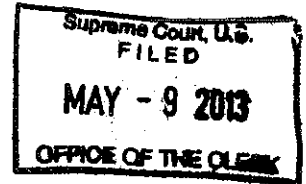


No. 12-1035



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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

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THE STATE OF OKLAHOMA

Petitioner,

v.

ANGELA MICHELLE WOLF

Respondent.

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MOTION FOR LEAVE TO PROCEED  
IN FORMA PAUPERIS

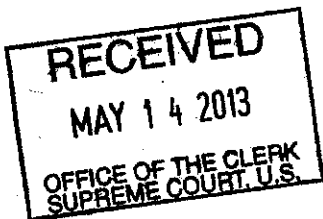
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LEE ANN JONES PETERS  
Oklahoma Bar No. 10360

Oklahoma Indigent Defense System  
P.O. Box 926  
Norman, Oklahoma 73070  
Telephone (405) 801-2666  
Telefacsimile (405) 801-2690

ATTORNEY FOR RESPONDENT



May 9, 2013

**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

The Respondent asks leave to file the attached brief in opposition without prepayment of costs and to proceed *in forma pauperis*.

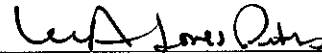
Respondent has previously been granted leave to proceed *in forma pauperis* in the following court(s):

The Oklahoma Court of Criminal Appeals

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Respondent has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Respondent's affidavit or declaration in support of this motion is attached hereto.



---

Lee Ann Jones Peters  
Oklahoma Bar Assoc. No. #10360  
Oklahoma Indigent Defense System  
Homicide Direct Appeals Division  
P.O. Box 926  
Norman, OK 73070  
(405) 801-2666  
(405) 801-2690 (telefacsimile)

ATTORNEY FOR RESPONDENT

**AFFIDAVIT OR DECLARATION  
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, Angela Wolf, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ <u>None</u>	\$ _____	\$ <u>None</u>	\$ _____
Self-employment	\$ <u>None</u>	\$ _____	\$ <u>None</u>	\$ _____
Income from real property (such as rental income)	\$ <u>None</u>	\$ _____	\$ <u>None</u>	\$ _____
Interest and dividends	\$ <u>None</u>	\$ _____	\$ <u>None</u>	\$ _____
Gifts	\$ <u>None</u>	\$ _____	\$ <u>None</u>	\$ _____
Alimony	\$ <u>None</u>	\$ _____	\$ <u>None</u>	\$ _____
Child Support	\$ <u>None</u>	\$ _____	\$ <u>None</u>	\$ _____
Retirement (such as social security, pensions, annuities, insurance)	\$ <u>None</u>	\$ _____	\$ <u>None</u>	\$ _____
Disability (such as social security, insurance payments)	\$ <u>None</u>	\$ _____	\$ <u>None</u>	\$ _____
Unemployment payments	\$ <u>None</u>	\$ _____	\$ <u>None</u>	\$ _____
Public-assistance (such as welfare)	\$ <u>None</u>	\$ _____	\$ <u>None</u>	\$ _____
Other (specify): _____	\$ <u>None</u>	\$ _____	\$ <u>None</u>	\$ _____
<b>Total monthly income:</b>	\$ <u>None</u>	\$ _____	\$ <u>None</u>	\$ _____

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
<u>None</u>			\$ _____
			\$ _____
			\$ _____

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			\$ _____
			\$ _____
			\$ _____

4. How much cash do you and your spouse have? \$ None  
 Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
		\$ _____	\$ _____
		\$ _____	\$ _____
		\$ _____	\$ _____

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

- |  |  |
|--|--|
| <input type="checkbox"/> Home<br>Value _____   | <input type="checkbox"/> Other real estate<br>Value _____                            |
| <input type="checkbox"/> Motor Vehicle #1<br>Year, make & model _____<br>Value _____ | <input type="checkbox"/> Motor Vehicle #2<br>Year, make & model _____<br>Value _____ |
| <input type="checkbox"/> Other assets<br>Description _____<br>Value _____            |  |

I have no assets

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
<u>None</u>	\$ _____	\$ _____
_____	\$ _____	\$ _____
_____	\$ _____	\$ _____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
<u>None</u>	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No	\$ <u>None</u>	\$ _____
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ <u>None</u>	\$ _____
Home maintenance (repairs and upkeep)	\$ <u>None</u>	\$ _____
Food	\$ <u>None</u>	\$ _____
Clothing	\$ <u>None</u>	\$ _____
Laundry and dry-cleaning	\$ <u>None</u>	\$ _____
Medical and dental expenses	\$ <u>None</u>	\$ _____

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ <u>None</u>	\$ _____
Recreation, entertainment, newspapers, magazines, etc.	\$ <u>None</u>	\$ _____
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ <u>None</u>	\$ _____
Life	\$ <u>None</u>	\$ _____
Health	\$ <u>None</u>	\$ _____
Motor Vehicle	\$ <u>None</u>	\$ _____
Other: _____	\$ <u>None</u>	\$ _____
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	\$ <u>None</u>	\$ _____
Installment payments		
Motor Vehicle	\$ <u>None</u>	\$ _____
Credit card(s)	\$ <u>None</u>	\$ _____
Department store(s)	\$ <u>None</u>	\$ _____
Other: _____	\$ <u>None</u>	\$ _____
Alimony, maintenance, and support paid to others	\$ <u>None</u>	\$ _____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ <u>None</u>	\$ _____
Other (specify): _____	\$ <u>None</u>	\$ _____
Total monthly expenses:	\$ <u>None</u>	\$ _____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes  No If yes, describe on an attached sheet.

10. Have you paid - or will you be paying - an attorney any money for services in connection with this case, including the completion of this form?  Yes  No

If yes, how much? \_\_\_\_\_

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes  No

If yes, how much? \_\_\_\_\_

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

*I am not married. I have been incarcerated in D.C. for the past 2 years. I have no source of income.*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 7<sup>th</sup>, 2013

  
(Signature)

No. 12-1035

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

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THE STATE OF OKLAHOMA

Petitioner,

v.

ANGELA MICHELLE WOLF

Respondent.

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BRIEF IN OPPOSITION  
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

---

---

LEE ANN JONES PETERS  
Oklahoma Bar No. 10360

Oklahoma Indigent Defense System  
P.O. Box 926  
Norman, Oklahoma 73070  
Telephone (405) 801-2666  
Telefacsimile (405) 801-2690

ATTORNEY FOR RESPONDENT

May 9, 2013



## QUESTION PRESENTED

Whether the Oklahoma Court of Criminal Appeals erred in invalidating as unconstitutional a statute that inflicted heavy criminal punishment on a person whose only crime was buying cold medicine containing pseudoephedrine while on probation for a methamphetamine-related offense and who was completely unaware that her purchase was illegal.

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**BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

Petitioner, the State of Oklahoma, has filed a petition for writ of certiorari seeking review of a decision by the Oklahoma Court of Criminal Appeals declaring unconstitutional a provision of Oklahoma’s Methamphetamine Offender Registry Act that, without a *mens rea* element, and without notice to the persons affected by the Act, prohibited certain people from buying pseudoephedrine products and imposed heavy criminal penalties for any such purchase. *Wolf v. State*, 292 P.3d 512 (Okla. Crim. App. 2012). Respondent respectfully urges this Court to deny the petition.



**STATUTORY PROVISIONS INVOLVED**

**U.S. Const. amend. XIV (in pertinent part):**

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

**OKLA. STAT. tit. 63, § 2-701 (2011)(in pertinent part):**

A. There is hereby created within the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control a registry of persons who, after November 1, 2010, have been convicted, whether upon a verdict or plea of guilty or upon a verdict or plea of nolo contendere, or received a suspended sentence or any deferred or probationary term, or are currently serving a sentence or any form of probation or parole for a crime or attempt to commit a crime including, but not limited to, unlawful possession, conspiring, endeavoring, manufacturing, distribution or trafficking of a precursor or methamphetamines [sic] under the provisions of Section 2-322, 2-332, 2-401, 2-402, 2-408 or 2-415 of Title 63 of the Oklahoma Statutes.

B. It shall be unlawful for any person subject to the registry created in subsection A of this section to purchase, possess or have control of any Schedule V compound, mixture, or preparation containing any detectable quantity of pseudoephedrine, its salts or optical isomers, or salts of optical isomers. As provided in Section 2-212 of Title 63 of the Oklahoma Statutes, the provisions of this subsection shall not apply to any

compounds, mixtures, or preparations which are in liquid, liquid capsule, or gel capsule form if pseudoephedrine is not the only active ingredient. A prescription for pseudoephedrine shall not provide an exemption for any person to this law. Any person convicted of violating the provisions of this subsection shall be guilty of a felony, punishable by imprisonment in the custody of the Department of Corrections for not less than two (2) years and not more than ten (10) years, or by a fine of not more than Five Thousand Dollars (\$5,000.00), or by both such fine and imprisonment.

C. The registry created in subsection A of this section shall be maintained by the Bureau. The registry shall be made available for registrants who sell or dispense pseudoephedrine-related products and to law enforcement agencies for law enforcement purposes through the Central Repository and the prescription monitoring program. Every registrant selling, dispensing or otherwise delivering pseudoephedrine products shall deny any sale of pseudoephedrine to any individual listed on the methamphetamine offender registry.

D. The registry shall consist of the following information:

1. Name of the person;
2. Date of birth of the person;
3. The offense or offenses which made the person eligible for inclusion on the registry;
4. The date of conviction or the date that a plea of guilty or nolo contendere was accepted by the court for any violation of an offense provided for in subsection A of this section;
5. The county where the offense or offenses occurred; and
6. Such other identifying data as the Bureau determines is necessary to properly identify the person.

E. Beginning November 1, 2010, all district court clerks shall forward a copy of the judgment and sentence or other applicable information relating to the disposition of the criminal case and date of birth of all persons who are subject to the provisions of this act for a violation of the offenses described in subsection A of this section to the Bureau. The information shall be sent in an electronic format in a manner prescribed by the Bureau within thirty (30) days of the date of final disposition of the case. Every person that receives a deferred sentence or is otherwise not in the custody of the Department of Corrections shall be required to register and submit

a methamphetamine offender registration form in a format prescribed by the Bureau within thirty (30) days of entering a plea or receiving a sentence for an offense described in subsection A of this section. Failure to submit the form required by this subsection shall constitute a misdemeanor.



### STATEMENT OF FACTS

“[T]he infliction of criminal punishment on the unaware has long troubled the fair administration of justice.” *United States v. Int’l Minerals & Chemical Corp.*, 402 U.S. 558, 565 (1971)(Stewart, J., dissenting). This case involves that “root problem of criminal jurisprudence.” *Id.* Troubled by a statute that would allow a woman to be sent to prison for fourteen years when her only crime was buying a type of cold medicine that is, for most people, legal to buy when she did not know, and had no reason to know, that for her the purchase was forbidden, the Oklahoma Court of Criminal Appeals concluded the statute violated due process. App. 4.

Several years into successfully serving ten-years’ probation for drug crimes, Respondent Angela Wolf bought some over-the-counter cold and allergy medicine. Because the medication contained pseudoephedrine, she was required by law to show valid identification and sign for it. *See* OKLA. STAT. tit. 63, § 2-212 (A)(2)(b) (2011). Her purchase would have been legal if she had made it anytime through October 31, 2010; however, buying it on December 2, 2010, as she did, constituted a serious crime. This was not because Ms. Wolf had committed a crime in the meantime, but because on November 1, 2010, new penalties attached to previously innocent purchases. OKLA. SESS. Laws 2010, HB 3380, c. 458, § 2, eff. November 1, 2010 (now codified at OKLA. STAT. tit. 63, §2-701).



Unbeknown to Ms. Wolf, buying medicine containing pseudoephedrine on or after November 1, 2010, was, for her, illegal, and a single purchase subjected her to a minimum of four years' imprisonment and a maximum of life imprisonment.<sup>1</sup> She knew nothing about the new law that (1) created a Methamphetamine Offender Registry, (2) included within the definition of persons subject to the registry anyone who, like her, was currently on probation for a methamphetamine-related crime, and (3) prohibited anyone subject to the registry from buying pseudoephedrine products. Between December 2010 and April 2011, having no idea whatsoever that her purchases of cold medicine were now suddenly illegal, she bought several more packages of medicine with pseudoephedrine.

With each purchase, Respondent dutifully showed identification and signed for it in compliance with the laws restricting the sale of cold and allergy medications containing any detectable quantity of pseudoephedrine that had been in place in Oklahoma for several years. Under those laws, only licensed pharmacists or registered pharmacy technicians can sell it. OKLA. STAT. tit. 63, § 2-212(A)(2)(a) (2011). To buy it, the purchaser must show a specific form of identification and sign a log. *Id.*, § 2-212(A)(2)(b). The seller must record the purchaser's name, date of birth, and address; the type and number of identification shown; the date and time of the purchase; and the name and quantity of base pseudoephedrine or ephedrine purchased in grams. *Id.* 2-212(A)(2)(b)(1-6).

The Oklahoma Methamphetamine Registry Act added an additional requirement.

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<sup>1</sup> The offense carries a penalty of two to ten years' imprisonment and a fine of up to \$5,000.00 if the defendant has no prior felonies. OKLA. STAT. tit. 63, § 2-701(B). With one prior conviction, the minimum is doubled by statute, and the maximum penalty is life imprisonment. OKLA. STAT. tit. 21, § 51.1(A)(2).

Before making a sale, the seller must check the newly-created Methamphetamine Registry, maintained by the Oklahoma State Bureau of Narcotics and Dangerous Drugs (OSBNDD), and deny sale to anyone on the list. App. 1; OKLA. STAT. tit. 63, § 2-701(C).

Ironically, if the law had worked properly, no crime would have been committed. Respondent would have been told at the point of sale that she could no longer buy pseudoephedrine products and the sale would have been denied. OKLA. STAT. tit. 63, § 7-201(C). Due to a flaw in the legislation, however, neither Respondent nor the pharmacist/technician who sold the medicine was aware that Respondent was subject to the registry and no longer permitted to buy it.

The statute's defect is that to be barred from buying pseudoephedrine, the person does not actually have to be on the Registry – it is enough that the person is *subject* to the Registry – and there is no mechanism to get a person in Respondent's position on the Registry. *See id.*, § 2-701(B),(E). Mechanisms for registering those subject to the registry were established only for persons convicted of qualifying offenses after November 1, 2010.<sup>2</sup> *Id.*, § 2-701(E). No provision was made for anyone to register or to notify the OSBNDD about persons who, like Respondent, were already serving probation when the statute took effect. App. 2. This oversight let people like Respondent fall through the crack and unintentionally make an illegal purchase.

The consequences to Respondent Wolf flowing from the gap in the legislation were dire. After she had made several such purchases, the State charged her with seven counts of Unlawful Purchase of Pseudoephedrine While Subject to Oklahoma

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<sup>2</sup> District court clerks must notify the OSBNDD of newly-convicted felons so their names can be added to the Registry, and persons receiving a deferred sentence after that date must fill out a registration form. OKLA. STAT. tit. 63, § 2-701(E).

Methamphetamine Offender Registry Act. App. 1, 5. Faced with the prospect of being convicted and sentenced to serve up to seven terms of life imprisonment, Respondent entered a negotiated plea of guilty to five counts in exchange for two counts being dismissed and for being sentenced only to fourteen (14) years per count with the sentences to be served concurrently. App. 1, 5.

Respondent timely moved to withdraw the guilty plea on the basis that it was not knowing and voluntary, and it was entered without understanding, because she did not know about the registry or that she was not allowed to buy pseudoephedrine any more. App. 1. The State did not contest her claims but argued the strict liability crime was satisfied by her purchases of pseudoephedrine. App. 5. The request to withdraw her guilty plea was denied. App. 1.

On appeal to the Oklahoma Court of Criminal Appeals (OCCA), Wolf raised one proposition of error. She asked the OCCA to interpret the offense of Unlawfully Purchasing Pseudoephedrine While Subject to the Methamphetamine Registry Act as having a *mens rea* element, even though none was explicit in the statute, and then to find that the trial court abused its discretion by refusing to allow her to withdraw her plea of guilty because there was no factual basis for the *mens rea* element. App. 1. In support of this interpretation of the statute, Respondent argued that, due to the statute's failure to give fair warning that buying pseudoephedrine was illegal for some people, absent a *mens rea* component, the statute would be unconstitutional. App. 1, 2.

On appeal, the State did not suggest that the OCCA infer a "knowing" element into the offense, as stated on page 6 of the Petition for Writ of Certiorari. The State took a firm position that the crime was one of strict liability. By its plain terms, the statute has

no *mens rea*, and the State urged against the court reading one into it. App. 2. The State posited that construing the offense as a strict liability crime would not offend due process because the requirement of an affirmative act – purchasing pseudoephedrine after being convicted of a methamphetamine-related crime — negated the need for an intent requirement. App. 2.

Recognizing that the OCCA might prefer to interpret the statute as having an implied “knowing” *mens rea* element, the State urged that any knowing component of the offense apply only to whether Wolf knew that she bought pseudoephedrine. App. 4. As in the court below, the State did not contest Ms. Wolf’s claim that she did not know she was committing a crime by buying pseudoephedrine products. App. 2, 5. The State’s position was that it did not matter whether she knew buying pseudoephedrine was a crime for her. As there was no question that Respondent Wolf knew she purchased pseudoephedrine, there was a factual basis for her guilty plea, even if a knowing element was required. *Id.* In response to Ms. Wolf’s argument that due process requires more, the State argued there is no legal requirement that a person know she has violated the statute or is subject to criminal penalties. App. 2.

The OCCA did not explicitly hold that the offense was one of strict liability, but neither did it read a *mens rea* element into the statute. Instead, the OCCA held that the statute violated due process because it severely punished what would ordinarily be lawful conduct and did so without any notice provisions. App. 4. In the OCCA’s view, “Wolf was not prosecuted and sentenced to prison because she bought pseudoephedrine. She was prosecuted and sentenced to prison because she *was prohibited by law* from buying pseudoephedrine.” *Id.* The OCCA explained,

The mere purchase of pseudoephedrine is not a crime, unless one is subject to § 2-701(B). The wrongdoing was created by Wolf's status as a person subject to the statute. The uncontested record shows Wolf was completely unaware that she was subject to § 2-701(B). The statute itself makes no provision that relevant persons should be informed they are subject to its requirements. This is a violation of due process.

App. 4. The OCCA quoted from this Court's opinion in *Lambert v. California* to describe the essential nature of notice required by due process where a person is subject to criminal prosecution for otherwise lawful conduct:

As Holmes wrote in *The Common Law*, "A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." [] Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.

App. 4, quoting *Lambert*, 355 U.S. at 229-30. The OCCA concluded that Section 2-701 failed to meet the basic notice requirements of due process, and accordingly, found Subsection (B) of that statute unconstitutional. App. 4.



## REASONS FOR DENYING CERTIORARI

### I.

#### **CERTIORARI SHOULD BE DENIED BECAUSE NO GENUINE CONFLICT IN THE COURTS WAS CREATED BY THE RULING BY THE OKLAHOMA COURT OF CRIMINAL APPEALS.**

Petitioner contends that the Oklahoma Court of Criminal Appeals created a conflict of authority by relying in part on *Lambert v. California*, 355 U.S. 225 (1957), to invalidate a strict liability Oklahoma statute that, like the municipal ordinance struck

down in *Lambert*, criminally penalized, without notice, conduct that is generally not blameworthy. Certiorari need not be granted to resolve a conflict in authority because no true conflict exists. The behavior involved in our case – buying a small quantity of cold medicine – is of an innocent nature, far removed from the conduct in cases where courts have refused to apply the principles of *Lambert*. The decisions Petitioner alleges are conflicting are distinguishable.

**A. The federal cases cited by Petitioner are substantively so different from the one at bar that this Court should not draw an inference that if faced with the facts in the case at bar, those courts would have reached a different result than the OCCA.**

Most of the federal cases relied on by Petitioner as being in conflict with OCCA's decision involved convictions under various provisions of 18 U.S.C. § 922, the Gun Control Act of 1968. Those cases are *United States v. Miller*, 646 F.3d 1128, 1129-30 (8<sup>th</sup> Cir 2011) (appealing convictions under 18 U.S.C. §§ 922(g)(8) and (924(a)(2), which make possessing a firearm while subject to certain restraining orders illegal); *United States v. Shelton*, 325 F.3d 553, 555 (5<sup>th</sup> Cir. 2003) (appealing conviction under 18 U.S.C. § 922(g)(9), which makes possessing firearms or ammunition unlawful for a person convicted of domestic violence); *United States v. Denis*, 297 F.3d 25, 27 (1<sup>st</sup> Cir. 2002) (same); *United States v. Barnes*, 295 F.3d 1354, 1356 (D.C. Cir. 2002) (same); *United States v. Hancock*, 231 F.3d 557, 560 (9<sup>th</sup> Cir. 2000) (same); *United States v. Keuylian*, 602 F.2d 1033, 1036 (2<sup>nd</sup> Cir. 1979) (appealing conviction under 18 U.S.C. § 922(e), which makes having undisclosed firearms and ammunition on airline flights illegal). Another of Petitioner's cases likewise involved a federal statute regulating possession of firearms. *United States v. Horton*, 503 F.2d 810 (7<sup>th</sup> Cir. 1974) (appealing from a

conviction of knowingly receiving firearms in commerce as a convicted felon, in violation of 18 U.S.C. 1202(a)(1)).

The fact that these courts did not apply *Lambert v. California* to gun law violations does not give rise to the inference that they also would not have applied *Lambert* to a law that penalizes purchasing small quantities of pseudoephedrine-based cold medicine. Long before the Courts of Appeals decided the above gun cases, this Court pointed out the distinction between gun crimes and the conduct in *Lambert*, observing that a law that makes it unlawful for any person “to receive or possess a firearm” under certain circumstances is not comparable to a law that criminalizes presence in a city without registering with the police. *United States v. Freed*, 401 U.S. 601, 608, 609 (1971). “Being in Los Angeles is not *per se* blameworthy,” whereas the “possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons . . . .” *Id.* at 608, 609.

The federal courts of appeals cited by Petitioner simply followed suit by finding possession of a firearm, either after conviction of a violent offense or while subject to a court order restraining the defendant from harassing, stalking, or threatening an intimate partner, is not comparable to the conduct at issue in *Lambert v. California*. The cited cases shed no light on how those courts would rule if faced with the conduct the OCCA reviewed – buying a small quantity of cold medicine. As the OCCA recognized, buying cold medicine containing pseudoephedrine is not *per se* blameworthy. Under most circumstances, it is a lawful act. Where the sale is not refused, the person has no reason to believe she has committed a crime. App. 4.

Only two federal cases cited by Petitioner involved a crime other than possessing

a firearm: *United States v. Duran*, 596 F.3d 1283 (11<sup>th</sup> Cir. 2010), and *United States v. Talebnejad*, 460 F.3d 563 (4<sup>th</sup> Cir. 2006). Petitioner’s reliance on *Duran* is misplaced because the behavior involved there was inherently corrupt. The Court of Appeals found “hard to imagine that Duran was acting completely innocently” when he acted in the United States as a foreign government’s agent without notifying the United States Attorney General “because his actions generally involved bribery and extortion . . . .” *Duran*, 596 F.3d at 1286, 1295. Although the defendant’s reliance on *Lambert* was rejected because *Lambert* involved a *failure to act*, while Duran’s case involved *acting* as an agent of a foreign government without notifying the United States Attorney General, *id.* at 1292-93, the Court of Appeals recognized the distinction between misfeasance and nonfeasance may not always be clear. *Duran* did not present such a case. “[I]f there were any such confusion, the area of foreign intelligence activities is one which is highly regulated and a notification or registration requirement normally would not be unexpected by one who acts as an intermediary for a foreign government.” *Id.* at 1283, n.2.

The other non-weapon case, *United States v. Talebnejad*, 460 F.3d 563 (4<sup>th</sup> Cir. 2006), dealt with the crime of conducting an unlicensed money transmitting business. Apparently a great deal of money was involved, as the indictment also sought forfeiture of approximately \$18 million in property traceable to the charged offenses. *Id.* at 567. The Court of Appeals for the Fourth Circuit noted that the crime was not one of strict liability. *Id.* at 570, n.5. That fact separates *Talebnejad* from both *Lambert* and the instant case. The ordinance at issue in *Lambert* did not include an element of willfulness, and the California court did not read one into it. 355 U.S. at 227. Key to the



*Lambert* Court’s decision was that upon “first becoming aware of her duty to register,” Lambert “was given no opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent. She could but suffer the consequences of the ordinance, namely, conviction with the imposition of heavy criminal penalties thereunder.” *Id.* at 229. The same was true for Respondent. The statute contains no *mens rea*, and, at the State’s request, the OCCA did not read one into the statute. App. 2. Even though Respondent’s purchases of cold medicine were entirely innocent, like Lambert, by the time she was given an opportunity to comply with the law and avoid its penalty, there was nothing she could do to avoid the imposition of heavy criminal penalties. App. 4.

The distinctions between the cases Petitioner alleges are in conflict and the case at bar are clear. Openly buying a small quantity of cold and allergy medicine can be compared neither to possessing a firearm after conviction of domestic violence or while under a restraining order, nor to carrying undisclosed firearms on an airplane. Neither can the unauthorized acquisition of a small quantity of pseudoephedrine be reasonably compared to acts constituting bribery and extortion or conducting a high volume of unlicensed money transactions. There is no indication in any of Petitioner’s cases that the Courts of Appeal would have made a decision different than the OCCA’s if faced with the facts presented here. Thus, there is no genuine conflict of authority.

**B. Most of the State cases Petitioner cites are actually in harmony with the OCCA’s ruling, and none are in true conflict.**

The various State cases cited by Petitioner to argue the OCCA’s decision created a conflict are more diverse than the federal cases with respect to the crimes involved, but

when scrutinized, they equally fail to bear out a conflict. Three cases, *People v. Simon*, 886 P.2d 1271 (Cal. 1995); *People v. Lopez*, 140 P.3d 106<sup>3</sup> (Colo. 2005); and *People v. Wehrwein*, 568 N.E.2d 1 (Ill. App. 1 Dist. 1990), presented the same question our case did: whether the state statute under which the defendant was convicted was a strict liability offense or whether there was a *mens rea* element. *Simon*, 886 P.2d at 1280; *Lopez*, 140 P.3d at 110; *Wehrwein*, 568 N.E.2d at 3, 4. Even though the state statutes at question did not explicitly include a *mens rea* element, all three courts concluded that one was required. The substantial criminal penalties carried by the crimes persuaded the California and Colorado courts of the necessity of a *mens rea* element. *See Simon*, 885 P.2d at 1290-91; *Lopez*, 140 P.3d at 111, 113. Our case, like *Simon* and *Lopez*, involves a statute carrying heavy criminal penalties that is silent with respect to a *mens rea*. The OCCA differed from its sister courts only in the remedy fashioned. Instead of reading a *mens rea* into the statute like California and Colorado chose to do, the OCCA deemed the statute unconstitutional for failing to give notice. App. 4. The OCCA's conclusion that a strict liability offense that provides no notice violates due process is in accord with the decisions by the California and Colorado courts that due process required that their states' statutes have a *mens rea* element.

The Illinois court read a *mens rea* element into the statute because another

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<sup>3</sup> The Colorado court's "holding" cited by Respondent was not a holding. Rather, the comment about *Lambert*'s requirements was in the lone dissenter's attempt to explain why his interpretation of the statute, which was rejected by the majority, would not run afoul of the constitution. *Lopez*, 140 P.3d at 115 (Russel, J., concurring in part and dissenting in part). Judge Russel explained that the lack of a culpable mental state would not raise due process concerns under *Lambert* because the Colorado statute at issue explicitly required that sex offenders receive notice of their duty to register. *Id.* at 113, 115. He noted that a sex offender who did not receive notice of his duty to register could bring an individual challenge under *Lambert*. *Id.* at 115. Thus, it appears even Judge Russel would have ruled in Respondent Wolf's favor under the circumstances presented.

provision of the criminal code established the mental state applicable to offenses that do not specifically prescribe one. *Wehrwein*, 568 N.E.2d at 5. The court then concluded the government had proven the defendant intended to violate the statute. *Id.* at 7. Under the circumstances presented, the defendant should have been put on notice that he was required to complete the certificate of title when he sold a truck. *Id.* at 6. Thus, *Lambert* was distinguishable. *Id.* In our case, the State did not contest that Respondent did not know she was committing a crime. App. 2. The circumstances convinced the OCCA that as far as Respondent knew, her conduct was lawful. App. 4. Accordingly, *Wehrwein* does not advance Petitioner's claim that Oklahoma Court of Criminal Appeals' decision conflicts with a decision by the Illinois Court of Appeals.

The Florida case cited by Respondent is likewise not in conflict with ours. Both courts viewed knowledge as essential. In *State v. Adkins*, 96 So.3d 412 (Fla. 2012), the Supreme Court of Florida was asked to determine whether a state statute criminalizing possession of a controlled substance violated due process. Although knowledge of the illicit nature of the drug was not an element of the offense, the statute explicitly provided that lack of such knowledge is an affirmative defense. *Id.* at 414. It was this feature that made the statute constitutional, and it is this feature that sets the case apart from ours. Respondent Wolf's lack of knowledge was uncontested, yet that was not a defense. App. 2.

The Arizona case Petitioner cites is distinguishable because the crime at issue was inherently blameworthy. In *State v. Soltero*, 71 P.3d 370 (Ariz. Ct. App. 2003), the defendant complained that although he was driving on the roads while intoxicated, his conviction for driving a vehicle while under the extreme influence of intoxicating liquor

was unconstitutional because he did not know that the law had recently lowered the blood concentration limit from 0.18 to 0.15. Rejecting his due process claim, the court concluded, “Given the essentially universal and long standing laws throughout our country prohibiting the operation of a vehicle while under the influence, defendant cannot rationally claim that he had no reason to believe his conduct would not be subject to statutory prohibition.” *Id.* Unlike Soltero, Respondent Wolf had no reason to know a Methamphetamine Offender Registry had come into existence or to know that her ordinary conduct would subject her to criminal penalties. Buying cold medicine was legal for her on October 31, 2010. Buying that same medication, in the same quantity, on or after November 1, 2010, subjected her to a minimum of four years’ imprisonment, and a potential of being sent to prison for life. The only thing that had changed was the implementation of a law that she knew nothing about.

Neither does the OCCA’s ruling conflict with *Commonwealth v. McBride*, 281 S.W.3d 799 (Ky. 2009), the Kentucky case Petitioner cites. In that case, a sex offender, registered as such in Tennessee, moved to Kentucky, failed to register in that state as a sex offender, and was prosecuted for this failure. *Id.* at 802. Relying in part on *Lambert v. California*, an intermediate appellate court concluded that because the Commonwealth failed to inform McBride of his duty to register, convicting him was improper. *Id.* at 803-04. Disagreeing, the Kentucky Supreme Court distinguished *Lambert* on the bases that McBride failed to establish (1) that circumstances would not have moved a person in his position to inquire as to the necessity of registration, (2) that he was ignorant of his duty to register, and (3) that there was no reasonable probability that he knew his conduct was illegal. *Id.* at 804. As the Kentucky Supreme Court noted, sex offender

registration acts are widespread. By the time McBride moved to Kentucky, sex offenders had been subject to registration throughout all fifty states for about six years. *Id.* Thus, his failure to inquire into a state's registration requirements was not entirely innocent. *Id.* at 805. Moreover, McBride's sex offender identification card from another state indicated his knowledge of a registration requirement. *Id.* at 808 (Noble, J., concurring in part and dissenting in part).

Respondent Wolf was in a far different position than the sex offender in *McBride*. While it is widely known that sales of cold and allergy medicine containing pseudoephedrine are regulated – to buy it in Oklahoma, identification must be shown, the purchaser's name is entered into a database that tracks all the sales, and the purchaser must sign for it (App. 7) – it is not widely known that some people are now prohibited from buying such medicine at all. Petitioner has not cited any other jurisdiction with a similar law, and Respondent is aware of none. A person who buys pseudoephedrine in legal amounts, shows her identification, and signs for the purchase is not alerted to the need to inquire further. As the OCCA noted, under most circumstances, buying pseudoephedrine is a lawful act, and if the sale is not refused, the person has no reason to believe she has committed a crime. App. 4

Moving to the Iowa case relied on by Petitioner, the defendant in *State v. Tague*, 310 N.W.2d 209 (Iowa 1981), was convicted for having sex with a 13-year-old child. *Id.* at 210. Tague testified he did not know the girl was under the age of 14, then asked the court to instruct the jury “that good faith reasonable mistake of fact (the victim's age) is a defense to the charge . . .” *Id.* at 212. The trial court refused. On appeal, Tague argued this was error and cited *Lambert*. Holding the argument was without merit, the

Iowa Supreme Court observed that not only was Tague's case "far removed from the concerns addressed in Lambert," namely "the constitutionality of a proscription of passive conduct combined with lack of notice," the fact that Tague had questioned the victim about her age proved he was alerted to the possible criminal consequences of his acts. *Id.* By way of contrast, the fact that Respondent Wolf showed photographic identification and signed for her purchases strongly suggested she was *not* alerted to the criminal consequences of her acts.

Lastly, Petitioner relies on the case of *State v. Kreminski*, 422 A.2d 294 (Conn. 1979), to support its argument that a conflict of authority was created by the OCCA's decision. In this case involving a violation of the state Securities Act, the defendant was convicted for selling securities through various salesmen and acting as a broker or dealer without being properly registered. *Id.* at 295. He argued that because the crime was classified as a felony, the requirement of *mens rea* or evil intention should be effectively read into the statute. *Id.* at 295. Rejecting the argument, the Connecticut Supreme Court recognized that awareness of a licensing requirement is not essential for violation of a "blue sky" law forbidding security sales by unlicensed persons. *Id.* at 297. Regulatory legislation can dispense with awareness of wrongdoing if there is a public danger and the regulatory scheme would likely be frustrated by a requirement of scienter. *Id.* at 296. Also, the court noted that although the crime was classified as a felony, the penalties imposed fell within the limits provided for misdemeanors. *Id.* at 298. In fact, the defendant could be sent to prison only if he violated the conditions of probation. At most, he would be in jail for 30 days per count. *Id.* at 295, 298.

That the sale of securities has long-been heavily regulated is widely known. *See,*

*e.g.*, *Hall v. Geiger-Jones Co.*, 242 US 539 (1917). What makes the crime in our case so different is that a person could be doing the same thing month in and month out. One day her actions were legal, and the next, she was committing a serious felony. The penalty imposed was not just 30 days in jail, but imprisonment for 14 years for each purchase. Had the Connecticut court been faced with our facts, it may well have found that the statute violates the principles set forth in *Lambert*.

**C. Conclusion.**

As demonstrated above, some cases Petitioner alleges to be in conflict with the OCCA's decision are actually in harmony with it. Others deal with such a different ilk of crimes that they are simply not comparable. None are in true conflict. As there is no genuine conflict of authority to resolve, certiorari should be denied.

**II.**

**CERTIORARI SHOULD BE DENIED BECAUSE, AT MOST, THE STATE APPELLATE COURT'S DECISION MISAPPLIED THIS COURT'S DECISION IN LAMBERT.**

Petitioner argues the OCCA's ruling that the Oklahoma statute at issue was unconstitutional is contrary to this Court's decision in *Lambert v. California* because *Lambert* involved passive conduct and our case involves active conduct. The OCCA was well aware of this difference. After noting that *Lambert* dealt with "a person, wholly passive and unaware of any wrongdoing," who was "brought to the bar of justice for condemnation in a criminal case," App. 4, quoting *Lambert*, the OCCA acknowledged that "Wolf was not wholly passive – she bought pseudoephedrine." App. 4. Notwithstanding this distinction, the OCCA felt the guiding principles of *Lambert* applied to Wolf's situation because,

“[A]s far as Wolf knew this was a lawful act. The mere purchase of pseudoephedrine is not a crime, unless one is subject to § 2-701(B) [the Methamphetamine Registry Act]. The wrongdoing was created by Wolf’s status as a person subject to the statute. The uncontested record shows Wolf was completely unaware that she was subject to § 2-701(B). The statute itself makes no provision that relevant persons should be informed they are subject to its requirements. This is a violation of due process.

App. 4.

The OCCA properly quoted *Lambert*, including the passage characterizing Lambert’s conduct as “wholly passive.” Even if Petitioner’s complaint that the OCCA improperly applied *Lambert* to Respondent’s situation were legitimate, the misapplication of a properly stated rule of law does not present an important question of federal law that needs to be resolved by this Court.

Moreover, despite the emphasis on Virginia Lambert’s wholly passive conduct, the *Lambert* decision did not expressly limit its application to failures to act. The distinction between nonfeasance and misfeasance notwithstanding, this case is more like *Lambert* than it is different. What the defendant in each did or did not do was not morally blameworthy. What each did or did not do was ordinary and would not have been a crime but for a registration statute. Neither defendant was aware of the registration statute. The circumstances that might move one to inquire about the registration statute were completely lacking in both cases. Upon first becoming aware of the registration statute, neither defendant was given an opportunity to comply with the law and avoid its penalty, even though what she had done, or not done, was entirely innocent. The reasons for applying *Lambert* to Respondent’s situation are more compelling than the one reason for not applying it.

Furthermore, the statute the OCCA invalidated applied to “wholly passive”



conduct as well. Not only does Section 2-701(B) prohibit purchasing products containing pseudoephedrine, it also prohibits possessing or controlling such products. *See* OKLA. STAT. tit. 63, § 2-701(B) (2011). That means if a person such as Respondent legally bought a product containing pseudoephedrine before November 1, 2010, then failed to destroy whatever product was unused by the date the Methamphetamine Registry Act took effect, that failure to act would subject her to the same onerous penalties as purchasing products after that date.

The OCCA did not misapply *Lambert*, and even if it had, the decision does not present an important federal question worthy of this Court's consideration. Certiorari should be denied.

### III.

#### **CERTIORARI SHOULD BE DENIED WITH REGARD TO THE QUESTION OF WHETHER THE OCCA'S DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *TEXACO, INC. V. SHORT* BECAUSE THE ISSUE WAS NOT RAISED BELOW.**

Respondent argues that certiorari should be granted because the OCCA's decision conflicts with this Court's ruling in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). The petition fails to comply with Supreme Court Rule 14(1)(g)(i) , which governs the contents of a petition for writ of certiorari. That rule requires that "[i]f review of a state-court judgment is sought," the Petition for Writ of Certiorari must contain

specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e. g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error). . . .

The purpose of this rule is “to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.”

*Id.*

Petitioner fails to specify any of these required details. The fact of the matter is that the *Texaco* decision was never called to the OCCA’s attention by either party. Neither did Petitioner give the OCCA an opportunity to re-examine its decision in light of *Texaco* by filing a Petition for Rehearing, even though the Rules of the Oklahoma Court of Criminal Appeals specifically provide for rehearing where “[t]he decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument.” *See* Rule 3.14(B)(2), *Rules of the Oklahoma Court of Criminal Appeals*, OKLA. STAT. tit. 22, Ch. 18, App. (2011).

Because the petition for writ of certiorari does not comply with the Court’s Rules, it should be denied.

#### IV.

**CERTIORARI SHOULD BE DENIED BECAUSE THE OCCA’S DECISION REGARDING WHAT DUE PROCESS IS REQUIRED FOR A CRIMINAL STATUTE IS NOT IN CONFLICT WITH THIS COURT’S DECISION IN *TEXACO, INC. V. SHORT* REGARDING WHAT DUE PROCESS IS REQUIRED FOR EXTINGUISHMENT OF A PROPERTY INTEREST.**

Petitioner argues that the OCCA’s decision in this case “squarely conflicts” with this Court’s decision in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). Not only was this issue not raised in the court below, *Texaco* does not apply to the case at bar.

At issue in *Texaco* was the constitutionality of a statute which provided that a mineral interest severed from the surface and unused for a period of 20 years would lapse and revert to the property’s surface owner unless the mineral owner filed a statement of

claim in the local county recorder's office. *Id.* at 518. Petitioner claims, "While *Texaco, Inc.* was not a criminal case, this Court's answer to the question made no distinction between civil and criminal cases or laws affecting property rights and laws affecting liberty interests." Petitioner's Brief 19.

To the contrary, the *Texaco* Court explicitly noted the difference. The majority pointed out it was not constrained by the decision in *Lambert v. California* precisely because what was considered in *Lambert* was the validity of a *criminal offense* and the *mens rea* necessary before the State may convict an individual of a *crime*. *Id.* at 537, n.33. While the dissenters thought "the rigor with which the due process test was applied in *Lambert* [was] worth noting," they recognized it would be inappropriate to apply due process standards with the same rigor where only property interests are at stake. *Texaco*, 454 U.S. at 547 (Brennan, J., dissenting). Given this Court's explicit acknowledgment that the due process analysis differs between property interests and liberty interests, the *Texaco* decision is not applicable, and the OCCA's ruling for which the Petitioner seeks review is not in conflict with it.

Petitioner's essential argument is that the State of Oklahoma should be allowed to criminalize purchases of pseudoephedrine without requiring proof that the defendant knows or should know that her conduct is prohibited by law. Petitioner contends that criminalizing the buying pseudoephedrine, if the person who buys it is subject to the methamphetamine registry act, is no different than the situations in which this Court has held that knowledge of the prohibition need not be proved for a conviction. Those include the selling of narcotic drugs under certain circumstances, *United States v. Balint*, 248 U.S. 250, 252 (1922); the shipping of misbranded and adulterated drugs, *United*

*States v. Dotterweich*, 320 U.S. 277, 281 (1943); the possession of hand grenades, *United States v. Freed*, 401 U.S. 601, 609-10 (1971); and the shipping of sulfuric and other dangerous acids in interstate commerce, *United States v. Int'l Minerals*, 402 U.S. 558, 564-65 (1971).

Not everything, however, can be regulated without notice and enforced with heavy criminal penalties. The limits specifically noted in *International Minerals* apply in our case:

In *Balint* the Court was dealing with drugs, in *Freed* with hand grenades, in this case with sulfuric and other dangerous acids. Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require, as in *Murdock*,<sup>4</sup> 'mens rea' as to each ingredient of the offense. But where, as here and as in *Balint* and *Freed*, dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.

402 U.S. at 564-65.

Cold and allergy medicines such as Sudafed and Claritin D are more akin to pencils, dental floss, and paper clips than to hand grenades, dangerous acids, and narcotic, misbranded, or adulterated drugs. The OCCA decided that when the Oklahoma Legislature attached heavy criminal penalties to the purchase of pseudoephedrine by persons who had no reason to know it was illegal for them to buy it, the legislature's failure to give notice to those persons violated due process. That decision does not

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<sup>4</sup> This reference is to *United States v. Murdock*, 290 U.S. 389, 396 (1933), *overruled on other grounds by Murphy v. Waterfront Com'n of New York Harbor*, 378 U.S. 52 (1964), which interpreted a statute regarding income tax to include a purpose to bring about the forbidden result lest "a person, by reason of a bona fide misunderstanding as to his liability. . . should become a criminal by his mere failure to measure up to the prescribed standard of conduct."

conflict with *Texaco* or any of the other of this Court's decisions cited by Petitioner. Certiorari should be denied.

V.

**CERTIORARI SHOULD BE DENIED BECAUSE THE OKLAHOMA COURT OF CRIMINAL APPEALS REACHED THE RIGHT RESULT UNDER THE 14<sup>TH</sup> AMENDMENT.**

Petitioner's hue and cry is that "ignorance of the law is no excuse." The OCCA recognized that this maxim has bounds, and it found that those bounds were crossed by criminalizing conduct that was innocent one day and criminal the next without notice and with heavy penalties. The OCCA got it right.

The justification for the rule that a person is presumed to know the law is its necessity. *Texaco*, 454 U.S. at 544 (Brennan, J., dissenting). "As a practical matter, a State cannot afford notice to every person who is or may be affected by a change in the law." *Id.* However, "an unfair and irrational exercise of state power cannot be transformed into a rational exercise merely by invoking a legal maxim or presumption. If it is to survive the scrutiny that the Constitution requires us to afford laws that deprive persons" of their liberty, "an enactment that relies on that presumption of knowledge must evidence some rational accommodation between the interests of the State and fairness to those against whom the law is applied." *Id.*

In this case, the interest of the State is combating the production of methamphetamine, not setting traps for the unwary. Though pseudoephedrine is a key ingredient for manufacturing methamphetamine, its more common use is to alleviate sinus congestion. Every day ordinary citizens can and do innocently buy the same cold and allergy medicine Ms. Wolf purchased. As the OCCA recognized, in fairness to

people the State seeks to prohibit buying pseudoephedrine, there should be some warning that they can no longer, under any circumstances, buy any product containing a detectable quantity of pseudoephedrine. App. 4.

Fair notice to the people affected by the Methamphetamine Registry Act would prevent trapping the unwary purchaser who is only seeking relief of sinus congestion<sup>5</sup> without thwarting the government's goal of preventing sales of pseudoephedrine to people with methamphetamine-related convictions. Giving notice is easily accomplished, as demonstrated by Oklahoma's other offender registry acts. Oklahoma's Sex Offenders Registration Act, OKLA. STAT. tit. 57, §§ 581-590.2 (2011), and its Mary Rippey Violent Crime Offenders Act, OKLA. STAT. tit. 57, §§ 591-99 (2011), contain remarkably extensive notice provisions to the affected offenders. When a judge gives a sex offender a deferred or suspended sentence, the judge must explain to the probationer the myriad obligations imposed by the Sex Offender Registry Act. If the person goes to prison, upon release, the Department of Corrections must inform and explain the obligations. *Id.*, § 585(A). The Department of Public Safety is responsible for notifying out-of-state offenders moving to Oklahoma. *Id.*, § 585(B). In all cases, the offender must be informed about the duty to register; that if s/he changes address, notice must be given in person to the local law enforcement within three days if the new residence is in Oklahoma and within ten days if in another state; that if the offender obtains or terminates employment, with or without compensation, the offender must give notice of the change in employment; that enrolling in school requires registration in the

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<sup>5</sup> Liquid forms of pseudoephedrine can generally be legally purchased even by a person subject to the Registry. *See* OKLA. STAT. tit. 63, § 2-701(B).

state where the school is located and that changing enrollment requires further notifications. *Id.*, § 583 (F)(1)-(9). The same is true of Oklahoma’s Violent Crime Offenders Act. *Id.*, §§ 894(D), 597(A). Both types of offenders must sign an acknowledgment that the obligations have been explained to them and that they understand their duty to register. *Id.*, § 585(A)(2), 597(A)(2). This ensures the creation of a document showing that the person was notified of the Act’s applicability to the offender and the Act’s special requirements.

Contrariwise, Oklahoma’s Methamphetamine Registry Act has no notice provisions whatsoever. “Wholly absent from the statute is any provision giving notice to a person in Wolf’s position – someone on probation at the time the statute went into effect – that she is subject to the registry and thus subject to criminal penalties.” App. 2.

The “rule that ‘ignorance of the law will not excuse’ is deep in our law,” but it is not without limit. *Lambert*, 355 U.S. at 228 (internal citation omitted). Equally deeply-engrained is our concept that due process requires notice. “Notice is sometimes essential so that the citizen has the chance to defend charges.” *Id.* Here, Respondent Wolf had no chance to defend against the charges that subjected her to fourteen years’ imprisonment. The OCCA could have granted relief to Wolf by interpreting the statute as having a *mens rea* element. By ruling the statute’s failure to give notice that she was subject to the registry was unconstitutional, however, the OCCA put the onus on the state legislature to determine how notice is best given.

Sending Respondent Wolf to prison for fourteen years simply for buying cold and allergy medicine to alleviate her sinus congestion was unjust. She had been placed into

a category of persons who cannot buy it, but was never informed about her status and had no reason to know her purchase was illegal. Accordingly, the statute that allowed such a conviction violated due process. The OCCA's decision was correct. Certiorari should be denied.

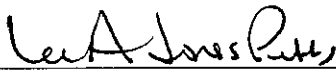


**CONCLUSION**

Petitioner has shown no reason for the Court to intervene in this case. The decision by the Oklahoma Court of Criminal Appeals did not violate this Court's rulings or apply them in a manner that created a conflict of authorities in the courts that needs to be resolved. The Petition for a writ of certiorari should be denied.

Respectfully submitted,

ANGELA MICHELLE WOLF

By:   
LEE ANN JONES PETERS  
Counsel for Respondent



## WOLF v. STATE

2012 OK CR 16

292 P.3d 512

Case Number: C-2011-1035

Decided: 11/28/2012

ANGELA MICHELLE WOLF, Petitioner, v. STATE OF OKLAHOMA, Respondent.

Cite as: 2012 OK CR 16, 292 P.3d 512

### SUMMARY OPINION

#### SMITH, JUDGE:

¶1 Angela Michelle Wolf pled guilty to five counts of Unlawful Purchase of Pseudoephedrine While Subject to Oklahoma Methamphetamine Offender Registry Act in violation of 63 O.S. Supp. 2010, § 2-701(B), after one former felony conviction, in the District Court of Garfield County, Case No. CF-2011-405.<sup>1</sup> In accordance with a negotiated plea the Honorable Dennis W. Hladik sentenced Wolf to fourteen (14) years imprisonment on each count, to run concurrently with one another and with Wolf's sentence in Garfield County Case No. CF-2005-457. Wolf filed a timely motion to withdraw her plea, which was denied after a hearing on November 21, 2011. Wolf filed a Petition for Writ of Certiorari in this Court on March 13, 2012. This Court directed the State to file a response, and that response was filed on June 11, 2012.

¶2 Wolf raises one proposition of error in support of her petition:

I. In order to be constitutional, the offense of unlawfully purchasing pseudoephedrine while subject to the methamphetamine registry act must be construed as having a mens rea component, and here, the factual basis was inadequate to establish such mens rea. The trial court abused its discretion by refusing to allow Petitioner to withdraw her plea of guilty when the court learned that Ms. Wolf was completely unaware that she was subject to the registry and prohibited from buying pseudoephedrine.

After thorough consideration of the evidence before us, including the original record, briefs, transcripts and evidence, we reverse.

¶3 Wolf was subject to the Methamphetamine Registry Act. 63 O.S. Supp. 2010 § 2-701(B). The Act establishes a registry of persons convicted of various methamphetamine crimes, and applies to all persons convicted after November 1, 2010, and all persons on probation for any specified offense as of that date. Upon conviction, the district court clerk is required to send the name of the offender to the Oklahoma State Bureau of Narcotics and Dangerous Drugs (OSBNDD), which maintains the registry. A person subject to the registry is prohibited from buying pseudoephedrine. Every pharmacist or other person who sells, manufactures or distributes pseudoephedrine must check the registry at each purchase, and deny the sale to any person on the list. Wolf claims that, to be constitutional, the Act must provide notice to the persons who are subject to criminal prosecution under its provisions. The statute does not provide such notice, and violates the Due Process Clause. U.S. Const. Amend. XIV.

¶4 The State argues, first, that this issue was not properly raised in Wolf's motion to withdraw her plea, and has been waived. This is not correct. Wolf claimed in her motion to withdraw that her plea was not knowing and voluntary, and entered without understanding, because she did not know she was not allowed to buy pseudoephedrine as a result of the registry statute. In lay terms, this is exactly what she claims on appeal - that

the statute is unconstitutional as applied to her because she did not know she had committed a crime when she engaged in otherwise lawful activity. Although Wolf's *pro se* language in her Motion to Withdraw was inartful, the issue is properly before the Court.

¶5 The State does not contest Wolf's claim that she did not know she was committing a crime by purchasing pseudoephedrine - an action which was otherwise legal.<sup>2</sup> The State argues, rather, that § 2-701(B) is a strict liability crime and there is no legal requirement that a person know she has violated the statute or is subject to criminal penalties - the same argument made by the prosecutor at the hearing on Wolf's motion to withdraw her plea. This interpretation of the law fails to take into account the Due Process Clause and United States Supreme Court case law. As we discuss below, when otherwise lawful conduct is criminalized, the criminal statute must provide sufficient notice for a person to know she is committing a crime. Section 2-701 contains no such provisions. There is a distinction between knowledge that one is subject to criminal penalties, and intent to commit a crime. A strict liability crime does not require any intent to commit a crime. However, due process requires notice that specific conduct is considered a criminal offense.

¶6 Subsection E of § 2-701 explains how OSBNDD is notified when persons are subject to the registry. However, Subsection E makes no provision for anyone to notify OSBNDD which persons currently serving probation, like Wolf, are subject to the registry. Wholly absent from the statute is any provision giving notice to a person in Wolf's position - someone on probation at the time the statute went into effect - that she is subject to the registry and thus subject to criminal penalties. In fact, the statute does not provide that court clerks notify any convicted person that their name has been submitted to the OSNBDD, or that they are subject to the registry. These omissions are the crux of Wolf's claim, and the basis of our ruling.

¶7 Wolf supports her Due Process claim with two Supreme Court cases, *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), and *Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240 2 L.Ed. 2d 228 (1957). *Lambert* held that a registration law which carried criminal penalties, but gave no notice to persons subject to the registration requirement, and required no proof of actual knowledge of the duty to register, violated due process. *Lambert*, 355 U.S. at 229, 78 S.Ct. at 243. *Liparota* concerned a statute prohibiting acquisition or possession of food stamps in a manner not authorized by statute or regulations, and including a criminal penalty. The Court held that due process required a showing that the defendant knew his conduct to be unauthorized: "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Liparota*, 471 U.S. at 425, 105 S.Ct. at 2088, quoting *Morissette v. United States*, 32 U.S. 246, 250, 72 S.Ct. 240, 243, 96 L.3d. 288 (1952). *Liparota* noted that construing the statute to require knowledge of the prohibited act "is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Liparota*, 471 U.S. at 426, 105 S.Ct. at 2088.

¶8 The State argues that *Lambert* does not apply, because it involved a statute requiring only registration. The State argues that, because *Lambert* involved a status crime - failure to register - and § 2-701 prohibits the affirmative act of buying pseudoephedrine after certain criminal convictions, there is no need for an intent requirement. *Lambert* does not support this claim. Whether the offense is purely a status crime or requires an action, the notice requirement remains. The Supreme Court framed this issue: "We must assume that appellant had no actual knowledge of the requirement that she register under this ordinance, as she offered proof of this defense which was refused. The question is whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge." *Lambert*, 355 U.S. at 227, 78 S.Ct. at 242. Section 2-701 does not require that the felon subject to the registry register; for persons convicted after November 1, 2010, the district court clerk is responsible for informing the OSBNDD that the person is subject to the registry and the OSBNDD actually puts the name on the register, while for persons serving probation, etc., on that date, the statute fails to name any person or entity who is responsible for ensuring that name is put on the registry. Nobody is responsible for notifying the convicted felon that she is subject to the registry.

¶9 The State also relies on language in *Lambert* noting that the Legislature may criminalize conduct alone, without regard to the intent of the perpetrator. However, in that same passage *Lambert* goes on to distinguish the passive conduct at issue there - failure to register - from "the commission of acts, or the failure to act *under circumstances that should alert the doer to the consequences of his deed*." *Lambert*, 355 U.S. at 228, 78 S.Ct. at 243 (emphasis added). Whether or not intent is required for the criminal conduct, it is essential that the person should be alerted that she is committing a crime. Furthermore, in *Liparota*, the Supreme Court discussed strict

liability "public welfare" offenses, which require no intent, but involve forbidden acts or omissions. The Court noted that, in most instances, Congress "rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liparota*, 471 U.S. at 432-33, 105 S.Ct. at 2092.

¶10 Taken together, *Lambert* and *Liparota* suggest that, while a legislature may criminalize conduct in itself, with no intent requirement, the legislature must make some provision to inform a person that the conduct, as applied to her, is criminal. This is particularly important where the conduct in question is otherwise legal. This is precisely the circumstance here: some convicted felons are prohibited from purchasing pseudoephedrine, while others, along with the general population, are not. The criminal penalties are substantial.

¶11 This Court has interpreted some apparent strict liability criminal statutes to require a finding of intent. Discussing the question of criminal intent, we held that the offense of Carrying a Firearm After Former Conviction of a Felony requires proof of intent or knowledge. *Williams v. State*, 1977 OK CR 119, ¶ 11, 565 P.2d 46, 48, *overruled on other grounds*, *Lenion v. State*, 1988 OK CR 230, 763 P.2d 381. We noted, "criminal intent is the essence of all criminal liability." *Williams*, 1977 OK CR 119, ¶ 6, 565 P.2d at 48 (citation omitted). We recognized that there are statutes whose purpose would be obstructed by a scienter requirement. *Williams*, 1977 OK CR 119, ¶ 8, 565 P.2d at 48. A court determines whether a given statute creates such a crime by interpreting the legislative intent. *Id.* We noted, "When the statute is silent, knowledge and criminal intent are generally essential if the crime involves moral turpitude, but not if it is *malum prohibitum*. [] Other elements to consider in determining the legislative intent include the subject matter of the prohibition and its manifest purpose and design, and the consequences of the several constructions to which the statute may be susceptible." *Williams*, 1977 OK CR 119, ¶ 9, 565 P.2d at 49 (quotations omitted). Wolf's case illustrates the consequences of treating § 2-701, with its lack of notice provisions, as a strict liability crime: a defendant who does not know she is prohibited from buying pseudoephedrine is sentenced to prison for what is otherwise lawful conduct.

¶12 In *Dear v. State*, 1989 OK CR 18, ¶ 6, 773 P.2d 760, 761, we held that the offense of Carrying a Weapon implicitly contained an element that the defendant must have knowledge of the crime. Citing *Williams*, we repeated that criminal intent is the essence of all criminal liability. *Id.* Wolf correctly notes that the statutes at issue in *Williams* and *Dear* are similar to § 2-701. They all begin "it shall be unlawful" and describe the prohibited conduct. See 63 O.S.Supp.2010, § 2-701(B); 21 O.S.2011, § 1272; 21 O.S.2011, § 1283. The brief discussion in *Williams* of *malum prohibitum*, or strict liability, crimes did not touch on whether a defendant must have notice that she is subject to prosecution for such a crime if she engages in otherwise lawful activity.

¶13 The State argues that the Supreme Court has upheld the constitutionality of strict liability criminal statutes, citing two cases from the 1940s. As Wolf notes, in neither of these cases was the constitutionality of a strict liability criminal statute at issue, and neither supports the State's argument.

¶14 In *Williams v. North Carolina*, 325 U.S. 226, 65 S.Ct. 1902, 89 L.Ed. 1577 (1945), the issue was whether North Carolina could refuse full faith and credit to a divorce decree issued in Nevada, if, contrary to the Nevada court's finding, North Carolina found that there was no bona fide domicile in Nevada at the time of the divorce. The question was whether the parties had committed bigamy. The Court concluded that, in seeking a divorce in Nevada when they lived in North Carolina, the petitioners assumed the risk that the Court would find they had not been domiciled in Nevada, their divorces were illegal, and any subsequent marriages in North Carolina were subject to prosecution for bigamy. The Court noted, "In vindicating its public policy and particularly one so important as that bearing upon the integrity of family life, a State in punishing particular acts may provide that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." *Williams*, 325 U.S. at 238, 65 S.Ct. at 1099 (quotations omitted). This involves, as the Supreme Court says, ignorance of the facts - the petitioners relied on Nevada's factual findings when acting in contravention of North Carolina law. *Id.* By contrast, the issue before this Court is whether persons like Wolf, who commit an otherwise lawful act, know that the act is, for them, a crime. This is a very different question.

¶15 In *U.S. v. Dotterweich*, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed 48 (1943), a corporation and Dotterweich, its president and general manager, were federally prosecuted for the misdemeanor offense of shipping adulterated or misbranded drugs in interstate commerce. The corporation was acquitted, but Dotterweich was found guilty. An appellate court reversed the conviction, finding that only the corporation was the person subject to prosecution under the statute. The Supreme Court disagreed, holding that the statute embraced both corporations and, to an undefined extent but including Dotterweich, their employees. The Court explicitly noted that the central purpose of this statute was to safeguard the public welfare. *Dotterweich*, 320 U.S. at 284, 64 S.Ct. at 138. This crime falls in

the category of "public offenses" discussed in *Liparota, supra*, which may carry a criminal penalty though the offender has no consciousness of wrongdoing in the transaction. *Dotterweich*, 320 U.S. at 284, 64 S.Ct. at 138. In dicta, the Court notes that, in enacting the statute, Congress placed the hardship of possible criminal prosecution "upon those who have *at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers* before sharing in illicit commerce." *Id.* (emphasis added). This is the only mention in the opinion of the strict liability nature of this offense, and nothing in the opinion discusses if or what kind of knowledge would be necessary to secure a conviction for this "public offense" crime. *Dotterweich* does not support the State's claim that the lack of notice provisions in § 2-701 is constitutional.

¶16 The State also argues that, even if a knowing element is required by § 2-701(B), it was satisfied in this case because Wolf knowingly purchased pseudoephedrine. This confuses knowledge that one is subject to criminal penalties - notice - with intent to commit a crime. It also misstates the crime created by § 2-701(B). The State argues earlier in its brief that Wolf's crime was buying pseudoephedrine "*after being convicted of multiple methamphetamine offenses.*" Later, the State appears to argue that the crime was simple purchase of pseudoephedrine. The State had it right the first time. The question here is not whether a person subject to the registry knows that she is buying pseudoephedrine. That is, under most circumstances, a lawful act, and if (as here) the sale is not refused, the person has no reason to believe she has committed a crime. The issue is precisely whether the person subject to the registry knows that, because of that status, she is not allowed to purchase pseudoephedrine. That is the criminal offense in question. Wolf was not prosecuted and sentenced to prison because she bought pseudoephedrine. She was prosecuted and sentenced to prison because she was *prohibited by law* from buying pseudoephedrine.

¶17 The State also argues that ignorance of the law is no excuse. This shows a clear misunderstanding of the interplay between criminal liability and the requirements of due process. Ignorance of the law will ordinarily not protect a person from the criminal consequences of her actions. In *Lambert* the United States Supreme Court noted that this maxim is limited by due process. *Lambert*, 355 U.S. at 228, 78 S.Ct. at 243. The Court described these limits: "Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. . . . [T]he principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case." *Id.* Wolf was not wholly passive - she bought pseudoephedrine. However, as far as Wolf knew this was a lawful act. The mere purchase of pseudoephedrine is not a crime, unless one is subject to § 2-701(B). The wrongdoing was created by Wolf's status as a person subject to the statute. The uncontested record shows Wolf was completely unaware that she was subject to § 2-701(B). The statute itself makes no provision that relevant persons should be informed they are subject to its requirements. This is a violation of due process.

¶18 The Supreme Court eloquently described the essential nature of notice that one is subject to criminal prosecution for otherwise lawful conduct. "As Holmes wrote in *The Common Law*, 'A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.' [] Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." *Lambert*, 355 U.S. at 229-30, 78 S.Ct. at 243-44 (citation omitted). Section 2-701 fails to meet the basic notice requirements of due process. As any notice requirement is wholly omitted from the statutory language, there is no statutory language regarding notice which this Court may interpret in a constitutional manner. This Court cannot provide constitutional language where no language exists in the statute. For this reason, we find Subsections (B) and (H) of Section 2-701 unconstitutional.

### DECISION

¶19 The Petition for Writ of Certiorari is **GRANTED**. The case is **REMANDED** to the District Court of Garfield County with instructions to allow Wolf to withdraw her plea and **DISMISS** the case. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY  
THE HONORABLE DENNIS W. HLADIK, DISTRICT JUDGE

**ATTORNEYS AT TRIAL**

JOHN GREG CAMP  
ATTORNEY AT LAW  
2901 S. VAN BUREN  
ENID, OKLAHOMA 73701  
ATTORNEY FOR DEFENDANT

TALLENA C. MCCMICHAEL  
ASSISTANT DISTRICT ATTORNEY  
GARFIELD COUNTY DISTRICT ATTORNEY'S OFFICE  
GARFIELD COUNTY COURTHOUSE  
114 W. BROADWAY  
ENID, OKLAHOMA 73701  
ATTORNEY FOR STATE

**OPINION BY: SMITH, J.**  
A. JOHNSON, P.J.: CONCUR  
LEWIS, V.P.J.: CONCUR  
LUMPKIN, J.: DISSENT  
C. JOHNSON, J.: CONCUR

**ATTORNEYS ON APPEAL**

LEE ANN JONES PETERS  
APPELLATE DEFENSE COUNSEL  
OKLAHOMA INDIGENT DEFENSE  
SYSTEM  
P.O. BOX 926  
NORMAN, OKLAHOMA 73070  
ATTORNEY FOR PETITIONER

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA  
JARED ADEN LOOPER  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21ST STREET  
OKLAHOMA CITY, OKLAHOMA 73105  
ATTORNEYS FOR RESPONDENT

**FOOTNOTES**

<sup>1</sup> The State dropped two counts of the same charge as part of a negotiated plea.

<sup>2</sup> The record consists of Wolf's sworn testimony at the hearing on her motion to withdraw her plea. The State did not contest any of Wolf's claims at that hearing, arguing only that the statute was a strict liability crime which was satisfied by her purchases of pseudoephedrine. The State appears to suggest that this Court should disregard the uncontested evidence at the hearing, simply because it was offered by Wolf. While we have occasionally viewed a defendant's testimony with skepticism, this Court cannot choose to disregard an uncontested record. The State implies that the trial court similarly gave Wolf's testimony little weight in denying her motion. The record does not support this claim. The trial court merely confirmed that Wolf's plea form and testimony at her guilty plea proceedings were correct - a matter not at issue here - and denied her request to withdraw her plea.

**LUMPKIN, J.: DISSENT**

¶1 With all due respect, I am compelled to dissent to this Opinion. The opinion needlessly determines that the Oklahoma Methamphetamine Offender Registry Act is unconstitutional when Petitioner had sufficient notice in the first instance.

¶2 First and foremost, Petitioner waived appellate review of this issue by failing to properly set it out in her motion to withdraw plea. This Court's rule on this matter is clear: "[n]o matter may be raised in the petition for a writ of certiorari unless the same has been raised in the application to withdraw the plea." Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2012); 22 O.S.2011, § 1051(c). In *Walker v. State*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355, this Court interpreted Rule 4.2 and stated "[w]e do not reach the merits of the first proposition, for Walker waived the issue by failing to raise it in his motion to withdraw guilty plea."

¶3 The Opinion's determination that Petitioner raised this issue in her motion to withdraw plea is based upon a series of assumptions. Although Petitioner testified at the hearing held on her motion to withdraw plea that she did not know that she was not allowed to buy pseudoephedrine as a result of the registry statute, she did not include this claim within her motion. Nonetheless, the opinion reads a great deal into this testimony when it determines that this claim is "exactly" the same as claiming that 63 O.S.Supp.2010, § 2-701(B) is unconstitutional as applied

to her.

¶4 In a certiorari appeal we are reviewing the trial judge's decisions for an abuse of discretion. *Carpenter v. State*, 1996 OK CR 56, ¶ 40, 929 P.2d 988, 998. However, there is no decision of the trial judge to review in the present case because this issue was never presented to the trial court. As Petitioner did not claim that the statute is unconstitutional in her motion, this Court should not reach the merits of her claim.

¶5 Even if the Court were to erroneously conduct a merits review of the issue, the opinion misinterprets the United States Supreme Court's jurisprudence on this issue. The opinion completely does away with the traditional rule that ignorance of the law is no excuse and creates a requirement that the Legislature must make some provision to inform a person that conduct is criminal for a statute to be constitutional.

¶6 The rule of law that "ignorance of the law is no excuse" is a fundamental principle of our justice system. *United States v. Reddick*, 203 F.3d 767, 771 (10th Cir. 2000); see also *Frederick v. State*, 2001 OK CR 34, ¶ 143, 37 P.3d 908, 945 (finding every man would claim "ignorance of the law" if it were available as a criminal defense.). The United States Supreme Court has found an exception to this rule and required that the defendant have subjective knowledge of the law in question in only two circumstances.

¶7 First, the U.S. Supreme Court requires subjective knowledge in tax cases and currency structuring cases because both instances involve "highly technical statutes that present[ ] the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan v. United States*, 524 U.S. 184, 194-95, 118 S.Ct. 1939, 1946-47, 141 L.Ed.2d 197 (1998). Thus, in tax cases and currency structuring cases, the Court has required that the jury must find that the defendant had subjective knowledge of the applicable law or the unlawfulness of the act. *Id.*

¶8 Second, the U.S. Supreme Court has required subjective knowledge in the instance of a felon registration act. *Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d (1957). In *Lambert*, the California ordinance in question caused it to be illegal for a convicted felon to be or remain in Los Angeles for a period of more than five days without registering. *Id.*, 355 U.S. at 226, 78 S.Ct. at 241-42. The ordinance did not require that convicted felons be given notice of the requirement to register. *Id.* Likewise, no element of willfulness was included in the ordinance nor read into it by the California Court as a condition necessary for a conviction. *Id.*, 355 U.S. at 227, 78 S.Ct. at 242. The Court determined that Due Process limits application of the rule "ignorance of the law is no excuse" as well as a local government's police power. *Id.*, 355 U.S. at 228, 78 S.Ct. at 243. "Notice is required . . . where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case." *Id.* Because the conduct criminalized by the California statute was "wholly passive-mere failure to register" and the law "punished conduct which would not be blameworthy in the average member of the community," the U.S. Supreme Court held that "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply [were] necessary before a conviction under the ordinance [could] stand. *Id.*, 355 U.S. at 228-29, 78 S.Ct. at 243.

¶9 The Opinion cites *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), as espousing a requirement that the Legislature must make some provision to inform a person that conduct is criminal when it criminalizes a broad range of apparently innocent conduct. However, *Liparota* involved the U.S. Supreme Court interpreting the elements of an otherwise ambiguous federal statute under the rule of lenity. *Id.*, 471 U.S. at 423-34, 105 S.Ct. at 2087-92. The Court did not set forth any requirements of the various States or their legislatures in establishing criminal offenses. As such, *Liparota* is wholly inapplicable to the present discussion.

¶10 Therefore, this Court should review 63 O.S.Supp.2010, § 2-701(B), for either of the two circumstances in which the U.S. Supreme Court has required subjective knowledge. Section 2-701, is neither a highly technical statute nor does it deal with taxes or currency structuring. As such, *Bryan* does not require subjective knowledge in order for a conviction under § 2-701(B) to stand.

¶11 The subjective notice requirement set forth in *Lambert* is not applicable to the present case because § 2-701 does not criminalize "wholly passive" conduct. As set forth in the opinion, Petitioner's conduct was not "wholly passive, i.e. "Wolf was not wholly passive - she bought pseudoephedrine."

¶12 Although § 2-701(B) punishes conduct which would not be blameworthy in the average member of the community, the circumstances of the present case are distinguishable from those in *Lambert*. Petitioner knew that

she had been convicted of the felony of conspiracy to possess pseudoephedrine with intent to manufacture methamphetamine and knew that the sale of pseudoephedrine was regulated. (O.R. 5-6). To purchase pseudoephedrine an individual must present photographic ID and all sales are tracked. (O.R. 5). Section § 2-701 (G) requires that "the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control [] maintain a methamphetamine offender registry website available for viewing by the public."<sup>1</sup> Thus, § 2-701 provides an avenue for notice that was not present in *Lambert*. I find that *Lambert* is simply not applicable to the present case.

¶13 Even if this Court were to find that Due Process requires subjective knowledge of the prohibition in § 2-701 (B), the Opinion is overly broad and needlessly declares the statute in question unconstitutional. The language within the opinion is not limited to the narrow holding of *Lambert*. Instead of requiring subjective notice for acts criminalizing passive conduct and for which the average member of the community would not be blameworthy, as done in *Lambert*, the opinion requires the Legislature to provide notice as to all criminal prohibitions that do not contain an intent requirement.

¶14 There is no need to declare § 2-701 unconstitutional because there is a readily available interpretation that is constitutional.

Every presumption must be indulged in favor of the constitutionality of an act of the Legislature, and it is the duty of the courts, whenever possible, to harmonize acts of the Legislature with the Constitution. Statutes are to be liberally construed with a view to effect their objects and to promote justice. The constitutionality of a statute will be upheld unless it is clearly, palpably, and plainly inconsistent with fundamental law.

*State v. Hall*, 2008 OK CR 15, ¶ 23, 185 P.3d 397, 403 (internal quotations and citations omitted). Instead, of declaring the statute unconstitutional, this Court may simply interpret the statute to implicitly contain the element that "the person received notice that he/she was required to register as a [methamphetamine] offender." See Inst. No. 3-40, OUJI-CR(2d) (Supp.2012). In *Lambert*, the U.S. Supreme Court found the felon registration statute unconstitutional only after the California court had failed to read an element of willfulness into it. *Lambert*, 355 U.S. at 227, 78 S.Ct. at 242. This Court has on prior occasions interpreted statutes that were silent to implicitly contain an element necessary to effect the intent of the legislature. See *Dear v. State*, 1989 OK CR 18, ¶ 6, 773 P.2d 760, 761 (interpreting element of "knowingly" within offense of carrying a weapon as set forth in 21 O.S.1981, § 1272); *Williams v. State*, 1977 OK CR 119, ¶ 11, 656 P.2d 46, 49, *overruled on other grounds by Lenion v. State*, 1988 OK CR 230, 763 P.2d 381 (interpreting elements of "knowing" and "willfully" in offense of carrying a firearm after former conviction of a felony as set forth in 21 O.S.1971, § 1283).

¶15 The statute is constitutional on its face. See *Citizens United v. FEC*, 558 U.S. 310, 130 S.Ct. 876, 893, 175 L.Ed.2d 753 (2010) (finding that the distinction between facial and as-applied constitutional challenges is both instructive and necessary for it goes to the breadth of the remedy employed by the Court). Therefore, Petitioner's challenge to § 2-701(B) may also be solved by simply requiring the trial courts to advise the defendant in all future instances that he or she is subject to the Oklahoma Methamphetamine Offender Registry Act at the time of sentencing. This item should be added to the list of items a defendant is informed of when sentenced.

¶16 Regardless, I find that Petitioner had sufficient notice. Petitioner knew that she did not stand in the same position as the average member of the community. Petitioner acknowledged that she had been convicted of the offenses of unlawful possession of controlled dangerous substance with intent to distribute and conspiracy to possess pseudoephedrine with intent to manufacture methamphetamine in the District Court of Garfield County Case Numbers CF-2004-133 and CF-2005-457, respectively. (O.R. 4, 6, 21; Mtn. Tr. 13). Petitioner knew that pseudoephedrine is highly regulated and its sale is tracked by both local pharmacists as well as law enforcement officers. The Oklahoma Legislature provides notice of all Legislative enactments through the publication of the Oklahoma Statutes and annual cumulative supplements thereto. 75 O.S.2001, §§ 171-180; 75 O.S.Supp.2009, § 191. The provisions of § 2-701 were published to the public in 63 O.S.Supp.2010, § 2-701 and were further made available to the public on the Oklahoma State Courts Network webpage.

¶17 Finally, that portion of the opinion that finds that § 2-701(H) is unconstitutional is *dicta*.<sup>2</sup> Petitioner was not charged or convicted of any acts under § 2-701(H). Instead, she was charged and pled guilty to five violations of § 2-701(B). The Information, Plea of Guilty Summary of Facts form, and the Judgment and Sentence all clearly reflect that the offenses were in violation of 63 O.S. § 2-701(B). (O.R. 1, 21, 31). Petitioner does not cite to, discuss, or argue that § 2-701(H) is unconstitutional. This Court does not issue advisory opinions. *Murphy v. State*, 2006 OK CR 3, ¶ 1, 127 P.3d 1158, 1158.

"unless we are vested with original jurisdiction, all exercise of power must be derived from our appellate jurisdiction, which is the power and the jurisdiction to review and correct those proceedings of inferior courts brought for determination in the manner provided by law.... An advisory opinion does not fall within the Court's original or statutory jurisdiction; neither does it come within its appellate review. To offer advice in the form of an opinion would be to interfere with the responsibility of the trial court to exercise the powers confided to it. We will not do so absent constitutional or statutory authority."

*Canady v. Reynolds*, 1994 OK CR 54, ¶ 9, 880 P.2d 391, 394, quoting *Matter of L.N.*, 1980 OK CR 72, ¶ 4, 617 P.2d 239, 240. There is no constitutional or statutory authority for this Court to review the constitutionality of a statute upon its own suggestion. As such, the constitutionality of § 2-701(H) is not properly before the Court and any determination of this issue constitutes an advisory opinion. I cannot join in the process of issuing advisory opinions which violate our rules and precedent. See *Nesbitt v. State*, 2011 OK CR 19, ¶¶ 2-3, 255 P.3d 435, 441 (Lumpkin, J., concurring in part/dissenting in part).

#### FOOTNOTES

<sup>1</sup> This requirement is found within subsection I of the current version of the statute. See 63 O.S. Supp. 2012, § 2-701(I).

<sup>2</sup> I note that there was not a subsection H under 63 O.S. Supp. 2010 § 2-701. Instead, the statute ended with subsection G. In 2012, the Legislature moved the language that was in subsection G to subsection H. *Id.*; 63 O.S. Supp. 2012 § 2-701(H).



No. 12-1035

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

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THE STATE OF OKLAHOMA

Petitioner,

v.

ANGELA MICHELLE WOLF

Respondent.

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PROOF OF SERVICE

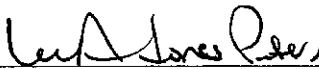
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I, Lee Ann Jones Peters, do swear or declare that on this date, *May 9*, 2013, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and BRIEF IN OPPOSITION on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Seth S. Branham, Assistant Attorney General  
313 NE 21<sup>st</sup> Street  
Oklahoma City, OK 73105

  
\_\_\_\_\_  
Lee Ann Jones Peters

