No. _____

In The
Supreme Court of the United States

THE STATE OF OKLAHOMA,

Petitioner,

v.

ANGELA MICHELLE WOLF,

Respondent.

On Petition For Writ Of Certiorari To The Oklahoma Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Oklahoma Court of Criminal Appeals erred when it created a split of authority amongst the lower courts by rejecting the universally-recognized limitations on the scope of this Court's decision in *Lambert v. California*, 355 U.S. 225 (1957), which held that a defendant's knowledge of an ordinance is constitutionally irrelevant except in a narrow class of convictions where (1) the ordinance involves conduct that is "wholly passive" and (2) conditions do not lead one to inquire about the existence of a regulation.

2. Whether the Oklahoma Court of Criminal Appeals' decision holding due process requires a statute provide a means of individual notice conflicts with this Court's holding in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), which held in pertinent part that the notice requirement of due process only requires the legislature to (1) enact the law, (2) publish the law, and (3) provide a period of time for people to become familiar with the law.

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The State of Oklahoma hereby petitions for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals (OCCA) in this case.

OPINION BELOW

The published opinion of the OCCA remanding the case to the trial court with instructions to dismiss the conviction is published as *Wolf v. State*, 292 P.3d 512 (Okla. Crim. App. 2012). It is reprinted at pages 1 through 25 of the appendix accompanying the petition ("App.").

STATEMENT OF JURISDICTION

On November 28, 2012, the OCCA issued a published opinion declaring portions of Okla. Stat. tit. 63, § 2-701 (Supp. 2010) violated the Fourteenth Amendment of the United States Constitution. App. 1, 14. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (permitting the review of final judgments of the highest court of a State through a writ of certiorari "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution.").

CONSTITUTIONAL PROVISION AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV:

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

Okla. Stat. tit. 63, § 2-701 (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 under the provisions of Section 2-322, 2-332, 2-401, 2-402, 2-408 or 2-415 of this title, or any crime including, but not limited to, crimes involving the possession, distribution, manufacturing or trafficking of methamphetamines or illegal amounts of or uses of pseudoephedrine in any federal court, Indian tribal court, or any court of another state if the person is a resident of the State of Oklahoma or seeks to remain in the State of Oklahoma in excess of ten (10) days.

(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. 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.

STATEMENT OF THE CASE

Methamphetamine is a highly-addictive and easily-manufactured drug with illicit use that has reached epidemic proportions. Bradly A. Rigdon, *Pharmacists on the Front Lines in the Fight Against Meth: A 50-State Comparison of the Laws Regulating the Retail Sale of Pseudoephedrine*, 33 J. Legal Med. 253, 255-56 (2012). "Pseudoephedrine is a key ingredient in meth." *Id*. Because of this epidemic, forty-three "states have enacted legislation regulating the retail sale of pseudoephedrine." *Id*. at 260. In 2010, Oklahoma enacted the Methamphetamine Offender Registry Act, provisions of which prohibit persons who

have previously been convicted of methamphetamine-related crimes from purchasing pseudoephedrine for ten years after their conviction. 2010 Okla. Sess. Law Serv. Ch. 458 (H.B. 3380) (West).

On September 14, 2011, Angela Michelle Wolf – who had previously pled guilty to possession of pseudoephedrine with the intent to manufacture methamphetamine – pled guilty to five felony counts of unlawful purchase of pseudoephedrine while subject to the Methamphetamine Offender Registry Act. *See* Okla. Stat. tit. 63, § 2-701(B). Wolf was sentenced to fourteen years imprisonment on each count and her sentences were ordered to run concurrently. On September 27, 2011, she moved to withdraw her plea claiming, *inter alia*, her plea was not knowing and voluntary and her conviction violated the Fourteenth Amendment to the United States Constitution. App. 1-3. Without addressing the Fourteenth Amendment issue, the district court denied Wolf's motion to withdraw her guilty plea. App. 17.

Wolf subsequently filed a petition for writ of certiorari with the OCCA on December 9, 2011, and a brief in support of her petition on March 13, 2012. App. 1-2. Before the OCCA, Wolf limited her argument to the sole question of whether § 2-701(B) should be construed as containing a mens rea element under state law. App. 2. Wolf did not seek to have the statute declared unconstitutional but merely

sought to withdraw her guilty plea. The OCCA thereafter directed a response from the State which was filed on May 22, 2012.[1]

On November 28, 2012, the OCCA, by a 4-1 vote, granted the petition for writ of certiorari and remanded the case to the district court with instructions to dismiss the case. App. 14-15. The OCCA held that the "Due Process Clause and United States Supreme Court case law" require that "when otherwise lawful conduct is criminalized, the criminal statute must provide sufficient notice for a person to know she is committing a crime" and because "Section 2-701 contains no such provision" it violates the Due Process clause and is unconstitutional. App. 4.

The decision was based exclusively on the OCCA's understanding of this Court's opinions in *Liparota v. United States*, 471 U.S. 419 (1985), and *Lambert v. California*, 355 U.S. 225 (1957). The OCCA majority held that "[t]aken together, *Lambert* and *Lipatora* 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." App. 8. The OCCA acknowledged *United States v. Dotterweich*, 320 U.S. 277, 284-85 (1943), in which this Court stated "[h]ardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be

[1] The OCCA opinion erroneously states that the State's response brief was filed on June 11, 2012. The file stamped copy of the brief shows the State's response was filed on May 22, 2012.

totally wanting[,]" but rejected it as dicta, finding that "*Dotterweich* does not support the State's claim that lack of notice provisions in § 2-701 is constitutional." App. 11-12.

The OCCA also rejected the State's suggestion that it infer a "knowing" element in the offense. The majority concluded that the State's argument "confuses knowledge that one is subject to criminal penalties – notice – with intent to commit a crime." This belief of the majority led to the odd and erroneous statement that "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." App. 12.

The OCCA rejected the State's argument that "ignorance of the law is no excuse." The Court noted that in *Lambert*, this Court held that the "maxim is limited by due process." The majority then suggested that notice that one's actions were prohibited by statute was the limit to which the *Lambert* Court referred. App. 12-13.

The sole dissenter, Judge Lumpkin, identified the errors in the majority's holding and rationale. Judge Lumpkin began with the proposition that "'ignorance of the law is no excuse' is a fundamental principle of our justice system." App. 17 (citing *United States v. Riddick*, 203 F.3d 767, 771 (10th Cir. 2000)). Judge Lumpkin then noted that the Supreme Court has found an exception to this rule in only two circumstances. The first group includes "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.'" App. 18 (quoting *Bryan v. United States*, 524 U.S. 184, 194-95 (1998)). The second group involves "felon registration acts." App. 18.

Judge Lumpkin believed that § 2-701 did not fall into the first group because it "is neither a highly technical statute nor does it deal with taxes or currency structuring." App. 19-20. Judge Lumpkin then noted that § 2-701 would not fall into the second group because it did "not prohibit 'wholly passive' conduct" which was the restriction this Court noted in *Lambert*. App. 20. Judge Lumpkin also found major distinctions between § 2-701 and the ordinance considered in *Lambert*, including the fact that Wolf had previously been convicted of an offense involving her possession of pseudoephedrine and the fact that pseudoephedrine is highly regulated. App. 20.

Finally, Judge Lumpkin concluded that, even if due process requires subjective knowledge, the majority's opinion was "overly broad and needlessly declares the statute in question unconstitutional" and that the statute could, nevertheless, be interpreted as constitutional by reading an element of willfulness into the statute. App. 21.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve a conflict between the OCCA's decision here and the decisions of numerous federal courts of appeals and state appellate courts regarding the scope of this

Court's decision in *Lambert v. California*, 355 U.S. 225 (1957) and because the OCCA's decision conflicts with this Court's decision in *Texaco, Inc. v. Short*, 454 U.S. 516, 531-33 (1982).

The decision below invalidated two criminal provisions of the Oklahoma Methamphetamine Offender Registry Act, *see* Okla. Stat. tit. 63, § 2-701, based on the OCCA's erroneous interpretation of this Court's decisions in *Lambert* and *Liparota*.[2] The OCCA summarized its erroneous understanding of those cases when the majority stated "[t]aken 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." App. 8. This led the OCCA to decide that, because "[t]he statute itself makes no provision that relevant persons should be informed they are subject to its requirements[,] [there] is a violation of due process." App. 13. The OCCA's ultimate holding was the following:

> As any notice requirement is wholly omitted from the statutory language, there is no statutory language regarding notice which

[2] In *Liparota*, this Court held, as a matter of statutory interpretation and congressional intent, that prosecution under 7 U.S.C. § 202(b)(1) required the government to prove that the defendant knew that he was acting in a manner not authorized by statute or regulation. *Liparota*, 471 U.S. at 433. Because the OCCA's decision is based on the Due Process Clause of the Fourteenth Amendment rather than on statutory interpretation and legislative intent, *Liparota* is inapposite.

> 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.

App. 14.[3] By failing to grasp the limitations inherent in *Lambert*, the OCCA struck down a state statute based on an interpretation of the Due Process Clause which conflicts with every federal court of appeals and state appellate court to consider *Lambert* and squarely conflicts with this Court's Due Process Clause decisions, most notably *Texaco, Inc*.

I. The OCCA created a split of authority regarding the proper scope of this Court's decision in *Lambert v. California* when it held actual knowledge or willful ignorance is necessary to convict a person of unlawfully purchasing pseudoephedrine, an act that is not "wholly passive."

In *Lambert*, this Court examined a Los Angeles city ordinance that required persons convicted of

[3] Subsection (H) of the Oklahoma Methamphetamine Offender Registry Act penalizes persons who assist those subject to Subsection (A) purchase pseudoephedrine. A person's first violation of Subsection (H) is a misdemeanor and a second or subsequent violation is a felony. Even though Wolf was not charged under Subsection (H) and neither party raised the constitutionality of Subsection (H), the OCCA held, *sua sponte*, that Subsection (H) was unconstitutional.

felonies in California or crimes elsewhere that would be felonies under California law to register with the Chief of Police if they remained in Los Angeles for longer than five days. *Lambert*, 355 U.S. at 226. The *Lambert* majority began its analysis of the constitutionality of the ordinance by stating:

> We do not go with Blackstone in saying that 'a vicious will' is necessary to constitute a crime, for conduct alone without regard to the intent of the doer is often sufficient. There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition.

Id. at 228. The Court then explained that the Los Angeles city ordinance fell outside of this "wide latitude" because the ordinance dealt "with conduct that is wholly passive – mere failure to register." *Id*. The ordinance in *Lambert* was "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." *Id*. The *Lambert* majority emphasized these limits, noting that the Los Angeles ordinance at issue there was "entirely different. Violation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test. Moreover, circumstances which might move one to inquire into the necessity of registration are completely lacking." *Id*. at 229. It was only in these circumstances "that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand." *Id*. Thus, the *Lambert*

majority held, "[w]here 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." *Id*. at 229-30.

The OCCA majority seized onto the last part of *Lambert* while completely ignoring the limitations contained within that holding. Read in its entirety, *Lambert* places two conditions that must be met before the Constitution's Due Process Clause requires the defendant to have actual knowledge of the law. First, the law must criminalize conduct that is "wholly passive." Second, there cannot be circumstances which suggest the need to inquire whether the law exists. At least one of these limitations on the applicability of *Lambert* has been recognized by every federal court of appeals to consider it. *See, e.g., United States v. Miller*, 646 F.3d 1128, 1132 (8th Cir. 2011) (concluding *Lambert* is limited to conduct that is "wholly passive" and does not apply where the object of the law "is nevertheless a highly regulated activity, and everyone knows it."); *United States v. Duran*, 596 F.3d 1283, 1292-93 (11th Cir. 2010) (noting *Lambert* "distinguished between misfeasance and nonfeasance."); *United States v. Talebnejad*, 460 F.3d 563, 570 (4th Cir. 2006) (noting the key to *Lambert*'s holding was this Court's "characterization of the conduct at issue as 'wholly passive.'"); *United States v. Shelton*, 325 F.3d 553, 564 (5th Cir. 2003) (noting two factors persuaded this Court in *Lambert*, (1) "the prohibited conduct was 'wholly passive'" and (2) "there was an absence of 'circumstances that should alert

the doer to the consequences of his deed.'"); *United States v. Denis*, 297 F.3d 25 (1st Cir. 2002) ("At the very least, a defendant seeking to avoid prosecution on the ground of ignorance of the law must satisfy two requirements. First, his conduct must have been 'wholly passive.' Second, there must be an absence of 'circumstances that should alert the doer to the consequences of his deed."); *United States v. Barnes*, 295 F.3d 1354, 1367 (D.C. Cir. 2002) (noting that *Lambert*'s holding was narrow and limited to "wholly passive conduct"); *United States v. Hancock*, 231 F.3d 557, 564 (9th Cir. 2000) (noting *Lambert* is limited to conduct that is "wholly passive" and "where the 'circumstances which might move one to inquire as to the necessity of registration [were] completely lacking'"); *United States v. Keuylian*, 602 F.2d 1033, 1043 (2d Cir. 1979) (rejecting *Lambert* claim when offense involved "active conduct" and "obvious circumstances suggesting the necessity of inquiring into the applicable legal restrictions"); *United States v. Horton*, 503 F.2d 810, 813 (7th Cir. 1974) (noting the holding in *Lambert* was based on the fact that it "involved 'conduct that is wholly passive'"). Numerous state appellate courts have also recognized one or both limitations on *Lambert*. *See, e.g.*, *State v. Adkins*, 96 So.3d 412, 419-21 (Fla. 2012) (noting *Lambert* is limited to conduct that is wholly passive); *Commonwealth v. McBride*, 281 S.W.3d 799, 804 (Ky. 2009) ("To be entitled to relief under the narrow *Lambert* exception, a defendant must establish that his conduct was 'wholly passive' such that 'circumstances which might move one to inquire as to necessity of registration

are completely lacking' and the defendant was ignorant of his duty to register and there is no reasonable probability that the defendant knew his conduct was illegal."); *People v. Lopez*, 140 P.3d 106, 115 (Colo. Ct. App. 2005) (holding that in order to raise a claim under *Lambert*, one must show "(1) his conduct was wholly passive, and (2) there were no circumstances that should have alerted him to the consequences of failing to register"); *State v. Soltero*, 71 P.3d 370, 373 (Ariz. Ct. App. 2003) (noting *Lambert*'s holding was based on the conduct being "wholly passive" and "situations in which the circumstances which might move one to inquire as to the necessity of registration [were] completely lacking"); *People v. Simon*, 886 P.2d 1271, 1290 (Cal. 1995) (noting *Lambert*'s holding was limited to conduct that was "wholly passive"); *People v. Wehrwein*, 568 N.E.2d 1, 6 (Ill. App. Ct. 1990) (holding *Lambert* was distinguishable when the offense did not involve wholly passive conduct); *State v. Tague*, 310 N.W.2d 209, 212 (Iowa 1981) (rejecting claim based on *Lambert* where conduct was not wholly passive); *State v. Kreminski*, 422 A.2d 294, 297 (Conn. 1979) (holding that in order to raise a *Lambert* due process claim the conduct involved must be "wholly passive . . . with no notice").

As the *Lambert* dissent recognized, if the principle underlying the *Lambert* majority's opinion were generalized and "given its relevant scope, a whole volume of the United States Reports would be required to document in detail the legislation in this country that would fall or be impaired." *Lambert*, 355

U.S. at 232 (Frankfurter, J., dissenting). The dissent, however, believed that the limited nature of the opinion would relegate *Lambert* to "an isolated deviation from the strong current of precedents – a derelict on the waters of the law." *Id*. Thus, when the OCCA majority held that "[w]hether the offense is purely a status crime or requires an action, the notice requirement remains[,]" App. 6, it implicitly rejected limitations of *Lambert* which were self-imposed by the *Lambert* majority and universally recognized by the lower federal and state appellate courts. By implicitly rejecting these limitations, the OCCA created a conflict amongst the lower courts.

Applying these universally-recognized limitations, it is clear that *Lambert* is inapplicable to the provisions of the Oklahoma Methamphetamine Offender Registry Act struck down by the OCCA. The conduct at issue in this case is purchasing pseudoephedrine. Unlike failing to register, purchasing pseudoephedrine is not wholly passive but requires action on the part of the defendant. Thus, the provisions struck down by the OCCA fail to overcome the first limitation established in *Lambert*.

Moreover, "circumstances which might move one to inquire" about the possibility of regulations exist in every prosecution that would occur under the provisions struck down by the OCCA. *See Lambert*, 355 U.S. at 229. Pseudoephedrine has been classified by the Drug Enforcement Administration as a List 1 Chemical, *see* 21 U.S.C. § 802(34)(K); 21 C.F.R. § 1310.02(a)(11), and has been classified by the

Oklahoma Legislature as a Schedule V controlled dangerous substance, *see* Okla. Stat. tit. 63, § 2-212(A)(2). In addition to the federal and state classifications, pseudoephedrine has become subjected to multiple federal and state regulations. *See, e.g.*, Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (codified as amended in scattered sections of 21 and 42 U.S.C.) (limiting purchase of pseudoephedrine to 3.6 grams per day and 9.0 grams every 30 days, limiting mail-service pharmacies to limit sales of pseudoephedrine to 7.5 grams every 30 days, requires products to be placed behind the counter or in a locked cabinet, requires customer to verify identification and sign a log book prior to purchasing pseudoephedrine); Okla. Stat. tit. 63, § 2-212(A)(2) (limiting purchase of pseudoephedrine to 3.6 grams per day, 7.2 grams within a 30-day period, and 60 grams within a twelve-month period, requiring a 72 hour cool-down period after defendant reaches daily limit, requiring purchaser to provide identification and sign a logbook showing details of the transaction); *id*. Okla. Stat. tit. 63, § 2-401(G)(1) (prohibiting the possession of pseudoephedrine with the intent to manufacture a controlled dangerous substance); *see generally* Rigdon, *supra*, at 260-67 (examining the restriction on the retail purchase of pseudoephedrine which exists in forty-three states).

Additionally, there has been "a comprehensive national anti-methamphetamine advertising and public awareness campaign that includes TV, print, radio, and online ads, as well as the Web site

MethResources.gov, which provides detailed information on meth use, its consequences and prevention and treatment resources." Office of National Drug Control Policy, Methamphetamine Trends in the United States 4 (2010), http://www.whitehouse.gov/sites/default/files/dndcp/Fact_Sheets/pseudoephedrine_fact_sheet_7-16-10_0.pdf. States have also used media and public awareness campaigns in an effort to combat methamphetamine related crimes, including those involving pseudoephedrine. *See, e.g.,* Governor Beshear Helps Launch Anti-Smurfing Public Awareness Campaign to Combat Meth Use, http://migration.kentucky.gov/Newsroom/governor/20121119smurfing.htm; AG, State Drug Task Force Praise New Law and Public Awareness "Anti-Smurfing" Campaign to Combat Meth, http://www.ago.state.al.us/News-256. In light of the methamphetamine problem in Oklahoma, the State of Oklahoma has been a leader in raising public awareness about and fighting the production of methamphetamine; most recently launching the "Crystal Darkness Oklahoma" campaign in January, 2009. *See, e.g., Oklahoma Methamphetamine Prevention Toolkit*, http://www.ok.gov/odmhsas/documents/373.pdf; *Meth in Oklahoma*, http://www.oeta.tv/okforum/blog/1053-meth-in-oklahoma.html; *Cherokee Nation Hosting Anti-Meth Watch Events*, http://www.cherokee.org/PressRoom/23844/Press_Article.aspx (noting the collaborative effort between the Cherokee Nation and the State of Oklahoma in the "Crystal Darkness Oklahoma Campaign"). In light of these laws, regulations, and public awareness campaigns, purchasing pseudoephedrine – unlike staying longer

than five days in Los Angeles – places a person on notice that there are laws in place governing the purchase and possession of pseudoephedrine.

Moreover, a person like Wolf, who has previously been convicted of possessing pseudoephedrine with the intent to manufacture methamphetamine, should be aware that their acquisition of pseudoephedrine is not free from regulation. *Cf. United States v. Capps*, 77 F.3d 350 (10th Cir. 1996) ("[I]n contrast to an ordinary citizen possessing a firearm unaware of its automatic firing capability or trafficking in sexually explicit materials involving adults, a person convicted of a felony cannot reasonably expect to be free from regulation when possessing a firearm."). Because Wolf was previously convicted of a pseudoephedrine offense, she has even more reason to be aware of regulations affecting purchasing pseudoephedrine than any other person who still must present identification and sign a logbook prior to making a purchase. *See* 21 U.S.C. § 830(e); Okla. Stat. tit. 63, § 2-212(A)(2). Thus, the provisions struck down by the OCCA do not fall within the second universally-recognized limitation of the *Lambert* holding. Therefore, the provisions of the Oklahoma Methamphetamine Offender Registry Act struck down by the OCCA do not fall within the limited scope of *Lambert*.

II. The OCCA's decision, which held due process requires a statute to provide express, individual notice that one is prohibited from purchasing pseudoephedrine, squarely conflicts with this Court's decision in *Texaco, Inc. v. Short*.

For over 100 years, this Court has recognized the legal maxim that "ignorance of the law is no excuse." *See Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 67-68 (1910) ("In other words, innocence cannot be asserted for an action which violates existing law, and ignorance of the law will not excuse."). This Court has reaffirmed that holding on numerous occasions. *See United States v. Int'l Minerals & Chemical Corp.*, 402 U.S. 558, 564-65 (1971) (where dangerous products are involved, specifically acid, the government need not prove a defendant's knowledge of the regulations which were violated); *United States v. Freed*, 401 U.S. 601, 609-10 (1971) (defendant did not need to know that his possession of a hand grenade violated federal law in order to be convicted); *Williams v. North Carolina*, 325 U.S. 226, 238 (1945) ("Mistaken notions about one's legal rights are not sufficient to bar prosecution for crime."); *Dotterweich*, 320 U.S. at 281 (1943) (noting the Federal Food, Drug, and Cosmetic Act "dispenses with the conventional requirement for criminal conduct awareness of some wrongdoing."); *United States v. Balint*, 258 U.S. 250, 252 (1922) ("[I]n the prohibition or punishment of particular acts, the state may in the maintenance of a public policy 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.'"). Implicit in these holdings is the fact that a legislature need not make a special effort to personally inform a person that their conduct might violate the law.

In *Texaco, Inc. v. Short*, this Court addressed the extent to which the state must inform persons within its jurisdiction of the laws enacted by the legislature. One of the questions addressed by the Court in *Texaco, Inc.* was "how a legislature must go about advising its citizens of actions that must be taken to avoid a valid rule of law that a mineral interest that has not been used for 20 years will be deemed to be abandoned." *Texaco, Inc.,* 454 U.S. at 531. 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. This Court held that "[t]he answer to this question is no different from that posed for any legislative enactment affecting substantial rights. Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Id*. at 531-32. In other words, to satisfy the constitutional due process requirements of notice the legislature must do three things: (1) enact the law, (2) publish the law, and (3) provide a period of time for people to become familiar with the law. For this third requirement, this Court recognized that "[i]t is . . . settled that the question whether a statutory grace period provides an adequate opportunity for citizens to become familiar with a new law is a matter on which

the Court shows the greatest deference to the judgment of state legislatures." *Id*. at 532; *see also Atkins v. Parker*, 472 U.S. 115, 130 (1985) ("All citizens are presumptively charged with knowledge of the law[.] Arguably that presumption may only be overcome in cases in which the statute does not allow a sufficient 'grace period'[.]" (citing *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925))).

The Oklahoma Methamphetamine Offender Registry Act was enacted into law on June 10, 2010. 2010 Okla. Sess. Law Serv. Ch. 458 (H.B. 3380) (West). The Act was published both through the 2010 supplement to the official published version of the Oklahoma Statutes and on the Oklahoma State Courts Network webpage. App. 23; *see* Okla. Stat. tit. 75, §§ 171-80 (2001); Okla. Stat. tit. 75, § 191 (Supp. 2009). Because the Act did not take effect until November 1, 2010, 2010 Okla. Sess. Law Serv. Ch. 458, § 7 (H.B. 3380) (West), the Legislature gave the citizenry almost five months to become familiar with the law before it took effect. *Cf. Atkins*, 472 U.S. at 130-31 (grace period of over 90 days was sufficient). Thus, the Oklahoma legislature followed the requirements for notice this Court laid out in *Texaco, Inc*.

Ultimately, the constitutional question raised by Wolf should have been rejected by the OCCA in light of this Court's decision in *United States v. Balint*, 258 U.S. 250, 252 (1922). At issue in *Balint* was the constitutionality of a provision of the Narcotic Act of December 17, 1914, which prohibited "selling to another a certain amount of a derivative of opium

and a certain amount of a derivative of coca leaves" without "written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue[.]" *Balint*, 258 U.S. at 251. Relying on *Shevlin-Carpenter*, this Court held that Congress could regulate the sale of drugs without requiring proof that the defendants were informed that their conduct was prohibited by law. *Id*. at 252. In reaching that decision, the *Balint* Court noted that the Narcotic Act had been passed with a "purpose of minimizing the spread of addiction to the use of poisonous and demoralizing drugs." *Id*. at 253. This Court later reaffirmed that decision in the context of misbranded and adulterated drugs, *Dotterweich*, 320 U.S. at 281, hand grenades, *Freed*, 401 U.S. at 609-10, and sulfuric and other dangerous acids, *Int'l Minerals*, 402 U.S. at 564-65. In light of the numerous regulations discussed above, pseudoephedrine should fall into the same category and due process should not require any extraordinary notice regarding the requirements of the law.

CONCLUSION

Certiorari is necessary because the OCCA's opinion in this case creates a conflict with every other state appellate court and federal court of appeals by rejecting the universally-recognized limitations of this Court's decision in *Lambert v. California*. Furthermore, certiorari is necessary because the OCCA held, in direct contradiction to this Court's decision in *Texaco,*

Inc. v. Short, that a state legislature must provide extraordinary notice to persons subject to a statute in order to comply with the constitution's due process requirement.

If allowed to persist, the OCCA's decision may well vindicate Justice Frankfurter's dissent in *Lambert* and "a whole volume of the United States Reports w[ill] be required to document in detail the legislation in this country that w[ill] fall or be impaired." *Lambert*, 355 U.S. at 232 (Frankfurter, J., dissenting). Therefore, Petitioner requests that this Court grant the petition for writ of certiorari, vacate the decision of the OCCA Appeals, and remand the case with instructions to abide by the precedent established by this Court.

Respectfully submitted,

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2012 OK CR 16
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ANGELA MICHELLE WOLF, Petitioner, vs. STATE OF OKLAHOMA, Respondent.	FOR PUBLICATION No. C-2011-1035

SUMMARY OPINION

(Filed Nov. 28, 2012)

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.[1] 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

[1] The State dropped two counts of the same charge as part of a negotiated plea.

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 pseudophedrine [sic] 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 psuedophederine [sic].

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.[2] 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.

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[2] 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.

¶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,* 342 U.S. 246, 250, 72 S.Ct. 240, 243, 96 L.Ed. 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

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OPINION BY: SMITH, J.

A. JOHNSON, P.J.:	CONCUR
LEWIS, V.P.J.:	CONCUR
LUMPKIN, J.:	DISSENT
C. JOHNSON, J.:	CONCUR

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."[1] 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.

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

¶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.*[2] 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

[2] 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).

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).