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COMMENTS

Mind the Gap: Issues with and Solutions to Oklahoma's Appellate Jurisdiction as Exposed by *Lockett v. Evans*¹

I. Introduction

In January 2014, Clayton Lockett and Charles Warner were scheduled for execution by the State of Oklahoma.² As Lockett's conviction stemmed from a robbery, kidnapping, and murder in the summer of 1999³ and Warner's originated with convictions of rape and first degree murder in 1997,⁴ this appeared to mark the end of a long road for both men. Apparently unprepared to concede the field, however, the two men launched an appeal challenging the constitutionality of the state's confidentiality provision for death-penalty proceedings.⁵ The controversial appeal brought conversations about cruel and unusual punishment—and the merits of the death penalty in general—to the forefront of observers' minds throughout Oklahoma and the nation.

Despite the uncontested importance of such well-publicized humanitarian issues, a second aspect of the Lockett saga offers comparative, albeit far more technical, significance. In its run through the gamut of Oklahoma courts, the case exposed some shortcomings of the state's appellate system. Unlike most cases, the procedural history of this case reads more akin to something out of a John Grisham novel.

Lockett and Warner initially challenged Oklahoma's death-penalty statute⁶ on both state and federal constitutional grounds.⁷ They also moved for injunctive relief, seeking to stay their executions.⁸ Because of the federal claims, the case was temporarily removed to federal court, but an amendment to the complaint left only challenges on state grounds, sending the case back to state court.⁹ The District Court of Oklahoma County then heard the case, but denied the request for a stay of execution, claiming that the Oklahoma Court of Criminal Appeals holds jurisdiction over such a

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1. (*Lockett 4*), 2014 OK 34, 330 P.3d 488 (per curium).
 2. *Lockett v. State (Lockett 2)*, 2014 OK CR 3, ¶ 1, 329 P.3d 755, 755-56.
 3. *Lockett v. State (Lockett 1)*, 2002 OK CR 30, ¶¶ 1-3, 53 P.3d 418, 421.
 4. *Warner v. State*, 2006 OK CR 40, ¶¶ 1-2, 144 P.3d 838, 856.
 5. *Lockett 2*, ¶ 1, 329 P.3d at 755-56.
 6. 22 OKLA. STAT. § 1015(B) (2011).
 7. *Lockett 2*, ¶ 1, 329 P.3d at 755-56.
 8. *Id.*
 9. *Id.*

motion.¹⁰ Lockett and Warner then filed a petition in error with the Oklahoma Supreme Court, appealing the denial of the stay of execution.¹¹ The supreme court, however, affirmed the district court, ruling that only the court of criminal appeals could hear the motion for the stay of execution, although the supreme court could hear the merits of the action.¹²

While it would seem that the matter should be ripe for a decision on the merits at this point, that was not yet the case. Although the District Court of Oklahoma County ruled that the confidentiality clause did violate the inmates' state constitutional rights, it denied the rest of their claims.¹³ Further, the court of criminal appeals denied Lockett and Warner's subsequent motion for a stay of execution, holding it had no authority to grant the motion because there was no pending case before it.¹⁴ Therefore, the petitioners brought another motion for a stay of execution before the Supreme Court of Oklahoma.¹⁵ But yet again, the supreme court kept the substantive appeal and transferred the stay of execution issue to the court of criminal appeals.¹⁶ Not to be outdone, the court of criminal appeals also denied the stay of execution once more, claiming that the supreme court "does not have the power to supersede a statute and manufacture jurisdiction in [the court of criminal appeals] for [Lockett and Warner's] stay request by merely transferring it here."¹⁷

So by April 21, 2014, the Supreme Court of Oklahoma and the Oklahoma Court of Criminal Appeals had each refused to hear the motion for a stay of execution twice, there was still a substantive appeal before the supreme court, and the first execution was scheduled for the following day, April 22.¹⁸ The supreme court, noting the "awkward position" that the court of criminal appeals had left it in, therefore reluctantly agreed to hear the request for a stay of execution.¹⁹ The court granted the inmates a twelfth-hour stay until the appeal of the constitutionality of the statute could be heard.²⁰ Two days later, the supreme court issued a ruling on the merits and

10. *Id.*

11. *Id.* ¶ 2, 329 P.3d at 756-57.

12. *Id.*

13. *Id.* n.6, 329 P.3d at 756.

14. *Id.* ¶ 2, 329 P.3d at 756-57.

15. *Id.* ¶ 2, 329, P.3d at 757.

16. *Id.*

17. *Id.* ¶ 4, 329 P.3d at 758.

18. Lockett v. Evans (*Lockett 3*), 2014 OK 33, ¶ 6, 356 P.3d 58, 59-60 (per curium) (mem. opin.).

19. *Id.* ¶ 13, 356 P.3d at 61.

20. *Id.* ¶ 15, 356 P.3d at 61.

held that the inmates' constitutional rights had not been violated, thus dissolving the stay on the executions it had previously administered.²¹

Regardless of whether this game of jurisdictional hot-potato reached the correct end, there are significant issues with the means. The supreme court recognized that it must either act without jurisdiction or deny Lockett and Warner access to the courts for their claims; claims which the appellants' lives truly depended on.²² And while the supreme court by all accounts chose the lesser of two evils by granting the stay of execution, in a properly functioning judicial structure such a prisoner's dilemma should never enchain the courts.

Further, while this scenario has a particular flair for the dramatic, it is far from the only situation where such a dilemma matters. While some assert that "mercifully few"²³ of these jurisdictional conflicts arise, the fact is, as shown above, that any time the supreme court and the court of criminal appeals disagree about which court has jurisdiction, negative consequences may follow. Moreover, regardless of the number of times these conflicts occur, the ripples in their wake are large enough that they need to be eliminated entirely. Most importantly, while perhaps the fact that there have not been more conflicts is a testament to "the constant willingness of the members of each Court to observe and comply with their jurisdictional restrictions,"²⁴ foundational principles of democracy and fairness contend that citizens should not have to rely on the goodwill of those with power to make the right decisions, but rather demand that systematic checks are in place.²⁵

This Comment thus contends that the system of appellate jurisdiction in Oklahoma needs to be changed. Part II of the Comment gives an explanation of the current state of appellate jurisdiction in Oklahoma. Part III examines in more detail the issues with the current system and where

21. *Lockett 4*, 2014 OK 34, ¶ 20, 330 P.3d 488, 492 (per curium). And yet, even at this point, the drama continues. See Bailey Elise McBride & Sean Murphy, *Oklahoma Inmate Dies After Execution Is Botched*, HUFFINGTON POST (Apr. 30, 2014, 1:04 AM), http://www.huffingtonpost.com/huff-wires/20140430/us--oklahoma-double-execution/?utm_hp_ref=travel&ir=travel.

22. See *Lockett 3*, ¶ 13, 356 P.3d at 61.

23. *Movants to Quash Multicounty Grand Jury Subpoena v. Dixon*, 2008 OK 36, ¶ 5, 184 P.3d 546, 548.

24. *Carder v. Court of Criminal Appeals*, 1978 OK 130, ¶ 1, 595 P.2d 416, 418.

25. See generally THE FEDERALIST NO. 48 (James Madison) (arguing that it is not enough that the Constitution merely separate the three branches of government on paper, to be upheld by goodwill and fair play. Instead, actual powers must be given to each branch to prevent the erosion of its power by another).

they originate. Part IV argues why the problems found within the current state of appellate jurisdiction warrant concern. Finally, Part V offers an examination of potential solutions to the problem, and Part VI concludes.

II. Current System of Appellate Jurisdiction

Although additional intricacies have been added through statutes and case law, the base of the Oklahoma system of appellate jurisdiction lies in the Oklahoma State Constitution. While judges were originally chosen through partisan elections, several bribery scandals in the 1960s led to the amendment of article VII of the Oklahoma Constitution, the cornerstone of judicial power in the state, in 1967.²⁶ Of particular importance here, section 1 of article VII roots traditional civil and criminal judicial power in the supreme court and the court of criminal appeals.²⁷ Section 1 states that the court of criminal appeals, while still continuing in effect, remains “subject to the power of the legislature to change or abolish said Courts.”²⁸ Presumably, this is because the court of criminal appeals was created by statute in 1907.²⁹ Therefore, while article VII acknowledges the validity of the court of criminal appeals, it does not bestow upon the court any more power than it was originally conferred; the court’s authority still comes from the legislature, not the constitution. And what the legislature giveth, the legislature can taketh away.

Article VII defines the jurisdictional scope of the Supreme Court of Oklahoma.³⁰ Namely, that the supreme court’s appellate jurisdiction extends “to all cases at law and in equity.”³¹ There is one critical exception though: the court of criminal appeals has exclusive appellate jurisdiction in

26. Lesli E. McCollum, *The Oklahoma Judiciary*, in *THE ALMANAC OF OKLAHOMA POLITICS* 1998, at 15, 22-23 (Gary W. Copeland et al. eds., 1998), <http://ojs.library.okstate.edu/osu/index.php/OKPolitics/article/view/1047/944>.

27. *See* OKLA. CONST. art. VII, § 1.

28. *Id.*

29. 20 OKLA. STAT. § 40 (2011); *History of the Court*, OKLA. COURT OF CRIMINAL APPEALS, <http://www.okcca.net/History.html> (last visited Mar. 9, 2017). This is made clearer by the fact that the state’s original constitution does not list the court of criminal appeals as a body in which the judicial power is vested. *Oklahoma Constitution*, OKLA. HIST. SOC’Y, <http://www.okhistory.org/research/okconstitution#page/27/mode/1up> (last visited Mar. 10, 2017). Instead, the original article VII, section 2 gives the power to hear criminal appeals to the supreme court until such time as a court of criminal appeals “shall be established by law.” *Id.*

30. OKLA. CONST. art. VII, § 4.

31. *Id.*

criminal cases.³² This puts Oklahoma in the rather unusual position of having two courts of last resort.³³ Yet, as before, this grant of power to the court of criminal appeals is not without loopholes: the constitution again goes on to say that this exclusive jurisdiction given to the court of criminal appeals only survives “until otherwise provided by statute.”³⁴ While the text specifically notes that both the supreme court and the court of criminal appeals have the power to issue remedial writs (such as writs of habeas corpus, mandamus and certiorari for matters within their respective jurisdiction), the text also makes clear that the supreme court retains “general superintending control” over all inferior courts “created by law.”³⁵

Neither this section nor any other of Oklahoma’s constitution defines the difference between civil and criminal matters. Yet the constitution does recognize that in some cases the line between the two may not be bright. Therefore, section 4 provides a method of resolution in the event that conflicts arise between the two courts.³⁶ In such a case, the supreme court shall decide where the matter should reside and that decision will be final.³⁷ This power to determine jurisdiction is extensive, extending even beyond conflicts in which the supreme court is involved.³⁸ This means that even when the court of criminal appeals and another inferior court disagree over jurisdiction, the supreme court can interject on its own accord and resolve the issue.³⁹ One important, established limitation of this power is that when civil claims depend on the outcome of a criminal claim wrapped up in the same appeal, the civil claims cannot be litigated until the criminal matter is disposed of.⁴⁰

In summation, the court of criminal appeals has jurisdiction over everything that is criminal. Additionally, the supreme court has jurisdiction over everything that is not criminal (thus, everything that is civil). Finally, the supreme court resolves conflicts between the two. This means that the

32. *Id.*

33. *See* McCollum, *supra* note 26, at 17.

34. OKLA. CONST. art. VII, § 4.

35. *Id.* And as the court of criminal appeals is created by law, it would seem to be included in this category. *See id.*

36. *See id.*

37. *Id.*

38. *See* Jackson v. Freeman, 1995 OK 100, ¶ 9, 905 P.2d 217, 220 (holding the Supreme Court of Oklahoma has the ability to determine jurisdictional complaints *against* the Oklahoma Court of Criminal Appeals).

39. *See id.*

40. Smith v. Okla. Dep’t of Corr., 2001 OK 95, ¶¶ 8-10, 37 P.3d 872, 873-74.

supreme court essentially defines what is civil and what is criminal.⁴¹ Specifically, the supreme court has held that the determination of such jurisdictional issues “is not a legislative matter, but a constitutional issue to be determined by this Court.”⁴²

Therefore, the supreme court, through its decisions, plays a large part in determining the appellate structure in Oklahoma. The supreme court has stated in multiple opinions that it makes such determinations on a “case-by-case basis.”⁴³ Case-by-case determinations typically rely on ad hoc reasoning, meaning the decision is based purely on the individual facts of that case “without consideration of wider application,” as opposed to applying a single hard-and-fast rule to all similar cases.⁴⁴ An examination of several decisions where the supreme court resolved jurisdictional conflicts based on the distinction between civil and criminal cases reveals that this court's jurisprudence does in fact lack a hard-and-fast rule.

The Oklahoma Supreme Court began walking the civil/criminal tightrope as early as 1927 in *Dancy v. Owens*.⁴⁵ At issue was whether the supreme court or the court of criminal appeals had jurisdiction over writs of habeas corpus.⁴⁶ There, the court promulgated a practical yet broad definition of criminal cases, namely those which are “prosecuted in the name of the state either by indictment or by information filed in a trial court.”⁴⁷ The court stated that the “law of this state” clearly provides this definition, yet it failed to cite any authority as to where that assertion originates.⁴⁸ The court also distinguished between civil and criminal by stating that “[p]roceedings to enforce civil rights are civil proceedings and proceedings for the punishment of crimes are criminal proceedings.”⁴⁹ Therefore, a writ of habeas corpus is a civil proceeding and within the jurisdiction of the supreme court, because even though it arose out of a criminal case, it is “a new suit brought by [the petitioner] to enforce a civil right . . . as against

41. See OKLA. CONST. art. VII, § 4.

42. *In re M.B.*, 2006 OK 63, ¶ 8, 145 P.3d 1040, 1044.

43. *Movants to Quash Multicounty Grand Jury Subpoena v. Dixon*, 2008 OK 36, ¶ 7, 184 P.3d 546, 549.

44. *Ad hoc*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/ad%20hoc> (last visited Sept. 17, 2016).

45. 1927 OK 203, 258 P. 879. Note that *Dancy* was decided before the amendments to the Oklahoma Constitution in 1967, so the relevant portion is limited to their discussion of what is criminal and civil, not their opening analysis of article 7, sections 1 and 2.

46. *Id.* ¶¶ 25-26, 258 P. at 884.

47. *Id.* ¶ 15, 258 P. at 882.

48. *Id.*

49. *Id.* ¶ 24, 258 P. at 885 (quoting *Ex parte Tom Tong*, 108 U.S. 556, 560 (1883)).

those who are holding him . . . under the criminal process.”⁵⁰ Therefore, at least potentially under this reasoning, if a criminal defendant challenges the constitutionality of the judicial process in some way, he is seeking to enforce his civil rights. Thus, the appeal would be a civil matter under the jurisdiction of the supreme court. Employed broadly, such a definition could potentially put many more cases before the supreme court than the court of criminal appeals.

The court further parsed the issue out by making an exception to its previously stated rule, noting that contempt hearings, even though involving punishment, are not criminal in nature.⁵¹ Indeed, “[c]ourts which have no criminal jurisdiction can punish for so-called criminal contempt, because the power to do so is inherent, and necessary to the efficiency and very existence of the court.”⁵² Therefore, jurisdiction simply lies in the court in which the actions leading to the contempt sanction occurred.⁵³

In 1990, almost sixty-five years later, in *State ex rel. Henry v. Mahler*, the supreme court was confronted with the question of whether amendments to an earned credits statute for inmates violated ex post facto requirements if the amendments enhanced the sentence of a current prisoner.⁵⁴ The court of criminal appeals argued that it did not have jurisdiction because the process of applying earned credits to a sentence is an administrative function that is separate from the underlying criminal case.⁵⁵ Another argument that potentially could have been raised is that this case demands resolution of a civil right, the right to be free from ex post facto punishments, which merely arose from a criminal proceeding. Therefore, the case would fit nicely within the framework of *Dancy*, and thus be under the jurisdiction of the supreme court. Instead, the court stated that “[c]learly questions pertaining to the length of sentences and credit time for reduction of those sentences belong in the Court of Criminal Appeals.”⁵⁶ And although the court briefly cites to *Dancy* in making an ancillary point, it makes no effort to distinguish or explain the opposite outcomes, so it is unclear whether this outcome is better characterized as an

50. *Id.* (quoting *Tom Tong*, 108 U.S. at 560).

51. *Id.* ¶ 30, 258 P. at 885.

52. *Id.* ¶ 31, 258 P. at 885 (quoting *Smith v. State ex rel. Gallaher*, 1916 OK CR 80, 159 P. 941, 943).

53. *Id.*

54. 1990 OK 3, ¶ 1, 786 P.2d 82, 83.

55. *Id.* ¶ 10, 786 P.2d at 84-85.

56. *Id.* ¶ 15, 786 P.2d at 86.

exception for issues of sentencing or an overhaul of the *Dancy* framework.⁵⁷

The court returned to its *Mahler* rationale again eleven years later in *Smith v. Oklahoma Department of Corrections*.⁵⁸ There, a former inmate disputed fees that she paid over her two-year period of supervised probations.⁵⁹ The court found the fees were “a condition of her probation and thus, her sentence.”⁶⁰ Therefore, since the length or amount of the petitioner’s punishment was essential to the issue, it is “clearly within [sic] the Court of Criminal Appeals’ exclusive jurisdiction.”⁶¹

The next context in which the dispute arose before the supreme court was whether an individual should be tried as a juvenile or an adult in *In re M.B.*⁶² Yet there, the court did not examine the substance of the claim as it did in *Dancy* by looking at whether the appeal asserted a civil right or not. Instead, the court looked to the origins of the procedural scenario that led to the appeal, asserting that the appeal “arose out of a criminal case” and therefore belonged in the court of criminal appeals.⁶³ This new understanding of how to determine jurisdiction puts far more weight on the side of the court of criminal appeals than the court’s previous methods; this template gives the court of criminal appeals jurisdiction over any appeal that originated with the prosecution of an individual under the criminal code, even if that individual now asserts a civil right. Again, the court made this shift without attempting to reconcile *Dancy*.⁶⁴

The supreme court moved back toward the *Dancy* rationale, however, in *Movants to Quash Multicounty Grand Jury Subpoena v. Dixon*, which analyzed the jurisdiction of an appeal regarding a grand jury’s power to issue a subpoena.⁶⁵ Following the framework of *In re M.B.*, it would seem that any matter involving a grand jury arises out of a criminal case and thus belongs in the court of criminal appeals. Yet, the court here returned to classifying the type of substantive appeal actually before it, as in *Dancy*.⁶⁶ Specifically, the court noted that if an appeal involving a grand jury raises issues of criminal procedure, then the appeal would fall within the

57. *Id.* ¶ 12, 786 P.2d at 85.

58. 2001 OK 95, 37 P.3d 872.

59. *Id.* ¶¶ 2-3, 37 P.3d at 873.

60. *Id.* ¶ 8, 37 P.3d at 873-74.

61. *Id.* ¶ 10, 37 P.3d at 874.

62. 2006 OK 63, ¶¶ 1-2, 145 P.3d 1040, 1041-42.

63. *Id.* ¶ 14, 145 P.3d at 1047.

64. *See M.B.*, 2006 OK 63, 145 P.3d 1040.

65. 2008 OK 36, ¶ 1, 184 P.3d 546, 547-48.

66. *Id.* ¶¶ 9-11, 184 P.3d at 549.

jurisdiction of the court of criminal appeals.⁶⁷ Whereas the question in *Dixon* only required a “generalized analysis of constitutional and statutory norms,” thus the case was properly situated before the supreme court.⁶⁸

Similarly, in *Movants to Quash Grand Jury Subpoenas Issued in Multicounty Grand Jury v. Powers*, the court assumed jurisdiction over a dispute involving a grand jury.⁶⁹ The court noted, however, as in *Dixon*, that jurisdiction regarding a grand jury could potentially go either way, to the supreme court or the court of criminal appeals, depending on the specific issue involved.⁷⁰ There, the deciding factor that gave the supreme court jurisdiction was not that the case was civil or criminal in nature, but rather that it was “a matter of broad public concern.”⁷¹

The supreme court further complicated the plot in *Leftwich v. Court of Criminal Appeals*.⁷² *Leftwich* sought to limit the court of criminal appeals’ ability to interpret the Oklahoma Constitution, presumably because she was aware of the holding in *In re M.B.* as mentioned above.⁷³ The supreme court, however, declined to assume jurisdiction and refused to address the jurisdictional issue.⁷⁴ It did so, however, not because the appeals were in any way criminal in nature, but because the parties agreed that the issues were not adequately raised before the court of criminal appeals, and that their interpretation of the Oklahoma Constitution was erroneous.⁷⁵ This seems especially strange given the protective nature the supreme court has previously demonstrated over its role as the only body able to determine jurisdiction under the Oklahoma Constitution.⁷⁶ Because of this, several judges dissented from the majority. The reasoning of each differed, but all of the three dissenters agreed that the court should have at least asserted its authority to decide the jurisdictional issue.⁷⁷

67. *Id.* ¶ 10, 184 P.3d at 549.

68. *Id.* ¶ 11, 184 P.3d at 549.

69. 1992 OK 142, ¶ 2, 839 P.2d 655, 656.

70. *Id.*

71. *Id.*

72. 2011 OK 80, 262 P.3d 750.

73. *Id.* ¶¶ 1-2, 262 P.3d at 750; *see also In re M.B.*, 2006 OK 63, ¶ 8, 145 P.3d 1040, 1044-45.

74. *Leftwich*, ¶¶ 3-4, 262 P.3d at 750-51.

75. *Id.* ¶ 2, 262 P.3d at 750.

76. Compare this attitude to *State ex rel. Henry v. Mahler*, 1990 OK 3, ¶ 2, 786 P.2d 82, 83, in which the supreme court refused to dismiss a jurisdictional conflict as moot just because the court of criminal appeals had denied jurisdiction over the matter.

77. *Leftwich*, 2011 OK 80, 262 P.3d 750 (Winchester, J., concurring in part and dissenting in part, positing that the court should have dismissed for lack of jurisdiction to

But, while the court's decision in *Leftwich* leaves much to be desired,⁷⁸ their end result is not without precedent.⁷⁹ In *Hinkle v. Kenny*, the supreme court agreed to leave statutory construction, and even constitutional analysis, in the hands of the court of criminal appeals.⁸⁰ It did so because the legislature had created the court of criminal appeals, pursuant to article VII, section 4 of the Oklahoma Constitution.⁸¹ The supreme court chose to do so, not because it was powerless to interpret such statutes itself—even criminal ones—but because it is their “policy, deliberately adopted, of avoiding a conflict of opinions and decisions between the two courts.”⁸² In other words, the supreme court could hear such issues, but would rather not. Again, this seems to be analysis after the heart of *In re M.B.*, where the supreme court is not worried that the court of criminal appeals is hearing civil issues, as long as they arose from a criminal case.⁸³

Finally, and most recently, in 2015 the Oklahoma Supreme Court decided *Dutton v. City of Midwest City*, an appeal of the legal correctness of the petitioner's convictions and sentence for assault, public intoxication, and domestic assault and battery.⁸⁴ There, the supreme court gave a much more detailed analysis of why it refused to adopt jurisdiction, listing four ways in which the petitioner failed to show that the court should have jurisdiction over the petitioner's request to have his previous convictions invalidated.⁸⁵ First, the petitioner failed to show why the substantive claim was a civil cause of action as opposed to criminal, meaning a cause of action involving “personal criminal liability, defenses thereto, and the imposition and execution of a criminal sentence.”⁸⁶ Second, the petitioner failed to show the claim was based on institutional deficiencies separate from the underlying criminal cause of action.⁸⁷ Third, the petitioner did not

review the court of criminal appeals in an undisputed criminal matter) (Watt, J., dissenting, arguing that the supreme court should assert original jurisdiction and prevent the state from pursuing charges under the current statute) (Reif, J., dissenting, stating that the court should assume original jurisdiction because the case presents a matter of significant public interest).

78. The main reason why the majority's stance is so difficult to decipher is that their opinion spans a mere four paragraphs. *See id.*

79. Albeit, a cite to which is not given within their four paragraphs.

80. 1936 OK 582, ¶ 10, 62 P.2d 621, 622.

81. *Id.* ¶ 9, 362 P.2d at 622.

82. *Id.* ¶ 12, 62 P.2d at 623.

83. *See In re M.B.*, 2006 OK 63, ¶¶ 13-14, 145 P.3d 1040, 1047.

84. 2015 OK 51, ¶¶ 2-3, 353 P.3d 532, 536.

85. *Id.* ¶ 20, 353 P.3d at 540-41.

86. *Id.* ¶ 20, 353 P.3d at 540.

87. *Id.* ¶ 20, 353 P.3d at 540-41.

claim that the court of criminal appeals had acted in excess of its authority.⁸⁸ Finally, the petitioner did not show that there was concurrent civil jurisdiction for any reason in the supreme court in addition to a criminal proceeding in another court.⁸⁹ Again, this analysis is essentially based upon whether the underlying substantive issue is a civil or criminal one.

The supreme court further explained its reasoning on the difference between civil and criminal matters. Specifically, the court noted that criminal claims include those that are “previously brought by a criminal defendant when using the form of a common-law writ to challenge his or her criminal judgment and sentence.”⁹⁰ Therefore, unlike the supreme court had previously held, merely seeking a writ that can be issued by the supreme court “does not transform a criminal matter into a civil matter.”⁹¹ Instead, the court must look to the petitioner’s substantive claims to determine whether they are criminal or civil.⁹²

In short, four things about the appellate jurisdiction in Oklahoma are clear: (1) the supreme court has jurisdiction over civil matters;⁹³ (2) the court of criminal appeals has jurisdiction over criminal matters;⁹⁴ (3) the supreme court has the final authority to determine which court has jurisdiction;⁹⁵ and (4) these decisions are made on an ad hoc, case-by-case basis.⁹⁶ Such determinations eschew neat and clean categorization by their nature, but by examining the above opinions, rough categories begin to appear.

As noted throughout the above paragraphs, there are essentially two different categories of analysis that the supreme court has used to make its decisions in jurisdictional matters. The first is that found in *Dancy*, the “type of appeal” category, which analyzes which court should have jurisdiction with respect to the type of substantive law that the appeal is based on.⁹⁷ The second is derived from *In re M.B.*, the “origin” category, which analyzes which court the underlying appeal arose out of, regardless

88. *Id.* ¶ 20, 353 P.3d at 541.

89. *Id.*

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

91. *Id.* ¶ 21, 353 P.3d at 542.

92. *Id.*

93. OKLA. CONST. art. VII, § 4.

94. *Id.*

95. *Id.*

96. *Movants to Quash Multicounty Grand Jury Subpoena v. Dixon*, 2008 OK 36, ¶ 7, 184 P.3d 546, 548.

97. *See Dancy v. Owens*, 1927 OK 203, ¶ 26, 258 P. 879, 884.

of the type of substantive law involved.⁹⁸ Of those analyzed in this Comment, the court is relatively split in its use of the two categories, employing the former in four cases⁹⁹ and the latter in three,¹⁰⁰ while two cases use a concoction that could well be placed in either category.¹⁰¹ Further, there is no clear shift or pattern in the court's preference for a particular category over time.¹⁰² Even a cursory glance through this case law shows that the doctrine is confusing, convoluted, and conflicting. But this revelation is not new to the supreme court. In fact, in *Dixon*, the court concedes outright that when these cases are examined in light of each other "[t]he results can be confusing."¹⁰³ Yet the supreme court does not see this as a negative. Rather, it asserts that its case-by-case method of determination is superior because "a hard-and-fast rule would not serve the ends of justice."¹⁰⁴ In looking at the broader picture, however, this assertion seems difficult to support.

III. The Problem

The current system of appellate jurisdiction in Oklahoma, as explained in the previous section, differs from the typical way other states or the federal government approach the same issue.¹⁰⁵ While there is nothing inherently wrong with this, and in fact it is most likely a positive trait,¹⁰⁶ *Lockett* reveals that there are some problems with the system in practice. This part

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

99. See *Dutton v. City of Midwest City*, 2015 OK 51, ¶ 21, 353 P.3d 532, 541-42; *Dixon*, ¶¶ 10-11, 184 P.3d at 549-50; *Movants to Quash Grand Jury Subpoenas Issued in Multicounty Grand Jury v. Powers*, 1992 OK 142, ¶ 2, 839 P.2d 655, 656; *Dancy*, ¶ 13, 258 P. at 882.

100. See *Leftwich v. City of Midwest City*, 2011 OK 80, ¶¶ 3-4, 262 P.3d 750, 750; *M.B.*, ¶ 14, 145 P.3d at 1047; *Hinkle v. Kenny*, 1936 OK 582, ¶ 12, 62 P.2d 621, 622-23.

101. See *Smith v. Okla. Dep't of Corr.*, 2001 OK 95, ¶ 10, 37 P.3d 872, 874; *State ex rel. Henry v. Mahler*, 1990 OK 3, ¶ 12, 786 P.2d 82, 85.

102. In fact, when the seven clearer cut cases are put together chronologically, they alternate perfectly: *Dancy*, 1927 OK 203, 258 P. 879 (Type); *Hinkle*, 1936 OK 532, 62 P.2d 621 (Origin); *Powers*, 1992 OK 142, 839 P.2d 655 (Type); *In re M.B.*, 2006 OK 63, 145 P.3d 1040 (Origin); *Dixon*, 2008 OK 36, 184 P.3d 546 (Type); *Leftwich*, 2011 OK 80, 262 P.3d 750 (Origin); *Dutton*, 2014 OK 51, 353 P.3d 532 (Type).

103. *Dixon*, 2008 OK 36, n.1, 184 P.3d at 548.

104. *Id.*

105. See McCollum, *supra* note 26, at 15-17.

106. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 306-11 (1932) (Brandeis, J., dissenting) (arguing that denial of the right of the states to experiment in economic and social issues might be costly; interestingly enough, the case also involved an Oklahoma law).

will first examine other potential situations where problems similar to *Lockett* could arise, producing suboptimal scenarios. Second, it will show why these scenarios should be considered suboptimal, although that assertion is further developed in Part IV. Finally, it will begin to explore precisely where in the current system these problems originate from.

A. Scenarios

In an instance of jurisdictional conflict between the Oklahoma Supreme Court and the Oklahoma Court of Criminal Appeals, there are many different possible outcomes. The one constant, however, is that the supreme court will make the decision.¹⁰⁷ In such a scenario, the supreme court has two initial options: (1) keep the case or (2) transfer it to the court of criminal appeals. So, logically, if the supreme court follows the first option and decides to keep the case, there are two possible outcomes or scenarios.

Scenario One

The conflict involves a case “at law [or] in equity.”¹⁰⁸ In this case, the supreme court should indeed have jurisdiction, making this an optimal outcome.

Scenario Two

The conflict involves a “criminal case[.]”¹⁰⁹ This scenario is a complex one, as the supreme court has, on one hand, violated a provision of the Oklahoma Constitution as shown above by taking a criminal case.¹¹⁰ But on the other hand, the supreme court is authorized to “determine which court has jurisdiction and such determination shall be final.”¹¹¹ One would hope that the supreme court would refrain from making such a decision in an obvious case. But in a close call with honest intentions, the supreme court would still infringe upon the jurisdiction of the court of criminal appeals without recourse. For reasons developed further below, this is a suboptimal outcome.

The second initial option before the supreme court is to transfer the matter to the court of criminal appeals. In this instance there are five new potential scenarios or outcomes.

107. OKLA. CONST. art. VII, § 4.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

Scenario Three

The court of criminal appeals accepts the case. If the case involves a criminal matter, then the court of criminal appeals rightly has jurisdiction.¹¹² This is merely the inverse of Scenario One, and is thus also an optimal outcome.

Scenario Four

The court of criminal appeals again accepts the case. If the case in fact does not involve a criminal matter, however, then the supreme court should have jurisdiction.¹¹³ This is the inverse of Scenario Two, and thus by the same rationale is a suboptimal outcome.

Scenario Five

The court of criminal appeals refuses to accept the case, and then the supreme court concedes to hear it. Albeit lacking several intermediary steps, this is essentially the *Lockett* scenario. As the supreme court would now be hearing a case that it previously determined it did not have jurisdiction over, this is a suboptimal outcome.

Scenario Six

The court of criminal appeals refuses to accept the case, the supreme court refuses to take the case back, and then the court of criminal appeals concedes to hear it. This is Scenario Five in the inverse, with the court of criminal appeals now hearing a case that it previously determined it did not have jurisdiction over, rather than the supreme court. There is an argument that this outcome is optimal because the supreme court has the ability to make final determinations, and so the court of criminal appeals' determination should not matter.¹¹⁴ But since the court of criminal appeals is nevertheless hearing a case it believes it has no jurisdiction over and has issued some sort of opinion or order to that effect, this is still a suboptimal outcome.

Scenario Seven

The court of criminal appeals refuses to accept the case, and the supreme court refuses to take the case back. If neither court gives in, there will eventually be a point of no return, and either the rights of the parties in the

112. *Id.*

113. *Id.*

114. *Id.*

case at issue will become moot, or they will give up. This essentially leads to a denial of the rights of the parties in a decision that is not based on the merits of the case. Imagine if in *Lockett*, for example, the supreme court in its memorandum opinion on April 21, 2014, once again asserted that the case should be before the court of criminal appeals instead of taking up the appeal. In that case, the inmates would have been executed on the mornings of April 22 and 29, without their appeal being heard.¹¹⁵ Again, this is a suboptimal outcome.

Therefore, in summary, whenever a jurisdictional conflict arises between the supreme court and the court of criminal appeals, there are seven possible outcomes. Of these seven, only two are optimal (Scenarios One and Three). The remaining five are all suboptimal (Scenarios Two, Four, Five, Six, and Seven). Of the suboptimal scenarios, there are three different categories of reasons why the individual scenario is less than desirable. The first is that the scenario involves one of the courts infringing upon the express jurisdiction of the other as delineated in the constitution (Scenarios Two and Four).¹¹⁶ The second is where the court that ultimately decides the case has previously stated in an opinion, order, or other pronouncement that it had no jurisdiction over the matter (Scenarios Five and Six). The third and final category is where each court declines to take the case, resulting in a de facto denial of the appeal (Scenario Seven).

B. Why Suboptimal

All three of these categories raise concerns for the structure of the judicial branch as a whole. While there is some overlap, however, the concerns vary in both type and degree among the different categories. Therefore, each category is discussed individually in more detail below.

1. Jurisdictional Infringement (Scenarios Two and Four)

Typically, state courts are courts of general jurisdiction.¹¹⁷ This means that the court can hear any case brought before it “unless a showing is made to the contrary.”¹¹⁸ In Oklahoma, however, both the Oklahoma Supreme Court and the Oklahoma Court of Criminal Appeals are courts of limited

115. *Lockett 3*, 2014 OK 33, ¶ 6, 356 P.3d 58, 59-60 (per curium) (mem. opin.).

116. See OKLA. CONST. art. VII, § 4.

117. 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3522 (3d ed. 2008).

118. *Id.*

jurisdiction, as stipulated by the Oklahoma Constitution.¹¹⁹ This makes these Oklahoma courts, for purposes of this discussion, more similar to federal courts than other state courts, as federal courts are also of limited jurisdiction.¹²⁰

The importance of a court having limited jurisdiction is that there are basic structural restrictions in place, the breaking of which is “no mere technical violation” but rather “an unconstitutional usurpation” of power not granted to the court.¹²¹ This means that when the Oklahoma Supreme Court hears a criminal case, it is not merely failing being a good chum to its sister court. Instead, whether willingly or not, it is usurping its express, delineated jurisdiction and violating the foremost authority of the State of Oklahoma.¹²² In turn, when this decision is made outside of the authority granted to the court by elected representatives in the legislature, democratic power is taken from the hands of Oklahoma citizens.¹²³

Of course, there is a further complication here as the Oklahoma Constitution grants the supreme court the power to have the final say in whether a matter is civil or criminal.¹²⁴ Therefore, the question is fairly raised whether it is possible for the Oklahoma Supreme Court to exercise power outside of its jurisdiction when it decides the line at which its jurisdiction stops in actuality or only in theory. Such an usurpation of power, however, is very much an actual threat.

It is true that the definitional boundary between what is criminal and what is civil is often blurry; indeed, this is why the authors of Oklahoma’s constitution included a provision for deciding precisely such jurisdictional disputes.¹²⁵ So in a close call, the supreme court trumps. Nevertheless, assuredly occasions arise where it would simply be wrong for the supreme court to assert jurisdiction. Examples abound. Any appeals regarding issues of evidence, sentencing, or substantive criminal law surely belong in this

119. OKLA. CONST. art. VII, § 4 (stating that the Oklahoma Supreme Court does not have jurisdiction over criminal cases); 20 OKLA. STAT. § 40 (2011) (granting the court of criminal appeals jurisdiction over criminal matters).

120. WRIGHT ET AL., *supra* note 117, § 3522 (stating that federal courts are courts of limited jurisdiction, and thus can only hear cases that are within the grant of the judicial power from the Constitution, and have been supplied by Congress).

121. *Id.*

122. Namely of course, OKLA. CONST. art. VII, § 4.

123. Dustin E. Buehler, *Solving Jurisdiction’s Social Cost*, 89 WASH. L. REV. 653, 660 (2014).

124. OKLA. CONST. art. VII, § 4.

125. *See id.* (“[I]n the event there is any conflict as to jurisdiction, the Supreme Court shall determine which court has jurisdiction and such determination shall be final.”).

category. Even if the supreme court asserted jurisdiction over such cases—leaving the court of criminal appeals with no recourse—that would surely be unconstitutional. Despite the fact that the supreme court is the final arbiter, it simply does not have jurisdiction over criminal matters.¹²⁶

And indeed, this should be a constitutional violation. This is made clear by the fact that the Oklahoma Constitution, while granting the supreme court a wide array of authority, does not go so far as giving it general jurisdiction, or giving it authority to determine its own limits to jurisdiction.¹²⁷ Therefore, the supreme court has authority to determine its own jurisdiction *within boundaries* provided by the Oklahoma Constitution. Thus, it can violate this mandate, and can do so obviously at the extremes. The problem is, in a close-call case, the court can violate the constitution silently, by hearing a case that should be criminal. This can happen without anyone (the court of criminal appeals, the litigants, or even the supreme court itself) being aware it has done so.

2. Previous Opinion or Order Denying Jurisdiction (Scenarios Five and Six)

All of the issues above are implicated in this particular situation as well, with one exception: the constitutional violation that occurs when a court hears a case it has jurisdiction over is no longer silent. Above, where the Oklahoma Supreme Court has never spoken to whether a particular issue falls within its jurisdiction or the jurisdiction of the court of criminal appeals, the validity of its decision necessarily involves line-drawing of a blurry and unclear definition.

In this situation however, there has been an additional step. Because the supreme court (or court of criminal appeals) has already spoken to the jurisdictional issue, any lack of clarity is removed. The court has no jurisdiction, a fact supported by the constitution and the jurisprudence of the supreme court.¹²⁸ Therefore, it is clear that they have no jurisdiction. Choosing to exercise it is therefore problematic for all the same reasons mentioned in the preceding section.

3. De facto Denial of the Appeal (Scenario Seven)

Here, neither court would choose to act, eventually leading to the case being disposed of. This is problematic because the case would not be determined on its merits. And while it is generally thought to be preferable

126. *Id.*

127. *See id.* §§ 1, 4.

128. *Id.* § 4.

to decide a case on its merits rather than procedural deficiencies,¹²⁹ this is definitely true here as the procedural deficiency is beyond the individual parties' control. Rather, the result would be from a lack of any court wanting to assume jurisdiction over the matter.

In *Lockett*, when faced with this decision, the Oklahoma Supreme Court found that this alternative would violate article II, section 6 of the Oklahoma Constitution.¹³⁰ This section provides that the courts will be open to every person and assures them a "certain remedy afforded for every wrong."¹³¹ The court seems correct in concluding that this section implies that all citizens have a right of access to the courts, meaning that they must be given an opportunity to be heard.¹³² This conclusion led the *Lockett* court to hear the case rather than violate this constitutional right.¹³³ And while the *Lockett* court perhaps was correct in choosing the lesser of two evils,¹³⁴ the fact of the matter is that both options were less than ideal, with each potentially resulting in a constitutional violation.¹³⁵ This is a situation which should never occur in a properly functioning system.

C. Origin of Problems

If the system indeed is problematic, then it needs to be corrected. But, merely stating that a car is broken is not enough for a mechanic to fix it. The mechanic first needs to know whether the problem is due to the engine or the transmission before he or she can make the car run properly again. Similarly, it must be identified what exactly it is within Oklahoma's appellate system that makes these problems occur; a solution cannot be designed until it is clear what must be addressed. As above, the problems can be organized according to the different scenarios.

First, Scenarios Five, Six, and Seven occur when the supreme court and the court of criminal appeals disagree about which court has jurisdiction. Therefore, these problems emanate from whatever in the system allows the two courts to disagree. Namely, this stems from the fact that the supreme court has the ability to arbitrate jurisdiction between the two.¹³⁶ This leaves

129. Edward F. Sherman, *Dean Pound's Dissatisfaction with the "Sporting Theory of Justice": Where Are We a Hundred Years Later?*, 48 S. TEX. L. REV. 983, 997 (2007).

130. See *Lockett 3*, 2014 OK 33, ¶ 13, 356 P.3d 58, 61 (per curiam) (mem. opin.).

131. OKLA. CONST. art. II, § 6.

132. See *Lockett 3*, ¶ 13, 256 P. 3d 58, 61.

133. *Id.* ¶ 14, 356 P.3d at 61.

134. The relatively indirect constitutional violation of exerting authority not granted to it by the constitution or the legislature against the direct denial of rights to citizens.

135. See OKLA. CONST. art. VII, § 4; OKLA. CONST. art. II, § 6.

136. OKLA. CONST. art. VII, § 4.

the court of criminal appeals in an awkward, hybrid sort of position between being a court of last resort for all criminal matters and still being clearly inferior to the supreme court.

Second, Scenarios Two and Four occur when either court takes jurisdiction where it should not, which is problematic for reasons explained above. This alone, however, is hard to stop and is a problem faced by all courts on every level, as it would be impossible to prevent this while also allowing courts to determine their own jurisdiction. Therefore, there will likely always be at least some inherent risk. Typically, this is handled by checks on judicial power from other branches—namely, that the judiciary has neither the sword nor the purse, so if they make a decision beyond the bounds of their authority, the executive branch and the legislature may choose not to enforce or give weight to the decision.¹³⁷ In Oklahoma, however, there is the additional problematic possibility of “silent violations” by the supreme court, as discussed above, when they make decisions.

Both of these situations, therefore, seem to stem from the supreme court being the final arbiter of jurisdiction. This is further compounded by the confusion resulting from the supreme court’s jurisprudence, despite its assertions to the contrary.¹³⁸ Surely there needs to be some flexibility, as the supreme court acknowledges. Yet, here it comes at the cost of clarity. If the supreme court consistently used a clearer standard to make jurisdictional decisions, then the court of criminal appeals could analyze on its own before rejecting or accepting jurisdiction, raising the odds greatly that the two courts will agree instead of disagree. That would also keep the supreme court honest: if it made a decision out of line with that standard, the court of criminal appeals, the executive branch, and the legislature would have grounds to ignore the opinion.

IV. Why It Matters

These problems with the current system of appellate jurisdiction are not merely theoretical or abstract; they have lasting impacts upon how justice is dispensed in Oklahoma. In particular, there are three broader areas affected by these problems: efficiency, control of the case by litigants, and the Rule of Law.

137. THE FEDERALIST NO. 78, at 450 (Alexander Hamilton) (Am. Bar Ass’n ed., 2009).

138. *Movants to Quash Multicounty Grand Jury Subpoena v. Dixon*, 2008 OK 36, ¶ 7, n.1, 184 P.3d 546, 548-49.

A. Efficiency

In making jurisdictional decisions, courts commonly adopt one of two contrasting perspectives. First, courts may focus on the structural concerns that arise when a court exercises jurisdiction where it should not. These courts are acutely aware of the importance of respecting their constitutional or statutory boundaries, finding that “‘no amount of “prudential reasons” or perceived increases in efficiency’ can justify adjudication when jurisdiction does not exist.”¹³⁹ By contrast, under the second perspective, courts may consider the massive amount of waste that occurs when cases are dismissed for jurisdictional purposes, especially late in the process.¹⁴⁰ Courts that adopt this perspective might be more willing to blur the lines and exercise jurisdiction in questionable situations in order to ensure that the litigants receive an opportunity to be heard on the merits of their case.

Yet neither structural concerns nor efficiency can be viewed in isolation, as both are implicated by nonwaivable jurisdictional rules; instead there must be a balance between the two.¹⁴¹ Therefore, focusing on the structural component to the exclusion of efficiency concerns still leads to suboptimal results.¹⁴² This applies to the current structure of the appellate jurisdiction in Oklahoma.

The problem is clear when Scenario Seven is examined, the situation where neither court wants to take jurisdiction, constituting a de facto denial of the case. Placing aside the concerns over lack of court access and looking only at the structural issue of whether either the Oklahoma Supreme Court or Oklahoma Court of Criminal Appeals has exercised power which it does not have, this scenario comes out well. Indeed, both courts have played their hands conservatively, but the bottom line is that the supreme court has obviously not heard a criminal case and the court of criminal appeals has clearly not heard a civil case. Thus, each has acted within its constitutional bounds.¹⁴³

Yet this is likely small consolation to the parties, as no amount of technical legal propriety can bring back “their sunk litigation costs.”¹⁴⁴ By this point, the parties have already either hired new lawyers or retained their old, and put forth, at a minimum, the costs of filing an appeal and quite

139. Buehler, *supra* note 123, at 660 (quoting *Dow Jones & Co. v. Ablaise Ltd.*, 606 F.3d 1338, 1348 (Fed. Cir. 2010)).

140. *Id.* at 661.

141. *Id.* at 664.

142. *See id.* at 660-64.

143. *See* OKLA. CONST. art. VII, § 4.

144. Buehler, *supra* note 123, at 664.

likely a good deal more than that.¹⁴⁵ If we accept the definition of inefficient as “not capable of producing desired results without wasting materials, time, or energy,”¹⁴⁶ then this seems to fit the bill. Materials, time, and energy were all spent, and the desired result of having the appeal heard on the merits has not been produced.

Moreover, this means that even if the Oklahoma Supreme Court makes a choice that stays within its constitutional bounds, allows the court of criminal appeals to do the same, and the litigants are heard on the merits of their case (as is the case in Scenarios One and Three), these structurally optimal results can still quickly be turned suboptimal. This is exemplified by the long, complex procedural history in *Lockett*.¹⁴⁷ Assuming that the Oklahoma Supreme Court is in fact the court that should have ultimately heard the appeal (thus making it constitutionally proper and clearly fitting within the range of Scenario One), *Lockett* and Warner first made a filing for the matter on February 26, 2014.¹⁴⁸ Yet the supreme court did not decide to fully assert its jurisdiction until April 21, 2014.¹⁴⁹ This means that for nearly two full months, the case was in jurisdictional limbo, while a bevy of motions, briefs, and hearings occurred before multiple courts, not to mention the rising legal fees.¹⁵⁰ And this must assuredly be one of the faster, more efficient examples in Oklahoma, as the court was operating under an all-too-literal deadline.¹⁵¹

But even so, this situation fails to meet the mark of efficiency.¹⁵² While it is true that this time around the desired results were accomplished, it was not done without waste. The impossibly convoluted sidebar that occurred over the two months before the Oklahoma Supreme Court accepted

145. *Id.* at 655-56.

146. *Inefficient*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/inefficient> (last visited Sept. 1, 2016).

147. *Lockett 2*, 2014 OK CR 3, ¶ 1, 329 P.3d 755, 755 (noting that the recent procedural history of the case is “lengthy and requires repeating for clarity”).

148. *Id.* ¶ 1, 329 P.3d at 755-56.

149. *Lockett 3*, 2014 OK 33, ¶ 15, 356 P.3d 58, 61 (per curium) (mem. opin.) (deciding to issue a stay of execution).

150. *See Lockett 2*, ¶ 1, 329 P.3d at 755 (describing the procedural history of the case); *see also Lockett 3*, ¶¶ 4-8, 356 P.3d at 59-60 (also detailing the procedural history).

151. *Lockett 3*, ¶ 6, 356 P.3d at 59-60 (noting that the execution date for one of the petitioners was set at the time for April 22, note also that this memorandum opinion finally deciding to grant a stay was decided on April 21).

152. *See Inefficient*, *supra* note 146.

jurisdiction still represented a period where litigants were spending time and money on issues not related to the merits of their case.¹⁵³

Furthermore, the analysis to this point has only centered on the parties to the litigation, and said nothing of the systemic effects. The judicial system is necessarily one of finite resources as there are only so many judges, courtrooms, and hours in a day.¹⁵⁴ Therefore, each time that a jurisdictional dispute is prolonged in this manner, time is being spent that could be going to other parties with meritorious claims. And while this wrong is grave in economic terms, it also has constitutional implications. As the Oklahoma Supreme Court recognized in *Lockett*, the Oklahoma Constitution demands that the courts shall provide a “certain remedy . . . without . . . delay” to “every person . . . for every wrong.”¹⁵⁵ This certainly seems to imply that delivering justice in a timely and efficient manner is a constitutional guarantee to the citizens of the state.

This is not to say that resolving this particular problem entails a solution. In fact, it may be impossible to always provide an outcome that is optimal from both a structural and efficiency perspective in any certain terms.¹⁵⁶ Yet, if there is an acceptable solution from a structural standpoint that is more efficient, then the inefficient aspects of the current state of jurisdictional determinations—and their effects on the entire system—cannot be ignored.¹⁵⁷

B. Control of the Litigants

In civil litigation, forum selection is frequently regarded as the most important strategic decision that a party will make.¹⁵⁸ This importance goes beyond the mere geographic location of the court and extends to determining what substantive and procedural law will apply.¹⁵⁹ These considerations are particularly relevant here, as whether a party ends up before the Oklahoma Supreme Court or the Oklahoma Court of Criminal

153. See *Lockett 2*, ¶ 1, 329 P.3d at 755-56 (describing the procedural history of the case); see also *Lockett 3*, ¶¶ 4-8, 356 P.3d at 59-60 (also detailing the procedural history).

154. *McIntyre v. K-Mart Corp.*, 794 F.2d 1023, 1026 (5th Cir. 1986).

155. OKLA. CONST. art. II, § 6 (emphasis added); *Lockett 3*, ¶ 11, 356 P.3d at 61 (quoting OKLA. CONST. art. II, § 6).

156. Buehler, *supra* note 123, at 667 (describing structural and efficiency values as incommensurable, and thus impossible to analyze from a cost-benefit perspective).

157. *Id.* at 665-66.

158. Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 55 (2009).

159. *Id.*

Appeals will dictate whether Oklahoma civil or criminal procedure applies.¹⁶⁰

There are many varying perspectives on exactly how much control litigants should have to select their forum.¹⁶¹ It seems to be a fundamental matter of fairness, however, that, as much as possible, parties should be able to foresee the effects of certain actions that they take in their case. That is, even if they cannot cherry-pick which court will hear their case, litigants should not be totally in the dark about where they should file an appeal.

For example, imagine an individual who has been convicted of a crime in Oklahoma and believes she has an appeal on some civil claim regarding her trial or conviction. The individual takes her case to an attorney who has vast experience arguing such claims before the Oklahoma Supreme Court. The attorney agrees that the supreme court is the proper forum for the case to be decided; in fact, it has decided such cases before. To the attorney's surprise, however, the supreme court decides this time that the court of criminal appeals should have jurisdiction over the matter.¹⁶² Now, much of the preparation to appear before the supreme court has gone to waste, not to mention the very real possibility that the attorney has never appeared before the court of criminal appeals before, leaving the client in a particularly awkward and frustrating situation (and potentially raising ethical considerations for the attorney).¹⁶³ While this situation always remains a potential outcome, it should be limited as much as possible so that parties can have certainty in results, which in turn will allow them to make better decisions regarding their cases.

C. Rule of Law

Concededly, the phrase "rule of law" has become somewhat of a loaded term.¹⁶⁴ Attempts to reconcile conceptions of the term with modern legal

160. See *State ex rel. Coats v. Hunter*, 1978 OK CR 57, ¶ 3, 580 P.2d 158, 159 (stating that the law of civil procedure does not apply to habeas corpus proceedings, which are considered criminal in Oklahoma).

161. See generally Rosenthal, *supra* note 158.

162. Recall, "a hard-and-fast rule would not serve the ends of justice." *Movants to Quash Multicounty Grand Jury Subpoena v. Dixon*, 2008 OK 36, n.1, 184 P.3d 546, 548-49.

163. See *Hunter*, ¶ 3, 580 P.2d at 159 (stating that the law of civil procedure does not apply to habeas corpus proceedings, which are considered criminal in Oklahoma); MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2015).

164. See Richard H. Fallon, "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 2 (1997) (describing invocations of the Rule of Law as often "smug or hortatory," and as increasingly having "acquired either defensive or accusatory tones"); Major Tonya L. Jankunis, *Military Strategists Are from Mars, Rule of*

and political underpinnings, however, are beyond the scope of this article. Here, it is sufficient to note that the Rule of Law embodies an ideal that serves three primary purposes, as proposed by Richard Fallon.¹⁶⁵ First, the Rule of Law stands as a dike between civilization and anarchy.¹⁶⁶ Second, the Rule of Law allows individuals to have enough predictive information about a society in order to arrange their affairs.¹⁶⁷ And finally, the Rule of Law, to some extent, protects against “official arbitrariness.”¹⁶⁸ That is, at its core, the Rule of Law stands in direct juxtaposition to the “rule of men” in order that “those applying the law, as much as those to whom it is applied, can be bound by it.”¹⁶⁹ Further, Fallon proposes five elements that must be present in order to realize the ideals of the Rule of Law.¹⁷⁰ They are as follows:

- 1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.
- 2) The second element of the Rule of Law is efficacy. The law should actually guide people, at least for the most part. In Joseph Raz's phrase, “people should be ruled by the law and obey it.”
- 3) The third element is stability. The law should be reasonably stable, in order to facilitate planning and coordinated action over time.
- 4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.
- 5) The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures.¹⁷¹

Law Theorists Are from Venus: Why Imposition of the Rule of Law Requires a Goldwater-Nichols Modeled Interagency Reform, 197 MIL. L. REV. 16, 29 (2008) (noting that “[t]he rule of law has become ubiquitous to the point of becoming slippery”).

165. Fallon, *supra* note 164, at 7-8.

166. *Id.* at 7.

167. *Id.* at 7-8.

168. *Id.* at 8.

169. *Id.* at 3.

170. *Id.* at 8-9.

171. *Id.* (quoting Joseph Raz, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 224 (1979)).

In applying these elements to Oklahoma, it appears the current system comes up short. As for the first and second elements, the supreme court's jurisprudence lacks clear standards and thus does not guide decision making.¹⁷² Third, the law does not allow for planning and coordination of activities.¹⁷³ Fourth, it would seem that the current system does not control judges because decisions are made independent of any other standard, which gives the appearance of arbitrariness, at a minimum.¹⁷⁴ Finally, the fifth element is at least partially not met as courts may potentially be unavailable to litigants with meritorious claims.¹⁷⁵

Even so, it would be the most uncouth of hyperboles to suggest that the issue discussed in this article risks the collapse of Rule of Law in Oklahoma entirely. Moreover, reasonable minds can differ in consideration of the effects of such principles in any instance.¹⁷⁶ Nevertheless, these concerns, when combined with those of efficiency and control of litigants, are severe enough that they need to be protected from erosion, however slight, wherever possible.

V. Solutions

In analyzing options to resolve some of these issues, potential solutions can be categorized by the actor that must engage in them. Here, the saving grace must either come from the hand of the state legislature or that of the state judiciary. While legislative options are worth considering, action by the judiciary seems to be the best solution, as argued further below.

A. Legislative Options

If the legislature acts, it has three basic courses available to follow: (1) dissolve the Oklahoma Court of Criminal Appeals, (2) change the structure of the relationship between the court of criminal appeals and the Oklahoma Supreme Court, or (3) further define through statute what is criminal and what is civil. Each of these has some appeal, but also some drawbacks.

172. *See* *Movants to Quash Multicounty Grand Jury v. Dixon*, 2008 OK 36, n.1, 184 P.3d 546, 548-49.

173. *See supra* Section IV.B.

174. *See supra* Part II.

175. *See supra* Part III (Scenario Seven).

176. Fallon, *supra* note 164, at 9 (stating that there is disagreement as to what sorts of departures from the Rule of Law are objects of concern, also noting that even a generally effective legal system can include regulations or decisions that do not comply with the Rule of Law).

First, the Oklahoma Court of Criminal Appeals could be dissolved entirely. While this seems an unlikely option, it would actually not take a great amount of action on the part of the legislature. Recall that the court of criminal appeals was created by statute, not the state constitution.¹⁷⁷ While the constitution recognizes the court of criminal appeals, it only grants the court equal appellate jurisdiction with the supreme court “until otherwise provided by statute.”¹⁷⁸ Therefore, all the legislature would have to do is amend or repeal title 20, section 40 of the Oklahoma Statutes, resulting in Oklahoma having one intermediate court of appeal and one court of last resort—putting it in line with the vast majority of other states in that respect.¹⁷⁹ If this course of action were followed, the problems created by the gap in appellate jurisdiction between the two courts would be completely eliminated as the supreme court would be the single, ultimate judicial authority in Oklahoma, removing the possibility of disagreement between it and the court of criminal appeals.¹⁸⁰

Of course, the court of criminal appeals has greater utility than that solution would suggest. It provides specialization in addition to relieving some of the supreme court’s case load, purposes which are beneficial and not to be taken lightly. Moreover, the mere fact that Oklahoma is somewhat unique in this structure is by no means enough to justify changing it—after all, states are to be laboratories of democracy.¹⁸¹ Further, the switching costs of transferring the entire docket of the court of criminal appeals would be significant. To mention just a few of the abundant headaches that could result, the Oklahoma Court of Civil Appeals and supreme court may not have the infrastructure to deal with the influx on their dockets; variances in procedural timelines and rules would have to be accounted for; litigants in pending cases would have to make numerous adjustments to logistics and potentially to strategy as well. Therefore this solution—although perhaps intriguing and definitely effective—seems overbroad.

Second, similar to the previous option, the legislature could amend the statute that created the court of criminal appeals to change its status from a

177. 20 OKLA. STAT. § 40 (2011); *see supra* Part II.

178. *See* OKLA. CONST. art. VII, § 4; *supra* Part II.

179. *See State Court Organization*, NAT’L CTR. FOR STATE COURTS, <http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewi sa&anonymous=true> (last visited Feb. 26, 2017).

180. *See supra* Section III.C.

181. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting) (arguing that denial of the right of the states to experiment in economic and social issues might be costly).

co-equal superior court to an inferior court underneath the umbrella of the supreme court, on a level equal with the Oklahoma Court of Civil Appeals. This would simply create alternate paths that an appeal could travel before reaching the supreme court. Such a system is similar to that adopted by Alabama and is therefore not without precedent.¹⁸² This solution would also eliminate issues with the current system in that the supreme court would have coextensive jurisdiction with the court of criminal appeals while also clearly being the superior court. That is, the supreme court would have authority to hear every case, whether or not the court of criminal appeals did. Therefore, regardless of whether a litigant's case would be heard at the intermediate level by the court of civil appeals or the court of criminal appeals, it would clearly be able to be heard by the supreme court. Again, this would eliminate issues by removing the potential for disagreements over jurisdiction between the two courts.¹⁸³

This solution seems more effective than dissolving the court of criminal appeals entirely. It would limit—albeit not eliminate—some of the switching costs and would still allow for maximization of the court of criminal appeals' specialization, just at a different stage in the process. Such a solution may be a less efficient distribution, however, as it would still increase the supreme court's docket and would still have some amount of switching costs.

Moreover, as was the problem with dissolving the court of criminal appeals entirely, the problems of efficiency, control of the litigants, and Rule of Law are not necessarily inherent in a system of two courts of last resort. The problem is not necessarily that Oklahoma *has* such a system, but the *way* it implements such a system. The structure is not entirely meritless in and of itself. Therefore, this solution is also overbroad in that it unnecessarily changes the entire system.

Third, the legislature could amend title 20, section 40 of the Oklahoma Statutes, which gives the court of criminal appeals broad jurisdiction over “criminal cases,”¹⁸⁴ to include a definition of that term. This would provide more consistency by at least giving a baseline to determine in which court a particular issue belongs. This solution rightfully does not entirely remove decision-making authority from the judiciary, however, as no matter how particular the legislature believes its definition is, there will necessarily be

182. See ALA. CONST. art. VI, §§ 140-141 (creating a Supreme Court with the highest authority but also the intermediate courts of civil and criminal appeals with jurisdiction set by law and rules of the Supreme Court).

183. See *supra* Section III.C.

184. 20 OKLA. STAT. § 40 (2011).

some level of ambiguity that must be resolved through an interpretation by the supreme court.¹⁸⁵ This still represents an improvement by adding some articulable standard outside of the judiciary that the supreme court can be held to, thus making it harder for the court to silently violate the constitution.¹⁸⁶ There would still remain, however, issues with the supreme court's jurisprudence on its own. Therefore, this solution would narrow the magnitude of the problem, but not entirely eliminate it.

Texas provides an example of a clearer structure for determining jurisdiction between two courts. Texas also has a supreme court and a court of criminal appeals that are courts of last resort.¹⁸⁷ As in Oklahoma, the Supreme Court of Texas has jurisdiction over all cases, except for criminal law matters.¹⁸⁸ Similarly, the Texas Court of Criminal Appeals has jurisdiction in all criminal matters.¹⁸⁹ But while the Texas Constitution does not directly say how conflicts between the two courts are to be handled, it still drastically narrows the potential for conflicts by its structure. First, generally all appeals, civil or criminal, are handled by the intermediate courts of appeals.¹⁹⁰ Any further issues in a civil matter will then go before the Texas Supreme Court.¹⁹¹ In a criminal matter, the appeal will be to the court of criminal appeals, which the court can accept or deny at its discretion.¹⁹² Further, the court of criminal appeals may issue an order on its own to review the decision of the court of appeals.¹⁹³

This one feature eliminates the potential for the two courts to disagree about jurisdiction, which is one problem with Oklahoma's current system.¹⁹⁴ In effect, this means that the court of criminal appeals cannot be forced to take any cases it does not want to hear, either by the parties to a case or by the Supreme Court of Texas. Of the suboptimal scenarios discussed in Part II, this feature alone eliminates the potential for three of the five suboptimal scenarios—specifically Scenarios Five, Six, and Seven. Those three scenarios, all involving one court being forced to hear a case it previously stated it did not have jurisdiction over, are now impossible for two reasons. First, it is impossible for the Texas Court of Criminal Appeals

185. *See In re M.B.*, 2006 OK 63, ¶ 8, 145 P.3d 1040, 1044-45; *supra* Part II.

186. *See supra* Part III.

187. *See State Court Organization*, *supra* note 179.

188. TEX. CONST. art. V, § 3(a).

189. *Id.* § 5(a).

190. *Id.* § 6(a).

191. *Id.* § 3(a).

192. *Id.* § 5(b).

193. *Id.*

194. *See supra* Section III.C.

to have to deny having jurisdiction of a case, since it can only move to take cases it has already established it has jurisdiction over.¹⁹⁵ Second, unlike Oklahoma, even if the Texas Court of Criminal Appeals did theoretically determine it did not have jurisdiction, the Supreme Court of Texas does not have the opportunity to attempt to force jurisdiction upon it.¹⁹⁶

Additionally, the Texas Constitution states that an appeal can bypass the court of appeals and go directly to the court of criminal appeals if the case is one “in which the death penalty has been assessed.”¹⁹⁷ While the point of this section is presumably to eliminate some bureaucratic red tape by creating a fast track for death-penalty cases, the effect is clear that if the death penalty has been assessed in the underlying case, then the appeal clearly belongs in the Texas Court of Criminal Appeals. The combination of these two facets of the Texas Constitution creates a limited potential for jurisdictional conflicts.

The possibility remains, however, that the supreme court will try to take an appeal of what is actually a criminal case or that the court of criminal appeals will move to hear what is actually a civil case (Scenarios Two and Four as discussed in Part III). Of course, if a court wants to act unconstitutionally and take a case that it does not have jurisdiction over, little can be done about it at the time. The effect can only be retroactive in not giving force, precedential or otherwise, to the opinion.¹⁹⁸ A greater danger, however, lies in the close cases where it is not entirely clear which court has jurisdiction. Therefore, the more cases where jurisdiction is unclear, the greater the danger. And while these cases can perhaps never entirely be eliminated, they can be narrowed by the creation of an ascertainable standard, something the Texas Constitution has done for death-penalty cases.

B. Judicial Options

Because of the preceding, the most effective answer has to come from the judiciary itself, as it is the heart of the problem. Specifically, as shown above in Part II, the supreme court relies on an ad hoc approach to deciding whether it or the court of criminal appeals should have jurisdiction,

195. TEX. CONST. art. V, § 5(b).

196. *See* OKLA. CONST. art. VII, § 4.

197. TEX. CONST. art. V, § 5(b).

198. *See* THE FEDERALIST NO. 78, at 450 (Alexander Hamilton) (Am. Bar Ass’n ed., 2009); *see also supra* Part III.

deciding each time on a “case-by-case basis.”¹⁹⁹ Such an approach is based in flexibility, allowing the law to be formed and changed as needed, and is regularly identified as the American way of solving legal issues.²⁰⁰ While effective in many situations, it is not the only path, nor is it necessarily always the right path to take.²⁰¹ In addition to flexibility, competing norms of consistency and predictability are also necessary to effective lawmaking as they too are essential to basic underpinnings of fairness, and indeed in certain situations are even paramount to flexibility.²⁰² Laws with these latter characteristics, however, cannot be achieved through ad hoc decision making, but require clear, articulable standards.²⁰³ The effective jurist therefore recognizes the need for both sorts of law making—ad hoc decisions and intelligible standards—to be available in his toolbox. The difficulty comes in determining which instances call for the implementation of what type of rule.

For example, Professor Roger Dworkin argues that the flexible nature developed by the Supreme Court of the United States in its Fourth Amendment jurisprudence is inappropriate for those circumstances.²⁰⁴ Primarily, this is because police search and seizure techniques are not everyday occurrences and can hardly be expected to be easily attainable to the general public.²⁰⁵ Therefore, if the judiciary attempts to make these decisions without any sort of hard standard, there is “a void into which attempts to influence are bound to rush.”²⁰⁶ That is, it is possible for ad hoc decisions not grounded in reasonableness to become decided more on the whims of judges rather than sound legal reasoning.²⁰⁷ Moreover, while remedies of police atrocities is the purpose of the due process clause, the

199. *Movants to Quash Multicounty Grant Jury Subpoena v. Dixon*, 2008 OK 36, ¶ 7, 184 P.3d 546, 548.

200. Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 *IND. L.J.* 329, 364-65 (1973).

201. *See id.* at 365 (noting that “the utility of [factual adjudication] has limits”).

202. *Id.*

203. The Oklahoma Supreme Court itself implicitly recognizes this dichotomy, it simply comes out the other way, arguing that in this situation, a case-by-case determination is appropriate because “a hard and fast rule would not serve the ends of justice.” *Dixon*, ¶ 7, n.1, 184 P.3d at 549.

204. Dworkin, *supra* note 200, at 365.

205. *Id.* at 366.

206. HENRY J. FRIENDLY, *BENCHMARKS* 104 (1967).

207. *See LeMoyné-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (describing how, in the context of administrative agencies, over-flexible standards such as the “totality of the circumstances” test can turn into rationalizing whatever decision the agency desires).

purpose of search and seizure law under the Fourth Amendment is to control police conduct, forcing them to respect individual rights.²⁰⁸ Therefore, if that goal is to be attainable, there is a natural need for predictable and consistent norms to which police can actually conform their conduct, a situation that cannot be reached through ad hoc decision making.²⁰⁹

So, the question then becomes whether the ad hoc, case-by-case jurisprudence adopted by the Oklahoma Supreme Court is appropriate in determining whether a claim is civil or criminal. Based on the factors examined above, it does not seem to be. First, consider the nature of the acts involved. Defining whether a legal issue is criminal or civil seems to be inherently conceptual. Unlike negligence, it is not something we can measure based on common, everyday experiences. Rather, it is a legal construct created to better categorize and understand different types of legal problems. Therefore, there is a greater danger with ad hoc decisions that the tail will wag the dog, meaning that a court will decide whether it wants jurisdiction over a case or not, and then will create whatever rule is necessary to make the particular facts criminal or civil as desired. Moreover, while perhaps the designation of criminal or civil in itself is not an important issue, it has profound impacts on the efficiency of the case and the situations of the parties.²¹⁰

Secondly, the nature of what the law is trying to accomplish also pushes away from ad hoc decision making. In distinguishing between civil and criminal to determine jurisdiction, courts clearly are not providing a remedy to right a past wrong, as in negligence. Instead, jurisdictional arguments are somewhat extra-litigation as they are outside the context of the merits of the case. Therefore, since the common conception is that jurisdictional disputes should be limited as much as possible,²¹¹ this leads even more strongly to the idea that there should be a clear standard rather than ad hoc decision making here. Without a clear standard, ad hoc decision making usually leads to more issues being litigated, as it is easier to find potential

208. Dworkin, *supra* note 200, at 365-66.

209. *Id.*

210. *See supra* Part IV.

211. *See Buehler, supra* note 123, at 679-80 (arguing that jurisdictional litigation has value in deterring other parties from transcending jurisdictional boundaries and promoting values of federalism and separation of powers; when these values are not present, such litigation is inefficient).

ammunition for any legal argument.²¹² And while this is a good thing when remedies are being provided because the law seeks to provide remedies for those who deserve them, in the jurisdictional situation, the incentive is in the opposite direction: to limit disputes.²¹³ Therefore, a clearer standard would better achieve this goal by eliminating some potential arguments, thus making jurisdictional lines clearer and enhancing the ability to focus on the merits of the case.²¹⁴ This is especially true when, as in *Lockett*, the death penalty is on the line and the defendant in the original case has nothing to lose and everything to gain by extending the case for as long as possible. Moreover, the supreme court is trying to control conduct at some level, even though it is just the conduct of itself and the court of criminal appeals, rather than a third party. Put differently, jurisdiction is power and the power of the courts needs to be legitimate to enhance Rule of Law principles.²¹⁵ Therefore, it makes more sense to make those decisions based on an ascertainable standard, especially when one of the potential beneficiaries is the party making the decisions.

For such standards, two basic options provide workable solutions to determine jurisdiction. The heart of the problem with Oklahoma's current jurisprudence is not that it has failed to recognize either of these solutions, but that through its ad hoc decision making it has employed them both haphazardly on different occasions. First, if the appeal arises out of or relates back to a case that was prosecuted by the State, then the appeal belongs in the court of criminal appeals.²¹⁶ Such a standard would be easy to apply. If an appeal to a higher court involves a stay or injunction, it is unclear on its surface and could go either way. If in the underlying case, however, the injunction references a nuisance claim from one private citizen against another private citizen, or even against the government, then that appeal would clearly be a civil case that belongs in the Supreme Court of Oklahoma. But, if in the underlying case the injunction references a private citizen being prosecuted by the government for a violation of the criminal code of Oklahoma, then it is very intuitively a criminal case and belongs in the Oklahoma Court of Criminal Appeals.

212. See Dworkin, *supra* note 200, at 367 (arguing that, in the Fourth Amendment context, "adopting forthright, inflexible rules . . . may avoid much useless, expensive, and frustrating litigation engendered by the current chaos, which appears to offer hope of escaping conviction to countless criminals").

213. See Buehler, *supra* note 123, at 679-80.

214. See Dworkin, *supra* note 200, at 367.

215. See *supra* Part IV.

216. Similar to that used in the *In re M.B.* line of cases. See *supra* Part II.

One potential argument against such an approach is that it puts too much weight on the criminal side of the scale. In one sense, this would give more power to the court of criminal appeals, as it would potentially have the ability to hear more cases than it currently does. The standard is not overbroad, however, in the sense that anything with a hint of criminality would automatically get shipped to the court of criminal appeals by default. For example, imagine a citizen of Oklahoma charged with murder. As a part of his defense, the citizen seeks to exclude evidence on the grounds that a search by the police violated Oklahoma search and seizure law. Separately, the citizen also brings some sort of due process claim against the police for that same violation. On appeal of the former case, the legal issue would arise out of the actual trial prosecuting the citizen for murder. Therefore, it would be criminal. But, the latter appeal would not merely get swept up in the criminality just because it is related to the same set of factual circumstances. Rather, the due process claim would be civil because even if the government had never prosecuted the citizen, he would still have access to the due process cause of action for the potentially illegal search. Therefore, it is independent, does not arise from the prosecution, and is a civil case, thus belonging in the Supreme Court of Oklahoma. Applied to *Lockett*, this standard would greatly enhance clarity. *Lockett* and Warner's appeals both arose out of criminal prosecutions, and therefore would be under the jurisdiction of the Oklahoma Court of Criminal Appeals.²¹⁷

The second available solution is to examine whether the appeal itself actually asserts a civil or criminal right.²¹⁸ This solution achieves a more balanced distribution of cases, in that more civil claims would end up before the supreme court and more criminal claims would be distributed to the court of criminal appeals. This same feature would also increase the specialization benefits of having two courts of last resort. Using the same example as above, the outcome would be the same, albeit for different reasons. The due process claim would still find its way onto the docket of the supreme court because it asserts a civil right, while the court of criminal appeals would still preside over the challenge to the search and seizure provision, as that is a criminal right.

One problem with this solution is that, while it works well in easy areas, it does less in tougher cases. Defining something as a civil or criminal right makes sense for those rights that one commonly thinks of in those terms,

217. See *Warner v. State*, 2006 OK CR 40, ¶ 2, 144 P.3d 838, 856; *Lockett 1*, 2002 OK CR 30, ¶ 1, 53 P.3d 418, 421.

218. Similar to that used in the *Dancy* line of cases. See *supra* Part II.

but for something more questionable, or for a novel question that has not yet been put into one of those categories, this method uses the term attempted to be defined in the definition itself. Thus, some inherent ambiguity persists.

Further, even in clearer cases, this approach creates difficulties when an appeal includes more than one type of right. In this instance, it becomes unclear whether the case should be split or stay together. The supreme court was faced with this question in *Lockett*, as the appeal regarding the confidentiality of the state's death-penalty procedures seemed to assert a civil right, but the claim for a stay of injunction appeared to assert a criminal right.²¹⁹ In *Lockett*, the supreme court decided to split the cases, holding on to the civil constitutional claim while transferring the criminal request for an injunction to the court of criminal appeals.²²⁰ This proved problematic, however, as the court of criminal appeals was put in the interesting situation of having to hear a case for a remedy without being able to hear the underlying case. That is, how could it grant or deny a stay of execution without making an implicit statement about the merits of the inmates' civil appeal, which was not before it to decide?²²¹ The other solution, to keep the claims together, is no more appealing. In that case, the supreme court would be put in the unenviable position of deciding whether the appeal was more civil or more criminal, in effect trying to determine which issue is more important—a determination that could hardly be objectively made.

Because of these issues, it seems that the former standard could be more effective. Either standard employed consistently, however, will capture the benefits of increased stability and efficacy in the appellate structure. Therefore, more important than which standard is chosen, the Oklahoma Supreme Court should realize that commitment to a singular, articulable standard instead of its current ad hoc approach will enhance the predictability and consistency of its jurisprudence.

VI. Conclusion

Gaps currently exist within the system of appellate jurisdiction in Oklahoma and that will likely always be the case. But here, a step in the right direction may be taken at a relatively small cost. If the standard advocated here existed during the appeals of *Lockett* and *Warner*, the

219. *Lockett 3*, 2014 OK 33, ¶ 3, 356 P.3d 58, 59 (per curium) (mem. opin.).

220. *Id.* ¶ 8, 356 P.3d at 60.

221. *Lockett 2*, 2014 OK CR 3, ¶ 2, 329 P.3d 755, 756-57.

situation would have been clear. As the appeal arose from the prosecution of both men, the Oklahoma Court of Criminal Appeals would clearly have had the authority to issue the stays necessary to hear the appeals on the merits. Over two months of labor, anxiety, and judicial resources would have been saved. Such a step, however slight, would increase the efficiency, efficacy, and respectability of the legal system in Oklahoma.

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