 773 P.2d 762, 764 (Okl.Cr. 1989). **This part of the test is totally independent from the involvement of the defendant in the offense**. The magistrate must consider the proof established by the State in light of the statutory elements of the given offense. **If the elements of the crime are not proven, then the fact of the commission of a crime cannot be said to have been established.** A defendant cannot be held to answer for actions which do not amount to a crime as defined by our statutes. **This is a higher burden of proof than is required for the second part of the preliminary analysis**.

State v. Berry, 1990 OK CR 73, ¶¶ 8-9, 799 P.2d 1131.

And so it remained for eighty-seven freedom-loving years. Article 2, §17, in tandem with 22 OS §§ 257, 258 and 259 defined the magistrate's gate-keeping function *and* protected the fundamental and unfettered right of defendants to full participation in an adversarial preliminary hearing, including the right to present and examine witnesses in order to preserve testimony, assert defenses and probe the strengths and weaknesses of the state's case.

THE LEGISLATURE HAS DONE ITS BEST TO EVISCERATE THE RIGHT TO A MEANINGFUL PRELIMINARY HEARING

In 1994 the Legislature decisively altered the statutory [but not the constitutional] balance between the State and the felony defendant – devolving the legislative preliminary hearing from a personal and fundamental right of the defendant, to a dog and pony show benefitting and protecting the State and the State alone.

16. The 1994 revision of 22 O.S. §258 unleashed the newly spawned, yet awesome power of magistrates to summarily terminate a preliminary hearing *as soon as the State has made it's case for bind over*:

> … Sixth: A preliminary **magistrate shall have the authority to limit the evidence presented at the preliminary hearing to that which is relevant to the issues** of: (1) *whether the crime was committed,* and (2) whether there is probable cause to believe the defendant committed the

> crime. **Once a showing of probable cause is made the magistrate shall terminate the preliminary hearing and enter a bindover order**; provided, however, that the preliminary hearing shall be terminated **only if the state made available for inspection law enforcement reports within the prosecuting attorney's knowledge or possession** at the time to the defendant five (5) working days prior to the date of the preliminary hearing. In the alternative, upon agreement of the state and the defendant, the court may terminate the preliminary hearing once a showing of probable cause is made.

22 OS §258. Amended by Laws 1994, c. 292, § 3, eff. September 1, 1994.

17. The 1994 amendment of §258 also added a seventh part; a seemingly superfluous restatement of the familiar mantra regarding the questions to be answered by preliminary hearing magistrates:

> Seventh: The purpose of the preliminary hearing is to establish probable cause that a crime was committed and probable cause that the defendant committed the crime.

22 OS §258. Amended by Laws 1994, c. 292, § 3, eff. September 1, 1994.

18. At first glance, the newly added seventh part seems harmless enough – but when read more carefully and critically, two constitutional defects are apparent:

a. It treats the questions to be answered by the magistrate as though they are the *sine qua non* of a preliminary hearing, ignoring the core principles derived from Article 2, §17 of the Oklahoma Constitution; and,

b. It conflates the two questions by misstating the requirement concerning proof of a crime as one of "probable cause," rather than *actual proof by some evidence of each of the elements of the crime*.[4]

19. In 2002, the Legislature plowed ahead, giving prosecutors explicit control over the ways and means of sharing police reports:[5]

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[4] Ironically, the correct formulation, "whether the crime was committed, and whether there is probable cause to believe the defendant committed the crime" continues to be imbedded in part six of §258, quoted in *italics*, *supra* in paragraph 14.

[5] Oddly, when the District Attorney decides to deny discovery, defendants with enterprising counsel are actually better off than those to whom the District Attorney deigned to offer limited inspection of some written police reports. See *McLaughlin v. District Court*, 1996 OK CR 11, ¶13.

> Sixth: … **The district attorney shall determine whether or not to make law enforcement reports available prior to the preliminary hearing**. If reports are made available, the district attorney shall be required to provide those law enforcement reports that the district attorney knows to exist at the time of providing the reports, but **this does not include any physical evidence** which may exist in the case. This provision **does not require the district attorney to provide copies** for the defendant, but only to make them available for inspection by defense counsel. In the alternative, upon agreement of the state and the defendant, the court may terminate the preliminary hearing once a showing of probable cause is made.

22 OS §258. Amended by Laws 2002, SB 1536, c. 460, § 16, eff. November 1, 2002.[6]

20. The parallel amendment of 22 O.S. §259 followed an equally pro-prosecution course, abandoning the defendant's heretofore absolute right to call any witnesses they "may produce" [a statutory provision dating to 1910], and replacing it with the bare right to ask permission to call defense witnesses on the off chance that the magistrate hadn't already terminated the hearing:

> When the examination of the witnesses on the part of the state is closed, any witnesses the defendant may produce **may** be sworn and examined **upon proper offer of proof** made by defendant and **if such offer of proof shows that additional testimony is relevant to the issues of a preliminary examination**.

22 OS §259. R.L. 1910, § 5675. Amended by Laws 1994, c. 292, § 4, eff. Sept. 1, 1994.

Ouch! – nearly nine decades of unassailable jurisprudence honoring Oklahoma defendants' personal constitutional right to a meaningful preliminary hearing were swept away without so much as a kiss goodbye.

Or, perhaps not . . .

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[6] It cannot be a coincidence that this amendment undermined *Lafortune v. District Court of Tulsa County*, 1998 OK CR 65, ¶16, 972 P.2d 868, which had angered prosecutors by declaring this limited pre-preliminary hearing discovery to be mandatory. See *Wishful Thinking*, page 19, *infra*.

§258 was amended again in 2003, adding a provision allowing the admission of uncertified copies of sentencing documents relating to prior convictions. The amendment did not otherwise alter the impact of §258 on defendants' preliminary hearing rights.

22 O.S. §§ 258 AND 259 ARE UNCONSTITUTIONAL TO THE EXTENT THAT THEY IMPAIR THE DEFENDANT'S FUNDAMENTAL RIGHT TO A MEANINGFUL PRELIMINARY HEARING

21. On April 4, 1969, the magistrate presiding over a preliminary hearing in Oklahoma County had heard enough to answer his "two questions," and refused to permit the defense to call witnesses.[7]

22. Just six weeks later, writing for the unanimous Court, Judge Nix outlined the clearly understood *constitutional* dimensions of the defendant's personal right to a preliminary hearing, *a right which could never be "terminated" by a "satisfied" magistrate*:

> ¶6 **It is well conceded that a preliminary hearing is not a trial** to determine the guilt of accused, but only the two issues: "Was a crime committed, and is there reasonable cause to believe the defendant committed said crime." **However, this does not mean that only the State can put on witnesses, and the magistrate allowed to call a halt to the proceeding under the auspices that he has been satisfied with the evidence**.
>
> ¶7 **Defendant certainly has a right to produce evidence material to the two issues. The materiality of evidence as to these two issues is broad in scope and the magistrate should restrict the testimony with caution, or else defendant may be denied his Constitutional right to be confronted with his accusers. After all, a preliminary hearing is the right given by the Bill of Rights for benefit of the defendant**. Its origin, like the Grand Jury, was created to prevent a person from becoming the victim of an unjust and malicious prosecution. The Constitution provides for the preliminary hearing to ascertain whether there is just cause for defendant to stand trial in District Court, or whether he should then and there be released. **It is a most important part of our system of Jurisprudence and should not be treated lightly**. Unfortunately, seldom do you find a person who has served as a magistrate for any period of time who has not bound defendant over to District Court when he knew justice would have been better served by having the judicial courage to have released defendant at the preliminary hearing. **It must be borne in mind that the hearing is always being conducted for the benefit of the accused**. This Court has held in Ex parte Pruitt, 89 Okl.Cr. 312, 207 P.2d 337:

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[7] Astute readers will recognize that this is *exactly* the procedure later mandated by the game-changing 1994 amendment of §258(Sixth).

> "The Constitutional provision that no person shall be prosecuted for a felony by information without having had or waived preliminary examination before examining magistrate is in nature of **a personal privilege for benefit of accused**, which may be waived by him."
>
> Also, see Ex parte Musgrove, 88 Okl.Cr. 192, 201 P.2d 272; and, Clark v. State, 91 Okl.Cr. 210, 218 P.2d 410.

Beaird v. Ramey, 1969 OK CR 195, ¶¶6-7, 456 P.2d 587.[8]

23. The *Beaird* Court then specifically noted that the defendant's *constitutional* right to call preliminary hearing witnesses for the purpose of preserving their sworn testimony was not dependent on any statutory "designation:"

> ¶8 ***Though not designated by law*, and other than protecting defendant from unjust prosecution, the preliminary hearing** under our system of jurisprudence **has been recognized as a median serving several purposes. First, it permits the State as well as the defendant to preserve the testimony of witnesses, in lieu of depositions.** Witnesses die, leave the state, abscond, and are often unable to be found. …

Beaird v. Ramey, *Id*.

24. In the very next sentence, – wait – let your anticipation build – *Beaird* hangs a *constitutional bell* on the Cheshire "no-right-to-use-the-preliminary-hearing-for-discovery" cat:

> ¶8 … Next, **it is a procedure whereby defendant may discover what testimony is to be used against him at the trial, as he may examine witnesses in detail and be prepared to cope with their testimony at the time of trial** in case defendant is bound over.

Beaird v. Ramey, *Id*..

25. This constitutional "though-not-designated-by-law-and-other-than-protecting-defendant-from-unjust-prosecution" purpose of an Oklahoma preliminary hearing bears repeating:

> ¶8 … Next, **it is a procedure whereby defendant may discover what testimony is to be used against him at the trial, as he may examine**

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[8] Mr. Beaird was represented by the enterprising Herbert K. Hyde of *Hyde v. Hutchison* fame, 1971 OK CR 162, 483 P.2d 766.

> **witnesses in detail and be prepared to cope with their testimony at the time of trial** in case defendant is bound over.

Beaird v. Ramey, *Id*..

26. Judge Nix then prescribes the proper approach for preliminary hearing magistrates:

> ¶9 *Since the hearing is conducted for benefit of an accused*, **he should be given broad latitude in the cross-examination of State's witnesses and in producing evidence that would tend to obtain defendant's release**, **or [!] that which would be material or relevant.** …

Beaird v. Ramey, *Id*. [bracketed exclamation added]

27. Immediately following is an anticipatory refutation of §259's 1994 notion of requiring the defense to recite the details of a proposed witness' testimony so that the Magistrate can make prophylactic exclusions: [9]

> … It appears to your writer that **it would create a most difficult task for the magistrate to pass on the materiality or relevancy of the testimony of a witness without first hearing said witness and then pass upon any objection by the State as to its competency.**

Beaird v. Ramey, *Id*.

28. Lest any jurist complain of the burdens of meaningful preliminary hearings, Judge Nix presciently warns against the temptation to dilute this important right *no matter how tiresome it may be to enforce it*:

> ¶10 Your writer is aware of the fact that the tremendous workload of the present day Judge has created a tendency to rush, rush, rush, all proceedings so they might keep up with the ever growing caseload. **But the wheels of justice have always been keyed to a slow, steady pace in our system of Democracy, while speed in executing the law has been more frequently associated with anarchy and despotism; and a speedy proceeding is not always a substitute for justice**.

Beaird v. Ramey, *Id*.

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[9] A restrictive interpretation of the "offer of proof" threshold in §259 limits the defense to only those witnesses whose knowledge of relevant facts is already known to the defense. So much for using the preliminary hearing to prepare for trial by discovering the strengths and weaknesses of the State's case.

29. Finally, and for good measure, Judges Nix, Bussey and Brett leave nothing to the Legislative imagination:

> ¶11 **This Court is of the opinion that to deny defendant the right to produce witnesses … constitutes a denial of that type of preliminary hearing allowed by the Constitution**. It is, therefore, the order of this Court that this cause be remanded to the examining magistrate to conduct a hearing in conformity with this decision.

Beaird v. Ramey, *Id*.

Could it possibly be more clear? *Beaird* stands rock-solid for the defendant's constitutional right to a meaningful preliminary hearing – *a right impervious to assault by the Legislature*. Thanks to those who framed our Bill of Rights, Oklahoma defendants have the due process right to insist that Preliminary Hearing Magistrates, District Judges, and Judges of the Court of Criminal Appeals enforce the right to a meaningful preliminary hearing, crowded dockets and offending statutes notwithstanding.[10]

HOW DID THINGS END UP LIKE THIS?

The Begged Question: How can such patently unconstitutional laws survive for nearly two decades without drawing the ire of our Court of Criminal Appeals?

The Sad Answer: Through a combination of careless *dicta*, sauce for the goose, and wishful thinking – each and all enabled by red herrings and a slow boil.

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[10] Judge Bussey thought the outcome was such black letter law that it was a waste of the Court's time to issue a written opinion:

> ¶1 Having been advised by the Presiding Judge that this matter has already been remanded by the District Court to the Magistrate for further preliminary hearing, I am of the opinion that the matter is moot and although **I do not disagree with the conclusions reached by the author, I believe the question is moot and the law so well established as to not require a written opinion**. Particularly is this true when some members of the Court are so far behind on their caseload.

Beaird v. Ramey, *Id*.. [Judge Bussey, specially, though somewhat petulantly, concurring.]

Careless *Dicta:*
McLaughlin v. District Court

The 1994 evisceration of the right to a meaningful preliminary hearing became effective on September 1, 1994. Just over a year later, an enterprising defense lawyer called the legislative bluff. *McLaughlin v. District Court*, Delaware County Case No. CF-1995-251.

30. Stephen McLaughlin was charged with ten counts of lewd molestation in Ottawa County. At the close of the State's preliminary hearing evidence McLaughlin's attorney, C. Rabon Martin, following in Herbert Hyde's footsteps, demanded the right to call defense witnesses. The Magistrate denied the motion based on the District Attorney's assurance that the State had complied with §258's newly created five day disclosure deadline.

31. Sometime before District Court arraignment, Mr. Martin discovered, and the State admitted, that ***one*** police report had been left out of the packet of "law enforcement reports" delivered to the defense before the beginning of the preliminary hearing.[11]

32. At arraignment, Mr. Martin sought a remand based on the prodigal report so that defense witnesses could be presented at the remanded preliminary hearing. Both District Judge Larry Oaks and District Judge Sam Fullerton denied relief.[12] When the motion was denied the second time, the defense moved the case to the Court of Criminal Appeals:

> ¶3 On January 31, 1996, Petitioner filed in this Court an Application to Assume Original Jurisdiction and Petition for Alternative Writ of Prohibition and/or Mandamus. Petitioner asserts in his Application that **the District Court of Delaware County has "abridged Mr. McLaughlin's constitutionally guaranteed and statutory right to a fair, full and impartial preliminary hearing."** Trial was scheduled to begin February 26, 1996.

McLaughlin v. District Court, 1996 OK CR 11, ¶3, 915 P.2d 919.

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[11] *McLaughlin*, 1996 OK CR 11, ¶2.

[12] It is not clear from the record why two district judges issued the same ruling on the same issue.

33. The Court of Criminal Appeals recognized immediately that §§ 258 and 259 were part and parcel of the legislative assault on Article 2, Section 17:

> ¶10 There is no ambiguity in 22 O.S.Supp.1994, § 258(6). When the legislature amended the preliminary examination provisions **in 1994, [the legislature] took away a valuable benefit from the defendant — the ability to call witnesses at preliminary hearing**. The legislature took away the defendant's unquestioned ability to call witnesses at the preliminary hearing, conditionally upon the State's disclosure of all law enforcement reports five days prior to the preliminary hearing.
>
> …
>
> ¶12 **Prior to the 1994 amendment** to the preliminary examination provisions, particularly sections 258 and 259, **a defendant in this State had the right to produce evidence material to the two issues** to be decided at the preliminary hearing. Beaird v. Ramey, 456 P.2d 587, 589 (Okl.Cr. 1969). This Court noted in Beaird that **a preliminary hearing permitted the defendant to preserve testimony of witnesses and that it was used as a procedure whereby the defendant might discover what testimony is to be used against him at trial**. Id.

McLaughlin, Id.

34. The unanimous *McLaughlin* Court found that the Legislature's wholesale but *conditional* extinguishment of such valuable rights was to be strictly construed – only the complete satisfaction of the condition could justify the egregious loss of a defendant's rights:

> ¶13 In 1994, when the legislature amended the preliminary examination provisions in Title 22, it took away the defendant's right to call witnesses only if the State disclosed law enforcement reports prior to preliminary hearing. **The "only if" language implies that the legislature intended the benefit of calling witnesses not to be eliminated unless the State complied with the condition precedent of disclosing law enforcement reports. Therefore, Petitioner should be allowed the benefit of calling witnesses at the preliminary hearing.** ...

McLaughlin, Id.

Notwithstanding the loose language, *McLaughlin* cannot be construed as affirming, confirming, or even addressing, the constitutionality of the 1994 amendments. Mr. McLaughlin gained relief on the plain language of the statute. The Court's judicial musings, never

questioning the constitutionality of §258, are unnecessary to the outcome of litigation. There's a term of art for those musings – *dicta*.

Sauce For The Goose:
State v. Martin

35. The Court of Criminal Appeals has recognized that defendants are at a significant disadvantage when compared to the resources available to the prosecution:[13]

> ¶9 **The United States Supreme Court has been "particularly suspicious" of state rules which provide nonreciprocal benefits to the prosecution**, at least when the lack of reciprocity interferes with the defendant's ability to secure a fair trial. Wardius, 412 U.S. at 474 & n.6, 93 S.Ct. at 2212 & n.6. **Over the past several decades, Oklahoma, like most jurisdictions, has moved away from a "trial by ambush" or "poker game" approach to criminal prosecutions, and toward more even-handed discovery procedures**. This shift fosters the orderly administration of justice; it reduces the delay that accompanies surprise, enables the accused to make more informed decisions about his prospects at trial, and seeks, in the end, to make the trial an impartial search for truth. **As noted above, we have often used writs of prohibition and mandamus to clarify what "due process" requires with regard to particular pretrial discovery issues.** In this case, the State enjoys a benefit not through information obtained from the defense, but through its natural investigative advantage: its ability to psychologically evaluate a cooperative complaining witness even before charges are filed. **Yet as the Supreme Court has noted, "the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor**." Id. at 475 & n.9, 93 S.Ct. at 2212 & n.9.

Hamill v. Powers, 2007 OK CR 26, 164 P.3d 1083.

36. Unfortunately, the present imbalance in favor of the State is due in part to the activism of the same Court, a *Hamill*-authoring Court that clearly knows better.

37. Presented in 1998 with a conflict between a defendant seeking to waive his personal and fundamental constitutional right on one side, and a prosecutor just as determined to hold

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[13] Discovery in state court criminal cases is largely a matter of state law and procedure. *Wardius v. Oregon*, 412 U.S. 470, 474, 93 S.Ct. 2208, 2212, 37 L.Ed.2d 82 (1973).

the preliminary hearing on the other, the Court of Criminal Appeals asked itself a question it was more than willing to answer:

> Petitioner's matter gives rise to the following question: When a defendant has entered a valid waiver of his right to preliminary hearing, must a magistrate nonetheless permit the State to conduct a preliminary hearing if it so demands? We accept original jurisdiction over Petitioner's requests and answer in the affirmative.

State v. Martin, 1998 OK CR 35, ¶1, 959 P.2d 982.

38. It seems one Charles Ned had been charged by Information in Okfuskee County with Forcible Sodomy and three counts of Lewd Molestation. Mr. Ned elected to waive his right to a preliminary hearing, perhaps hoping to avoid a multiplication of counts based on anticipated testimony. As poor Ned's luck would have it, his prosecutors demanded that the hearing proceed for the State's sole benefit.

39. Okfuskee County Associate District Judge David N. Martin resolved the issue by granting Ned's waiver and then refusing to allow the State to proceed. *Martin*, ¶2.

40. Aided by the Court's sudden interest in the history, the prosecutors in *Martin* not only overcame poor Ned's waiver, they secured for themselves the defendant's heretofore personal constitutional right – the very right the Legislature sought to decimate just four years earlier – the defendant's personal and fundamental right to call witnesses *even after the gateway jurisdictional function of the preliminary hearing had been accomplished*:

> ¶5 Article II, Section 17, of the state Bill of Rights created the preliminary examination "to prevent a person from becoming the victim of an unjust and malicious prosecution" by requiring it to be first "ascertain[ed] whether there is just cause for defendant to stand trial." Beaird v. Ramey, 1969 OK CR 195, ¶7, 456 P.2d 587, 589. **But before the state Bill of Rights and even before the time of statehood in 1907, the Legislative Assembly of the Territory of Oklahoma had provided for preliminary examinations.** …
>
> ¶6 **Several of these early provisions concerned the preservation of testimony given at preliminary hearings**, and such provisions are today still found within our laws. …
>
> …

> ¶9 **The foregoing illustrates that both the ability of the State to investigate possible offenses and its privilege to preserve testimony through preliminary examination have long established statutory and judicial histories.** If the Legislature intended such securely established powers to be outdone, we do not believe it would do so in an innocuous fashion. … Instead we FIND that **neither Section 258** (Seventh), **nor the amendments which accompanied its enactment in 1994**, **has caused abolishment of the State's ability to proceed with a preliminary examination upon waiver thereof by the defendant.** …

Martin, *Id*.

41. In truth, the curious historical analysis in *Martin* was completely unnecessary because the very essence of an Article 2, Section 17, preliminary hearing included the right of both parties to preserve testimony:

> ¶8 **Though not designated by law**, and other than protecting defendant from unjust prosecution, the preliminary hearing under our system of jurisprudence has been recognized as a median serving several purposes. **First, it permits the State as well as the defendant to preserve the testimony of witnesses**, in lieu of depositions. Witnesses die, leave the state, abscond, and are often unable to be found. …

Beaird v. Ramey, 1969 OK CR 195, ¶8, 456 P.2d 587.

42. It is troubling to note that *Beaird* is cited in paragraph 5 of *Martin*. *Beaird* contains only eleven paragraphs, and we must assume that the Court was aware of all eleven. Did the Court intentionally overlook this plain authority for permitting the State to call witnesses? If so, was it done because of the awkward need to avoid recognizing the constitutional foundation of preliminary hearings? One hopes not, but other motivations are difficult to divine.

When the dust had cleared, Charles Ned's prosecutors had enforced historical preliminary hearing rights in the same Court where defendants, whose superior "historical rights" are bolstered by Article 2, Section 17, and 1910's contemporaneous statutes, find their historical, statutory and *constitutional* rights are subject to neglect. Irony aside, the *Martin* court was right

about one thing – statutes passed nearly a century after the right to a meaningful preliminary hearing was baked into our constitution cannot obviate the founders' original intent.[14]

Wishful Thinking:
Lafortune v. District Court

43. A few months after the State's victory in *Martin* the 1994 amendments were again the subject of an extraordinary *writ*. This time it was Tulsa County District Attorney William Lafortune who was aggrieved by the interpretation of the conditional disclosure language of §258. No doubt having read *McLaughlin*, District Judge Jesse S. Harris had done what Delaware County District Judge Sam Fullerton had failed to do; he remanded a felony prosecution for further preliminary hearing based on law enforcement reports that had not been provided prior to the initial preliminary hearing.[15]

44. Judge Harris, however, had gone one step further – he had remanded the case, not for the presentation of defense witnesses, but with instructions to the District Attorney to turn over the reports so that §259's provision for "offers of proof" could be satisfied before any subsequent bind-over order:

> ¶4 Judge Harris remanded the cases for further preliminary hearing because the State had not made law enforcement reports available to the defendants prior to the preliminary hearing. **Judge Harris found it was difficult and unfair for a defendant to make an offer of proof as to the**

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[14] As if aware of the implications of recognizing a *sui generis* right for prosecutors, the Court added its own bit of whimsy,[14] directly after the above quoted text from ¶9:

> … However, this ability is now limited by 22 O.S.Supp.1997, § 258 (Sixth), which provides "**[o]nce a showing of probable cause is made the magistrate shall terminate the preliminary hearing and enter a bindover order**."

Martin, *Id*.

[15] Tulsa attorney Mark Lyons represented the defendant in both of the Tulsa County cases that were consolidated for the *writ*. After the remand, Mr. Lyons' client, Erin Colleen Dukes was acquitted of first degree murder at trial. Tulsa County Case No. CF-1997-4902. No OCIS record exists for the companion case, CF-1997-3813, suggesting it may have settled with a deferred sentence which was later expunged.

> **relevance of the testimony of defense witnesses without access to the State's file and the information contained therein.**

Lafortune v. District Court of Tulsa County, 1998 OK CR 65, 972 P.2d 868. [footnote omitted]

45. The three judge majority rejected Judge Harris' reasoning, but it backed his remedy to the hilt, ruling that the Legislature *must have intended* that all reports be provided so that the constitutional right embodied in Article 2, Section 17 could be honored and sustained:

> ¶11 … **The 1994 legislation** cannot be warped or twisted and interpreted to suit the converse of a particular situation, and it **must be applied as written unless it constitutes a denial of that type of preliminary hearing allowed by the Constitution.** Beaird, 1969 OK CR 195, ¶¶5, 11, 456 P.2d at 589-90. ... At the preliminary hearing, a defendant must not be denied his Constitutional right to be confronted with his accusers, **and must be allowed to produce evidence material to the two issues in a preliminary hearing.**
>
> …
>
> ¶14 … Moreover, we do not believe production of the law enforcement reports is contingent upon a [972 P.2d 873] request by the defendant for such reports. There is no requirement in Section 258(Sixth) that such a request be made, and **the decision in McLaughlin was not contingent upon the defendant requesting such reports**. 22 O.S.Supp.1997, §§ 258(Sixth); McLaughlin, supra.
>
> ¶15 **Finally, all criminal defendants**, and not just those whose preliminary hearing is terminated, **need the law enforcement reports** the Legislature has made available in order to prepare to cross-examine the State's witnesses with whom they are confronted, and **to ensure that the preliminary hearing is not terminated when evidence material to the two issues in a preliminary hearing is not contained in the State's presentation of evidence**. … Therefore, this Court finds that the Legislature intended for the State to make available law enforcement reports to the defendant five (5) working days prior to the date of preliminary hearing in all criminal cases, so magistrates can utilize the cut-off rule, and defendants can prepare and ensure evidence material to the two issues in a preliminary hearing is presented

Lafortune, *Id*. [footnote omitted]

46. Remarkably, as the dissenters are quick to point out, during the actual preliminary hearing in *Lafortune* §258(Sixth) "termination" was never an issue. The State had

provided 0 [zero] police reports. Consequently, no §258 termination order was even considered.

47. In fact, at the preliminary hearing, two defense witnesses actually testified without objection. It was only when the defense sought a continuance to present *additional*, *absent* defense witnesses *who had not been subpoenaed* that the magistrate asked for §259 offers of proof. In response, defense counsel asserted an inability to comply, because the lack of law enforcement reports prevented him from formulating reasonable offers of proof regarding absent police officers. *That premise* was the one the magistrate had rejected – further "un-proffered" witnesses were not allowed and the defendants were bound over for trial. §258 "termination" never came up before District Judge Harris.[16]

48. The *writ* before the Court of Criminal Appeals asked whether the "offer of proof" language included an implied right to discovery of police reports as Judge Harris had ruled. A simple yes or no would have sufficed, and the Court might better have responded with a monosyllable.

49. Instead, the *Lafortune* majority strains constitutional precedent and statutory construction to the breaking point in quest of a new grand unifying theory for preliminary hearings:

> ¶6 … While we concur in the results reached by Judge Harris, we do not agree with the rationale used to reach that result.
>
> ¶7 **The task in addressing this matter is to interpret and reconcile laws passed concurrently by the Oklahoma Legislature in 1994,** which amended preliminary hearing procedures and enacted the Oklahoma Criminal Discovery Code. …

Lafortune, *Id*. [footnote omitted]

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16 *Lafortune*, *Id*., ¶2, Lumpkin, Judge, dissenting.

50. Embracing *dicta* and working backwards from its snap-judgment that §258(Sixth) includes an implied obligation for the State to *always* provide *all* of *McLaughlin's* police reports, the Court casually relegates §259 to the cutting room floor:[17]

> ¶9 Moreover, it would defy common sense to find … that law enforcement reports must be provided before the preliminary hearing **in order for the defendant to be able to make an offer of proof** as to the relevance of testimony of defense witnesses. **If the law enforcement reports are properly made available and probable cause is shown during the State's evidence, the magistrate is required to terminate the preliminary hearing.** 22 O.S.Supp.1997, § 258(Sixth). **If the preliminary hearing is so terminated, the defendant would not even be allowed to call defense witnesses, and having the law enforcement reports in order to make an offer of proof as to the relevance of their testimony would be useless**. Id. …

Lafortune, *Id*,. [footnote omitted]

51. Thus the *Lafortune* Court conjures a preliminary hearing in its own image, one in which the State *always* provides *all* police reports, and, since providing the reports *always* triggers the termination clause, one in which the defense *never* calls its own witnesses to the stand – all this while paying lip service not only to *McLaughlin*, but to the canonical *Beaird v. Ramey* as well:

> ¶11 The 1994 legislation must be held to mean what it plainly expresses, and no room is left for construction and interpretation where the language is clear and unambiguous. McLaughlin, 1996 OK CR 11, ¶9, 915 P.2d at 921. The 1994 legislation cannot be warped or twisted and interpreted to

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[17] The cavalier discard of a statute inconsistent with the Court's new vision is directly contrary to the settled rule requiring courts to rescue, not repudiate, whenever possible:

> ¶13 … Our statutes are to be construed with a view to effect their objectives and promote justice. 25 O.S.2001, § 29. **This Court will not presume the Legislature to have done a vain thing. We are mindful that elementary rules of statutory interpretation require us to avoid any statutory construction which would render any part of a statute superfluous or useless**. See Vilandre v. State, 2005 OK CR 9, ¶ 5, 113 P.3d 893, 896; Byrd v. Caswell, 2001 OK CR 29, ¶ 6, 34 P.3d 647, 648-49. …

Prater v. District Court of Oklahoma County, 2008 OK CR 21, 188 P.3d 1281

> suit the converse of a particular situation, and it must be applied as written unless it constitutes a denial of that type of preliminary hearing allowed by the Constitution. Beaird, 1969 OK CR 195, ¶¶5, 11, 456 P.2d at 589-90. The Oklahoma Constitution provides that "[n]o person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination." Okla. Const. Art.2, §17. **At the preliminary hearing, a defendant must not be denied his Constitutional right to be confronted with his accusers, and must be allowed to produce evidence material to the two issues in a preliminary hearing**. Beaird, 1969 OK CR 195, ¶7, 456 P.2d at 589. …

Lafortune, *Id*.

52. Stacking irony on top of *dicta*, the Court then reverses field in the final sentence of paragraph 11, refuting the newly pronounced rule that it would be "useless" and would "defy common sense" to permit the defendant to call witnesses under §259 when all *McLaughlin* reports have been provided:

> ¶11 … It is apparent that the Legislature provided for law enforcement reports to be made available for inspection in order for the defendant (1) to prepare to cross-examine the State's witnesses with whom he is confronted, **and (2) to ensure that the preliminary hearing is not terminated when evidence material to the two issues in a preliminary hearing, such as an alibi, is not contained in the State's presentation of evidence**.7 22 O.S.Supp.1997, § 258(Sixth); Beaird, 1969 OK CR 195, ¶¶6, 7, 456 P.2d at 589.

Lafortune, *Id*. [footnote omitted]

53. How exactly will the omitted alibi witnesses manage to present their exculpatory evidence, "[i]f the preliminary hearing is so terminated, the defendant would not even be allowed to call defense witnesses?" Lafortune, ¶9, *supra*. The opinion never addresses the inherent contradiction. Nor has any opinion since.[18]

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[18] There is a chiasmic symmetry between Judge Harris and the *Lafortune* authors. Judge Harris found a duty to provide all reports based on the defendant's right to a reasonable chance to call witnesses. *Lafortune* found a prohibition against the calling of defense witnesses based on the State's duty to provide all of the reports.

54. In any event, the central premise of *Lafortune*[19] survived for only four years. In 2002, the Legislature renewed its assault on defense rights by inserting new language into §258(Sixth), making it clear that prosecutors are firmly in control of the Legislature's notion of a preliminary hearing:

> Sixth: … **The district attorney shall determine whether or not to make law enforcement reports available prior to the preliminary hearing**. If reports are made available, the district attorney shall be required to provide those law enforcement reports that the district attorney knows to exist at the time of providing the reports, but this does not include any physical evidence that may exist in the case. This provision does not require the district attorney to provide copies for the defendant, but only to make them available for inspection by defense counsel. …

22 O.S. §258, Amended by Laws 2002, SB 1536, c. 460, § 16, eff. November 1, 2002.

55. The 2002 amendment repudiates *Lafortune's* curious presumption that the Legislature's 1994 amendments of §258 and §259 were anything other than a frontal assault on the settled constitutional dimensions of an Oklahoma preliminary hearing.

56. Legislative repudiation aside, *Lafortune's* curious conditional holding that ¶258 annihilates §259, and therefore no defense witnesses can be called if the five-day rule has been satisfied, has somehow survived to be cited as a justification denying the clear right to call defense witnesses while simultaneously giving lip service to the constitutional right:

> ¶27 The preliminary examination provided by Article II, section 17 of the Oklahoma Constitution is "a personal privilege for benefit of accused, which may be waived by him." Ex parte Pruitt, 1949 OK CR 66, 89 Okla. Crim. 312, 207 P.2d 337, 339. While the law confers a limited right to confront adverse witnesses at preliminary examination, that right is also subject to waiver. Beaird v. Ramey, 1969 OK CR 195, ¶ 7, 456 P.2d 587, 589; **LaFortune v. District Court, 1998 OK CR 65, ¶ 11, 972 P.2d 868, 872 ("At the preliminary hearing, a defendant must not be denied his Constitutional right to be confronted with his accusers")**; Miles v. State, 1954 OK CR 33, ¶ 15, 268 P.2d 290, 298 (defendant in a criminal

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[19] The universal delivery of law enforcement reports mitigates any adverse impact on Article 2, Section 17 preliminary hearings while simultaneously rendering moot §259.

> action may be held to waiver of the right to confrontation by conduct inconsistent with a purpose to exercise it), citing 23 C.J.S. Criminal Law § 1009, p. 377, n. 97.

Randolph v. State, 2010 OK CR 2, 231 P.3d 672.

> ¶13 The only issues at Preliminary Hearing are: (1) whether there is probable cause that a crime was committed and (2) whether there is probable cause to believe the defendant committed the crime. 22 O.S.2011, § 258. See also State v. Heath, 2011 OK CR 5, ¶ 7, 246 P.3d 723, 725. **As set forth in Lafortune v. District Court of Tulsa County, 1998 OK CR 65, ¶ 10, 972 P.2d 868, 871: "The Legislature has clearly provided that a defendant shall not have unlimited ability to call defense witnesses at the preliminary hearing, and has thus eliminated the preliminary hearing as a discovery forum.**"

Office Of State Chief Medical Examiner V. Reeves, 2012 OK CR 10, 280 P.3d 357.

In any case, two things now clear: *Lafortune's* carefully constructed house of cards has fallen, and the Legislature's relentless machinations, stripped of benign camouflage, are left exposed to renewed constitutional challenge.

RED HERRINGS DEBONED

Despite the Black Letter principle that a statute can never trump a constitutional right, advocates for truncated preliminary hearings may adopt a willfully blind reading of *Beaird*, and two allegedly compensating "rights" enacted at the same time the preliminary hearing rug was being pulled out from under the defense. The importance of the right being defended makes a brief discussion of each appropriate, even though the legal case for meaningful preliminary hearings is already open and shut.

A Bogus Interpretation of *Beaird v. Ramey*

57. *Beaird* contains only 11 paragraphs, and can be carefully read in just a few minutes. Nevertheless it has too often been referenced for the contrarian notion that the *Beaird* Court held that the Legislature has plenary authority over preliminary hearing procedures.

58. The misapplication results from *dicta* found early in the opinion:

> ¶3 This part of our Constitution [Article 2, §17] is fortified by statute. Title **22, O.S. § 257** [22-257], which reads as follows:
>
> > "At the examination the magistrate must, in the first place, read to the defendant the complaint on file before him. He must, also, after the commencement of the prosecution, issue subpoenas for any witnesses required by the prosecutor or the defendant."
>
> Also by Title **22, O.S. § 259,** recited, which reads as follows:
>
> > "When the examination of the witnesses on the part of the State is closed, any witnesses the defendant may produce must be sworn and examined."
>
> ¶4 **As this Court has theretofore stated, this statute should be complied with, or repealed**. Shapard v. State, Okl.Cr., 437 P.2d 565. **Two Sessions of the Legislature have passed since the rendition of that decision, and the statute still prevails, and is still being abused.**

Beaird v. Ramey, *Id*..

59. The purpose and scope of preliminary hearings, at least in the statutory sense, has always been contained in 22 O.S. §258, a statute *not even mentioned by Judge Nix* in his call for relief from §259's blanket provision for *totally unfettered* presentation of defense witnesses, *whether relevant or not*.

60. Nonetheless, our Court of Criminal Appeals transposes Judge Nix's and the Court's historical invitation to reel in §259, into a never-issued invitation to alter the §258 landscape:

> ¶10 **In the 1994 legislation, the Legislature accepted a challenge issued by this Court for decades by limiting the purpose and scope of the preliminary hearing, and thus limiting opportunities for the defendant to benefit therefrom.** The Legislature has clearly provided that a defendant shall not have unlimited ability to call defense witnesses at the preliminary hearing, and has thus eliminated the preliminary hearing as a discovery forum. …

Lafortune, *Id*. [footnote omitted]

61. The bold-face first sentence of §10, *supra*, is conjured out of thin air. Nothing in *Beaird* even hints of a decades-long judicial challenge to the Legislature for statutes, "**limiting**

the purpose and scope of the preliminary hearing, and thus limiting opportunities for the defendant to benefit therefrom." Lafortune, *Id*., ¶10.[20]

62. Holy Cow! The exact opposite is true - Judge Nix's challenge to the Legislature is to amend §259. The opinion is a robust warning that the sought-after amendment *cannot* be allowed to transgress the defendant's personal and fundamental right to be a *participant* in a proceeding defined not by statute, but by Article 2, Section 17, and the many cases speaking to its fundamental nature.

Naysayers notwithstanding, *Beaird* stands foursquare for judicial vigilance against the inevitable temptation to streamline preliminary hearings for the benefit of the Court and prosecution, and to the detriment of the true beneficiary of Article 2, Section 17's fundamental guarantees.

Conditional Examinations

63. Until 1994, conditional examinations were independent of, and complementary to, the defendant's personal right to a preliminary hearing.

> When a defendant has been held to answer a charge for a public offense, he may either before or after indictment or information, have witnesses examined conditionally on his behalf as prescribed in this article, and not otherwise.

22 O.S. §761, R.L. 1910, §6025.

64. The conditions under which the defendant was entitled to conduct such examinations were limited to material witnesses who were: 1) about to leave the State; or, 2) sick or infirm to the degree that they might not be able to attend the trial.

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[20] *Larfortune's* ¶10 concludes, "… **compare Beaird**, 1969 OK CR 195 at ¶6, 456 P.2d at 589 (previous versions of Sections 258 and 259 did not allow such a procedure)" Did the researcher somehow overlook the constitutional theme of *Beaird* while selecting it to distinguish statutes?

65. In the fateful year, 1994, under the guise of compensating the defendant for the loss of his historical and constitutional right to call witnesses at a preliminary hearing, the Legislature made two changes concerning conditional examinations:

a. §762 was amended to grant prosecutors the explicit right to conduct their own conditional examinations; and,

b. §762.1 was added, allowing *both* parties to conditionally examine witnesses *if and only if* the magistrate had "terminated the preliminary hearing pursuant to Section 258 of Title 21," and *if and only if* the witness "subsequently refuses an interview with counsel for the opposing party."[21]

66. The upshot is that *prosecutors* have gained new discovery rights, while *defendants* are left without the essential tools to compel the sworn testimony of material witnesses:

a. Only witnesses whom the defense alleges by sworn affidavit are *unwilling* to grant an "interview" to the defense may be conditionally examined. *Willing* witnesses who are not "about to die," or "about to become medically incapacitated," cannot be conditionally examined, and their testimony cannot be preserved; and,

b. There is no mechanism for forcing material witnesses to provide testimony under oath. So long as they don't "subsequently refuse an interview," they will never face impeachment by their prior sworn responses.

Thanks, but no thanks.

The Discovery Code

The Criminal Discovery Code[22] is even less valuable to the defense, and comes at the high price of requiring disclosure of the defense's own evidence and witnesses to the prosecution.

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21 This last phrase seems odd – with respect to a fact witness, how does one know which party is the "opposing party," and what difference would it make?

22 22 OS §2002. Laws 1994, SB 666, c. 292, § 2, eff. September 1, 1994; Amended by Laws 1996, SB 1087, c. 304, § 4, emerg. eff. June 10, 1996; Amended by Laws 1998, HB 2387, c. 155, § 1, eff. November 1, 1998; Amended by Laws 2002, SB 1536, c. 460, § 23, eff. November 1, 2002, *et seq*..

67. In 1990, the Court of Criminal Appeals foreshadowed the Discovery Code when it promulgated comprehensive discovery procedures of its own, including the hitherto unknown obligation of defense attorneys to provide extensive discovery to the State. *Allen v. District Court*, 1990 OK CR 83, 803 P.2d 1164.

68. The Criminal Discovery Code and *Allen* are peas in a pod. As such, they suffer from the same three defects:

a. For the first time in Oklahoma history, the defense is required to provide comprehensive disclosure of its own evidence;

b. Discovery of the prosecution's evidence is delayed until after arraignment in the District Court; and,

c. The prosecution is not required to turn over any evidence that wasn't already available to the defense by resort to the Constitution, case law and statutes.

69. Judge James F. Lane disagreed with his *Allen* colleagues, and by extension those Legislators who codified *Allen* in 1994, on each of these points, albeit in a different order:

b. Regarding the delay of discovery until after District Court arraignment:

> ¶3 In the first part of the Order, the majority relies on historic procedure in determining that pre-arraignment discovery is not authorized and then ignores historical precedence on discovery issues and in effect creates a criminal discovery code.. …
>
> Judge Lane, Vice Presiding Judge, concurring in part/dissenting in part. 803 P.2d 1169-1170.

c. Regarding the lack of any new obligations on the prosecution:

> ¶3 … In this "code" the majority sets forth items discoverable by the defendant that have in the most part already been approved by this Court. …
>
> Judge Lane, *Id*.

a. Regarding the mandate for defense disclosures:

> ¶3 … However, for the first time in Oklahoma judicial history, it requires the defendant to disclose many items that heretofore have not been discoverable by the State and designates sanctions to be imposed if either party fails to follow the rules set out. …
>
> Judge Lane, *Id*.

70. Court of Criminal appeals cases published in the 87 years from Statehood to 1994 reveal an arc of steady expansion of the defendant's discovery rights. The earlier cases treat defense discovery rights as the exception to the general rule that discovery of the government's evidence is not allowed. Over the years, the exceptions swallow more and more of the antiquated rule, until by 1994 the roles of rule and exception were thoroughly reversed:

1910 22 O.S. § 192. [Disclosure of warrants.]

1910 22 O.S. § 303.[23] [Disclosure of the names of witnesses intended to be called at preliminary hearing or trial.]

1957 *Hurt v. State*.[24] [Convoluted Common Law analysis regarding the fundamental duty of the prosecution to notify the Court and defense when a witness has falsely denied that he was to receive lenient treatment for testifying against defendant.]

1957 *Sadler v. Lackey*.[25] [*Writ* affirming the Court's inherent authority in the interests of "equal and exact justice," to compel pre-trial disclosure of forensic reports that reflect matters to which the government has exclusive or significantly greater access.]

1960 *Layman v. State*.[26] [Disclosure of scientific and technical reports.]

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[23] R.L. 1910, § 5694; Amended by Laws 1980, SB 546, c. 136, § 1, emerg. eff. April 15, 1980; Amended by Laws 1991, HB 1724, c. 35, § 1, eff. September 1, 1991; Amended by Laws 1992, HB 2294, c. 68, § 1, eff. September 1, 1992; Amended by Laws 2004, HB 2445, c. 275, § 9, emerg. eff. July 1, 2004; Amended by Laws 2008, HB 2819, c. 179, § 3, eff. November 1, 2008.

[24] *Hurt v. State*, 1957 OK CR 55 ¶70, 312 P.2d 169.

[25] *Sadler vs. Lackey*, 1957 OK CR 119, ¶¶ 6-13, 319 P.2d 610. Cited with approval in *Hamill v. Powers*, 2007 OK CR 26, ¶6, fn. 7, 164 P.3d 1083.

[26] *Layman vs. State*, 1960 OK CR 64, ¶8-15, 355 P.2d 444.

1963 *Brady v. Maryland*.[27] [Fundamental duty to disclose exculpatory, impeachment and mitigation evidence.]

1967 *Shepard v. State*.[28] [Fundamental duty of the prosecution to notify the Court and defense when a witness was to receive lenient treatment for testifying against defendant, particularly when the witness falsely denies such an arrangement. Relief denied because defense counsel was present when the deal was made.]

1968 *Doakes v. District Court*.[29] [Disclosure of statements of the defendant made without benefit of counsel. Right of the defense to examine alleged murder weapon.]

1969 *Beaird v. Ramey*.[30] [The right to present witnesses, and the right to discover and prepare to meet the State's evidence.]

1969 22 O.S. § 749.[31] [The authority of all peace officers to take sworn statements from prospective witnesses, and requiring that all such statements be turned over to the Defense as they are obtained. See, *Vassaur v. State*, 1973 OK CR 400, ¶14, 514 P.2d 673.]

1970 *Lambert v. State*.[32] [Inspection of physical evidence upon proper request.]

1971 *Stevenson v. State*.[33] [Disclosure of the criminal records of prospective witnesses along with all evidence favorable to the defendant.]

1971 *Blevens v. State*.[34] [Disclosure of Brady material, regardless of the good or bad faith of the prosecutor and without the necessity of a request by the defendant.]

1971 *Watts v. State*.[35] [Disclosure of all written and oral statements of the Defendant upon proper request.]

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27 *Brady vs. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).

28 *Shepard v. State*, 1967 OK CR 197, ¶¶ 65-72, 437 P.2d 565.

29 *Doakes v. District Court*, 1968 OK CR 214, ¶¶ 14-15, 447 P.2d 461.

30 *Beaird vs. Ramey*, 1969 OK CR 195, 456 P.2d 587

31 Laws 1969, c. 224, § 1, emerg. eff. April 21, 1969.

32 *Lambert vs. State*, 1970 OK CR 70, ¶7, 471 P.2d 935.

33 *Stevenson vs. State*, 1971 OK CR 183, ¶¶ 12-17, 486 P.2d 646.

34 *Blevens vs. State*, 1971 OK CR 262, ¶¶ 20-25, 20-25, 487 P.2d 991.

1972 *Giglio v. United States*[36] [Duty of the prosecutor to identify and disclose Brady material, even when it is not personally known to the individual prosecutor responding to the request.]

1978 12 OS § 2612.[37] [Disclosure of writings used to refresh memory.]

1979 *Burks v. State*.[38] [Mandatory notice of evidence of other crimes and offenses intended to be presented at trial.]

1979 *Mays v. State*.[39] [The right to cross-examine witnesses concerning bias or any other motivation to testify falsely, and the duty of the prosecution to disclose all evidence bearing on the issue.]

1983 Driskell v. State,[40] [The duty of the State to take reasonable steps to preserve evidence in a condition that will allow inspection and analysis by the defense.]

1987 *Moore v. State*.[41] [Disclosure of scientific tests and results. Adoption of ABA Standards for Criminal Justice, § 11-2.1]

1989 *US v. Buchanan*.[42] [Right to in camera review of the personnel files of law enforcement officers, and the production of such files for use as impeachment evidence.]

1990 Pierce v. State.[43] [Disclosure of scientific and technical reports. Affirming *Moore's* adoption of "ABA guidelines as the standard for disclosure in Oklahoma."]

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35 *Watts vs. State*, 1971 OK CR 275, ¶¶ 11-12, 487 P.2d 981.

36 *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

37 Laws 1978, SB 276, c. 285, § 612, eff. October 1, 1978; Amended by Laws 2002, HB 1939, c. 468, § 52, eff. November 1, 2002.

38 *Burks v. State*, 1979 OK CR 10, ¶¶ 11-18, 594 P.2d 771.

39 *Mays v. State*, 1979 OK CR 27, ¶¶ 5-10, 594 P.2d 777.

40 *Driskell v. State*, 1983 OK CR 22, ¶¶ 58-60, 659 P.2d 343.

41 *Moore v. State*, 1987 OK CR 149, ¶¶ 13, 14, 18-21, 740 P.2d 73.

42 *US v. Buchanan*, 891 F.2d 1436, 1444 (10th Cir. 1989). See also, *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991).

43 *Pierce v. State*, 1990 OK CR 7, ¶¶ 22-28, 786 P.2d 1255.

1992 *Richie v. Beasley*.[44] [Duty to disclose the names and addresses of all persons having knowledge of any relevant facts.]

1993 *Daubert v. Merrell Dow*.[45] [Fundamental right to pre-trial challenge of the credentials and validity of scientific theories concerning expert opinion evidence.]

1994 *Munson v. State*.[46] [Impeachment evidence, including the use of hypnosis or other memory enhancement techniques, along with law enforcement reports concerning other suspects.]

In short, the 1994 addition of the Criminal Discovery Code offered nothing new to defendants, while on the back end imposing discovery *obligations* which had never before been part of Oklahoma jurisprudence. Perhaps worse, meaningful discovery, which from Statehood had been available at the time of the preliminary hearing, cannot be *requested* until District Court Arraignment, and cannot be *compelled* until a pathetic "10 days before trial." Better for the defense to be returned to the good old days when compulsory process and testimony under oath allowed the defense to develop its own case on its own schedule.

A SLOW BOIL

Conventional wisdom has it that a frog placed in a lidless pan of room temperature water can be boiled alive so long as the water is only gradually heated to the fatal temperature. That's how we managed to become decoupled from the constitutional right to meaningful preliminary hearings.

71. When the amendments became effective on September 1, 1994, the sun didn't rise in the west. No one confiscated subpoenas or released defense witnesses. In many cases, defense attorneys enjoyed the benefit of the bargain – dating back to Statehood there have always been cases in which defense counsel had no intention of calling defense

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44 *Richie v. Beasley*, 1992 OK CR 52, ¶¶ 2-4, 837 P.2d 479.

45 *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). *Taylor v. State*, 1995 OK CR 10, 889 P.2d 319, adopts *Daubert* analysis for Oklahoma Courts.

46 *Munson v. State*, 1994 OK CR 77, ¶¶ 17-24, 886 P.2d 999.

witnesses. In such cases, receipt of all law enforcement reports before the preliminary was a welcome aide in cross-examination that came at no real cost.[47]

72. Gradually the collective inertia of our various District Courts, communities of Judges and attorneys who worked regularly with one another, absorbed the 1994 amendments and settled on practices and procedures that were followed day to day, docket to docket, District to District.[48]

73. In most jurisdictions, continued deference was paid to the defense bar. *Beaird's* "wide latitude" was honored with actual wide latitude. Over time these attorneys and Judges in permissive Districts became comfortable with, and accepting of, the 1994 amendments. Since little had changed after September 1, 1994, there was little reason to ponder or initiate a constitutional crisis.

74. In a handful of other jurisdictions the consequences were more immediate and dire. Spurred by aggressive prosecutors, compliant magistrates adopted §258(Seventh)'s destructive mantra: *the one and only purpose of the preliminary hearing is for the magistrate to pass judgment on the State's evidence; with no real role for the defense other than "informed" cross-examination*.

75. More oppressively, as these preliminary hearings offered less and less of a role to the defense *Beaird's* concepts of relevance and materiality morphed from a broad and inclusive invitation for defense participation into a mighty threshold over which defense "offers of proof" simply cannot leap. In these jurisdictions, lead by Tulsa and Oklahoma Counties, prosecutors held dominion over all they observed.

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47 Over time, some police agencies learned to game the system, and if not the agencies, dozens and hundreds of individual officers and detectives. The prosecution can't be forced to disclose information that isn't within prosecuting attorney's, "knowledge or possession."

48 One thing the undersigned John Echols learned from eight years of court appointed murder defense around the State is that these practices and procedures vary widely from District to District and County to County.

76. The final fundamental preliminary hearing right to evaporate was cross-examination itself – prosecutors found they could successfully object to defense questions that, though probing and germane, relevant and material, were "beyond the scope" of the purposefully sparse testimony offered by the State. Other evidence was irrelevant, for failing to further the "purpose of a preliminary hearing," which became "just enough evidence from the State, and no more, lest discovery occur."

77. Slowly, inexorably, the most restrictive jurisdictions began to infect their neighbors, and then their neighbors' neighbors. When an Assistant District Attorney left a restrictive jurisdiction for employment in a formerly permissive one, the virus was carried to a new coven of prosecutors. DAC training programs now promote these invasive tactics, spreading the virus to one and all.

78. Though it has taken more than two decades for the 1994 assault on meaningful preliminary hearings to gain traction throughout the State, in most if not all of our courthouses a new inertia has settled over "preliminary hearings" that are unworthy of their constitutional namesake.

Failing to notice the slow rise in temperature, the constitutional frog is succumbing without fighting for its life. The zero-sum crisis is at hand. We must regain the high ground and save our frog.

CONCLUSION

In re Constitutional Rights,
Our lawmakers lack all insight,
They thought if they frowned,
The Right would come down,
But Judges can still set things Right.

22 O.S. §258(6) cannot be reconciled with Article 2, Section 17. One or the other must give way – either §258 is unconstitutional or Section 17 is unstatutory. Good thing for us there's no such thing as an unstatutory constitutional right.

-30-

Postscript: Interested volunteers are invited to help improve this memorandum in anticipation of its future use. Cases to the contrary, corrected citations, suggested citations, and textual improvements of all types are solicited. Case law addressing original intent, or additional pre-1994 discovery cases would clearly improve the memo. Please send both criticism and suggestions to john@jdechols.com or defender@mac.com, and I'll reflect on your views and credit your contributions.

Postscript the second: I began to cobble together these arguments more than a decade ago, when prosecutors and magistrates first began to derail the calling of *relevant and material* defense witnesses. I have argued these issues in dozens of courthouses around the State, each time filing the then current version of these authorities. On each of those occasions when the client was bound over and defense witnesses were denied, I filed and argued a motion to quash based in part on denial of the constitutional right to a meaningful preliminary hearing. In all that time, in all of those arguments ending in adverse rulings, no prosecutor or judge has ever challenged the legitimacy of the cases and arguments contained in this screed. Not once. Nor, in that time, has *Beaird v. Ramey* been overturned or limited by any opinion of the Court of Criminal Appeals – in fact it is regularly cited in the opinions that ignore it.

And yet our frog continues to suffer. Go figure.

John Echols
August 15, 2016
john@jdechols.com

Updates, if any:
https://defguild.org/cgi-bin/defender.pl?wtd=tools

GOOD FAITH MY ARSE

At least we live in interesting times. Whether by authentic grass roots enthusiasm or cynical astroturfing,[1] Oklahomans have taken up the cause of defending our state against the perceived encroachment of the federal government. The working poor oppose federally subsidized and universally available health care. Our elected officials challenge the federal Environmental Protection Agency whenever the agency's rules affect on our powerful energy companies. We'd rather go our own way than follow the Common Core Curriculum promoted by the National Governors Association. We insist on following our "Oklahoma values," because we know in our hearts that we are the better arbiters of our fate.

How odd then that, while our Legislature and Governor fight the good fight, our Court of Criminal Appeals seems determined to surrender the interpretation of our Oklahoma Bill of Rights to the unelected Supreme Court of the United States? This memo takes a brief look at this contrarian judicial activism through the analysis of the alleged "good faith" exception to the application of the exclusionary rule in all Oklahoma trial courts.

Page References

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[1] https://en.wikipedia.org/wiki/Astroturfing.

The Bill Of Rights
And The Exclusionary Rule

It's been more than a century since the Supreme Court of the United States solidified its rationale of excluding evidence seized in violation of the guarantees of the Bill of Rights:

> .... We shall deal with the 4th Amendment, which provides: [2]
>
> > '**The right of the people** to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, **shall not be violated**, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'
>
> The history of this Amendment is given with particularity in the opinion of Mr. Justice Bradley, speaking for the court in Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. As was there shown, it took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument **a Bill of Rights, securing to the American people, among other things, those safeguards which had grown up in England to protect the people from unreasonable searches and seizures**, such as were permitted under the general warrants issued under authority of the government, by which there had been invasions of the home and privacy of the citizens, and the seizure of their private papers in support of charges, real or imaginary, make against them.

Weeks v. United States, 232 U.S. 383, 389-390, 34 S.Ct. 341, 58 L.Ed. 652 (1914).[3]

> We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, **in direct violation of the constitutional rights of the defendant**; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. **In holding them and permitting their use upon the trial, we think prejudicial error was committed.** ...

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[2] Still earlier, in 1886, the exclusionary rule barred federal courts from receiving evidence taken in violation of the 5th Amendment, noting that the 4th and 5th run 'almost into each other'. *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886).

[3] Unless otherwise indicated, all **emphasis** in quoted text has been added by the author.

Weeks, 232 U.S. 383, at 398.

Supreme Court decisions over the next four decades solidified two doctrinal points: 1) evidence seized in violation of the 4th Amendment was inadmissible in federal courts; but, 2) the states continued to be free to exercise their respective police power as they saw fit. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920). *Byars v. United States*, 273 U.S. 28, 29-30, 47 S.Ct. 248, 71 L.Ed. 520 (1927). *Olmstead v. United States*, 277 U.S. 438, 462, 48 S.Ct. 564, 567, 72 L.Ed. 944 (1928). *McNabb v. United States*, 318 U.S. 332, 339-340, 63 S.Ct. 608, 612, 87 L.Ed. 819 (1943). *Wolf v. Colorado*, 338 U.S. 25, 33, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949).

The last of these, *Wolf v. Colorado*, came very close to imposing the exclusionary rule on the States through the 14th Amendment due process clause, but backed away after suggesting that the States should do the right thing on their own:[4]

> **The security of one's privacy against arbitrary intrusion by the police**—which is at the core of the Fourth Amendment—is basic to a free society. It **is therefore implicit in 'the concept of ordered liberty'** and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be **condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples**.
>
> Accordingly, we have no hesitation in saying that **were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.** But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it

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[4] The wholesale enforcement of the Bill of Rights upon the states was considered, but rejected, in *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937):

> We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

Palko, 302 U.S. 319, at 323.

> should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

Wolf v. Colorado, 338 U.S. 25, at 27-28.

Wolf's benign paternalism gave way to full 4th Amendment incorporation in 1961 when the respective states were commanded to adopt the exclusionary rule for evidence seized by violation of any person's right against unlawful searches and seizures:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. **Were it otherwise, then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be 'a form of words', valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in 'the concept of ordered liberty.**"

Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

The Exclusionary Rule In Oklahoma

Importantly, *Mapp v. Ohio* didn't compel Oklahoma Judges to exclude anything they hadn't already been excluding for nearly 4 decades under section 30 of the Bill of Rights of the Oklahoma Constitution:

> **And under the Bill of Rights it is held that the admission of evidence procured by an illegal search warrant was reversible error.** The principle involved was by Judge Bessey in the [Foreman] opinion thoroughly discussed, and the authorities reviewed, and, so far as the same are applicable here it is unnecessary to again present them.
>
> The search and seizure detailed in the record was an unauthorized trespass and an invasion of the constitutional rights of this defendant. **It follows that all evidence with reference to liquor secured thereby should have been excluded on defendant's objections.**

Russell v. State, 1923 OK CR 357, 25 Okl.Cr. 423, 426-427, 221 P. 113.[5]

> ¶6 This Court adopted the exclusionary rule several decades before it was held by the United States Supreme Court to be enforceable against the states. See Gore v. State, 24 Okl.Cr. 394, 218 P. 545, 547, 550 (1923). In Simmons v. State, 277 P.2d 196, 198 (Okl.Cr. 1954), we further held that the exclusion of evidence acquired through an unconstitutional search or seizure was not merely a rule of procedure, but a fundamental right under art. II, § 30 of the Oklahoma Constitution.3 We will continue, when deemed appropriate, to interpret our state constitution as providing more expansive individual liberties than those conferred by the United States Constitution.

Richardson v. State, 1992 OK CR 76, ¶6, 841 P.2d 603

The Good Faith Exception

In 1984 the Supreme Court announced that the exclusionary rule required by the Fourth Amendment was no longer required if a given law enforcement officer had executed a warrant in "objectively reasonable reliance" on the magistrate's authorization. After all, there are "carefully guarded" and "limited" exceptions:

> Even defendants with standing to challenge the introduction in their criminal trials of unlawfully obtained evidence cannot prevent every conceivable use of such evidence. Evidence obtained in violation of the Fourth Amendment and inadmissible in the prosecution's case in chief may be used to impeach a defendant's direct testimony. Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954). See also Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). A similar assessment of the "incremental furthering" of the ends of the exclusionary rule led us to conclude in United States v. Havens, 446 U.S. 620, 627, 100 S.Ct. 1912, 1916, 64 L.Ed.2d 559 (1980), that evidence inadmissible in the prosecution's case in chief or otherwise as substantive evidence of guilt may be used to impeach statements made by a defendant in response to

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[5] Oklahoma continued to independently apply the exclusionary rule to violations of Article 2, Section 30, throughout the pre-incorporation decades. *Miles v. State*, 1925 OK CR 191, 30 Okl.Cr. 54, 235 P. 260. *Taylor v. State*, 1929 OK CR 256, 43 Okl.Cr. 365, 279 P. 361. *McDonald v. State, 1932 OK CR 134, 53 Okl.Cr. 443, 13 P.2d 213*. *Yeargain v. State*, 1939 OK CR 112, 67 Okl.Cr. 262, 93 P.2d 1104. *Kuhn v. State*, 1940 OK CR 96, 70 Okl.Cr. 119, 104 P.2d 1010. *Simmons v. State*, 1951 OK CR 38, 94 Okl.Cr. 18, 229 P.2d 615.

> "proper cross-examination reasonably suggested by the defendant's direct examination." Id., at 627-628, 100 S.Ct. at 1916-1917.

United States v. Leon, 468 U.S. 897, 910, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The *Leon* majority went on to characterize the exclusionary rule as a doctrine serving only a single purpose: deterrence of police officers. Since exclusion wasn't intended to deter "neutral and detached" magistrates, officers with arguably valid warrants would avoid deterrence and the evidence would poor into federal courtroom.[6]

Leon is an example of the end justifying the means. The "conservative" activists on the Supreme Court all-in with jurist Benjamin Cardozo's famous aphorism, "Why should the criminal go free because the constable has blundered?" They regard the exclusionary rule as an impediment in the war on crime. *People v. Defore*, 242 N. Y. 13, 24–25, 150 N. E. 585, 588–589 (1926). These Justices *actively* seek to limit or extinguish the body of law that demands the exclusion of illegally obtained evidence.

It's no surprise then that "good faither" jurists have set up a straw-man justification for the very doctrine that they oppose:

> The judicial integrity rationale was soon entirely supplanted by the deterrence rationale. When determining the scope of the exclusionary rule, the Court began focusing solely on whether exclusion of evidence is likely to deter future police misconduct. **The deterrence analysis became an invitation for the Court to engage in unsupported speculation about police behavior, and specifically, about whether suppressing evidence in various circumstances would provide an incentive for police to obey the law**. In case after case, the Court has concluded that even if the evidence was suppressed, the police would be unlikely to change their behavior. **In each case, the Court has weighed this "speculative"**

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[6] The *Leon* majority's tunnel vision re the purpose of the exclusionary rule is contradicted by other decisions, including *Whren* v. U.S., 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). *Whren* and similar cases allowing evidence seized following pretext arrests reason that the purpose of the exclusionary rule is assessed from the point of view of the person who is asserting a claim of unlawful search. If the same intrusion might have been lawfully by an officer with a benign intent, then the person doesn't really have a privacy right to be violated. In these cases, deterrence plays no role in application of the exclusionary rule. See, *Right and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext*, by Eric F. Citron, 116 Yale L.J. 1072 (2007).

> **likelihood of deterrence against the "substantial" costs of exclusion, and found that the exclusionary rule should not apply.**

The Roberts Court and the Future of the Exclusionary Rule, by Susan A. Bandes, American Constitution Society For Law and Policy, April 2009.

Having declared police deterrence as the *condicio sine qua non* of the exclusionary rule, the *Leon* majority summarily decouples magistrates from the law of deterrence. Like all fallacious reasoning, "good faith" is betrayed by the axiomatic declarations on which it is carefully built:

> **Third, and most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate**. … And, to the extent that the rule is thought to operate as a "systemic" deterrent on a wider audience, **it clearly can have no such effect on individuals empowered to issue search warrants**. Judges and magistrates are not adjuncts to the law enforcement team; **as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions**. The threat of exclusion thus cannot be expected significantly to deter them. Imposition of the exclusionary sanction is not necessary meaningfully to inform judicial officers of their errors, and **we cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests**.

United States v. Leon, 468 U.S. 897, 916-917, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). [footnotes omitted]

Puh-leze! A magistrate approves a facially invalid search warrant, and the police are free to illegally gather evidence to be used against a defendant because the magistrate's signature is in and of itself the only deference required by the constitution? This is supposed to honor our fundamental rights? What happened to the, "no warrants shall issue" constitutional mandate?

> **The efforts of the courts and their officials** to bring the guilty to punishment, praiseworthy as they are, **are not to be aided by the sacrifice of those great principles established be years of endeavor and suffering** which have resulted in their embodiment in the fundamental law of the land.

Weeks, at 393. Indeed, the absence of the exclusionary rule will demote the fundamental right to be free from unconstitutional searches and seizures to, "'a form of words', valueless and undeserving of mention in a perpetual charter of inestimable human liberties." *Mapp*, at 655.

If magistrates and judges are immune from course-correcting invalidation of issued warrants, then they are also free to make the same mistake over and over again. Why use magistrates at all? If only that pesky 4th Amendment didn't insist that "no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.".

Oklahoma Courts Refused To Adopt The Good Faith Doctrine

The notion of a "good faith" exception had been percolating among Oklahoma prosecutors for some time before the *Leon* victory. While *Leon* was pending before the Supreme Court, the State urged the Oklahoma Court of Criminal Appeals to adopt "good faith" as a defense to exclusion of unlawfully seized evidence.

> ¶5 The State's suggestion that the officers' good faith prevents application of the exclusionary rule supposes the officers' ignorance of the law. **Formulations of the so-called "good faith" exception to the exclusionary rule do not include within their scope actions in ignorance of established law.** See, e.g., United States v. Williams, 622 F.2d 830, 841 (5th Cir. 1980), cert. den., 449 U.S. 1127, 101 S.Ct. 946, 67 L.Ed.2d 114, Note 4a (the officer's good faith belief must be based on articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully; the officer's unawareness of constitutional requirements would not suffice). **Assuming arguendo that a good faith exception should be recognized, it would not be applicable in the case at bar.**

Hightower v. State, 1983 OK CR 160, ¶5, 672 P.2d 304 [decided Jan. 31, 1984].

From 1984 through 2010, the Court of Criminal Appeals, refused to adopt, or avoided application of, the good faith doctrine in at least eleven additional published cases. *Beeler v. State*, 1984 OK CR 55, 15, 677 P.2d 653. *White v. State*, 1985 OK CR 84, ¶9, 702 P.2d 1058. *Lowry v. State*, 1986 OK CR 177, ¶¶ 5-7, 729 P.2d 511. *Miles v. State*, 1987 OK CR 179, ¶8, 742 P.2d 1150. *Farmer v. State*, 1988 OK CR 142, ¶6, 759 P.2d 1031. *Moore v. State*, 1990 OK

CR 5, ¶29, 788 P.2d 387. *Solis-Avila v. State*, 1992 OK CR 27, ¶¶ 3-4, 830 P.2d 191. *Richardson v. State*, 1992 OK CR 76, ¶5, 841 P.2d 603. *Tomlin v. State*, 1994 OK CR 14, 33, 869 P.2d 334 [Special Panel under Emergency Rules]. *Dodson v. State*, 2006 OK CR 32 ¶¶ 17, 19-20, 150 P.3d 1054. *Baxter v. State*, 2010 OK CR 20, ¶¶ 9-12, 238 P.3d 934.

In the first of these, *Beeler v. State*, the Court of Criminal Appeals specifically rejected the good faith exception for Oklahoma cases:

> ¶15 Failing in its warrant and probable cause contentions, **the State argues that the officers were acting in good faith, and that we should approve an exception to the exclusionary rule to validate such conduct. We must decline to do so**.

Beeler v. State, 1984 OK CR 55, ¶15, 677 P.2d 653.

After a decade of deflecting "good faith" assertions by the State, the rejection of *Leon's* good faith exception was explicitly re-affirmed eight:

> ¶4 ... **This Court, however, has never adopted the United States v. Leon "good faith" exception to search warrants such as in this case and we see no reason to do so at this time.** We agree with appellant that the trial court erred by failing to sustain his motion to suppress after finding that the search warrant was improperly executed. Therefore, in a four-to-one (4-1) vote, we find that this case must be REVERSED and REMANDED WITH INSTRUCTIONS TO DISMISS.

Solis-Avila v. State, 1992 OK CR 27, 830 P.2d 191.

And, after another fourteen years:

> ¶17 … The State responds that "both federal and state courts in which anticipatory warrants are allowed have ruled that the Leon good faith exception is applicable." The State acknowledges that "one could not use good faith to rehabilitate an inherently flawed warrant.
>
> …
>
> ¶19 The purpose of the exclusionary rule is furthered by extending it to the facts of this case. **"Suppression of the evidence seized pursuant to a search warrant issued contrary to the rule of law is necessary to preserve the rule of law itself."** Ex parte Turner, 792 So.2d at 1151. ….
>
> ¶20 **We will not apply the good-faith exception to save the admission of evidence obtained pursuant to a search warrant which was not supported by probable cause.** ... The Legislature may amend the

> language of Section 1222 of Title 22 to allow issuance of search warrants based upon future anticipated events, **the application of the exclusionary rule to the facts of this case will ensure that police officers and magistrates and judges abide by the strictures of statutes relating to the issuance of search warrants.**

Dodson v. State, 2006 OK CR 32, §§ 17, 19-20, 150 P.3d 1054.

Not So Good Faith

Then, out of the blue in 2010, and with more of a whimper than a bang, a two Judge plurality of the Court of Criminal Appeals aided by a Justice of the Oklahoma Supreme Court cherry-picked a case involving the overly zealous collection on a civil judgment to publicly embrace the good faith doctrine once. Remarkably, the course-altering plurality neither acknowledged nor addressed the decades of contrary Oklahoma precedent cited above, preferring instead to surrender interpretation of the Oklahoma Bill of Rights to the United States Supreme Court.

This is how it happened.

Johnny Q. Sittingdown was a judgment debtor who owned a bar in Woods County. In February 2007, the Sheriff received a Writ of Execution naming both Mr. Sittingdown and his bar, directing the seizure of assets. Deputies were dispatched to recover any cash in the register or on Mr. Sittingdown's person. The writ they held read:

> NOW, THEREFORE, You are commanded that of the goods and chattels of the said John Sittingdown, an individual, you cause the money above specified to be made; and for want of goods and chattels you cause the same to be made by EXECUTING ON THE CASH REGISTER AT THE DEBTOR'S PLACE OF BUSINESS AS WELL AS ANY CASH ON THE PERSON OF MR. JOHN SITTINGDOWN. And make return of this Execution, with your certificate thereon, showing the manner you have executed the same, within sixty days from the date hereof.

Sittingdown, 2010 OK CR 22, ¶4. [EMPHASIS in the original]

When the Deputies confronted Johnny Sittingdown, he was instructed, "to take all of his money, everything out of his pockets." When he complied, "a small clear baggie containing a white crystal substance (methamphetamine) was mixed in with the money." The unfortunate Mr.

Sittingdown was promptly arrested. Further searches, one by consent, and another by warrant, yielded additional methamphetamine and cash.

Mr. Sittingdown faired considerably better on his motion to suppress the evidence – Judge Ray Linder found that the Deputies had exceeded their lawful authority when they insisted that "everything" be emptied from the debtor's pockets and that the balance of the evidence was fruit of the poisonous tree.[7] The State appealed.

The *Sittingdown* majority enunciated three reasons to reverse the Trial Court. First, though the Deputies had no search warrant *per se*, the civil writ of execution falls within an established exception to the general rule that warrantless seizures are presumptively unlawful:

> ¶13 Because a civil order or writ is court process, the resulting seizure's constitutionality is subject to the "ultimate standard" of "reasonableness." Soldal, 506 U.S. at 71, 113 S.Ct. at 549; quoting Camara, 387 U.S., at 539, 87 S.Ct., at 1736. **In Soldal the Supreme Court noted that where officers were acting pursuant to a court order, a showing of unreasonableness in the execution of the civil process would be a "laborious task indeed."** Soldal, 506 U.S. at 71, 113 S.Ct. at 549.

Sittingdown, 2010 OK CR 22, ¶12.

Second, this particular writ and its manner of execution were objectively reasonable:

> ¶14 The seizure in the present case was reasonable. The seizure was conducted solely pursuant to the civil writ of execution. The writ has not been shown to be unreasonable on its face. No challenge was made to the writ in the District Court. Furthermore, the officer's actions did not go outside the authority of the writ. The writ was executed as it was presented to the officer.

Sittingdown, 2010 OK CR 22, ¶14.

Third, the enforcement of civil judgments necessarily contemplates compulsion:

> ¶15 **The writ of execution authorized the officer to assume control and dominion over the contents of Appellee's pockets**. A writ of execution is a command to the officer, to whom it is directed, to collect the money specified in the writ from the goods and chattels of the debtor. ... **In making a valid levy, it is essential that the officer executing the order**

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[7] April M. Davis of Enid represented Mr. Sittingdown at trial and on appeal.

> **assumes control and dominion over the property.** See Fiegel v. First Nat'l Bank, 1923 OK 112, ¶ 16, 214 P. 181, 184.

Sittingdown, 2010 OK CR 22, ¶15.

Not satisfied with three rather routine grounds for approving the plain view seizure of the offending drugs, Judge Lumpkin summarily conformed Oklahoma law to the Supreme Court's embrace of "good faith" in *Leon*:

> ¶17 **In addition** to the fact that the actions of the officers were reasonable, they were also acting in "good faith" and their actions fall directly under the criteria outlined by the United States Supreme Court in United States v. Leon, 468 U.S. 897, 920-21, 104 S.Ct. 3405, 3419, 82 L.Ed.2d 677 (1984). **Since this Court has previously held in DeGraff v. State**, 1901 OK CR 82, 103 P. 538, 541; State v. Thomason, 1975 OK CR 148, ¶ 14, 538 P.2d 1080, 1086; and Long v. State, 1985 OK CR 119, ¶ 6. 706 P.2d 915, 916-17, **that the Federal Constitution and the Oklahoma Constitution are the same in the rights protected, we find Leon is applicable here.** ... The same rationale applies to a civil writ or order. **The fruits of a search and seizure pursuant to a civil writ will not be suppressed even if the writ is subsequently found invalid if the officer acted in "objectively reasonable reliance" upon the civil writ and abided by its terms.**

Sittingdown v. State, 2010 OK CR 22, ¶¶ 17, 240 P.3d 714.

This about face on *Leon* passed unnoticed until 2014's first published opinion, *State v. Marcum*, 2014 OK CR 1, ¶16, 319 P.3d 681. Angela Marie Marcum had been convicted on evidence obtained without a warrant from United States Cellular, her cell phone provider. Her motion to suppress had been denied by the trial court. She was convicted and appealed, claiming that her right against unreasonable search and seizure had been violated. The Court of Criminal Appeals readily rejected this claim, finding that she had no reasonable expectation of privacy in the third party records, and that no right of hers had been violated.

Having resolved the issue, the Court felt it necessary to add a bit of *dicta*:

> ¶16 Given our resolution of Proposition II, **Proposition III is moot.** However, we note that, in finding the search warrant invalid, the district court rejected the State's reliance on the good faith exception, stating that this Court had not adopted that exception under these circumstances. This is not correct. **This Court recently adopted the good faith exception. …** *Sittingdown v. State*, 2010 OK CR 22, ¶ 17, 240 P.3d 714, 718.

State v. Marcum, 2014 OK CR 1, ¶16.

A second nod in the direction of *Sittingdown* is found in *State v. Thomas*, 2014 OK CR 12, ___ P.3d ___. Kanton Demont Thomas had been convicted with evidence found in a warrantless search of his cell phone. Fortunately for Mr. Thomas, his case reached the Court of Criminal Appeals shortly after the U.S. Supreme Court's decision mandating that search warrants be obtained before the contents could be downloaded. *Riley v. California*, __ U.S. __, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014).

The State attempted to use a good faith argument to avoid *Riley*, but improvidently cited *Solis-Avila v. State*, 1992 OK CR 27, a case, *supra*, from the line of opinions that had specifically rejected the *Leon* doctrine in Oklahoma. Judge Smith noted the anomaly, and provided the better alternative:

> ¶11 The State also argues … the officers relied on the warrant in good faith. The State inexplicably appears to argue that in cases dating back to 1992, this Court adopted the good faith argument (in fact, the State relies on the case in which the Court declined to adopt that doctrine, Solis-Avila v. State, 1992 OK CR 27, ¶ 4, 830 P.2d 191, 192). **This Court adopted the good-faith doctrine in Sittingdown v. State, 2010 OK CR 22, ¶ 17, 240 P.3d 714, 718.** However, the State offers no compelling reason to apply that doctrine here.

State v. Thomas, 2014 OK CR 12, 334 P.3d 941.[8]

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[8] Judge Lumpkin has consistently advocated the unification of Article 2, Section 30 and the 4th Amendment. His concurring opinion in *Thomas* makes a point of rebooting his long-slumbering *Sittingdown* victory for the "good faith" exception:

> ¶6 **The extent of the good-faith exception is well defined.** "The exclusionary rule is not applied when a law enforcement officer has conducted a search in **'objectively reasonable reliance' upon a search warrant** issued by a magistrate and has abided by the terms of the warrant even if the warrant is subsequently determined to be invalid." **State v. Sittingdown**, 2010 OK CR 22, ¶ 17, 240 P.3d 714, 718, citing Leon, 468 U.S. at 922, 104 S.Ct. at 3420. The good-faith exception turns on objective reasonableness. Leon, 468 U.S. at 923, 104 S.Ct. at 3421.

Thomas, Judge Lumpkin concurring in the result, at ¶6.

Given the line of cases "in which the Court declined to adopt that doctrine," what are we to make of *Sittingdown*? Not only is *Sittingdown* a departure for settled law, it concerns the abusive execution of civil process for the enforcement of a judgment – hardly the wheelhouse of the Court of Criminal Appeals. Most significantly, *Sittingdown* is a 3-2 decision with a cobbled . The author Judge Lumpkin, who reprises his dissents in *Solis-Aliva* and *Dodson*. Judge A. Johnson concurs. Judge C. Johnson concurs *only in the result*. Judge Lewis dissents. The deciding third vote in this *accelerated docket case* is cast by a member of the Oklahoma Supreme Court, Justice Taylor, sitting by designation.

Sittingdown neither references, nor refutes the dozen prior cases reaching the opposite result. Taken together, *Sittingdown*, *Marcum* and *Terry* neither overrule, nor refute *Beeler*, *Solis-Aliva* and *Dodson*. It is an opportunity seized by Judge Lumpkin to bypass *stare decisis*. *Sittingdown* is the outlier in Oklahoma jurisprudence, and given its nature, should not become a foundation for a new direction in Oklahoma.

Fighting Back

Unless you have no use for the exclusionary rule you're going to have to carefully plan your refutation of purported good faith exception. These approaches may prove helpful:

1. The fallacy of "deterrence" as the be all and end all of the exclusionary rule.

The exclusionary rule's core historical justification is judicial respect for the fundamental principles of the Bill of Rights:

> … **The efforts of the courts and their officials to bring the guilty to punishment,** praiseworthy as they are, **are not to be aided by the sacrifice of those great principles established be years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.**

Weeks, at 393.

In 1923, Oklahoma's Court of Criminal Appeals explicitly adopted *Weeks*' integrity-of-the-courts rationale when formally adopting the exclusionary rule as necessary to enforce the core values of the Oklahoma Bill of Rights:

> It was not the purpose of these constitutional provisions to build a wall behind which criminals could hide and escape punishment. Some of them do and will escape, but **better so than to disregard these safe-guards designed to protect the innocent from being harrassed and annoyed, and sometimes abused, by trespassing officers**.

Gore v. State, 1923 OK CR 268, 24 Okl.Cr. 394, 412, 218 P. 545. Followed later that same year by the explicit adoption of the exclusionary rule *in aide of the Oklahoma Constitution*:

> In Weeks v. U.S., 232 U.S. 383, … it was said by Mr. Justice Day:
>
> > "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, house, papers and effects against all unreasonable searches and seizures under the guise of law. **This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our federal system with the enforcement of the laws**. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to **unwarranted practices destructive of rights secured by the federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with support in the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights**."
>
> In Foreman v. State, 8 Okla. Cr. 480, 128 P. 1101, we said:
>
> > "The Bill of Rights is something more than a mere compilation of glittering generalities. ... **The guaranty in article 2, § 30 (38 Williams'), that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated, should be respected by all peace officers and law-abiding citizens.** …
>
> …
>
> **And under the Bill of Rights it is held that the admission of evidence procured by an illegal search warrant was reversible error. …**
>
> **The search and seizure detailed in the record was an unauthorized trespass and an invasion of the constitutional rights of this defendant. It follows that all evidence with reference to liquor secured thereby should have been excluded on defendant's objections.**

Russell v. State, 1923 OK CR 357, 25 Okl.Cr. 423, 425-427, 221 P. 113.

The Oklahoma Supreme Court is no less protective of Oklahoma's more-expansive interpretation of Article 2, Section 30.

> ¶18 The citizens of Oklahoma possess a double-barrelled source of protection which safeguards their homes from unauthorized and unwarranted intrusions - the Fourth Amendment and art. 2, §30. …
>
> ¶19 **The Okla. Const. art. 2, §30 constitutes a bona fide, separate, adequate, and independent grounds** upon which we rest our finding that the illegal search prohibition pertains equally to civil and criminal proceedings. …
>
> ¶20 **Courts organized and established for the purpose of enforcing the laws of the state cannot permit an order of termination to stand, after finding a violation of the law and a disregard for the constitutional protection guaranteed to every citizen of this state.** ... **If the time has come for a more restrictive exclusionary rule, a constitutional amendment should serve as the people's vehicle for change.**
>
> ¶21 This decision is not founded on a desire to protect a possible miscreant, but rather **to insure that all citizens are enfolded within the embrace of protections which have remained inviolate since the framers of the Declaration of Independence sought relief from harrassment by swarms of the King's officers and since the Oklahoma Constitutional Convention recognized the self-evident truths of the time**. …

Turner v. City of Lawton, 1986 OK 51, ¶¶ 19-21, 733 P.2d 375, 381-382.[9] [footnotes omitted]

The Court of Criminal Appeals cited and relied on *Turner* and "over seventy years" of Oklahoma law for the proposition that the exclusionary rule is rooted in the Oklahoma Bill of Rights:

> ¶6 **This Court adopted the exclusionary rule several decades before it was held by the United States Supreme Court to be enforceable against the states**. See Gore v. State, 24 Okl.Cr. 394, 218 P. 545, 547, 550 (1923). In Simmons v. State, 277 P.2d 196, 198 (Okl.Cr. 1954), we

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[9] The issue before the Court was whether the exclusionary rule regarding illegally seized evidence applied to an administrative hearing for termination of a city employee. Four Justices ruled that it does apply; one concurred in the result; and three dissented, noting that the administrative hearing had been held before the evidence had been suppressed in the criminal case.

> further held that the exclusion of evidence acquired through an unconstitutional search or seizure was not merely a rule of procedure, but a fundamental right under art. II, § 30 of the Oklahoma Constitution. **We will continue, when deemed appropriate, to interpret our state constitution as providing more expansive individual liberties than those conferred by the United States Constitution.**

Richardson v. State, 1992 OK CR 76, 841 P.2d 603.

> ¶35 **An illegal arrest renders inadmissible any evidence obtained pursuant to the arrest.** See Hunt v. State, 601 P.2d 464, 466 (Okl.Cr. 1979), cert. den'd., 446 U.S. 969, 100 S.Ct. 2951, 64 L.Ed.2d 830 (1980). **This so-called "exclusionary rule," prohibiting illegally-obtained evidence from being used against an accused, is not just a rule of evidence or procedure in Oklahoma. It is a matter of state constitutional magnitude, and has been for over seventy years.** See Okla. Const. art II, § 30; **Turner v. City of Lawton**, 733 P.2d 375, 377-78 (Okl. 1986), cert. den'd., 483 U.S. 1007, 107 S.Ct. 3232, 97 L.Ed.2d 738 (1987); Michaud v. State, 505 P.2d 1399, 1402-03 (Okl.Cr. 1973); Gore v. State, 24 Okla. Crim. 394, 218 P. 545, 549 (1923); Hess v. State, 84 Okla. 73, 202 P. 310, 314-16 (1921).

Tomlin v. State, 1994 OK CR 14, ¶35, 869 P.2d 334.[10]

And so it continued in the Twenty First Century, with :

> … the application of the exclusionary rule to the facts of this case will ensure that **police officers and magistrates and judges** abide by the strictures of statutes relating to the issuance of search warrants.

Even if the federal courts decide that the 4th Amendment is satisfied by a myopic focus on officer deterrence, Oklahoma courts remain free to demand adherence to Article 2, Section 30, by all branches of the state government, and most certainly by "magistrates and judges."[11]

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[10] *Tomlin* was decided by three Judges assigned to emergency Appellate Panel 8, Judges Ray D. Linder, Michael R. Dayton and Gerald Riffe. For what it's worth, Judge Linder was the trial judge reversed in *Sittingdown*. Judge Linder is one of the finest Judges I've known over my four decades of practice.

[11] Although it concerns violation of the statutes governing searches and seizures rather than Article 2, Section 30, the exclusionary rule is a restraint imposed on the bench as well as the police:

> ¶20 … the application of the exclusionary rule to the facts of this case will ensure that **police officers and magistrates and judges** abide by the strictures of statutes relating to the issuance of search warrants.

2. Don't take *Sittingdown* sitting down.

In this century, when you take the side of state's rights and Oklahoma values, you are on the side of the angels. Don't allow the State to blithely claim that *Sittingdown* is settled law. The operative language is *dicta* by its own terms. It relies on authority from 1909, but ignores contravening cases on point. It manages a majority only by inviting the participation of a Justice of the Oklahoma Supreme Court. It was a convenient vehicle for a long sought goal, rather than the careful analysis of the import of *stare decisis*. And, neither of the cases pledging adherence to the newly "adopted" doctrine seem aware of its shortcomings. Nor do they cite any Oklahoma authority for adoption of *Leon* other than *Sittingdown*.

Sittingdown, with its unsound *dicta* and cobbled majority, is no more of an obstacle to meaningful enforcement of the exclusionary rule in Oklahoma than *Wolf v. Colorado* was for the Court that crafted *Mapp*:

> It, therefore, plainly appears that the factual considerations supporting the failure of the Wolf Court to include the Weeks exclusionary rule when it recognized the enforceability of the right to privacy against the States in 1949, while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling.

Mapp v. Ohio, 367 U.S. 643, at 653.

3. When the law is against you, win on the facts.

Let's assume for the purposes of argument that the Judge in your particular case rules that *Leon* and *Sittingdown* are the law in Oklahoma. What are the sorts of arguments and *evidence* that can save your motion to suppress? That's right, evidence – the stuff that comes from witnesses and exhibits.

Recent experience in Tulsa County opens a welcome door in light of *Groh v. Ramirez*:

> Moreover, **because petitioner himself prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate's assurance** that the warrant contained an adequate description of the things to be seized and was therefore valid.

Dodson v. State, 2006 OK CR 32 ¶20, 150 P.3d 1054.

Groh v. Ramirez, 540 U.S. 551, 561, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004).[12] Upon information and belief, no Tulsa County magistrate has been the *author* of a Tulsa County Search Warrant in forever. Just this past month, the State stipulated that a challenged search warrant had been prepared and printed by the police and then presented as a *fait accompli* to the waiting issuer.[13]

You are entitled to subpoena and question those applying for, issuing, and executing the warrant. Ignorance of the law is not good faith. And, just how ignorant are they? Ask them anything that will inure to your benefit by establishing intentional or reckless disregard of your client's right against unreasonable searches and seizures. And most certainly, ask them who actually wrote that defective warrant. We're interested in establishing *in the record* wholesale disregard for the law. And that ain't good faith. [14]

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[12] *Groh* is a civil case discussing qualified good-faith immunity in relation to liability for the execution of an overly broad warrant. The overly broad and invalid warrant was not saved by the executing officers' self-imposed restraint during its execution.

[13] Were we to now lose this case, and were the Court of Criminal Appeals to affirm the denial of our motion to suppress, having that stipulation in the record may neuter the AEDPA and allow *habeas* review in federal court – the state court conviction will have transgressed United States Supreme Court precedent directly on point. If you can't get a stipulation, call the affiant as a witness, or better, the magistrate.

[14] Additional low hanging fruit in Tulsa is the complete failure of the police to follow the search and seizure statutes regarding the filing of returns of service for warrants. 22 O.S. §1233. Returns aren't just a silly fool's errand; the filing of the return triggers a series of statutory duties for the magistrate including the duty, if requested, to hold an immediate hearing on the legality of the search. 22 O.S. §§ 1234-1238. In addition, the Tulsa County District Attorney routinely ignores the statute requiring the DA to obtain an order transferring all affidavits, warrants and returns into the relevant criminal case file. 22 O.S. §1224.2. Who cares if the case law allows a return to be filed, "any time before trial?"

Postscript: Interested volunteers are invited to help improve this memorandum in anticipation of its future use. Cases to the contrary, corrected citations, suggested citations, and textual improvements of all types are solicited. Please send both criticism and suggestions to john@jdechols.com or defender@mac.com, and I'll reflect on your views and credit your contributions.

Note: Richard O'Carroll suggested the addition of *Turner v. City of Lawton* to the line of cases upholding Oklahoma's right and election to provide greater protection against unlawful searches and seizures than the protections of the Fourth Amendment as interpreted by the United States Supreme Court.

Updates, if any:
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August 15, 2016
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