

No. 12-1035

**In The
Supreme Court of the United States**

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THE STATE OF OKLAHOMA,

Petitioner,

v.

ANGELA MICHELLE WOLF,

Respondent.

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

—◆—
**REPLY TO RESPONSE TO
PETITION FOR WRIT OF CERTIORARI**

—◆—
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REPLY BRIEF

Respondent argues that the decision of the Oklahoma Court of Criminal Appeals (OCCA) at issue here is so factually different from the many state and federal cases cited by Petitioner to establish a conflict that there really is no conflict at all. Resp. at 12 (“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.”). Respondent does not deny, however, that Petitioner’s cases recognize one or both of the conditions *Lambert v. California*, 355 U.S. 225 (1957) imposes before the Due Process Clause requires a criminal defendant to have actual knowledge of the law, i.e., the law at issue must criminalize conduct that is “wholly passive” and there must be an absence of circumstances suggesting the need to inquire whether the law exists. Pet. at 11. In this sense, a conflict does arise from the OCCA’s decision, applying as it does *Lambert’s* actual notice requirement to conduct even the OCCA majority admitted “was not wholly passive.” Pet. App. 13. Respondent’s attempt to distinguish her case factually from the cases cited by Petitioner to establish a conflict amounts to little more than a response on the merits of the constitutional issue itself.

For example, Petitioner cites *United States v. Miller*, 646 F.3d 1128, 1132 (8th Cir. 2011) for its conclusion that *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.” Pet. at 11. *Miller* involved a federal conviction for possession of a firearm while subject to a court order restraining the defendant from harassing, stalking, or threatening an intimate partner. *Id.* at 1129-30. On appeal, the defendant argued he had no actual or constructive knowledge that he was subject to a restraining order that prohibited him from possessing a firearm. *Id.* at 1131. He cited *Lambert* to argue that his ignorance of the law excused his conduct. *Id.* at 1132. The Court of Appeals rejected this argument, holding that Miller’s “conduct of possessing a firearm while subject to a restraining order is different from the ‘wholly passive’ conduct of being a felon while remaining in Los Angeles for five days.” *Id.* While “firearms possession . . . is not a kind of activity comparable to possession of hand grenades, narcotics, or child pornography,” *id.* (quoting *United States v. Meade*, 175 F.3d 215, 226 (1st Cir. 1999)) the Court of Appeals concluded “that firearms possession also is not the kind of activity comparable to ‘mere presence in the city.’” *Id.* (citing *Lambert*, 355 U.S. at 230). “So although Miller’s conduct may not be ‘per se blameworthy,’ the possession of a firearm, especially by someone subject to a restraining order, ‘is nevertheless a highly regulated activity, and everyone knows it.’” *Id.* (quoting *United States v. Hutzell*, 217 F.3d 966, 968, 969 (8th Cir. 2000)).

Respondent claims that a court’s failure to apply *Lambert* to a gun law violation does not also mean the court “would not have applied *Lambert* to a law

that penalizes purchasing small quantities of pseudoephedrine-based cold medicine.” Resp. at 10. But Petitioner did not cite the string of cases Respondent now attempts to minimize because they involve the very same crime for which Respondent was convicted, i.e., purchase of pseudoephedrine by a person previously convicted of conspiracy to possess pseudoephedrine with intent to manufacture methamphetamine. Rather, Petitioner cites these cases to show the large number of courts that adopted and applied the restrictions *Lambert* imposed on itself. There is a genuine conflict arising from the OCCA’s decision – which requires resolution by this Court – because the OCCA held that *Lambert* is not limited to wholly passive conduct, yet the cases cited by Petitioner hold to the contrary.

Of course, Respondent’s argument on the applicability of *Lambert* to her case fails miserably in light of her admission that pseudoephedrine is a highly-regulated item *even for non-felons*. Resp. at 16. But for felons like Respondent, who were convicted of conspiracy to possess pseudoephedrine with intent to manufacture methamphetamine, it is even more difficult to argue *Lambert* does not apply. *See Lambert*, 355 U.S. at 227 (“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.*”) (emphasis added). As noted by Judge Lumpkin in dissent, Respondent “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.” Pet. App. 20.

Purchase and possession of cold medicine containing pseudoephedrine, like the purchase and possession of a firearm, is not conduct that is per se blameworthy. However, purchase and possession of pseudoephedrine, especially by someone previously convicted of conspiracy to possess pseudoephedrine with intent to manufacture methamphetamine, is like the possession of a firearm by one subject to a restraining order – it is a highly regulated activity “and everyone knows it.” *Miller*, 646 F.3d at 1132. Respondent’s brief in opposition provides a litany of excuses as to why she should not be held accountable for her violation of Oklahoma law prohibiting the purchase of pseudoephedrine by those convicted of methamphetamine-related crimes, effectively shifting blame to everyone but herself for her felonious actions. Resp. at 5. But virtually *every* convicted drug felon could offer up excuses like those offered by Respondent in this case in order to avoid application of the law. The instant case presents a significant constitutional issue because the OCCA applied *Lambert* to validate Respondent’s blame shifting despite conduct on her part that was “not wholly passive,” Pet. App. at 13, and despite the fact that the purchase and possession of pseudoephedrine by a person with her criminal history is a highly regulated activity *and everyone knows it*. The OCCA’s decision ignores the

conditions *Lambert* placed on its own applicability and, in the process, guts the “common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally[.]” *Barlow v. United States*, 32 U.S. 404, 411 (1833).

The conflict arising from the OCCA’s decision with the numerous cases cited by Petitioner at pages 11 through 13 of the petition warrant certiorari. Respondent does little more than argue the merits of the constitutional claim at stake in this litigation with her attempt to minimize this conflict.

Finally, Respondent complains that Petitioner did not raise below the issue of whether *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) conflicts with the OCCA’s opinion and therefore it was not preserved for review on certiorari. Resp. at 20-21. In *Texaco, Inc.*, this Court addressed the extent to which the state must inform persons within its jurisdiction of the laws enacted by the legislature, holding that 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. *Texaco, Inc.*, 454 U.S. at 531-32. This line of argument was not raised below because, as Respondent admits, she asked the OCCA on appeal to read a *mens rea* requirement into the Oklahoma statutory provision at issue. Resp. at 6. The issue of notice truly surfaced in the OCCA’s opinion when it sidestepped the issue of whether the statute has a *mens rea* requirement and instead focused on the constitutional requirement of notice. See Resp. at 7 (“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.”). As such, Petitioner’s failure to raise the applicability of *Texaco, Inc.* below does not bar certiorari review of that particular issue. See *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (“even if this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice ‘permit[s] review of an issue not pressed so long as it has been passed upon. . . .’”) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)).

Respondent does little to challenge Petitioner’s assertion that the OCCA’s decision conflicts with *Texaco, Inc.* other than to argue its holding is limited to civil cases. Resp. at 21-22. Respondent ignores, however, the OCCA’s own adoption of language from *Lambert* referencing the notice requirements for property interests in its interpretation of the due process clause and the notice that is required for criminal statutes. Pet. App. 13 (“Notice is required *before property interests are disturbed*, before assessments are made, before penalties are assessed.”) (quoting *Lambert*, 355 U.S. at 228) (emphasis added). Further, this Court held that *Lambert* was not controlling in *Texaco, Inc.* not only because it concerns

the *mens rea* necessary before the State may convict an individual of a crime, but also because:

[*Lambert's*] application has been limited, lending some credence to Justice Frankfurter's colorful prediction in dissent that the case would stand as "an isolated deviation from the strong current of precedents – a derelict on the waters of the law."

Texaco, Inc., 454 U.S. at 537 n.33 (quoting *Lambert*, 355 U.S. at 232 (Frankfurter, J., dissenting)). Certiorari is warranted in this case because the OCCA's holding conflicts directly with the acknowledgment by numerous other courts of appeals that *Lambert* has limited application in light of the conditions contained within the holding itself. As discussed above, the OCCA disregarded the limits of *Lambert*, thus creating a conflict with other courts warranting certiorari review.



CONCLUSION

Petitioner's petition for writ of certiorari should be granted and the OCCA's decision should be vacated and remanded with instructions to abide by the precedent established by this Court.

Respectfully submitted,

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