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THE JURISDICTIONAL BOUNDARY BETWEEN THE OKLAHOMA SUPREME COURT AND THE COURT OF CRIMINAL APPEALS: BLURRED LINES

GREG EDDINGTON*

Oklahoma is one of only two states—the other being Texas—with two courts of last resort: one with civil appellate jurisdiction and the other criminal. The original Oklahoma Constitution provided an option for the legislature to create a criminal court of appeals,¹ and the legislature did so the next year.² After an initial period sorting out the types of cases that fell on each side of the boundary, the two courts existed relatively free from jurisdictional conflict throughout the first hundred years of their coexistence. In fact, in 1978, the Oklahoma Supreme Court wrote that

[i]t speaks well of our bifurcated civil-criminal appellate system that there has not been a jurisdictional conflict between this Court and the Court of Criminal Appeals for more than fifty years. This scarcity of conflict is a testament to both the clarity of jurisdictional boundaries between the two Courts and the constant willingness of the members of each Court to observe and comply with their jurisdictional restrictions.³

In the last five years, this spirit of comity appears to have deteriorated. The supreme court has addressed the jurisdictional boundary several times in reported opinions, usually followed by a rebuttal from the court of criminal appeals. The most well-known case, *Lockett v. Evans*,⁴ nearly provoked a constitutional crisis in 2014 when the supreme court issued a stay of a prisoner's execution,⁵ and the governor issued an executive order declining to "give effect" to the stay.⁶ A jurisdictional conflict arose again in 2016,⁷ with one court of criminal appeals judge suggesting that the

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1. OKLA. CONST. art. 7, § 2 (amended 1967).

2. 1907-1908 Okla. Sess. Laws 291.

3. *Carder v. Court of Criminal Appeals*, 1978 OK 130, ¶ 1, 595 P.2d 416, 417-18 (footnote omitted).

4. (*Lockett IV*), 2014 OK 34, 330 P.3d 488 (per curiam).

5. *Lockett v. Evans (Lockett III)*, 2014 OK 33, 356 P.3d 58 (per curiam) (mem.).

6. 31 Okla. Reg. 618 (Apr. 22, 2014).

7. *Meyer v. Smith*, 2015 OK 86, 366 P.3d 311; *Meyer v. Engle*, 2016 OK CR 1, 369 P.3d 37.

legislature might need to intervene and “reaffirm this Court’s exclusive appellate jurisdiction in criminal matters.”⁸

Much has been written in critique of subject-matter judicial specialization.⁹ This article addresses only one of the common criticisms as it applies to the Oklahoma system: boundary problems. This article reviews the history of the jurisdictional boundary drawing in Oklahoma, with particular attention given to the principles advanced by the Oklahoma Supreme Court to support its occasional incursions into what appear at first blush to have been criminal cases. The article then analyzes the recent conflicts, particularly the one in *Lockett*, examining the positions of both courts in light of that history. Finally, the article concludes with comparisons to analogous issues in Texas and recommendations for resolution of the current state of jurisdictional bickering.

I. The Creation of the Oklahoma Court of Criminal Appeals

The Oklahoma Constitution was adopted in 1907. It created a supreme court, district courts, and other inferior courts such as county courts and municipal courts.¹⁰ Initially, the appellate jurisdiction of the supreme court extended to all civil and criminal cases.¹¹ But the original constitution granted the supreme court criminal appellate jurisdiction only “until a Criminal Court of Appeals with exclusive appellate jurisdiction in criminal cases shall be established by law.”¹² The constitution also provided that the supreme court’s original jurisdiction extended “to a general superintending control over all inferior courts and all commissions and boards created by law.”¹³ Finally, the supreme court was authorized to issue writs.¹⁴

The history of the constitution does not indicate why its framers chose to include the option of bifurcated appellate jurisdiction. Presumably, they were undecided about whether to follow the Texas model—two coequal

8. *Engle*, ¶ 3, 369 P.3d at 42 (Lewis, J., specially concurring).

9. See generally Paul R. Gugliuzza, *Rethinking Federal Jurisdiction*, 100 GEORGETOWN L.J. 1437 (2012); Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847 (2012); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761 (1983).

10. OKLA. CONST. art. 7, § 1 (amended 1967).

11. *Id.* art. 7, § 2.

12. *Id.*

13. *Id.*

14. *Id.*

highest courts—or the model of the other forty-five states that had one supreme court with both civil and criminal jurisdiction. In any event, the legislature quickly created a criminal court of appeals in 1908, with “exclusive appellate jurisdiction . . . in all criminal cases appealed from” other courts.¹⁵ The court also had the power to issue writs of habeas corpus and “writs as may be necessary to exercise its jurisdiction.”¹⁶ In 1959, the court was renamed the Oklahoma Court of Criminal Appeals (COCA) and still bears that name.¹⁷

The available legislative history of the enactment consists solely of a message from the governor urging passage.¹⁸ The message noted that the supreme court was “completely snowed under” and that “the speedy trial and termination of criminal cases and the establishing of precedents by a court of last resort for the guidance of local courts . . . is not only a desirable thing but the cheapest way to conduct the criminal prosecutions of the State.”¹⁹ The governor calculated that the cost of keeping two or three prisoners per county awaiting trial for the long period then existing would amount to more than the cost of a court of criminal appeals.²⁰

The statute originally provided that COCA had exclusive appellate jurisdiction over criminal cases, unless the construction of the Oklahoma Constitution, the Constitution of the United States, or an act of Congress was in question, in which the case the court was to certify the question to the Oklahoma Supreme Court and await its decision.²¹ The statute was amended in 1909 to eliminate that limitation, leaving COCA with exclusive appellate jurisdiction in criminal cases.²²

In 1967, the Oklahoma Constitution was amended. The amended constitution now vests jurisdiction in COCA, recognizing its exclusive appellate jurisdiction in criminal cases, but with a proviso that the jurisdiction of the court is subject to the power of the legislature to alter.²³ The amendment also gave COCA the power to issue writs in “criminal

15. 20 OKLA. STAT. § 40 (2011).

16. *Id.* § 41.

17. *Id.* § 31.1.

18. *Message from the Governor*, H. Journal, 1st Leg. 350, 357-58 (Okla., Mar. 30, 1908).

19. *Id.* at 357.

20. *Id.*

21. 1907-1908 Okla. Sess. Laws 291.

22. 1909 Okla. Sess. Laws 171-72.

23. OKLA. CONST. art. 7, § 1 (amended 1967).

matters.”²⁴ Most importantly, the amended constitution explicitly provides that in the event of conflict between the two courts regarding jurisdiction, “the Supreme Court shall determine which court has jurisdiction and such determination shall be final.”²⁵ The amended version made no change to the supreme court’s general superintending power or power to issue writs.

The Oklahoma Supreme Court and courts of other states whose constitutions contain similar language consider that language as creating three types of jurisdiction: appellate, superintending control, and writ.²⁶ Appellate jurisdiction is used to decide appeals from final orders or certain interlocutory orders.²⁷ Superintending-control jurisdiction is used to control the course of litigation in inferior courts,²⁸ and as discussed below, has been used more broadly. Writ jurisdiction may be used to issue common-law writs in multiple circumstances, including circumstances outside superintending control of other courts,²⁹ but Oklahoma and other states have noted that the two types of jurisdiction, “while separate and distinct, are closely related,” and “[i]t is not always easy or necessary to note the line of demarcation between the two.”³⁰ In practice, the difference between the two types of jurisdiction is that superintending-control jurisdiction is broader: although it is usually exercised via writ, superintending-control jurisdiction allows for remedies other than writs, for example, declaratory relief.³¹

24. *Id.* art. 7, § 4.

25. *Id.*

26. *E.g.*, *State ex rel. Fourth Nat’l Bank of Phila. v. Johnson*, 79 N.W. 1081, 1086 (Wis. 1899). The Oklahoma Supreme Court actually considers itself to have five types of jurisdiction, adding jurisdiction to determine whether it or COCA has jurisdiction in a particular case, and “further jurisdiction [as may be] conferred by statute.” *Cline v. Okla. Coal. for Reprod. Justice*, 2013 OK 93, ¶ 6, 313 P.3d 253, 256 (citing OKLA. CONST. art. 7, § 4).

27. 12 OKLA. STAT. § 952 (2011).

28. *Fourth Nat’l Bank*, 79 N.W. at 1087.

29. *See Ethics Comm’n v. Cullison*, 1993 OK 37, ¶ 8, 850 P.2d 1069, 1085 (“Writs . . . are mere *remedial devices* for redressing a variety of governmental usurpation and private abuse of power . . .”) (Opala, J., concurring in result).

30. *Bd. of Comm’rs of Harmon Cty. v. Keen*, 1994 OK 243, ¶ 5, 153 P.2d 483, 485 (invoking superintending control to issue writ prohibiting trial judge from proceeding with case); *see, e.g.*, *Petition of Heil*, 284 N.W. 42, 46 (Wis. 1938).

31. *See, e.g.*, *Cullison*, ¶ 37, 850 P.2d at 1080 (issuing declaratory relief regarding the constitutionality of a statute). The distinction between writ jurisdiction and superintending-control jurisdiction is not particularly helpful. For example, in *Dutton v. City of Midwest City*, 2015 OK 51, ¶¶ 22-26, 353 P.3d 532, 542-45, the court attempted to explain the

Regarding superintending control (the 1967 amendment changed the term to “superintendent”),³² the framers of the Oklahoma Constitution presumably adopted this language from that of numerous other state constitutions with similar provisions, which those states had adopted from the model of King’s Bench in England.³³ Blackstone had characterized this power as “high and transcendent,” and as “keep[ing] all inferior jurisdictions within the bounds of their authority.”³⁴ Other states had considered the power “as broad as the exigencies of the case demand.”³⁵ The Oklahoma Constitution grants the supreme court this power over “all inferior courts” as well as agencies, boards, and commissions.³⁶

In older, pre-constitutional amendment opinions, the supreme court specifically classified COCA as an “inferior” court subject to superintending control.³⁷ The supreme court based this analysis on COCA’s absence from the original constitution, along with the constitution’s provision that other courts “inferior to the Supreme Court . . . may be established by law.”³⁸ Because COCA’s existence depended on its being established by the legislature, the supreme court found it clearly within the definition of an “inferior” court, subject to superintending control.³⁹ As

distinction, giving examples of both types. One case, *State v. Lynch*, 1990 OK 82, 796 P.2d 1150, was listed as an example for each type of jurisdiction, indicating that the two are not distinct types of jurisdiction at all. *Cf. Cullison*, ¶¶ 2-3, 850 P.2d at 1081, 1083 (Opala, J. concurring) (listing three categories: “(1) appellate jurisdiction, (2) original jurisdiction and (3) superintending control,” and reasoning that “[p]rereogative writs do not translate into jurisdiction; they rather afford examples of personal commands that may be used in the exercise of this court’s cognizance.” (emphasis omitted))

32. See OKLA. CONST. art. 7, § 4.

33. See JAMES E. PFANDER, ONE SUPREME COURT 28 (2009); see also *State ex rel. Freeling v. Kight*, 1915 OK 772, ¶¶ 3-11, 152 P. 362, 363-64; *Fourth Nat’l Bank*, 79 N.W. at 1087.

34. 3 WILLIAM BLACKSTONE, COMMENTARIES at *42; see also 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 212 (A. L. Goodhart & H. G. Hanbury eds., 7th ed. 1971) (describing King’s Bench jurisdiction as “general and universal” and including “jurisdiction ‘to examine and correct all and all manner of errors in fact and in law of all the judges and justices of the realm in their judgments, process, and proceedings’” (quoting EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 71 (1644))).

35. *Kight*, ¶ 15, 152 P. at 364 (citing *State ex rel. Bayha v. Kan. City Court of Appeals*, 10 S.W. 855 (Mo. 1889); *State ex rel. Whitesite v. Dist. Court of First Judicial Dist.*, 63 P. 395 (Mont. 1900)).

36. OKLA. CONST. art. 7, § 4.

37. *Dancy v. Owens*, 1927 OK 203, ¶ 10, 258 P. 879, 881.

38. *Id.* ¶ 9, 258 P. at 881 (quoting OKLA. CONST. art. 7, § 1 (amended 1967)).

39. *Id.* ¶ 14, 258 P. at 882.

noted above, the 1967 amendment gave COCA constitutional recognition and added the provision for the supreme court to resolve jurisdictional conflicts. But the “superintending control” language was not changed in any significant way, and the sparse history of the amendment indicates no intent to clarify or change the relationship of the two courts, except for the conflict-resolving provision.⁴⁰ Accordingly, the supreme court continued to cite with approval its pre-1967 analysis of the relationship.⁴¹

Although the supreme court’s appellate jurisdiction is explicitly limited to civil cases, the constitution does not explicitly limit superintending-control jurisdiction to civil cases. Taken in isolation, therefore, the supreme court would seem to be able to exercise its broad, King’s Bench-like control over COCA as a court inferior to the supreme court. It is easy to see, though, that such a view would essentially eliminate the exclusivity of COCA’s appellate jurisdiction, if COCA’s decisions were undercut by writs from the supreme court. Thus, the supreme court has recognized the need to “construe[] in harmony” its superintending-control jurisdiction with COCA’s exclusive jurisdiction in criminal cases.⁴² And in practice, as this article discusses, the supreme court until 2015 exercised superintending-control jurisdiction over COCA only when necessary to resolve jurisdictional disputes—a power that the supreme court is now explicitly granted in the constitution.⁴³ So the primary issue in boundary disputes—regardless of whether appellate jurisdiction or superintending-control jurisdiction was invoked—has been whether the case is civil or criminal.

II. The Development of the Jurisdictional Boundary

Initially, after COCA came into existence, a period of defining and testing the jurisdictional boundaries occurred. Litigants were sometimes

40. See 1967 Okla. Sess. Laws 698.

41. *Carder v. Court of Criminal Appeals*, 1978 OK 130, ¶¶ 10-24, 595 P.2d 416, 419-20. The term “inferior courts” has been used in different ways. It is sometimes used to refer to courts of limited jurisdiction. See, e.g., *Kempe’s Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173, 185 (1809). In state constitutions, the term usually applies to rank. See, e.g., *State ex rel. Harvey v. Medler*, 142 P. 376, 378 (N.M. 1914) (“While it is true that the term ‘inferior court’ is usually applied to courts of limited or special jurisdiction, yet it is used in different senses, and frequently refers to relative rank and authority, and not to intrinsic quality. . . . It was in this sense, in our opinion, that the term inferior courts is used in our Constitution . . .”). The use of the phrase “inferior to the Supreme Court” in Oklahoma’s constitution clearly indicates the second meaning.

42. *Dutton v. City of Midwest City*, 2015 OK 51, ¶ 33, 353 P.3d 532, 549.

43. See *infra* Section II.C.3.

uncertain about which court had jurisdiction. More often, litigants who were unsatisfied with the result in one court would seek a second opinion via habeas petitions, petitions for writs of prohibition, or writs of mandamus. Through this process, the courts began to delineate the boundary, although not entirely consistently. In fact, the supreme court has commented that the “dichotomous division of Oklahoma appeals into ‘civil’ and ‘criminal’ has never been perfectly airtight. Although case law expressions might reject the concept of ‘shared’ power over any class of appeals by clinging to ‘undivided’ and ‘exclusive’ jurisdiction in each class, the marketplace reality contradicts such notion.”⁴⁴ Some of the history must be reviewed to understand where the boundary presently appears to exist and the policies and reasoning behind its placement. Further, some of these early cases occasionally find their way into modern opinions, so it is important to understand their origins.

A. 1908-1927: A Period of Comity Concluding with a Jurisdictional Battle

The early years were marked by a great deal of deference by both courts. Most issues arose via requests for writs, and usually the courts could look at the underlying case and decide whether the particular request was considered civil or criminal based on which court would have had jurisdiction over an appeal. For example, in *Ex parte Fowler*, one of the first COCA cases to address the jurisdictional boundary, the petitioner had been jailed for contempt in a civil case.⁴⁵ COCA, apparently *sua sponte*, held that it had no jurisdiction.⁴⁶ Because it would have had no jurisdiction over an appeal of the underlying civil action, the court reasoned that it also lacked jurisdiction over a habeas petition arising from the same action.⁴⁷ The court modestly announced that it had “no desire to intrude [its] views upon matters wholly within the authority of the Supreme Court.”⁴⁸

Similarly, the supreme court deferred to COCA in a petition for writ of prohibition alleging a double jeopardy violation.⁴⁹ After COCA had denied a habeas petition based on the double jeopardy claim, the petitioner sought relief from the supreme court. The court noted that COCA had the power to

44. *Hale v. Bd. of Cty. Comm’rs*, 1979 OK 158, ¶ 3 n.12, 603 P.2d 761, 763 (citations omitted).

45. 105 P. 180 (Okla. Crim. App. 1909).

46. *Id.*

47. *Id.* at 182.

48. *Id.*

49. *Jeter v. Dist. Court of Tulsa Cty.*, 1922 OK 140, 206 P. 831.

issue a writ of mandamus in a criminal case, and that mandamus is “in the nature of appellate jurisdiction,” and thus held that it had no jurisdiction.⁵⁰ The court reasoned that the petition was an attempt to receive an advance determination of an issue that could be decided via appeal to COCA.⁵¹ The court also commented favorably that COCA’s declination of jurisdiction over civil contempt actions was support for the “sound logic” of its own restraint.⁵²

This deference extended to issues decided by COCA that arguably could have fallen under the supreme court’s superintending jurisdiction over inferior courts other than COCA. For example, in *Herndon v. Hammond*, the court considered whether municipal courts had jurisdiction over liquor ordinance violations.⁵³ The defendant sought a writ of prohibition from the supreme court, but COCA had already decided the issue in another case.⁵⁴ The supreme court reasoned that because an appeal in the case would go to COCA and the subject matter of the case was exclusively criminal, the court “fe[lt] constrained to follow” COCA’s holding.⁵⁵ Similarly, the supreme court deferred to COCA’s determination of jurisdiction between a county court and district court in a misdemeanor nepotism case, despite inconsistency with pre-COCA supreme court cases.⁵⁶ The supreme court held that it would follow COCA’s decision regarding the lower courts’ jurisdiction over a criminal matter “since the enforcement of [criminal] statutes must be in accordance with such construction.”⁵⁷

Other issues of statutory construction were not as clearly civil or criminal, and in *Flood v. State ex rel. Caldwell*,⁵⁸ the supreme court announced an important principle of comity for the construction of those “mixed” statutes. The issue was the constitutionality of one section of the Enforcing Act, Oklahoma’s liquor prohibition statute.⁵⁹ The section

50. *Id.* ¶ 9, 206 P. at 834 (citing *Ex parte Crane*, 30 U.S. (5 Pet.) 190 (1831)).

51. *Id.* ¶ 11, 206 P. at 834.

52. *Id.*

53. 1911 OK 159, 115 P. 775.

54. *Ex parte Simmons*, 1911 OK CR 14, 112 P. 951, *overruled in part by Ex parte Johnson*, 1917 OK CR 3, 161 P. 1097.

55. *Herndon*, ¶ 4, 115 P. at 776.

56. *State ex rel. Ikard v. Russell*, 1912 OK 425, 124 P. 1092.

57. *Id.* ¶ 1, 124 P. at 1093; *see also Ex parte Buchanan*, 1925 OK 676, 240 P. 699 (same regarding constitutionality of municipal criminal court); *Ex parte Anderson*, 1912 OK 437, 124 P. 980 (same regarding constitutionality of county court jurisdiction).

58. 1911 OK 27, 113 P. 914.

59. *Id.* ¶ 1, 113 P. at 914.

empowered the governor to appoint counsel to enforce the act, in part by bringing actions to recover monetary penalties.⁶⁰ In a criminal case, COCA had already held that the appointment provision was constitutional.⁶¹ In a one-paragraph opinion, the supreme court announced that it would follow COCA's conclusion because even though the statute in question—the appointment provision—was “not a penal statute . . . it has to do almost solely with the enforcement of such statutes.”⁶² Similarly, in *State ex rel. Perkins v. Sneed*, the supreme court followed COCA's decision regarding the constitutionality of an act with civil and criminal provisions creating a real estate commission.⁶³

The supreme court first carved out a civil issue from a criminal case in *Dunn v. State*.⁶⁴ The issue was the forfeiture of an appearance bond.⁶⁵ After the defendant was late for his trial for the crime of perjury, the trial judge continued the trial but ordered the bond forfeited.⁶⁶ The defendant moved to vacate the forfeiture and appealed the denial to the supreme court. The court decided that it had jurisdiction, reasoning that although COCA had exclusive jurisdiction in all criminal cases appealed from lower courts, “[t]he instant case . . . is not a criminal case. The *judgment* appealed from was not an adjudication of guilt, but was an adjudication that the principal had breached the condition of his bond, i.e., incurred a civil liability, and that he and his sureties were liable to the state.”⁶⁷ The court reasoned that the bond forfeiture was “an independent proceeding of a civil nature.”⁶⁸

The court's decision in *Dunn* was questionable, both as a matter of statutory construction, as well as a matter of policy. Both the constitution and the statute creating COCA provide exclusive jurisdiction in criminal cases.⁶⁹ The perjury case was indisputably criminal. Focusing on the order being appealed rather than on the nature of the case served no purpose other than to blur the boundary between civil and criminal cases. Particularly considering that the purpose of the creation of COCA was to relieve the

60. 1907-1908 Okla. Sess. Laws 612.

61. *Childs v. State*, 1910 OK CR 230, 113 P. 545.

62. *Flood*, ¶ 1, 113 P. at 914 (emphasis added).

63. 1930 OK 248, 287 P. 1021.

64. 1917 OK 269, 166 P. 193.

65. *Id.* ¶ 0, 166 P. at 193.

66. *Id.* ¶ 1, 166 P. at 193.

67. *Id.* ¶ 4, 166 P. at 194 (emphasis added).

68. *Id.* ¶ 4, 166 P. at 195 (citing *United States v. Dunne*, 173 F. 254, 257 (9th Cir. 1909)).

69. OKLA. CONST. art. 7, § 4; 20 OKLA. STAT. § 40 (2011).

supreme court of some its caseload, and considering that decisions regarding forfeiture of appearance bonds are fairly common case-management decisions, the court's decision to assume jurisdiction over this appeal seems unwise. Both COCA and the supreme court, however, have continued to follow this decision in forfeiture cases.⁷⁰

The first outright split between the courts involved a trial judge's disqualification in a criminal case. In *State v. Brown*, COCA held that it had exclusive jurisdiction to decide the issue in a mandamus action.⁷¹ The State had sought to disqualify a trial court judge because of his "bias and prejudice in behalf of" a defendant charged with murder.⁷² The court noted its constitutional and statutory mandate and denied the writ on the merits.⁷³ Regarding its jurisdiction, the court strongly stated its claim and asserted a broad definition of exclusive jurisdiction:

Exclusive jurisdiction cannot be divided, but must be confined solely and entirely to the court upon which it is conferred. Exclusive appellate jurisdiction of criminal cases means that this court alone has the power to review and correct any and all errors committed in criminal cases by the trial court. If any other court shares such power with this court, our jurisdiction would not be exclusive, and it would necessarily result in conflicts and confusion, and would thereby destroy the unified and harmonious enforcement of criminal law in Oklahoma.⁷⁴

Ten years later, the supreme court decided the same jurisdictional issue with a different result, basing its decision on the superintending-control jurisdiction given in the constitution. In *Robertson v. Bozarth*, a defendant charged with accepting a bribe filed a mandamus action in the supreme court, seeking the disqualification of the trial judge.⁷⁵ The court determined that it had jurisdiction, basing that conclusion on some spurious reasoning.⁷⁶ The court quoted the constitution, noting that its appellate

70. See, e.g., *Machell v. State*, 1970 OK 207, 481 P.2d 148; *Hargrove v. State ex rel. Dennis*, 1964 OK CR 105, 396 P.2d 675.

71. 8 Okla. Crim. 40, 126 P. 245 (Okla. Crim. App. 1912).

72. *Id.* at 42, 126 P. at 246.

73. *Id.* at 41, 126 P. at 245.

74. *Id.* at 48, 126 P. at 249.

75. 1922 OK 288, 209 P. 742.

76. *Id.* ¶ 2, 209 P. at 742.

jurisdiction was limited to civil cases.⁷⁷ The court then cited the statutory definition of a criminal case as “one prosecuted by the state as a party, against a person charged with a public offense, for the punishment thereof,” and the definition of a civil case as “every other.”⁷⁸ The court then noted that, regarding original jurisdiction, it had superintending control over all inferior courts, with the power to issue, *inter alia*, writs of mandamus.⁷⁹ Because the petition for writ was an original action in the supreme court, the court deemed that to be the “case” at issue and was “forced to the conclusion” that it was a civil matter, being that the action in the supreme court was the petition for a writ, not the state prosecuting a defendant charged with an offense.⁸⁰

This reasoning took the *Dunn* analysis to another extreme, focusing on the writ being requested, rather than on the case from which the issue had arisen or even the particular issue being contested. The court disclaimed any interest in whether COCA would have had jurisdiction had the action been brought there initially, finding that “unnecessary to decide” because the supreme court had jurisdiction over the original action before it.⁸¹ The court did not even mention the exclusivity language of the constitution or the statute regarding appellate jurisdiction and thus made no attempt to harmonize the two.⁸² The court reached the same result in *Heard v. Sullivan*, again reasoning that the exclusivity of appellate jurisdiction was irrelevant because mandamus was within the court’s superintending control over the trial court.⁸³

Fortunately, the courts have never cited either *Robertson* or *Heard* for this jurisdictional analysis, and this line of reasoning is inconsistent with the courts’ present treatment of the issue. In fact, the Rules for District Courts promulgated by the supreme court specifically provide that original mandamus proceedings to disqualify a judge in a criminal case shall be

77. *Id.* ¶ 2, 209 P. at 742-43.

78. *Id.* ¶ 11, 209 P. at 743 (quoting 12 OKLA. STAT. §§ 7-8 (repealed 1984)).

79. *Id.* ¶ 2, 209 P. at 742-43.

80. *Id.* ¶ 14, 209 P. at 743. As support, the court cited *Marshall v. Sitton*, 1918 OK 110, 172 P. 964, where the supreme court affirmed mandamus in a criminal case where the district court had ordered the county court to change venue. The supreme court did not address its jurisdiction, even though the case was clearly criminal in nature.

81. *Robertson*, ¶ 16, 209 P. at 744.

82. *Id.*

83. 1955 OK 41, ¶ 3, 280 P.2d 708, 709.

brought in COCA, and that such cases “will be transferred to the proper court” if civil or criminal matters are sought in the wrong forum.⁸⁴

The relations of respectful deference came to a temporary halt in 1927, when an unusual set of circumstances resulted in a battle of competing orders from the two courts.⁸⁵ The underlying case was a civil one.⁸⁶ At one point in the proceedings, one of the litigants, Owens, filed a motion that the supreme court deemed to contain false statements, contemptuous of the court.⁸⁷ The motion alleged that an opinion of the court had actually been written by the plaintiff’s counsel and that one justice was “under the control and direction” of another counsel.⁸⁸ The supreme court found Owens in contempt and ordered twelve months imprisonment and a \$5000 fine.⁸⁹ Within a few minutes of receipt of the contempt order, Owens filed a habeas application with COCA.⁹⁰ COCA issued a show-cause order and ordered him released on bond.⁹¹ The supreme court then issued a writ of prohibition against COCA, prohibiting it from altering the supreme court’s final judgment.⁹² Owens then filed a new habeas petition with COCA, and the supreme court issued a new writ of prohibition.⁹³ Despite the writ, COCA granted the habeas petition and discharged Owens from the judgment of the supreme court.⁹⁴ In its opinion, COCA seemed to characterize the contempt as a criminal case because of the sanction that was issued: a sanction that the judges believed was excessive.⁹⁵

Unsurprisingly, the supreme court was not amused, reciting that COCA’s order was “127 typewritten pages” and that it would serve “no useful purpose to meander with the intemperate and rude statements found

84. OKLA. DIST. CT. R. 15(b).

85. *Dancy v. Owens*, 1927 OK 203, 258 P. 879.

86. *Id.* ¶ 24, 258 P. at 884.

87. *See Ex parte Owens*, 37 Okla. Crim. 118, 258 P. 758 (Okla. Crim. App. 1927), *vacated*, *Dancy*, ¶ 41, 258 P. at 887.

88. *State ex rel. Att’y Gen. v. Davenport*, 1927 OK 137, ¶ 7, 256 P. 340, 350 (quoting *Ex parte Owens*, 37 Okla. Crim. at 149, 258 P. at 770).

89. *Id.* ¶ 8, 256 P. at 350-51.

90. *Id.* ¶ 2, 256 P. at 341-42.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Ex parte Owens*, 37 Okla. Crim. 118, 204, 258 P. 758, 786 (Okla. Crim. App. 1927), *vacated*, *Dancy*, ¶ 41, 258 P. at 887.

95. *Id.* at 277, 258 P. at 810-11.

therein.”⁹⁶ For the first time, the court granted a writ of certiorari and held that COCA had acted beyond the bounds of its jurisdiction.⁹⁷ The court recited articles 1 and 2 of the original constitution, using those articles to establish the proposition that COCA was an “inferior” court because it was established by the legislature, and thus was subject to the supreme court’s superintending control.⁹⁸ Although COCA has appellate jurisdiction in a criminal case, the court focused on the habeas petition as an original action in COCA.⁹⁹ The action was not an appeal, because it was not brought from a lower court to correct an error. And the underlying issue was contempt in a civil case, clearly outside the definition of a criminal case. Relying on United States Supreme Court precedent, the court reasoned that contempt is *sui generis*, within the power of each court, and is not a criminal case merely because of the sanction.¹⁰⁰ The court closed its opinion with a slightly veiled threat of more serious consequences should COCA continue to entertain habeas petitions in the case.¹⁰¹

B. 1927-2010: Deference with Exceptions

For the most part, the courts stayed free of conflict after *Dancy*, and a spirit of comity again prevailed throughout the rest of the courts’ first hundred years. For example, in *Hall v. Welch*, the supreme court declined jurisdiction of an appeal on the issue of whether testimony was compelled and thus the basis of immunity from prosecution.¹⁰² In *Ex parte Meek*, the court declined to declare a securities statute unconstitutional under the United States Constitution where COCA had already ruled on the issue.¹⁰³ Interestingly, the court stated that it indeed had the right to declare criminal provisions in violation of the United States Constitution, but it declined to

96. *Dancy*, ¶ 3, 258 P. at 881.

97. *Id.* ¶¶ 28, 40, 258 P. at 885, 886.

98. *Id.* ¶ 10, 258 P. at 881.

99. *Id.* ¶¶ 22-23, 258 P. at 884.

100. *Id.* ¶¶ 33-34, 258 P. at 885-86.

101. *Id.* ¶ 42, 258 P. at 887 (“If more stringent means are necessary to keep the Criminal Court of Appeals within the legislative authority granted it, such means are adequate, and if necessary, will be used, however reluctant this court may be, if such necessity is brought about by that court.”)

102. 1931 OK 548, 3 P.2d 232.

103. 1933 OK 473, 25 P.2d 54.

exercise that right because of its policy to avoid jurisdictional conflicts with COCA when possible.¹⁰⁴

Despite this spirit of comity, issues of boundary location occasionally arose during this period. But the issues were always resolved peacefully, without competing orders from the two courts. Three notable areas of line drawing have relevance to the modern jurisdictional disputes: (1) ambiguous jurisdictional statutes,¹⁰⁵ (2) carve-outs from criminal cases for “institutional deficiency”¹⁰⁶ claims, and (3) issues regarding punishment in criminal cases.¹⁰⁷

1. Jurisdictional Conflicts Created by Statute

Occasionally, statutes have created jurisdictional conflicts, either because of ambiguity or somewhat conflicting provisions. *Carder v. Court of Criminal Appeals*,¹⁰⁸ the case where the supreme court noted the break from fifty years of jurisdictional peace, involved a statute providing appellate jurisdiction in juvenile cases.¹⁰⁹ In an unusual set of facts, a juvenile court judge had entered an order finding the juvenile a delinquent child and a ward of the court, and placing him in the custody of the State.¹¹⁰ The boy’s father sought a return of custody after allegations that the boy had been abused in the state school where he was placed.¹¹¹ Upon application by the State, COCA granted a writ prohibiting the juvenile court from hearing the change-of-custody motion.¹¹² Barred from conducting the hearing, the juvenile court instead dismissed the case against the juvenile, thus freeing him from the State’s custody.¹¹³ COCA granted mandamus against the judge, directing him to vacate the order.¹¹⁴

104. *Id.* ¶ 11, 25 P.2d at 56. The court offered no authority for such a right, and that claim is inconsistent with the change to the statute removing the exception for Constitutional claims. *See supra* notes 21-22 and accompanying text.

105. *See In re M.B.*, 2006 OK 63, ¶¶ 8, 13, 145 P.3d 1040, 1044, 1047.

106. *Dutton v. City of Midwest City*, 2015 OK 51, ¶ 23, 353 P.3d 532, 543.

107. *State ex rel. Henry v. Mahler*, 1990 OK 3, ¶ 15, 786 P.2d 82, 86.

108. 1978 OK 130, 595 P.2d 416.

109. *Id.* ¶¶ 14-17, 595 P.2d at 419-20 (citing 10 OKLA. STAT. § 1123 (1971) (current version at 10A OKLA. STAT. § 1-5-101 (2011))).

110. *Id.* ¶ 4, 595 P.2d at 418.

111. *Id.* ¶ 5, 595 P.2d at 418.

112. *State ex rel. Dep’t of Insts., Soc. & Rehab. Servs. v. Maley*, 1977 OK CR 299, ¶¶ 3-4, 569 P.2d 1020, 1021.

113. *Id.* ¶ 6, 569 P.2d at 1021.

114. *Id.*

Petitioners, the juvenile and his father, then asked the supreme court for a writ of prohibition against COCA, contending that COCA had exceeded its jurisdiction.¹¹⁵ The supreme court agreed, vacating COCA's order.¹¹⁶ The court noted COCA's power to issue writs in aid of its jurisdiction but held that COCA had no jurisdiction because the order could not have been appealed to COCA.¹¹⁷ The supreme court's decision rested on a very strict interpretation of the jurisdictional statute. The statute regarding juvenile cases provided that appeals from orders in juvenile cases were to the supreme court, except that "appeals taken *from a trial court's decision in a proceeding for an adjudication of juvenile delinquency or in a proceeding certifying a juvenile to stand trial as an adult or denying such certification shall be taken to the Court of Criminal Appeals.*"¹¹⁸ The supreme court reasoned that the order dismissing the case was a post-dispositional order—not an adjudication of juvenile delinquency—and as such did not fall within the statutory exceptions.¹¹⁹

This interpretation was not entirely without support: juvenile delinquency had already been adjudicated, so the dismissal was not a proceeding for adjudication. On the other hand, the juvenile court retained jurisdiction after the adjudication, so COCA's broader interpretation of "proceeding" was also defensible because dismissal of the entire case was arguably part of the same "proceeding." At least plausibly, this was a case of the supreme court strictly interpreting the statute to assume jurisdiction only because the court thought that COCA's decision on the merits was clearly wrong. COCA had upheld the State's contention that once a child was adjudged delinquent and placed in state custody, the State assumed the role of parent and the child was beyond the jurisdiction of the juvenile court. The supreme court found this reasoning contrary to statute and public policy, so it intervened to protect the juvenile court's role in supervising delinquent children as wards of the court.¹²⁰

Procedurally, the court proceeded carefully because it wanted to resolve the jurisdictional conflict in the manner "least disruptive to our appellate

115. *Carder*, ¶ 2, 595 P.2d at 418.

116. *Id.* ¶ 40, 595 P.2d at 422.

117. *Id.* ¶ 16, 595 P.2d at 420.

118. *Id.* ¶ 14, 595 P.2d at 419 (emphasis added) (citing 10 OKLA. STAT. § 1123 (1971) (current version at 10A OKLA. STAT. § 1-5-101 (2011))).

119. *Id.* ¶¶ 15-16, 595 P.2d at 419-20.

120. *Id.* ¶ 31, 595 P.2d at 421.

process.”¹²¹ Noting that “[t]here is no appeal or proceeding in error from the Court of Criminal Appeals to this Court,” the court recast the action as a proceeding for certiorari rather than prohibition.¹²² The court recited its constitutional power to grant writs of certiorari, resolved the issue on the merits, and ended the litigation.¹²³ Because the court determined that COCA had acted outside its jurisdiction, this manner of proceeding was clearly correct under the supreme court’s constitutional power to determine which court has jurisdiction. Even without this specific constitutional power, this would have been a valid exercise of the supreme court’s superintending power to ensure that inferior courts are acting within their jurisdiction.¹²⁴

Comparatively, statutory jurisdictional issues regarding grand juries have been resolved amicably, with extreme deference and expressions of respect between the two courts. Statutes provide for supreme court jurisdiction to convene a multicounty grand jury,¹²⁵ but any matters not specifically covered by the multicounty grand jury statutes are subject to the grand jury statutes.¹²⁶ Thus, appeals regarding criminal-type issues would fall under COCA’s criminal jurisdiction.¹²⁷ For example, in *Movants to Quash Grand Jury Subpoenas Issued in Multicounty Grand Jury v. Powers*, COCA issued a stay of grand jury subpoenas and referred the matter to the supreme court for decision.¹²⁸ The court decided the First Amendment claim to quash investigative subpoenas and decided issues regarding the relative powers of the Ethics Commission and the grand jury.¹²⁹ The court also announced that future grand jury issues would be resolved on an issue-by-issue basis

121. *Id.* ¶ 19, 595 P.2d at 420.

122. *Id.* ¶ 20, 595 P.2d at 420.

123. *Id.* ¶¶ 29-40, 595 P.2d at 421-22.

124. For an example of the supreme court using its superintending power without a jurisdictional boundary conflict, see *Jackson v. Freeman*, 1995 OK 100, 905 P.2d 217. In *Jackson*, a defendant’s conviction had been affirmed by a panel of the Emergency Appellate Division of COCA. *Id.* ¶ 0, 905 P.2d at 217. The defendant contended that the panel—authorized by the legislature and comprised of non-COCA judges appointed by the Chief Justice of the supreme court—was unconstitutional. *Id.* The court recast the defendant’s quo warranto petition as a request for prohibition and held that it had jurisdiction to decide the request, citing *Carder*. *Id.* ¶¶ 8-9, 905 P.2d at 219-20.

125. 22 OKLA. STAT. § 351 (2011).

126. *Id.* § 350.

127. OKLA. CONST. art. 7, § 4.

128. 1992 OK 142, ¶ 1, 839 P.2d 655.

129. *Id.* ¶¶ 5-10, 839 P.2d at 656-57.

because this grand jury was addressing some non-criminal issues regarding removal of persons from office.¹³⁰ Later, when an issue concerning secrecy of testimony arose regarding the same grand jury, the parties filed separate mandamus petitions in each court. The supreme court consolidated the cases and transferred them to COCA.¹³¹ In holding that witness-immunity hearings must be closed to the public, COCA was careful to avoid conflict.¹³² As part of its analysis, the court noted that “[b]ecause of such dual jurisdiction over grand jury matters, it is important that the two courts do not take conflicting positions concerning grand jury secrecy. We do not find that our position requiring secrecy of grand jury proceedings is in conflict with positions taken by the Oklahoma Supreme Court.”¹³³

Similarly, in *Movants to Quash Multicounty Grand Jury Subpoena v. Dixon*, COCA referred to the supreme court the issue of whether a multicounty grand jury lacks jurisdiction to investigate crimes alleged to have occurred in only one county.¹³⁴ Because the issue involved “a generalized analysis of constitutional and statutory norms,” the supreme court retained jurisdiction.¹³⁵ And in a similar show of deference, the supreme court transferred a grand jury matter to COCA.¹³⁶ In *Woolverton v. Multi-County Grand Jury*, the petitioners had filed an original action in the supreme court, seeking a writ of prohibition regarding a multicounty grand jury's subpoena for fingerprints, palm prints, and blood samples.¹³⁷ Because the issue involved constitutional issues of the grand jury's authority “to conduct discovery in the form of a bodily search as part of a criminal investigation,” the supreme court reasoned that the case was within COCA's jurisdiction and transferred it.¹³⁸

Thus, in these and other cases where statutes contained or created jurisdictional ambiguity, the courts have worked well together. The supreme court has resolved the ambiguities via its constitutional power to

130. *Id.* ¶ 2, 839 P.2d at 656.

131. *Griffin Television v. Powers (In re Proceedings of Multicounty Grand Jury)*, 1993 OK CR 12, ¶ 2, 847 P.2d 812, 813.

132. *Id.* ¶ 3, 847 P.2d at 813.

133. *Id.* ¶ 12, 847 P.2d at 815.

134. 2008 OK 36, ¶ 0, 184 P.3d 546.

135. *Id.* ¶ 11, 184 P.3d at 549.

136. *Id.* ¶ 10, 184 P.3d at 549.

137. 1993 OK CR 42, ¶¶ 1-2, 859 P.2d 1112, 1113.

138. *Dixon*, ¶ 10, 184 P.3d at 549.

determine which court has jurisdiction, and COCA has accepted the decisions without incident.¹³⁹

2. *Attorney Fees in Criminal Cases: “Institutional Deficiencies”*

In 1977, the supreme court carved out another jurisdictional area in *Sanders v. Followell*,¹⁴⁰ which it has since referred to as civil jurisdiction over claims of “institutional deficiencies” or “the proper functioning of a governmental entity.”¹⁴¹ The issue in *Sanders* was construction of the statute providing a fee to appointed counsel in death penalty cases.¹⁴² The attorneys petitioned for a writ of mandamus to compel the trial judge to award the statutory fee for each of three defendants represented, rather than one fee per case.¹⁴³ Without addressing any jurisdictional issue vis-à-vis COCA—presumably because no such issue was raised—the court granted the writ.¹⁴⁴ The court did address the propriety of mandamus, reasoning that the matter was “publici juris[] and of immediate concern to the orderly administration of justice,” but it did not consider whether the case may have been within COCA’s jurisdiction.¹⁴⁵

In fact, supreme court jurisdiction in such a case was not at all obvious. The issue of payment of counsel in death cases can arise only in criminal cases. COCA has exclusive appellate jurisdiction in criminal cases, and the supreme court has previously stated that mandamus is in the nature of appellate jurisdiction.¹⁴⁶ And although publici juris is sometimes cited as an independent basis for jurisdiction,¹⁴⁷ whether the matter was indeed publici

139. See *Hale v. Bd. Of Cty. Comm’rs*, 1979 OK 158, 603 P.2d 761 (After COCA rejected a sheriff’s appeal of his ouster, the supreme court treated the appeal as a civil appeal transferred by COCA. Although the ouster proceeding was conducted as a misdemeanor trial as required by statute, the proceeding was civil because it results in no criminal punishment.); see also *Courtney v. State*, 2013 OK 64, 307 P.3d 337 (holding, after the defendant appealed to both courts, that the supreme court had jurisdiction to decide the appeal regarding a claim of actual innocence under the Governmental Tort Claims Act, even though the defendant’s request to the trial court had been made as part of his post-conviction proceeding).

140. 1977 OK 143, 567 P.2d 84.

141. *Dutton v. City of Midwest City*, 2015 OK 51, ¶ 23, 353 P.3d 532, 543.

142. *Sanders*, ¶ 4, 567 P.2d at 85.

143. *Id.* ¶ 1, 567 P.2d at 85.

144. *Id.* ¶ 6, 567 P.2d at 86.

145. *Id.*

146. *Jeter v. Dist. Court of Tulsa Cty.*, 1922 OK 140, ¶ 9, 206 P. 831, 833-34 (citing *Ex parte Crane*, 30 U.S. (5 Pet.) 190 (1831)).

147. See, e.g., *Naylor v. Petuskey*, 1992 OK 88, ¶ 1, 834 P.2d 439, 440.

juris under a broad definition of the term was not relevant to whether the matter was civil or criminal.¹⁴⁸ Assuming jurisdiction was consistent with the court's taking jurisdiction over bond forfeiture in *Dunn v. State*.¹⁴⁹ This again focuses on the order being appealed rather than the nature of the case. And at first blush, carving out this exception serves no obvious purpose and could have been left to COCA. On the other hand, construction of the attorney fee statute has no relationship to the guilt or punishment of the defendant, the usual subjects of appeals in criminal cases. Furthermore, the maximum amount of the attorney fee is somewhat linked to the supreme court's function of regulating the practice of law.¹⁵⁰ But all things considered, the decision seems to unnecessarily intrude on COCA's jurisdiction.

This link to regulating the practice of law is more apparent in *State v. Lynch*, where the supreme court assumed jurisdiction of an appeal regarding payment of court-appointed attorneys in capital crime cases.¹⁵¹ The trial court had held that the statutory limit on attorney fees was unconstitutional and awarded the attorneys a fee based on an hourly rate. (The appeal was consolidated with an original jurisdiction request from three county bar associations dealing with the same issue.)¹⁵² The court affirmed the attorney fees award, with slight modifications, and announced guidelines and procedures for courts to follow until the legislature acted to fill the void created by the unconstitutionality of the statute.¹⁵³ The court relied on its superintending-control jurisdiction, its managerial and administrative authority over the district courts, and its "direct and inherent constitutional power to regulate the practice of law."¹⁵⁴

In *Lynch*, the supreme court ignored the possibility that COCA had jurisdiction. But its assumption of jurisdiction was better grounded than in *Sanders*. The court noted that the same issue arose in civil guardianship

148. Cf. *Keating v. Johnson*, 1996 OK 61, ¶ 4, 918 P.2d 51, 61 (Simms, J., concurring) ("[I]t should be remembered that the doctrine of *publici juris* is not a ground of jurisdiction in itself. It is merely one factor a court may consider in deciding whether to assume original jurisdiction when such jurisdiction already exists on proper grounds.")

149. 1917 OK 269, 166 P. 193; see *supra* text accompanying notes 63-69.

150. Cf. *State v. Lynch*, 1990 OK 82, ¶ 27, 796 P.2d 1150, 1162-63; *In re Integration of State Bar*, 1939 OK 378, 95 P.2d 113.

151. 1990 OK 82, ¶ 0, 796 P.2d 1150, 1152.

152. *Id.* ¶¶ 0-1, 796 P.2d at 1152-53.

153. *Id.* ¶¶ 21-24, 796 P.2d at 1161-62.

154. *Id.* ¶¶ 26-28, 796 P.2d at 1162-63 (footnote omitted) (citing OKLA. CONST. art. 7, §§ 4, 6).

proceedings.¹⁵⁵ So the need for consistency among all court-appointment cases combined with the court's duty to regulate the practice of law provide a firmer justification for supreme court jurisdiction.

3. Issues Regarding Punishment in Criminal Cases

One important development during this period was the supreme court's analysis of the jurisdictional aspects of issues regarding punishment in criminal cases, an analysis that resulted in complete jurisdictional deference to COCA. In *Hinkle v. Kenny*, the supreme court denied a writ of mandamus on an issue of statutory construction regarding whether particular sentences should run consecutively or concurrently.¹⁵⁶ In holding that COCA's decision regarding construction of penal statutes should be followed,¹⁵⁷ the court impliedly (and wisely) abandoned its pronouncement in *Robertson* that mandamus was a civil matter that gave rise to supreme court jurisdiction, either solely or concurrently with COCA.¹⁵⁸ In *Hinkle*, the petitioner specifically argued that mandamus was a civil matter, as opposed to a habeas petition which would be essentially criminal when the underlying case was criminal.¹⁵⁹ The court found the distinction unpersuasive. More importantly, the opinion shows that the supreme court considered sentencing statutes to be within the jurisdictional realm of COCA, just as previous issues regarding other statutes that the court deemed predominantly criminal.

Issues regarding *implementation* of the sentence of a criminal defendant were also held to be within the jurisdiction of COCA. In *State ex rel. Henry v. Mahler*, the court addressed how an amendment to the earned credit statute applied to prior crimes.¹⁶⁰ COCA, in a somewhat surprising refusal to assume jurisdiction, held that it lacked jurisdiction because the question was an administrative decision for the Department of Corrections, not a proper subject of the Post-Conviction Procedure Act.¹⁶¹ The supreme court, exercising its constitutional power to resolve jurisdictional conflicts, denied the requested relief of prohibition or certiorari and held that COCA should

155. *Id.* ¶ 5, 796 P.2d at 1155.

156. 1936 OK 582, ¶¶ 1-4, 13, 62 P.2d 621, 621-22, 623.

157. *Id.* ¶ 12, 62 P.2d at 622-23.

158. *See* *Robertson v. Bozarth*, 1922 OK 288, ¶¶ 12-14, 209 P. 742, 743.

159. *Hinkle*, ¶ 12, 62 P.2d at 622.

160. 1990 OK 3, ¶¶ 1-2, 786 P.2d 82, 83.

161. *Mahler v. State*, 1989 OK CR 62, ¶ 2, 781 P.2d 835, 835-36, *modified*, 1989 OK CR 82, 783 P.2d 973.

have decided the question.¹⁶² The court reasoned that matters regarding punishment and release are “clearly” within the jurisdiction of COCA, quoting with approval a statement from a COCA opinion that an “essential part of the judgment is the punishment and the amount thereof.”¹⁶³

Similarly, *Smith v. Oklahoma Department of Corrections* addressed the issue of whether the Department of Corrections unlawfully supervising defendants past the two-year statutory period was criminal in nature.¹⁶⁴ After the trial court dismissed a civil suit regarding the claims, the supreme court transferred the appeal to COCA.¹⁶⁵ A separate claim for supervision fees was civil but required resolution of the criminal issue first.¹⁶⁶ And in the same vein, the supreme court referred to COCA an issue of whether a juvenile court could extend jurisdiction over a youthful offender until age twenty.¹⁶⁷ Finding the statute silent as to appellate jurisdiction, the court reasoned that the case was criminal because the youthful offender was charged with a crime, the procedure was similar to that of a criminal trial, and the punishment available was identical to adult punishment except for a maximum sentence.¹⁶⁸

Finally, the supreme court applied this reasoning to a civil rights action challenging an execution on grounds that the defendants had interfered with the attorney-client relationship and deprived the plaintiff of access to the courts.¹⁶⁹ In *Maynard v. Layden*, a COCA opinion, the court noted that the supreme court had held that it had no jurisdiction to enjoin an execution because the issue was one of punishment.¹⁷⁰ COCA then prohibited the district court from enjoining the execution.¹⁷¹

162. *Henry*, ¶¶ 15-20, 786 P.2d at 86-87.

163. *Id.* ¶ 15, 786 P.2d at 86 (quoting *Ex parte Rice*, 1930 OK 279, 289 P. 360).

164. 2001 OK 95, ¶ 3, 37 P.3d 872, 873.

165. *Id.* ¶¶ 5, 11, 37 P.3d at 873, 874.

166. *Id.* ¶ 10, 37 P.3d at 874.

167. *In re M.B.*, 2006 OK 63, ¶ 1, 145 P.3d 1040, 1041.

168. *Id.* ¶¶ 13-14, 145 P.3d at 1047.

169. *See* *Maynard v. Layden*, 1992 OK CR 31, ¶ 3, 830 P.2d 581, 582. Though the original supreme court order in *Maynard* is no longer available, Justice Taylor referred to the precedent as recently as 2014. *See Lockett III*, 2014 OK 33, 356 P.3d 58, 61-62 (Taylor, J., dissenting).

170. *Maynard*, ¶ 3, 830 P.2d at 582.

171. *Id.* ¶ 10, 830 P.2d at 583.

C. 2011-2016: A Departure from Comity

Although not rising to the same level of conflict, cases in the past five years have given rise to acrimony between the two courts not seen since *Dancy*. The supreme court has issued orders in three criminal cases, including stays of the proceedings in two of the cases. These encroachments are not easily explained by previous line-drawing cases, and in some respects seem flatly inconsistent with them.

1. *Leftwich v. Court of Criminal Appeals*

*Leftwich v. Court of Criminal Appeals*¹⁷² was the first case since *Dancy*¹⁷³ in 1927 where the two courts issued somewhat conflicting statements about their jurisdiction in back-and-forth orders. Like *Carder*¹⁷⁴ in 1977, the last time the supreme court overrode a jurisdictional determination of COCA, the statements arose in a case where the supreme court obviously disagreed with COCA's decision on the merits. *Leftwich* was a state legislator charged with a felony for soliciting or accepting an offer of a state job to be created in exchange for her agreement to withdraw as a candidate for re-election.¹⁷⁵ She moved to dismiss the charges on various grounds, including immunity from prosecution under the Oklahoma Constitution's speech or debate clause.¹⁷⁶ When the motions were denied, she filed a petition with COCA for mandamus or prohibition.¹⁷⁷ COCA denied the petition on multiple grounds, but COCA's order included the following statement: "The Speech and Debate Clause in the Oklahoma Constitution includes an express exception for felonies."¹⁷⁸

That statement was incorrect. The Oklahoma Constitution's speech or debate clause is almost identical to the clause in the United States Constitution.¹⁷⁹ And the United States Constitution's exception for felonies

172. (*Leftwich I*), 2011 OK 80, 262 P.3d 750 (Mem.).

173. See text accompanying notes 77-88.

174. See text accompanying notes 93-108.

175. *Leftwich I*, ¶ 2, 262 P.3d at 751 (Watt, J., dissenting).

176. Order Denying Petition for Writ of Prohibition and in the Alternative Petition for Writ of Mandamus at 1-2, *Leftwich v. Alcorn*, No. PR-2011-319 (Okla. Crim. App. June 9, 2011).

177. *Id.* at 1.

178. *Id.* at 3.

179. Compare U.S. CONST. art. I, § 6, cl. 1 ("The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest . . . ; and for any Speech or Debate in either House, they shall not be questioned in any other Place.") with OKLA. CONST. art. 5, § 22 ("Senators and Representatives shall, except for

applies to the privilege from arrest, not the privilege for speech or debate.¹⁸⁰ So Leftwich moved to the supreme court, filing a petition for prohibition, mandamus, or declaratory relief.¹⁸¹ She did not seek any relief on the merits of her case—only a declaration that COCA’s statement regarding a felony exception was legally incorrect.¹⁸² She pointed to prior supreme court decisions holding that the Oklahoma speech or debate clause provides “at least as much protection” as the immunity granted by the comparable provisions of the Federal Constitution, and thus cast the statements as a direct conflict between the two courts.¹⁸³ The supreme court issued a stay in the trial court and heard oral argument.¹⁸⁴ At the oral argument, all counsel agreed that COCA’s interpretation of the clause “should not be enforced as the parties perceive that portion of the order to be a mistake of law.”¹⁸⁵ Based on counsel’s agreement and the court’s own review of the matter, the court announced in a brief order that it declined to assume jurisdiction in order to allow the parties to return to COCA and seek relief.¹⁸⁶ The court also dissolved its stay.¹⁸⁷

When Leftwich returned to COCA, COCA declined to assume jurisdiction—on procedural grounds. Finding that Leftwich essentially sought a rehearing of the order declining to issue the writ, the court held

treason, felony, or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same, and, for any speech or debate in either House, shall not be questioned in any other place.”)

180. See generally RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 8.8(a), 8.9(a) (4th ed. 2007). The COCA order may have been referring to the entirety of section 22 as the “Speech and Debate Clause,” but such a reference would have been inapplicable for two reasons. First, Leftwich was not seeking to avoid arrest. Second, the privilege from arrest has been interpreted to apply only to civil cases and is now considered obsolete. *Id.* § 8.9(a).

181. *Leftwich I*, 2011 OK 80, ¶ 1, 262 P.3d 750, 750 (Mem.).

182. Application to Assume Original Jurisdiction and Petition for Writ of Prohibition and/or Mandamus, or in the Alternative, Declaratory Relief at 10, *Leftwich I*, 2011 OK 80, 262 P.3d 750 (No. 109609).

183. *Id.* at 9; see, e.g., Brock v. Thompson, 1997 OK 127, ¶ 14, 948 P.2d 279, 287 (“The Speech or Debate Clause of the Oklahoma Constitution, Art. 5, § 22, absolutely protects legislators from suit calling for judicial inquiry into their performance ‘within the sphere of legitimate legislative activity.’”)(citations omitted).

184. *Leftwich I*, ¶¶ 2-4, 262 P.3d at 750-51.

185. *Id.* ¶ 2, 262 P.3d at 750.

186. *Id.* ¶ 3, 262 P.3d at 750.

187. *Id.* ¶ 4, 262 P.3d at 751.

that its rules did not provide for such a rehearing.¹⁸⁸ Further, the new application was time-barred under the court's rules.¹⁸⁹ Finally, COCA disagreed that its previous statement was a mistake of law, stating that the speech or debate clause indeed includes an exception for felonies.¹⁹⁰ (A concurring opinion defended COCA's original order but instead focused on the question of whether the conduct was merely related to legislative affairs or was part of the legislative process, an issue that required further fact-finding at the trial-court level.)¹⁹¹

Ultimately, Leftwich agreed to a bench trial and was found guilty, reserving only the issue of whether she was a candidate for office, as required by the elements of the crime charged.¹⁹² Her conviction was affirmed, so COCA never addressed speech or debate issues again.¹⁹³ The case is instructive regarding the jurisdictional boundary, however, because statements in the opinions indicate each court's view, or in some cases each justice's or judge's view, of the relationship. The supreme court's majority opinion stated that the court did not need to address its "supervisory writ jurisdiction over the Court of Criminal Appeals."¹⁹⁴ In other words, the majority recognized the possibility of exercising superintending jurisdiction over COCA as an inferior court but did not reach the issue of whether this was an appropriate case. Two justices dissented, advocating to assume jurisdiction and dismiss the entire criminal case.¹⁹⁵ Regarding jurisdiction, the dissenting justices considered the criminal nature of the case as irrelevant, reasoning that the supreme court had constitutional power to prohibit the district attorney from acting in excess of his authority.¹⁹⁶ Only one justice, in a concurrence, wanted to dismiss the petition for lack of jurisdiction because of COCA's exclusive jurisdiction in criminal matters.¹⁹⁷

The COCA majority opinion did not address its jurisdiction vis-à-vis the supreme court, because it declined jurisdiction based on its own rules. But

188. *Leftwich v. Alcorn (Leftwich II)*, 2011 OK CR 27, ¶¶ 3-4, 262 P.3d 770, 771.

189. *Id.*

190. *Id.* ¶ 5, 262 P.3d at 771.

191. *Id.* ¶¶ 1-14, 262 P.3d at 772-76 (Johnson, J., concurring).

192. *Leftwich v. State (Leftwich III)*, 2015 OK CR 5, ¶ 1, 350 P.3d 149, 151.

193. *Id.* ¶ 44, 350 P.3d at 162.

194. *Leftwich I*, 2011 OK 80, ¶ 3, 262 P.3d 750, 750 (Mem.).

195. *Id.* ¶ 1, 262 P.3d at 751 (Watt, J., dissenting); *id.* ¶¶ 13, 23, 262 P.3d at 754, 757 (Reif, J., dissenting).

196. *Id.*

197. *Id.* ¶ 7, 262 P.3d at 751 (Winchester, J., concurring in part and dissenting in part).

in a concurrence to the second COCA order, one judge quoted the statement regarding superintending jurisdiction from the supreme court's majority opinion, and "[t]o avoid any confusion . . . remind[ed] the parties that . . . this Court exercises exclusive appellate and writ jurisdiction in all criminal cases."¹⁹⁸ This statement seems to imply that its author does not believe that the supreme court has any type of jurisdiction over COCA in a criminal case. Thus, leading up to *Lockett*, differences of opinion were apparent regarding the relationship between the two courts.¹⁹⁹

2. *Lockett v. State*

Lockett began as a declaratory judgment action in the Oklahoma County District Court. The plaintiffs, prisoners awaiting execution, sought a declaration that title 22, section 1015(B)—the statute providing procedures for executions—was unconstitutional.²⁰⁰ The plaintiffs contended that the statute's secrecy provisions—preventing discovery of the identity of the suppliers of lethal drugs—denied them access to the courts.²⁰¹ They also sought an order enjoining enforcement of the statute and enjoining their executions.²⁰² After the defendants sought to remove the case to federal court,²⁰³ and the plaintiffs amended their complaint,²⁰⁴ the district court initially denied the request for a temporary order and injunction, reasoning that COCA had jurisdiction over the issues.²⁰⁵ The plaintiffs appealed that decision to the supreme court and requested a stay of their executions.²⁰⁶ The supreme court remanded the case (what it called the "civil claims") to the district court, with the exception of the stay request, which it transferred

198. *Leftwich II*, 2011 OK CR 27, ¶ 4 n.2, 262 P.3d 770, 773 n.2 (Smith, J., concurring).

199. See generally 5 HARVEY D. ELLIS, JR. & CLYDE A. MUCHMORE, OKLAHOMA APPELLATE PRACTICE § 1.9 (2014-2015 ed. 2014) (discussing *Leftwich* and describing the "contours of the jurisdictional boundary" as "nebulous").

200. Petition for Declaratory Relief and Request for Injunction at 3, *Lockett v. Evans*, No. CV-2014-330 (Dist. Ct. Okla. Cty. Feb. 26, 2014).

201. *Id.* at 22.

202. *Id.*

203. Notice of Removal of Civil Action, *Lockett v. Evans*, No. CV-2014-330 (Dist. Ct. Okla. Cty. Mar. 4, 2014).

204. Amended Petition for Declaratory Relief and Request for Injunction, *Lockett v. Evans*, No. CV-14-330, 2014 WL 6879907 (Dist. Ct. Okla. Cty. Mar. 7, 2014).

205. *Lockett v. Evans*, No. CV-2014-330, 2014 WL 6809101, at *1 (Dist. Ct. Okla. Cty. Mar. 11, 2014).

206. *Lockett III*, 2014 OK 33, ¶ 4, 356 P.3d 58, 59 (per curiam) (Mem.).

to COCA.²⁰⁷ COCA dismissed the stay request as moot because the State advised that it lacked the drugs required for the execution.²⁰⁸

The district court then held that the secrecy provision of the statute was unconstitutional,²⁰⁹ which the State appealed to the supreme court.²¹⁰ Armed with the district court's order, the plaintiffs again sought a stay from COCA.²¹¹ COCA again denied the stay, relying on the statute that sets the deadlines for carrying out executions.²¹² That statute also provides that COCA may stay execution dates under certain circumstances, specifically under subsection (C), when "an action challenging the conviction or sentence of death is pending before it."²¹³ Subsections (D), (E), and (F) provide for setting new execution dates if "any state or federal court" issues a stay that is later dissolved or vacated.²¹⁴ COCA reasoned that because there was no pending action before COCA under Oklahoma statute title 22, section 1001.1(C), the court lacked power to issue a stay.²¹⁵

At that point, the supreme court again retained jurisdiction over the appeal of what it considered the civil claims—those related to the constitutionality of the secrecy provision of the execution statute.²¹⁶ The court again transferred the stay request to COCA. In the order transferring the stay request, the court criticized COCA's interpretation of the statute, saying it ignored the

clear language of remaining portions of the statute which expressly provide for stays to be issued in other circumstances than those relating solely to the possibility that a conviction may be overturned or a sentence vacated. Subsections (D) through (F), all contemplate that stays may be issued by "any state or federal court." In Oklahoma, we determine the courts having

207. *Id.* ¶ 5, 356 P.3d 58, 59.

208. *Lockett v. State*, Nos. D-2000-1330 and D-2003-829 (Okla. Crim. App. Mar. 18, 2014) (order vacating and resetting execution dates).

209. *Lockett v. Evans*, No. CV-2014-330, slip op. at 2 (Dist. Ct. Okla. Cty. Apr. 1, 2014).

210. *Lockett III*, ¶ 8, 356 P.3d at 60. The plaintiffs also appealed the portion of the district court's order "that the Oklahoma Administrative Procedures Act does not apply to the execution protocol and that the protocol does not constitute an unconstitutional delegation of authority by the Legislature." *Id.*

211. *See Lockett v. State (Lockett II)*, 2014 OK CR 3, ¶ 2, 329 P.3d 755, 756-57.

212. *Id.*

213. 22 OKLA. STAT. § 1001.1(A) (2011).

214. *Id.* § 1001.1.

215. *Lockett II*, ¶ 2, 329 P.3d at 756-57.

216. *Lockett v. Evans (Lockett I)*, 2014 OK 28, ¶ 2, 377 P.3d 1254, 1254 (Mem.).

authority to issue such stays in criminal matters are limited to the district courts and the Oklahoma Court of Criminal Appeals.²¹⁷

This is a misinterpretation of the statute. Subsection (A) directs COCA to set execution dates.²¹⁸ Subsection (C) provides specific circumstances under which COCA may stay an execution.²¹⁹ Subsections (D), (E), and (F) refer to stays by “any state or federal court,” but those subsections also direct COCA to set new execution dates and direct the attorney general to notify COCA of the dissolution or vacation of the stay.²²⁰ Construing all the subsections together, especially the notification provisions, indicates that the state and federal courts referred to are courts other than COCA. Subsection (C)’s specific limitations on COCA’s ability to issue a stay when a challenge is pending before it would be meaningless if COCA were free to issue stays without a challenge at all, under the more general subsections.

The supreme court also urged COCA to be “cognizant of the time restraints . . . [and] the gravity of the first impression constitutional issues,”²²¹ but did not purport to order COCA to issue the stay. COCA again declined to issue the stay, reasoning that the statute controlled and that “[w]hile the Oklahoma Supreme Court has authority to deem an issue civil and so within its jurisdiction, it does not have the power to supersede a statute and manufacture jurisdiction in this Court for Appellants’ stay request by merely transferring it here.”²²²

With the first plaintiff’s execution date only a few days away, and COCA having denied a request for stay, the supreme court chose to grant the stay in a 5-4 decision.²²³ Although recognizing that the drafters of the Oklahoma Constitution “never contemplated” that the supreme court would be involved in a death penalty case, the court cited the constitution’s access-to-courts provision as the basis for its decision to do so.²²⁴

This case presents a very narrow question: whether these appellants should have some access to an appellate tribunal for

217. *Id.* ¶ 3, 377 P.3d at 1254 (quoting OKLA. CONST. art. 7, § 4).

218. 22 OKLA. STAT. § 1001.1(A) (2011).

219. *Id.* § 1001.1(C).

220. *Id.* § 1001.1(D)-(E).

221. *Lockett I*, ¶ 4, 377 P.3d at 1254-55.

222. *Lockett II*, 2014 OK CR 3, ¶ 4, 329 P.3d 755, 758.

223. *Lockett III*, 2014 OK 33, ¶ 15, 356 P.3d 58, 61 (per curiam) (Mem.).

224. *Id.* ¶¶ 12-13, 356 P.3d at 61.

consideration of a stay of execution based upon the consideration of grave first impression constitutional issues regarding the manner in which their lives will be taken. More simply, *the sole issue presented to this Court on this date is whether some court should hear their plea for a stay and ensure their constitutional right to access to the courts.* The Oklahoma Constitution Article 2, section 6, provides: The courts of justice of the State *shall be open to every person, and certain remedy afforded for every wrong* and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.²²⁵

The supreme court's reliance on this access-to-courts provision was questionable. The court previously held that this provision "was intended to guarantee that the judiciary would be open and available for the resolution of disputes, but not to guarantee that any particular set of events would result in court-awarded relief."²²⁶ In *Lockett*, both plaintiffs had completed the entire process of post-conviction remedies in state and federal courts.²²⁷ Further, and more importantly to the stay request at issue, the plaintiffs made no attempt to bring the issue within the jurisdiction of COCA by filing any further application for post-conviction relief.²²⁸ Perhaps they believed that such an application would have been unsuccessful because of COCA's decision on related—but not identical—claims in *Malicoat v. State*, where COCA considered other Eighth Amendment challenges to the execution procedure.²²⁹ Thus, it would appear that the plaintiffs did have access to the courts—both previously and in regard to the secrecy claim at

225. *Id.* ¶¶ 10-11, 356 P.3d at 60-61.

226. *Mehdipour v. State ex rel. Dep't of Corrs.*, 2004 OK 19, ¶ 8, 90 P.3d 546, 550 (citing *Rollings v. Thermodyne Indus., Inc.*, 1996 OK 6, ¶ 9, 910 P.2d 1030, 1032) (holding that statute requiring prepayment of filing fees by prisoners who had filed three meritless claims was constitutional).

227. *Lockett II*, ¶ 10, 329 P.3d at 761 (Lumpkin, J., specially concurring).

228. *Id.* ¶ 9, 329 P.3d at 760 ("Despite repeated invitations from this Court for Appellants to file pleadings to invoke the jurisdiction of this Court, Appellants have failed to do so."). Title 22, section 1089 of the Oklahoma Statutes provides for late filings for post-conviction relief under certain circumstances. In *Malicoat v. State*, 2006 OK CR 25, ¶ 3, 137 P.3d 1234, 1235 (citation omitted), COCA considered such a filing, reasoning that "[t]his Court has the authority to consider the merits of an issue which may so gravely offend a defendant's constitutional rights and constitute a miscarriage of justice."

229. *Malicoat*, ¶¶ 6-9, 137 P.3d at 1236-38 (rejecting challenges based on the drugs used, the training of personnel, and the possibility of conscious pain).

issue—although they did not receive the desired relief. If the plaintiffs lacked access to COCA, it was because they chose to pursue their claims in another forum.²³⁰

The court also relied on the “rule of necessity,”²³¹ reasoning that because COCA held that it lacked jurisdiction, the supreme court was required to decide “the merits of the stay”²³² issue. This reasoning was also questionable for several reasons. First, although the supreme court correctly noted that under the constitution, it alone had the power to determine which of the two courts had jurisdiction over the issue, it does not follow that COCA “refused to exercise this Court’s order and to address the merits of the stay.”²³³ Deciding a stay request must necessarily include evaluating compliance with statutory requirements for the stay. The court’s determination that COCA had jurisdiction to decide the matter could not have included authority for COCA to disregard statutes when deciding whether to issue the stay. Yet the supreme court criticized COCA’s decision as “not having followed the constitutional directive of this Court.”²³⁴ Second, and relatedly, the court issued no directive to COCA. As discussed previously, the supreme court on rare occasions has used its power to issue writs in jurisdictional conflicts with COCA, but the court’s transfer order contained no such writ—it merely transferred the stay issue for COCA to consider. Finally, the applicability of the rule-of-necessity was tenuous. The court stated that the rule “requires a judge to remain in a case regardless of the judge’s preference, if the sole power to decide a controversy resides in that official.”²³⁵ Reasoning that COCA “refused to exercise its rightfully placed jurisdiction,”²³⁶ the court invoked the access-to-courts provision as the basis for its determination of necessity.

We can deny jurisdiction, or we can leave the appellants with no access to the courts for resolution of their "grave" constitutional claims. *As uncomfortable as this matter makes us, we refuse to*

230. See generally Andrew Spiropoulos, *Strategies Leading Up to the Botched Execution of an Oklahoma Death Row Inmate*, JURIST (June 9, 2014, 5:00 PM), <http://jurist.org/forum/2014/06/andrew-spiropoulos-oklahoma-death.php> (“The litigation strategy . . . was designed to exploit the fault lines in the bifurcated system.”).

231. *Lockett III*, 2014 OK 33, ¶ 13, 356 P.3d 58, 61 (per curiam) (Mem.).

232. *Id.* ¶ 12, 356 P.3d at 61 (emphasis omitted).

233. *Id.* (emphasis omitted).

234. *Id.*

235. *Id.* ¶ 13, 356 P.3d at 61 (citation omitted).

236. *Id.*

*violate our oaths of office and to leave the appellants with no access to the courts, their constitutionally guaranteed measure.*²³⁷

But historically, the rule of necessity applies in cases where no judge without some self-interest in the case is available to decide the issue because the judge or judges with jurisdiction would otherwise be disqualified.²³⁸ In *United States v. Will*, the case cited by the court as authority, the United States Supreme Court reasoned that the rule of necessity is required by the duty of judges to decide cases “within their jurisdiction.”²³⁹ The rule has never been used where a court merely disagrees with another court’s decision. Similar to the access-to-courts analysis, necessity is not created by failure to achieve a certain result or failure to comply with a court’s procedural requirements. The rule should not be a basis for courts to expand their jurisdiction. Had the Oklahoma Supreme Court transferred the entire case—not just the stay request—COCA would have had an action pending before it, within its own jurisdiction, and would have had discretion under the statute to issue a stay.²⁴⁰

The supreme court’s basis for retaining any part of the case, beginning with the very first appeal, is unclear. The first orders merely referred to the claims in the declaratory judgment action as civil matters.²⁴¹ In its final opinion,²⁴² issued two days after the governor announced that she would refuse to recognize the order granting the stay,²⁴³ the court summarized its reasoning regarding the jurisdictional issues. The court first noted that the Declaratory Judgment Act could be used as a vehicle to find that a statute was unconstitutional, and that the district court’s declaratory judgment that the confidentiality provisions were unconstitutional was a final judgment.²⁴⁴ Declaratory judgment actions are reviewed in the same manner as all other

237. *Id.*

238. *See* *United States v. Will*, 449 U.S. 200, 211-17 (1980) (discussing history of rule as authority for judges hearing and deciding cases despite grounds for disqualification).

239. *Id.* at 215.

240. 22 OKLA. STAT. § 1001.1(C) (2011) (“When an action challenging the conviction or sentence of death is pending before it, the Court of Criminal Appeals may stay an execution date”)

241. *Lockett III*, ¶ 5, 356 P.3d at 59.

242. *Lockett IV*, 2014 OK 34, ¶ 2, 330 P.3d 488, 489 (per curiam).

243. Exec. Order No. 2014-08, 31 Okla. Reg. 618 (Apr. 22, 2014).

244. *Lockett IV*, ¶ 2, 330 P.3d at 489.

judgments, so the court concluded that the appeal was within its appellate jurisdiction.²⁴⁵ Further, because the act provides that any court with jurisdiction can provide further relief as “necessary and proper,” the court reasoned that the stay was such further relief and was appropriate injunctive relief in aid of its jurisdiction.²⁴⁶

This rationale is inconsistent with the court’s prior cases. The supreme court previously never allowed declaratory judgment actions or civil actions for injunctive relief to be used as a way to attack penal statutes or proceedings. For example, in *Oklahoma State Senate ex rel. Roberts v. Hetherington*, the court assumed original jurisdiction to dismiss a declaratory judgment action because it “invokes the declaratory judgment remedy to launch an impermissible collateral attack upon the judgment and sentence in a criminal case.”²⁴⁷ Preventing use of declaratory judgment actions to construe criminal statutes is particularly important in jurisdictions with bifurcated courts of last resort.²⁴⁸

The *Lockett IV* court also made the following somewhat cryptic comment regarding the jurisdictional boundary between itself and COCA: “As concerns the scope of jurisdiction, neither the district court nor this Court has undertaken a review of the validity or terms of the judgments and sentences in the underlying criminal cases.”²⁴⁹ This statement implies that the secrecy provision related to neither the validity nor the terms of the sentence. This is a narrow view of the issue in light of the court’s prior jurisprudence. Given that the sentences at issue were for executions, issues relating to the secrecy of the drug supplier were obviously related to

245. *Id.* ¶¶ 2-3, 330 P.3d at 489-90 (citing 12 OKLA. STAT. § 1654 (2011)).

246. *Id.* ¶ 4, 330 P.3d at 490 (quoting 12 OKLA. STAT. § 1655 (2011)).

247. 1994 OK 16, ¶ 1, 868 P.2d 708, 709 (footnote omitted); *see also* *Walters v. Okla. Ethics Comm’n*, 1987 OK 103, ¶¶ 7-8, 746 P.2d 172, 181-82 (Opala, J., concurring) (“A civil court sitting in equity is not ordinarily concerned with the enforcement of criminal laws; the power to interpret penal provisions is reposed solely in the courts that exercise criminal jurisdiction. . . . The adoption of the Uniform Declaratory Judgments Act—which authorized the district courts to construe the meaning, or pronounce upon the validity, of a statute—did not change the time-honored rules that traditionally limit the power of equity to construe penal legislation . . .” (footnote omitted)).

248. As the Texas courts have reasoned, using declaratory judgment actions in this manner would create “potential for conflicting decisions[] between our civil and criminal courts of last resort on the validity of such statutes It is the *prospect* that civil courts will get into the business of construing criminal statutes which represents the real danger.” *State v. Morales*, 869 S.W.2d 941, 948 & n.16 (Tex. 1994).

249. ¶ 5, 330 P.3d at 490.

implementing the terms of the sentence. The mere fact that a stay of execution was sought and considered shows that the action was criminal in nature. Issues relating to the carrying out of sentences of execution are at least as criminal in nature as the issues regarding application of earned credits to sentences, supervision of probated sentences, and continuing jurisdiction over youthful offenders, all of which the supreme court has held are matters for COCA. Furthermore, related issues had been addressed by COCA in *Malicoat*, thus counseling in favor of COCA jurisdiction, analogous to the cases where the supreme court deferred to previous COCA decisions construing penal statutes or statutes almost solely related to the enforcement of penal statutes.²⁵⁰

Finally, the court's attempt to justify its decision to grant the stay by interpreting section 1001.1, the statute that COCA relied on in denying the stay request, was also unpersuasive.

In our second transfer order, we concluded the statute authorized the Court of Criminal Appeals to grant *this statutory remedy*, but in doing so also said that three subsections in this statute (D, E and F) also recognize and accommodate "a stay of execution . . . issued by any state or federal court." These subsections clearly indicate that the statutory stay remedy in this section is not exclusive.²⁵¹

This analysis begs the question of whether the supreme court correctly assumed jurisdiction over the case or the stay request. The fact that the statute recognized the possibility of stays by other courts has no bearing on whether this court—the supreme court—had the power to grant one.

In short, the *Lockett* saga is troubling as it relates to the jurisdictional boundary. It marked the second time in three years that the supreme court issued a stay in a criminal case. The court issued the stay despite its admission that the constitution's framers would never have contemplated such an act.²⁵² Even had COCA granted the stay at the direction of the supreme court, the supreme court still would have been involved in the criminal case either by issuing the directive or by deciding issues intertwined with the execution. And finally, the court issued the stay without articulating a viable basis for classifying the case as civil, merely

250. See discussion *supra* Section II.B.3.

251. *Lockett IV*, ¶ 7, 330 P.3d at 490 (quoting *Lockett I*, 2014 OK 28, ¶ 3, 377 P.3d 1254, 1254 (Mem.)).

252. *Lockett III*, 2014 OK 33, ¶ 12, 356 P.3d 58, 61 (per curiam) (Mem.).

making the cryptic—and inaccurate—statement about not passing on the validity or terms of the sentence.²⁵³

3. Meyer v. Smith

Meyer v. Smith involved the timeliness of a petition seeking to disqualify a trial judge in a criminal case.²⁵⁴ Pursuant to statute²⁵⁵ and its constitutional power,²⁵⁶ the supreme court promulgates rules for itself and other courts. The rules for district courts require that a petition for mandamus be filed within five days after the trial court denies the request to disqualify.²⁵⁷ This district court rule states that it applies to both civil and criminal cases. But the rule does not explain how days are to be counted. In civil cases, the rules of civil procedure apply and provide for counting of days excluding weekends and holidays.²⁵⁸ COCA, in contrast, has adopted its own rules for criminal cases, as authorized by statute.²⁵⁹ Those rules require that calendar days be used.²⁶⁰ When Meyer filed his petition for writ of mandamus seven days after the relevant district court order, COCA dismissed the petition as untimely.²⁶¹

Meyer then sought a writ of mandamus against COCA, urging that the supreme court direct COCA to use the business-day rule to calculate timeliness.²⁶² The supreme court assumed jurisdiction, citing article 7,

253. *Lockett IV*, ¶ 5, 330 P.3d at 490.

254. 2015 OK 86, ¶ 1, 366 P.3d 311, 311 (Mem.).

255. 12 OKLA. STAT. § 74 (2011).

256. See sources cited *infra* note 274.

257. OKLA. DIST. CT. R. 15(b).

258. 12 OKLA. STAT. §§ 2001, 2006 (2011); see also OKLA. SUPR. CT. R. 1.3.

259. 22 OKLA. STAT. § 1051(b) (2011). Actually, the statute directs COCA to provide rules of procedure for filing an appeal and a petition for a writ of certiorari. The statute does not address writs of mandamus or other writs. The Oklahoma Constitution, however, provides that in addition to its appellate jurisdiction, COCA has the power to issue writs in criminal matters. OKLA. CONST. art. 7, § 4. As noted previously, mandamus is considered to be in the nature of appellate jurisdiction, so COCA's adoption of rules for mandamus is consistent with this understanding and its constitutional powers. See *supra* text accompanying note 50. In its response to *Meyer v. Smith*, COCA cited section 1051(b) as its authority for its calendar-day rule. *Meyer v. Engle*, 2016 OK CR 1, ¶ 3, 369 P.3d 37, 38.

260. OKLA. CT. CRIM. APP. R. 1.4.

261. Order Declining to Assume Original Jurisdiction and Dismissing Petition for Writ of Mandamus at 2, *Meyer v. Engle*, No. MA-2015-874 (Okla. Crim. App. Oct. 28, 2015).

262. Brief in Support of the Application to Assume Original Jurisdiction and Petition for Writ of Mandamus at 1-2, 4-5, *Meyer v. Smith*, 2015 OK 86, 366 P.3d 311 (No. 114409).

section 4 of the constitution.²⁶³ Presumably, the court was invoking its superintending jurisdiction, although it did not explicitly say so. Instead of mandamus, the court granted “[d]eclaratory relief . . . to provide for uniform computation of the time periods” in Rule 15.²⁶⁴ The court announced that “[a]ll time periods shall be computed based upon business days whether disqualification is sought in a civil or criminal case.”²⁶⁵

When Meyer then filed an application with COCA seeking withdrawal of its decision on timeliness, COCA rejected the application.²⁶⁶ After a brief discussion of the jurisdictional boundary between COCA and the supreme court,²⁶⁷ the opinion listed various statutes that COCA had previously held require calendar-day computations in criminal cases,²⁶⁸ concluding that those statutes support the consistent use of calendar days in COCA’s own rules.²⁶⁹ Three judges filed special concurrences, two of those expressing extreme discontent with the supreme court’s involvement in the case.²⁷⁰ One suggested that legislative action might be necessary to “reaffirm [COCA’s] exclusive appellate jurisdiction in criminal matters.”²⁷¹

Legislative action is not necessary and would not be effective. The conflict in *Meyer* exists not because of a conflict between statutes²⁷² but because of an arguable conflict between a statute and the supreme court’s power under the constitution. As mentioned above, section 1051 directs

263. *Meyer*, ¶ 1, 366 P.3d at 311.

264. *Id.*

265. *Id.*

266. *Meyer v. Engle*, 2016 OK CR 1, ¶ 17, 369 P.3d 37, 41.

267. *Id.* ¶ 6, 369 P.3d at 38-39.

268. *Id.* ¶ 11, 369 P.3d at 40.

269. *Id.* ¶¶ 13-17, 369 P.3d at 40-41.

270. *Id.* ¶ 1, 369 P.3d at 42 (Lewis, J., specially concurring) (“What troubles me the most about this case and its history is that I am no longer surprised that the Oklahoma Supreme Court would entertain an extraordinary writ in a criminal case.”); *id.* ¶ 5, 369 P.3d at 43 (Hudson, J., concurring) (“The Oklahoma Supreme Court’s actions threaten to create the very type of conflicts and confusion in the administration of criminal justice which Oklahoma law forbids.”).

271. *Id.* ¶ 3, 369 P.3d at 42 (Lewis, J., specially concurring).

272. At first blush, the rulemaking statutes may appear to be in conflict. Title 12, section 74 directs the supreme court to make and amend rules that “shall apply to the Supreme Court . . . and all other courts of record.” However, this statutory authorization is limited to rules “as may be required to carry into effect the provisions of this Code [of Civil Procedure].” 12 OKLA. STAT. § 74 (2011). Thus, the statutory authorization does not conflict with the statute authorizing COCA to make rules for appeals in criminal matters. *See* 22 OKLA. STAT. § 1051(b) (2011).

COCA to create procedural rules for its cases.²⁷³ But under its constitutional supervisory-control power or general administrative authority,²⁷⁴ the supreme court may create rules for inferior courts. And as discussed above, COCA is inferior to the supreme court. May the supreme court create a rule for district courts that regulates petitions for mandamus to COCA, or direct COCA to apply a district court rule in a certain manner, despite the legislature's grant of rulemaking power to COCA? Is the statute granting rulemaking power to COCA an unconstitutional intrusion on the supreme court's constitutional power over inferior courts?

The answer to both questions should be no. The question of whether rulemaking power is exclusive to the courts or is jointly shared with the legislature has been much discussed and ruled on.²⁷⁵ In Oklahoma, the supreme court has recognized that the power is shared and that "rules promulgated by the Court must not contravene any constitutional or statutory provision upon the same subject."²⁷⁶ And the court has conceded that "the legislative arm of the government has the power to alter and

273. 22 OKLA. STAT. § 1051(b) (2011).

274. Oklahoma cases most commonly cite article 7, section 6 of the constitution, providing for "general administrative authority over all courts in this State" as the basis for the supreme court's rulemaking authority. Other states commonly cite the superintending-control power as the source of rulemaking authority. *See, e.g.*, *District Court of Second Judicial District v. McKenna*, 881 P.2d 1387, 1390 (N.M. 1994) (holding that promulgating rules that regulate procedure is inherent in the power of superintending control); *see also In re: Rules Regarding Dispute Resolution Act*, 57 OKLA. B.J. 863, 876 (1986) (Kauger, J., specially concurring) (citing general administrative authority of section 6 and superintending control of section 4 as authority for rulemaking); Annotation, *Power of Court to Prescribe Rules of Pleading, Practice, or Procedure*, 158 A.L.R. 705 (1945); *cf. McNabb v. United States*, 318 U.S. 332, 340 (1943) ("Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.").

275. *See, e.g.*, *Mowrer v. Rusk*, 618 P.2d 886, 890-91 (N.M. 1980) ("Any action of the executive or legislative branch of the municipal government which would preclude the Supreme Court or the district court from exercising its superintending or supervisory authority over the municipal court violates [the state constitution]."); Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 624 (1957) (surveying states and tracing power to King's Bench); Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599 (1926) (arguing that procedural rulemaking should be solely a function of courts).

276. *Eberle v. Dyer Constr. Co.*, 1979 OK 49, ¶ 27, 598 P.2d 1189, 1193 (first citing *Carlile v. Nat'l Oil & Dev. Co.*, 1921 OK 163, 201 P. 377; and then *Pierce v. State*, 1963 OK CR 58, 383 P.2d 699).

regulate the procedure in both law and equity matters.”²⁷⁷ Only where the legislature’s action has so intruded on the power of the courts as to violate separation-of-powers principles has the supreme court held a statute unconstitutional.²⁷⁸ For example, in *Atchison, Topeka & Santa Fe Railway v. Long*, the court held unconstitutional a statute requiring courts to hear certain types of cases within ten days of the defendant’s answer.²⁷⁹ The court reasoned that such a requirement stripped so much discretion from the courts as to interfere with the courts’ ability to safeguard the rights of litigants.²⁸⁰ In *In re Bledsoe*, the court held that the legislature could not eliminate bar passage as a requirement for bar admission, because it was an intrusion on the court’s inherent power to decide who should be admitted to practice.²⁸¹ And in *Puckett v. Cook*, the court held that a statute prohibiting consolidation of cases for trial was an “unconstitutional abridgement” of the courts’ power to exercise judicial discretion.²⁸²

The statute granting rulemaking authority to COCA is not analogous to the statutes involved in these cases. First, no separation-of-powers issue arises. The legislature has delegated power to the judiciary, just not to the supreme court. Second, the statute is consistent with the constitution and its bifurcation of appellate jurisdiction. Logic and efficiency support a power in each court to create its own rules for appeals within its jurisdiction. Especially considering that a statute is to be considered constitutional if possible,²⁸³ the statute giving COCA rulemaking powers easily passes muster. Further, were the supreme court to make a rule purporting to supersede the COCA rule, any such rule would contravene the statute giving rulemaking power to COCA, which the supreme court admits it is prohibited from doing.²⁸⁴ And finally, even if despite this reasoning, the supreme court considered the grant of rulemaking power to COCA to be an

277. *Atchison, Topeka & Santa Fe Ry. Co. v. Long*, 1926 OK 963, ¶ 16, 251 P. 486, 489.

278. *See, e.g., Puckett v. Cook*, 1978 OK 108, ¶ 13, 586 P.2d 721, 723 (“Where the legislature acts with regard to a matter over which courts have ultimate authority, and acts in a way to deprive courts of that authority, the legislative act is an unconstitutional abridgement of the principle of separation of powers.”).

279. ¶ 20, 251 P. at 489.

280. *Id.* ¶ 16, 251 P. at 489.

281. 1939 OK 506, ¶ 0, 97 P.2d 556, 556.

282. ¶ 5, 586 P.2d at 722.

283. *Naylor v. Petuskey*, 1992 OK 88, n.2, 834 P.2d 439, 440 n.2 (“[T]here is a presumption that an act of the legislature is constitutional. Acts of the legislature will be construed in harmony with the constitution.” (citation omitted)).

284. *Eberle v. Dyer Constr. Co.*, 1979 OK 49, ¶ 27, 598 P.2d 1189, 1193.

unconstitutional intrusion on its superintending-power jurisdiction, the court should remember that superintending power is a discretionary power.²⁸⁵ Uniformity of filing deadlines is a worthy principle. But in view of Oklahoma's system of bifurcated appellate jurisdiction and the need for comity and clarity of jurisdictional boundaries, use of the superintending power to usurp COCA's procedural rules seems to be a poor exercise of discretion.

After the COCA opinion in *Meyer v. Engle*, the petitioner was left in limbo. The supreme court's order lacked a writ of mandamus ordering COCA to allow the petitioner to file his petition.²⁸⁶ Instead, the court's order announced a grant of "declaratory relief" that time periods should be based on business days in both civil and criminal proceedings to disqualify a trial judge.²⁸⁷ COCA considered the order "a request for comity," which it declined to grant.²⁸⁸ After the petitioner requested direction from the supreme court, the court wrote that—because it had already ruled—it "deem[ed] no further action need be taken," citing article 7, section 4 of the constitution.²⁸⁹

This is an odd state of affairs. The supreme court knows that COCA declined to act in accordance with the supreme court's decision, so the court should take some action either to enforce or withdraw its order. First, the supreme court could use its superintending power to order COCA to change its rule. As discussed above, this would not be a good use of the superintending power. The power should be used sparingly, and its use here would conflict with the statute directing COCA to make procedural rules.

The second obvious course of action is for the supreme court to withdraw its order granting declaratory relief. This is effectively the result anyway, because COCA ignored the order, and the petitioner's criminal case is proceeding before the judge that the petitioner sought to disqualify—without the petition for mandamus ever being considered by COCA. If the supreme court had withdrawn its order, at least the rule would be clear for the petitioner and other parties who may become similarly situated.

Instead, the third choice of doing nothing, as the supreme court has chosen, leaves the rule in a state of ambiguity. The declaratory relief is of

285. *E.g.*, *Dutton v. City of Midwest City*, 2015 OK 51, ¶ 27, 353 P.3d 532, 545-46.

286. *Meyer v. Engle*, 2016 OK CR 1, ¶ 15, 369 P.3d 37, 41.

287. *Id.*

288. *Id.*

289. *Order, Meyer v. Smith*, 2015 OK 86, 366 P.3d 311 (Feb. 29, 2016) (No. 114,409).

no benefit to the petitioner, unless he is convicted and somehow convinces the supreme court to become involved in his appeal, based on COCA's failure to consider his petition for mandamus. This seems unlikely, because if the supreme court were going to press the issue, the time to do that would be before the trial, not after. Allowing a trial before the judge in question, and then attempting to intervene afterwards, would be a waste of resources for all parties and courts. It would also put the supreme court in a position it has never been—becoming involved with the merits of a conviction. So the result is an order whose only effect is to create ambiguity for future petitioners.

III. Conclusion

Unlike the Texas court structure of coequal courts of last resort²⁹⁰—which a Texas Supreme Court justice recently described as a “Rube Goldberg-designed judicial ‘system’”²⁹¹—the Oklahoma Constitution provides that the Oklahoma Supreme Court is the final arbiter of the jurisdictional boundary between itself and the Oklahoma Court of Criminal Appeals. One would think this provision would be a safeguard against lingering jurisdictional disputes between the two courts, and for the most part, this has been true. In some instances—such as the allocation of jurisdiction over grand jury proceedings—the lack of conflict is because the courts have worked well together, taking care to provide a clear boundary and consistency between criminal and civil issues. In other instances, the lack of conflict is because the courts have been extremely deferential to each other, even to the extent of ceding jurisdiction over issues arguably within their own realms. And even the most recent conflicts should not be overstated. Although three times²⁹² in the last five years, the courts have

290. TEX. CONST. art. V, §§ 3, 5.

291. *In re Reece*, 341 S.W.3d 360, 378 (Tex. 2011) (Willett, J., dissenting).

292. A fourth case, *Allen v. State*, 2011 OK CR 31, 265 P.3d 754, resulted in somewhat competing orders but to a lesser extent than the three cases discussed. In *Allen*, another execution case, the defendant attempted to appeal a jury's determination of his sanity to be executed. *Id.* ¶ 2, 265 P.3d at 755. The supreme court initially assumed jurisdiction over the appeal but reversed itself a year later and transferred the case to COCA. *Id.* ¶ 2, 265 P.3d at 755-56. The supreme court's order stated that the case was transferred to COCA for “a constitutionally acceptable substantial and procedural review of the jury's verdict.” *Id.* ¶ 4, 265 P.3d at 756. The defendant argued that this order required COCA to conduct such a review. *Id.* COCA declined, holding that Oklahoma statutes provided for no appeal from the jury's sanity determination and that no review was constitutionally required. *Id.* ¶ 13, 265 P.3d at 757.

issued orders that compete to some extent, the supreme court ultimately declined to assume jurisdiction in one of those—*Leftwich*—after considering briefs and oral argument.

Yet the supreme court issued a stay in the criminal case in *Leftwich*—a clear crossing of the boundary.²⁹³ The most troubling case, of course, was *Lockett*, not only because it was a death penalty case where stakes are highest, but also because the publicity surrounding the dueling orders and the governor’s announcement that the supreme court had exceeded its constitutional authority tends to undermine the public’s confidence in the court system.²⁹⁴ And the publicity continues regarding the latest conflict in *Meyer*, including a reminder of the courts’ disputes in the previous two cases.²⁹⁵ For that reason alone, the supreme court would be wise to recognize a brighter civil-criminal line and articulate specific reasons for crossing it. Instead, the court has used a case-by-case approach, which it admits has weaknesses:

This “case-by-case” approach necessarily results in an evolving understanding of the appropriate line of demarcation between the Supreme Court’s jurisdiction and that of the Court of Criminal Appeals. The results can be confusing when a more recent decision is viewed against the backdrop of older, factually similar cases reaching the opposite conclusion on the jurisdictional issue. We acknowledge that confusion, but conclude that a hard-and-fast rule would not serve the ends of justice.²⁹⁶

The court’s recent opinion in *Dutton v. Midwest City* purported to categorize the types of cases where the supreme court has exercised jurisdiction when criminal matters are involved.²⁹⁷ But the opinion lacked clarity for those seeking guidance regarding future cases. For example, in the “Original Supervisory Civil Jurisdiction” section, one of the categories was “other various circumstances where civil jurisdiction exists in this

293. See *Leftwich I*, 2011 OK 80, ¶ 4, 262 P.3d 750, 750-51.

294. See generally *Lockett IV*, 2014 OK 34, 330 P.3d 488 (per curiam).

295. Nolan Clay, *Oklahoma’s Top Courts’ Judges Squabble Over Duties*, OKLAHOMAN (Feb. 1, 2016, 12:01 AM), <http://newsok.com/article/5475962>.

296. *Movants to Quash Multicounty Grand Jury Subpoena v. Dixon*, 2008 OK 36, ¶ 7 n.1, 184 P.3d 546, 548 n.1 (citations omitted).

297. 2015 OK 51, 353 P.3d 532 (holding on various grounds that it lacked jurisdiction to adjudicate an appeal from a criminal conviction in municipal court).

Court, although its exercise may involve a criminal proceeding.”²⁹⁸ This vague category included the appearance bond cases²⁹⁹ and a proceeding to oust a public official.³⁰⁰ Thus, the opinion categorized prior decisions but did not always offer a cogent rationale for why those decisions had been reached. Similarly, in its discussion of the civil-criminal distinction, the court cited *Mahler* for the proposition that punishment is an essential part of a criminal case.³⁰¹ The court followed that with a cite to *Lockett IV*, using the signal “*cf.*” with the quote indicating that the court had refrained from reviewing the validity or terms of the sentence in *Lockett IV*.³⁰² As previously discussed, this distinction is puzzling, at best.

Two statements from *Dutton* come close to defining the civil-criminal boundary. First, the court reasoned that “if a petitioner’s claim is of such a nature that it is normally reviewed by the Court of Criminal Appeals in a properly filed proceeding in that Court such as a direct appeal or post-conviction appeal, then the Oklahoma Supreme Court will not assume jurisdiction on that claim.”³⁰³ This kind of circular definition may have predictive value in some cases but is not useful in less clear cases, and it offers no basis for analysis in a close case of first impression. The other possibly definitional statement in *Dutton* was in its explanation of *Lynch*, the case where the court decided the constitutionality of compensation for attorneys representing criminal defendants. The court stated that its decision did “not include an adjudication of the elements of a defendant’s criminal offense, defenses, and personal rights a defendant possesses in his or her criminal proceeding as they relate to the criminal cause of action, judgment, or sentence,” implying that only an adjudication of one of those items would qualify as a criminal case that would be within COCA’s jurisdiction under the constitution.³⁰⁴ This description is certainly more predictive of

298. *Id.* ¶ 20, 353 P.3d at 541.

299. *E.g.*, *Dunn v. State*, 1917 OK 269, 166 P. 193; *see supra* notes 64-70 and accompanying text.

300. *Hale v. Bd. Of Cty. Comm’rs*, 1979 OK 158, 603 P.2d 761; *see supra* note 139. *Hale* was not really a criminal proceeding at all—the statute merely required the ouster to be conducted as one. But no criminal punishment was involved.

301. *Dutton*, ¶ 21 n.24, 353 P.3d at 541 n.24.

302. *Id.*

303. *Id.* ¶ 21, 353 P.3d at 541 (emphasis omitted).

304. *Id.* ¶ 23, 353 P.3d at 543. The court made a similar statement regarding *Sanders v. Followell*, the case of statutory interpretation of the attorney-fee statute. “The controversy adjudicated by this Court did not involve a part of the criminal cause of action, defenses

whether the supreme court would consider an issue civil or criminal. But its restrictive wording seems more focused on particular issues rather than whether the issue arose in a criminal *case*, as the constitution specifies. Further, applying the description to *Lockett* indicates that the court should have considered the case to be criminal. The secrecy of the supplier of drugs used in the execution seems clearly to be an issue regarding personal rights possessed by a defendant in his criminal proceeding, relating to his sentence.³⁰⁵ Similarly, applying the wording to the issue in *Leftwich* supports the concurring opinion of the sole supreme court justice who wanted to dismiss for lack of jurisdiction. Application of the speech or debate clause obviously related to a defense in the criminal proceeding.

Comparatively, although the Texas courts have also struggled with jurisdictional issues caused by bifurcation, they have articulated some broad principles to define the boundary. In Texas, the constitution's jurisdictional language is not consistent for the two courts. The Texas Supreme Court has appellate jurisdiction over "all cases except in criminal law matters,"³⁰⁶ whereas the Texas Court of Criminal Appeals has appellate jurisdiction "in all criminal cases."³⁰⁷ But the Texas Court of Criminal Appeals has writ jurisdiction "in criminal law matters."³⁰⁸ The difference in language—"matters" versus "cases"—and the varying constitutional language defining the Texas Supreme Court's jurisdiction throughout the years³⁰⁹ have resulted in interpretation of both terms. Although the courts have never specifically defined a "criminal case," or a "criminal law matter," they have adopted principles that, for the most part, result in broader jurisdiction for the Texas Court of Criminal Appeals compared to the jurisdiction of COCA. For example, the Texas Court of Criminal Appeals held that an appeal from a post-conviction denial of a motion for DNA testing was a "criminal case" because it was "closely connected to, and could affect, a

thereto, or issues relating to the propriety or enforcement of a sentence upon a criminal judgment." *Id.*

305. The same result is reached using the court's alternate formulation of "issues relating to the . . . enforcement of a sentence upon a criminal judgment." *Id.* ¶ 23, 353 P.3d at 543. The secrecy of the drug supplier relates to the enforcement of the sentence of execution.

306. TEX. CONST. art. V, § 3(a).

307. *Id.* art. V, § 5(a).

308. *Id.* art. V, § 5(c).

309. Section 3 originally limited the supreme court's jurisdiction to "civil cases." *Id.* art. V, § 3 (amended 1981).

conviction and sentence . . . in a criminal case.”³¹⁰ The court relied on language in Texas Supreme Court precedent holding that bond forfeiture appeals are criminal cases.³¹¹ Regarding “criminal law matters,” the court has stated that “[i]n our view, average voters reading the phrase ‘criminal law matters’ at the time of its adoption would probably have interpreted it to encompass, at a minimum, all legal issues arising directly out of a criminal prosecution.”³¹² “Disputes which arise over the enforcement of statutes governed by the Texas Code of Criminal Procedure, and which arise as a result of or incident to a criminal prosecution, are criminal law matters.”³¹³

No definition could provide an easy answer to every issue that might arise, but these broad principles are in line with what the public and most attorneys would consider to describe a criminal case or a criminal law matter, as opposed to a civil case or matter. For example, applying these principles to *Lockett* would clearly define the issue regarding secrecy of the drug supplier as criminal. The issue was “closely connected to, and could affect” the sentence of execution in the criminal case.³¹⁴ The execution statutes at issue are part of the Criminal Procedure title, and the issue

310. *Kutzner v. State*, 75 S.W.3d 427, 429 (Tex. Crim. App. 2002). Another of the court’s statements was not as helpful, though: “[T]his Court will entertain an appeal when . . . it is related to the ‘standard definition’ of a criminal case.” *Id.* at 431 (quoting *Bradley v. Miller*, 458 S.W.2d 673, 674 (Tex. Crim. App. 1970)).

311. *E.g.*, *Jeter v. State*, 26 S.W. 49, 49-50 (Tex. 1894).

312. *Lanford v. Fourteenth Court of Appeals*, 847 S.W.2d 581, 585 (Tex. Crim. App. 1993) (assigning a judge to a criminal case was a criminal law matter).

313. *Curry v. Wilson*, 853 S.W.2d 40, 43 (Tex. Crim. App. 1993) (holding a dispute regarding collection from defendant of costs for appointed counsel in capital case was criminal law matter). The Texas Court of Criminal Appeals has sometimes interpreted “criminal law matter” even more broadly. For example, the court has stated that “[a]n issue does not cease to be a criminal law matter merely because elements of civil law must be addressed to resolve the issue.” *Armstrong v. State*, 340 S.W.3d 759, 765 (Tex. Crim. App. 2011) (holding a dispute regarding sufficiency of evidence for clerk’s bill of costs in criminal case was a criminal law matter); *see also State ex rel. Holmes v. Honorable Court of Appeals for Third District*, 885 S.W.2d 389, 394 (Tex. Crim. App. 1994) (“Although civil and criminal law matters may occasionally overlap, when a matter is essentially criminal, the presence of civil law issues will not remove the matter from our jurisdiction.”), *abrogated in part on other grounds by Ex parte Elizondo*, 947 S.W.2d 202, 206 (Tex. Crim. App. 1996); *Smith v. Flack* 728 S.W.2d 784, 788-89 (Tex. Crim. App. 1987) (“[E]nforcement of an order issued pursuant to a criminal statute is a criminal law matter as much as the issuance of the order itself, even if it requires this Court to examine civil laws in the process.”).

314. *Kutzner*, 75 S.W.3d at 429.

certainly arose “as a result of” a criminal prosecution.³¹⁵ Furthermore, these principles seem to create no more jurisdictional conflicts than the Oklahoma system—just differing results—as indicated by the difference in jurisdiction of the appearance bond forfeiture cases.³¹⁶ The Texas Court of Criminal Appeals was created for the same purpose as COCA—docket relief—and these principles are consistent with that purpose.³¹⁷ Going forward, the Oklahoma Supreme Court should articulate similar broad principles that would be more predictive of future outcomes, be consistent with the purpose of COCA’s creation, and be consistent with the common meaning of a “criminal case.”

Finally, a fair question is whether the disadvantages of this bifurcated court system outweigh its advantages, and whether bifurcation at the highest level serves any purpose.³¹⁸ Although outside the scope of this

315. In Texas, the Court of Criminal Appeals has reasoned that “[c]learly, the entry of an order which stays the execution of a death row inmate is a criminal law matter.” *Holmes*, 885 S.W.2d at 394.

316. Similarly, attorney fee matters in criminal cases are criminal law matters. *Weiner v. Dial*, 653 S.W.2d 786, 787 (Tex. Crim. App. 1983) (“The provision for appointment and compensation of attorneys to represent indigents in criminal law matters is certainly itself a criminal law matter.”). However, there is authority holding that, unlike Oklahoma’s decisions, appeals of jury determinations of sanity are not criminal law matters. *See Torres v. State*, 403 S.W.2d 135 (Tex. Crim. App. 1966); *Hardin v. State*, 248 S.W.2d 487, 487 (Tex. Crim. App. 1952). But these cases have been criticized for conflating the appealability of the determination with whether it was criminal or civil. *See Kutzner*, 75 S.W.3d at 430-31; GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE SERIES, CRIMINAL PRACTICE & PROCEDURE § 57.2 (3d ed.), Westlaw (database updated November 2015).

317. William L. Willis, *The Evolution of the Texas Court of Criminal Appeals*, 29 TEX. B.J. 723, 723 (1966). *But see* Ben L. Mesches, *Bifurcated Appellate Review: The Texas Story of Two High Courts*, JUDGES J., Fall 2014, at 30 (citing Scott Henson, *Caveats to Debate on Merging Texas Supreme Court, Court of Criminal Appeals*, GRITS FOR BREAKFAST (Dec. 13, 2012), <http://gritsforbreakfast.blogspot.com/search?q=Caveats+to+debate> (arguing that the court was created to “facilitate the use of criminal law” to enforce Jim Crow policies)).

318. *See generally* 1 STANDARDS RELATING TO COURT ORG. § 1.13 (AM. BAR ASS’N 1990) (“Where the volume of appeals is such that the state’s highest court cannot satisfactorily perform these functions, a system of intermediate appellate courts should be organized. . . . The supreme court, or highest appellate court, should have authority to review all justiciable controversies and proceedings, regardless of subject matter or amount involved.”). The commentary following the standard notes that appellate courts are considered to perform two basic functions: error correction and law development. The theory behind a court structure with an intermediate appellate court—as Oklahoma has on the civil side—is that the workload is distributed so that each court may focus on its role. The intermediate appellate court focuses on correcting errors by the trial courts, primarily for

article, subject-matter judicial specialization has been criticized on numerous grounds in addition to boundary problems.³¹⁹ In fact, criminal law has been singled out as a particularly inappropriate subject matter for a specialized court.³²⁰ And Oklahoma's system creates a possibility of divergent views on issues that could arise in both courts. Comity between the courts has avoided that result so far, with *Leftwich* being the closest call.³²¹

the benefit of the appellant. The highest court focuses on the law development function—resolving issues for the community at large. No intermediate court exists on the criminal side in Oklahoma, so COCA performs both functions.

319. See generally Posner, *supra* note 9. In addition to boundary problems, three of Posner's arguments against specialization would be relevant to COCA: (1) Insularity—the court is cut off from divergent perspectives or broader views that might be provided by non-specialists, and non-specialists likely do not pay close attention to its decisions; (2) Inferiority—the focus solely on criminal issues makes the work repetitive, and it may be considered less prestigious than the supreme court; (3) Expertise—the argument is that specialized knowledge is not significantly valuable, because judging requires decision-making expertise rather than subject-matter expertise. Posner also argues that specialized courts exacerbate the danger of one ideological view dominating the court, giving a specific example of a division in “criminal law between those who emphasize public safety and those who emphasize defendants' rights.” *Id.* at 783; see also Oldfather, *supra* note 9. The author provides a collection of sources discussing judicial specialization, *id.* at 849 n.9, and considers research into the psychology of expertise. Within discussion of the potential inferiority of specialists, Oldfather identifies another potential argument against specialization: desensitization. The argument is that “specialized judges will come to view a greater fraction of the cases before them as routine . . . [and thus] engage less deeply.” *Id.* at 860. In contrast, the arguments in favor of judicial specialization are primarily that the expertise of specialists leads to better results and efficiency. See Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 378 (“If, as common experience suggests, experts are better than laymen at dealing with matters in their special areas, the specialized judiciary should handle cases more efficiently Most important, the court's expertise should enable it to craft better opinions . . .”).

320. Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 638-39 (1973) (“[W]hile I am not at all opposed to specialized courts in principle, criminal law seems to me the last place for them. The main arguments for specialized courts are the need for expertise and for prompt and authoritative determination of the law so that people can formulate their conduct accordingly. . . . Neither argument applies to criminal law. Its concepts are readily within reach of any competent lawyer, even though, as has been the case with many federal judges, he has had little or no criminal practice. Furthermore, criminals do not plan their activity with an eye fixed on the . . . Penal Code. . . . Moreover, I see actual detriments in a specialized court of criminal appeals. It is too likely to become dominated by hard-liners or soft-liners, more likely the former.” (footnote omitted))

321. See *Leftwich I*, 2011 OK 80, 262 P.3d 750. Divergent views appear to exist regarding the scope of protection against search and seizure, but no conflicting decisions on

But regardless of these potential criticisms, the Oklahoma court structure is well entrenched and unlikely to change,³²² so the jurisdictional boundary should be respected. All three of the supreme court's recent incursions were inconsistent with precedent and ultimately fruitless. In none of the three did the supreme court's involvement change the result that would have occurred had the court held that it lacked jurisdiction. So a greater acceptance by the supreme court of COCA's exclusivity, and a better articulation of principles to define the boundary, would serve the system well.

a single set of facts appear to exist. Compare *Turner v. City of Lawton*, 1986 OK 51, ¶ 15, 733 P.2d 375, 380 (“The Oklahoma Constitutional prohibition is broader in scope than its federal counterpart, forbidding any unreasonable search *or* seizure and requiring that the place to be searched be described with greater particularity than does the federal constitution.”), with *State v. Sittingdown*, 2010 OK CR 22, ¶ 17, 240 P.3d 714, 718 (“[T]he Federal Constitution and the Oklahoma Constitution are the same in the rights protected.”).

322. Unlike the Texas system, Oklahoma's bifurcated system has not been the subject of critical commentary. Reform efforts periodically arise in Texas. See, e.g., Mesches, *supra* note 317; Thomas M. Reavley, *Court Improvement: The Texas Scene*, 4 TEX. TECH. L. REV. 269 (1973).