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## DRAFTING CRIMINAL DIRECT APPEALS IN OKLAHOMA: A PRACTICAL GUIDE

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### I. INTRODUCTION

My Guide, *Drafting Criminal Direct Appeals in Oklahoma: A Practical Guide*, is a practical resource for attorneys and *pro se* appellants drafting appeals to be submitted to the Oklahoma Court of Criminal Appeals with a primary focus on drafting criminal direct appeals. This Guide is to be used as a starting resource for those who are inexperienced or out of practice with drafting direct appeals to the Oklahoma Court of Criminal Appeals.<sup>1</sup> This Guide begins with a general background of the Oklahoma Court of Criminal Appeals and an introduction to the sitting judges. The Guide then introduces a how-to section for drafting a direct appeal starting with the statutory requirements, followed by basic

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1. This Guide focuses on direct appeals to the Oklahoma Court of Criminal Appeals. Applications for post-conviction relief and writs of habeas corpus are not covered but can be found in Title 22 of the Oklahoma Statutes and Title 28 of the United States Codes. As a precursor, which will be touched on in more detail in later sections, direct appeals are filed before applications for post-conviction relief and must come before writs of habeas corpus and, once decided, issues that were raised and ruled on are procedurally barred from further review under the doctrine of *res judicata*; and issues that were not raised and could have been raised are waived for further review. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973. Post-conviction review is not another avenue to provide applicants another direct appeal emphasizing the need for complete direct appeals. *Id.* Always keep waiver in mind when drafting direct appeals and throughout this Guide.

explanations and general rule statements for several common standards of review citing current authority used by the Court. A cautionary note to all readers: this Guide is not to be used as a replacement for legal research but to be a starting resource that will direct readers to statutory authority and precedential case law and provide a basic structure for rule statements for various standards of review.

## II. THE OKLAHOMA COURT OF CRIMINAL APPEALS

The Oklahoma Court of Criminal Appeals is the highest court for criminal cases in the State of Oklahoma.<sup>2</sup> The Court derives its origin and jurisdiction from the Oklahoma State Constitution, which was adopted by the people of Oklahoma in 1907, and became permanent by a vote of the Second Legislature in 1909.<sup>3</sup> To be a sitting judge on the Court, a judge must be appointed by the Governor and then run on a non-partisan statewide retention ballot at the general election.<sup>4</sup> The Governor selects the appointees from a list of three candidates provided by the Judicial Nominating Commission.<sup>5</sup> If retained by the voters, a judge serves a six-year term after which he or she must again be retained by a vote of the general electorate.<sup>6</sup> The 2018 term court consists of five judges: Presiding Judge David B. Lewis, Vice-Presiding Judge Dana Kuehn, Judge Gary Lumpkin, Judge Robert Hudson, and Judge Scott Rowland.<sup>7</sup>

### A. Meet the Judges

Presiding Judge David Lewis is serving his second term as a presiding judge.<sup>8</sup> Judge Lewis was appointed by Governor Brad Henry in 2005 and

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2. Okla. Court of Criminal Appeals Home, <http://www.okcca.net/index.html> (last visited Jan. 22, 2019) [<https://perma.cc/N7XE-9Z3D>].

3. Okla. Court of Criminal Appeals, *History*, <http://www.okcca.net/History.html> (last visited Jan. 22, 2019) [<https://perma.cc/DWA5-96AM>].

4. *Id.*

5. Okla. Courts, <https://courtfacts.org/courtsystem/> (last visited Jan. 22, 2019) [<https://perma.cc/68JH-SS3K>].

6. Okla. Court of Criminal Appeals, *History*, <http://www.okcca.net/History.html> (last visited Jan. 22, 2019) [<https://perma.cc/DWA5-96AM>].

7. Okla. Court of Criminal Appeals, *Judges*, <http://www.okcca.net/judges.html> (last visited Jan. 22, 2019) [<https://perma.cc/WG8F-WPLG>].

8. Okla. Court of Criminal Appeals, *Judge Lewis*, <http://www.okcca.net/judges/judgelewis.html> (last visited Jan. 22, 2019) [<https://perma.cc/N558-83ZM>].

has been serving for fourteen years.<sup>9</sup> Judge Lewis earned his Juris Doctorate in 1983 from the University of Oklahoma College of Law.<sup>10</sup> Judge Lewis's legal experience includes four years of private practice, four years as a Comanche County prosecutor, eight years as Comanche County Special Judge, and seven years as a district judge for Comanche, Stephens, Jefferson, and Cotton Counties.<sup>11</sup>

Vice-Presiding Judge Dana Kuehn is serving her first term as Vice-Presiding Judge and her second year on the Court.<sup>12</sup> Judge Kuehn was appointed in October 2017 by Governor Mary Fallin.<sup>13</sup> Judge Kuehn earned her Juris Doctorate in 1996 from the University of Tulsa College of Law.<sup>14</sup> Judge Kuehn's legal experience includes almost ten years as a prosecutor with the Tulsa County District Attorney's Office, two years in private practice as an associate with the firm of Steidley & Neal, and serving several years as an associate district judge of Tulsa County during which time she served three years as Chief of the Civil Division at Tulsa County.<sup>15</sup>

Judge Gary Lumpkin has served the Court for thirty years with six of those years as Vice-Presiding Judge and eight as Presiding Judge.<sup>16</sup> Judge Lumpkin was appointed by Governor Henry Bellmon in 1989.<sup>17</sup> Judge Lumpkin earned his Juris Doctorate in 1974 from the University of Oklahoma College of Law.<sup>18</sup> Judge Lumpkin's legal experience includes: military service as one of only two Marine Reserve judges assigned to the Navy-Marine Corps Court of Criminal Appeals; being a staff attorney with the Oklahoma Department of Consumer Affairs and a consultant with a non-profit organization; being Assistant District Attorney of Marshall County, being First Assistant District Attorney of the 20th District; being Associate District Judge of Marshall County from 1982 to 1985; and being

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9. *Id.*

10. *Id.*

11. *Id.*

12. Okla. Court of Criminal Appeals, *Judge Kuehn*, <http://www.okcca.net/judges/judgekuehn.html> (last visited Jan. 22, 2019) [<https://perma.cc/25RK-LYKF>].

13. *Id.*

14. *Id.*

15. *Id.*

16. Okla. Court of Criminal Appeals, *Judge Lumpkin*, <http://www.okcca.net/judges/judgelumpkin.html> (last visited Jan. 22, 2019) [<https://perma.cc/T387-EY55>].

17. *Id.*

18. *Id.*

District Judge of the 20th Judicial District, Division II, from 1985 to 1989.<sup>19</sup>

Judge Robert Hudson has served five years on the Court.<sup>20</sup> Judge Hudson was appointed by Governor Mary Fallin in 2015.<sup>21</sup> Judge Hudson earned his Juris Doctorate in 1983 from the University of Oklahoma College of Law.<sup>22</sup> Judge Hudson's legal experience includes: thirteen years of private practice in Guthrie, Oklahoma; fifteen years as District Attorney for Payne and Logan Counties; one year as First Assistant Attorney General in the Office of Attorney General; and over two years as a special judge in the 9th Judicial District, where he served the citizens of Logan and Payne Counties.<sup>23</sup>

Judge Scott Rowland is starting his second year of serving the Court after being appointed in November 2017 by Governor Mary Fallin.<sup>24</sup> Judge Rowland earned his Juris Doctorate *cum laude* in 1994 from Oklahoma City University School of Law.<sup>25</sup> Judge Rowland's legal experience includes service as Assistant Attorney General for the State of Oklahoma, General Counsel to the Oklahoma Bureau of Narcotics and Dangerous Drugs, and eleven years as First Assistant District Attorney in the Oklahoma County District Attorney's Office.<sup>26</sup>

### III. DIRECT APPEALS

The statutory and procedural authority governing appeals to the Oklahoma Court of Criminal Appeals is found in Title 22 Chapter 18 of the Oklahoma Statutes.<sup>27</sup> The specific procedures for drafting and filing an appeal are provided in the Rules of the Court of Criminal Appeals which are found in the appendix of Chapter 18.<sup>28</sup> The following subsections go

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19. *Id.*

20. Okla. Court of Criminal Appeals, *Judge Hudson*, <http://www.okcca.net/judges/judgehudson.html> (last visited Jan. 22, 2019) [<https://perma.cc/P8BD-MD4V>].

21. *Id.*

22. *Id.*

23. *Id.*

24. Okla. Court of Criminal Appeals, *Judge Rowland*, <http://www.okcca.net/judges/judgerowland.html> (last visited Jan. 22, 2019) [<https://perma.cc/7APM-4PGT>].

25. *Id.*

26. *Id.*

27. OKLA. STAT. tit. 22, Ch. 18 (2011).

28. OKLA. STAT. tit. 22, Ch. 18, App. (2011).

into detail regarding Oklahoma statutory requirements, specifically the Rules of the Oklahoma Court of Criminal Appeals, then discusses several frequently used standards of review with supporting authority, and concludes each subsection with recommendations on how to draft an assignment of error using that standard of review.

#### *A. Statutory Requirements*

As a matter of right, a defendant may make a direct appeal to the Court of Criminal Appeals from any adverse criminal judgment against the defendant.<sup>29</sup> Notice of the right to appeal must be provided by the district court at the time of entering the judgment and sentence.<sup>30</sup> The defendant, who becomes the appellant upon filing an intent to appeal, has ninety days to perfect the appeal conforming to procedural rules provided in the Rules of the Court of Criminal Appeals which bear the force of a statute.<sup>31</sup> If there are multiple defendants tried jointly, any one or more of them may appeal; however, any defendant who does not join the appeal does not receive the benefits from any decisions made on such an appeal.<sup>32</sup> One exception to the appellant initiating the appeal is provided in the Oklahoma Statutes which provides for automatic appeals from any judgments entered by a district court that rules a statute unconstitutional in criminal actions.<sup>33</sup> The State of Oklahoma also has the right to appeal adverse rulings through a procedure set forth in title 22, sections 1089.1-2 of the Oklahoma Statutes, which the State can waive if it does not file the application in accordance with such procedure.<sup>34</sup> The Oklahoma Court of Criminal Appeals has the power to reverse, affirm, or modify the judgment or sentence appealed from, and if necessary, may order a new trial or resentencing.<sup>35</sup>

#### *B. The Rules of the Oklahoma Court of Criminal Appeals*

The Rules of the Court of Criminal Appeals are located in title 22 of

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29. OKLA. STAT. tit. 22, § 1051 (Supp. 2018).

30. Tit. 22, § 1076.

31. Tit. 22, §§ 1051, 1054.

32. Tit. 22, § 1065.

33. Tit. 22, § 1053.1.

34. Tit. 22, § 1089.3.

35. Tit. 22, § 1066.

the Oklahoma Statutes in the appendix to chapter 18.<sup>36</sup> The rules apply to all appeals and proceedings in the Oklahoma Court of Criminal Appeals.<sup>37</sup> Any citation to the rules is to be formatted as “Rule \_\_\_\_, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (year).”<sup>38</sup> The following subsections will cover the rules regarding regular direct appeals of felony or misdemeanor cases unless otherwise stated.<sup>39</sup> The following subsections will not discuss the specific rules regarding certiorari appeals, state or municipality appeals, juvenile and youthful offender appeals, resentencing appeals, expungement of records proceedings, applications for post-conviction relief, or any other type of appeal; if drafting any of those types of appeals, refer directly to the Rules of the Court of Criminal Appeals and skip subsections (i) through (v).<sup>40</sup> The rules provide definitions for terms used throughout the rules as well as definitions for each type of vote the judges can cast when voting on a decision and its accompanying opinion.<sup>41</sup>

The following subsections cover: (i) initiating an appeal; (ii) drafting an appeal; (iii) perfecting an appeal; (iv) an overview of the specific rules for appeals from capital cases where the death sentence was imposed; and (v) a brief overview of the rules regarding oral arguments. Each subsection is written as a stand-alone section so the reader can navigate to the specific section needed while drafting an appeal. While the subsections provide a thorough review of the rules, always check the Court’s website for currentness.

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36. The Oklahoma Court of Criminal Appeals amends, revises, and otherwise modifies the Rules of the Court of Criminal Appeals, often with immediate force, thus requiring any drafter to check the Oklahoma Court of Criminal Appeals’ website for notices as well as Oklahoma State Court Network’s website for current rules. See Okla. Court of Criminal Appeals, *Online*, <http://www.okcca.net/online/> and Okla. State Court Network, *Statutes Title 22*, <https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKST22&level=1>.

37. Rule 1.0(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

38. Rule 1.0(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

39. Rule 1.2(A)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018).

40. Rule 1.2, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018).

41. Rule 1.13, 3.13(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011 & Supp. 2018).

### 1. Initiating an Appeal

To initiate a regular direct appeal in the Oklahoma Court of Criminal Appeals, defense trial counsel must file with the Clerk of the Oklahoma Court of Criminal Appeals a written notice of intent to appeal and a designation of record within ten days from the date the judgment and sentence was imposed.<sup>42</sup> Failure to file an intent to appeal within the ten days will constitute waiver of the right to appeal.<sup>43</sup> The notice of intent to appeal must include the specific authority under which the party seeks to perfect the appeal.<sup>44</sup> A copy of the designation of the record must be delivered to the trial judge, the district attorney, and the court reporter at the time of filing or immediately after.<sup>45</sup> Trial counsel must also submit to the Clerk of the Court either the appropriate filing fee, a pauper's affidavit, or the trial court's determination of indigency.<sup>46</sup> Any filings made to the Court must comply with the identification protective requirements of Rule 2.6(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018).<sup>47</sup> Once the appropriate filings are made, the Clerk of the Court will issue a Certificate of Appeal that contains the due date for the filing of the petition in error and the original record.<sup>48</sup>

If the time requirements are not met for filing the intent to appeal, a defendant can petition in an application for post-conviction relief for an appeal out of time.<sup>49</sup> The application must be filed in the trial court where the judgment and sentence or the final order denying relief was imposed.<sup>50</sup> The trial court will only grant the application if the defendant can show "he [or] she was denied an appeal through no fault of his [or] her own."<sup>51</sup>

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42. Rule 2.1(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

43. *Id.*

44. Rule 2.1(B)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

45. Rule 2.5(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

46. Rule 2.1(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

47. Rule 2.6(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018).

48. Rule 2.1(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

49. Rule 2.1(E)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

50. *Id.*

51. *Id.*

Once the trial court rules recommending an out of time appeal, the defendant must then file a petition for an appeal out of time with the Oklahoma Court of Criminal Appeals within thirty days of the trial court's ruling and must include the application for post-conviction relief and a certified copy of the trial court's recommendation.<sup>52</sup> If an out of time appeal is granted, the defendant will proceed with the regular procedures prescribed in Rule 2.1(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).<sup>53</sup>

The time to perfect an appeal begins to run on the date the judgment and sentence is pronounced or when the new sentence from a resentencing hearing is pronounced in open court.<sup>54</sup> The time to perfect an appeal for a misdemeanor or felony is ninety days and for an appeal from a conviction that resulted in the imposition of the death penalty, the time given is six months.<sup>55</sup> To perfect an appeal, an appellant must file the petition in error, original record, transcripts, and evidence within the allotted time frame.<sup>56</sup> The appellant is responsible for ensuring that all necessary records are filed with the Court.<sup>57</sup>

Once the Clerk of the Court receives notice of completion of record, the Clerk of the Court will file the notice to transmit records on appeal and will commence the time for the appellant's brief.<sup>58</sup> In felony and misdemeanor appeals, the appellant's brief must be filed with the Court within sixty days of the notice to transmit record on appeal.<sup>59</sup> The appellee's answer brief must be filed with the Court within sixty days from the date the appellant's brief was filed.<sup>60</sup> Appellant may apply for an

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52. *Id.*

53. Rule 2.1(E)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

54. Rule 1.4, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018).

55. Rule 1.4(A)-(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

56. *Id.*

57. Rules 2.1(C), 2.4(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

58. Rules 2.3, 2.4, 3.1(C), 3.4(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

59. Rule 3.4(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

60. Rule 3.4(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).



extension of time to file the brief.<sup>61</sup> To apply for an extension, an appellant must file with the Clerk of the Court an application supported by an “affidavit containing a specific statement of facts showing the reasons why it is impossible to file the brief within the time prescribed” and must recite any prior extensions of time granted to the applicant.<sup>62</sup> The Presiding Judge or Vice-Presiding Judge will determine whether or not to grant extensions that may not exceed more than sixty days.<sup>63</sup>

If two or more defendants were convicted as co-defendants at a single trial, the defendants may choose to join in one appeal or may appeal separately.<sup>64</sup> If only one defendant appeals, the defendant is only entitled to the portions of the record that pertain to that defendant.<sup>65</sup> If more than one defendant appeals, but each appeals separately, separate petitions in error and briefs must be filed for each defendant and must cross-reference to the other defendant.<sup>66</sup> If any of the defendants decides not to join the appeal, the non-joining defendant does not receive the benefits from any decisions made on such an appeal.<sup>67</sup>

An attorney licensed in another state, territory, or the District of Columbia may conduct an appeal in the Court if properly permitted “in accordance with [the] Rules Creating and Controlling the Oklahoma Bar Association.”<sup>68</sup>

## 2. Drafting an Appeal

Once the procedures for initiating an appeal have been completed, the next step in an appeal is drafting. The party that initiates the appeal is known as the appellant and the party against whom the appeal is taken is

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61. Rule 3.4(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

62. Rule 3.4(D)(1), 3.4(D)(2)(a), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

63. Rule 3.4(D)(2)(a), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

64. Rule 3.3(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

65. Rule 3.3(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

66. *Id.*

67. Okla. Stat. tit. 22, § 1065 (2011).

68. Rule 1.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011); Okla. Stat. tit. 5, art. II, § 5 (2009).

known as the appellee.<sup>69</sup> The appellant files a petition in error which must be filed with the Clerk of the Court within ninety days of the date the judgment and sentence is imposed or any order issued that is being appealed if appealing a felony or misdemeanor case.<sup>70</sup> Failure to timely file a petition in error constitutes waiver of the right to appeal.<sup>71</sup> A petition in error must include:

- (1) The trial court from which the appeal is being lodged and the trial court case number;
- (2) The crime, together with a citation to the statute or ordinance of which the appellant was convicted;
- (3) The Judgment and Sentence imposed and the date of pronouncement together with a copy of the Judgment and Sentence attached;
- (4) If a motion for new trial was filed, the date the motion was filed and the date it was denied;
- (5) The amount of bail and whether the appellant is free on bail or incarcerated;
- (6) The statutory authority and type of appeal the party is filing; and,
- (7) The nature of the relief the appellant seeks. Provided however, recitation of the specific errors of law alleged to have been committed at trial is not required.<sup>72</sup>

If a petition in error is determined as needing to be amended, an appellant must obtain leave of the Court by requesting permission to amend the petition in error setting forth the basis for the request.<sup>73</sup>

Once the petition in error is submitted and the notice to transmit record on appeal is filed by the Clerk of the Court, the appellant must file the

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69. Rule 3.1(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

70. Rule 3.1(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

71. *Id.* See also *G.W. v. State*, 2018 OK CR 36, ¶ 6, 433 P.3d 1283, 1289 (Kuehn, J., concurring in part and dissenting in part) (defining waiver as “the intentional relinquishment or abandonment of a known right”).

72. Rule 3.1(A)(1)-(7), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011) (internal capitalization omitted).

73. Rule 3.1(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

appellant's brief within sixty days from the date of the notice.<sup>74</sup> The appellee's answer brief must be filed within sixty days from the date the appellant's brief was filed.<sup>75</sup> An attorney may file for an extension of time; however, an extension is not a right, and the Court, in its discretion, will decide whether to grant an extension.<sup>76</sup> The appellant may respond to the appellee's answer brief with a reply brief within twenty days of the answer brief.<sup>77</sup> A reply brief may only respond to the appellee's brief in chief; it cannot assert any new propositions of error and is limited to ten pages.<sup>78</sup> Either party may supplement its brief if necessary to present new authority regarding the issues raised if a request for leave of Court is granted.<sup>79</sup> Once granted, the party must file the supplemental brief within fifteen days from the grant of approval.<sup>80</sup> The supplemental brief is also limited to ten pages.<sup>81</sup>

The briefs of both the appellant and the appellee must be in substantial compliance with the form and organization set forth in Rule 3.5(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018), which requires:

- (1) A cover page containing the style of the case, the case number(s) in th[e] Court and the trial court, together with the name(s), address(es) and telephone number(s) of the attorney(s) submitting the brief and the attorney(s) OBA number(s);
- (2) A table of contents, with page references, and an alphabetical table of cases, statutes and other authorities cited, with references to the pages in the brief where they are cited;
- (3) A statement of the case, indicating briefly its nature, the course

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74. Rule 3.4(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

75. Rule 3.4(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

76. Rule 3.4(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

77. Rule 3.4(F)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

78. Rule 3.4(F)(1), 3.4(F)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

79. Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

80. *Id.*

81. Rule 3.4(F)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

- of proceedings, and its disposition in the trial court;
- (4) A statement of the facts relevant to the issues presented for review, with appropriate references to the record, referring to the original record as “(O.R. \_\_\_\_\_ )” and to pages in the transcript of evidence as “(Tr. \_\_\_\_\_ )”;
- (5) An argument, containing the contentions of the appellant, which sets forth all assignments of error, supported by citations to the authorities, statutes and parts of the record. Each proposition of error shall be set out separately in the brief. Merely mentioning a possible issue in an argument or citation to authority does not constitute the raising of a proposition of error on appeal. Failure to list an issue pursuant to these requirements constitutes waiver of alleged error;
- (6) A short conclusion stating the specific relief sought;
- (7) A business address and telephone number following the signature of the attorney of record or party together with the attorney’s Oklahoma Bar number; and,
- (8) A certificate of service on the adverse party, as provided in Rule 1.9(B).<sup>82</sup>

If drafting a *pro se* appeal, a *pro se* handwritten brief must be printed, double-spaced, single-sided, and written with a pen.<sup>83</sup> The format of both the appellant’s and the appellee’s brief require the brief to be on 8-1/2- by 11-inch paper; the brief may be printed or typewritten, be double-spaced with 1-1/4-inch top margins and 1-inch bottom margins, must be paginated, and may not exceed fifty pages.<sup>84</sup> All quotations over fifty words must be indented and single spaced with 1-inch left and right margins.<sup>85</sup>

In the argument portion of the brief, both parties must include “concise statements of the applicable standard of review in the discussion of each issue presented or in a separate heading placed before the discussion of the

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82. Rule 3.5(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018) (internal citation omitted).

83. Rule 3.5(A)(9), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018).

84. Rule 3.5(D)-(G), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018).

85. Rule 3.5(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018).

issue.”<sup>86</sup> Subsection B of this Guide provides an overview of nine commonly used standards of review with current case law and drafting recommendations. Citations to published authority must include the Oklahoma public domain citation with reference to the specific paragraph and to the Pacific Reporter.<sup>87</sup> Citations to unpublished authority, which are not binding on the Court but may be used to support an argument, are permitted but can only be used when no published case would serve the same purpose.<sup>88</sup> Additionally, a copy of the cited unpublished cases must be provided to both the opposing party and the Court.<sup>89</sup> Citations to United States Supreme Court authority must include the United States Reports (U.S.), the Supreme Court Reporter (S. Ct.), and the United States Supreme Court Reports, Lawyers’ Edition (L. Ed. Citations).<sup>90</sup> Failure to comply with the required format for each type of citation will result in the issue being forfeited on appeal.<sup>91</sup>

### 3. Perfecting an Appeal

The calculation of the time period of perfecting an appeal begins to run on the date the judgment and sentence is pronounced or when the new sentence from a resentencing hearing is pronounced without counting the first and last day of that time period.<sup>92</sup> When a filing deadline falls when the Clerk’s office is closed, the filing deadline will be on the next day the Clerk’s office is open.<sup>93</sup> Only *pro se* appellants and licensed attorneys may

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86. Rule 3.5(C)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018).

87. Rule 3.5(C)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018).

88. Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018).

89. Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018).

90. Rule 3.5(C)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018).

91. Rule 3.5(C)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018). See *Stafford v. State*, 1990 OK CR 74, ¶ 12, 800 P.2d 738, 741; *Vanderpool v. State*, 2018 OK CR 39, ¶ 39, 434 P.3d 318, 326-27.

92. Rule 1.4, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018) (Calendar Day method adopted in *Meyer v. Engle*, 2016 OK CR 1, 369 P.3d 37).

93. Rule 1.5, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

sign and file motions or briefs with the Clerk of the Court.<sup>94</sup> The Court will not consider any pleadings, motions, or briefs without proof of service to the adverse party which is the responsibility of the serving party, with the exception of service on the Attorney General which will be completed by the Clerk of the Court.<sup>95</sup>

The petition in error, original records, transcripts, and evidence for noncapital felony and misdemeanor appeals must be filed within ninety days from the date the judgment and sentence was pronounced.<sup>96</sup> The petition in error, original record, transcripts, evidence, and trial judge's report for a capital appeal must be filed within six months from the date the judgment and sentence was pronounced.<sup>97</sup> To complete the appeal, appellant must file an original of the petition in error with ten copies and ensure that the original record is filed consisting of three certified copies: two to be sent to the Clerk of the Court and the other to the appellant.<sup>98</sup> The Clerk of the Court is responsible for transmitting the other certified copy of the original record to the appellee.<sup>99</sup>

The appellant's brief in noncapital felony and misdemeanor appeals must be filed, unless otherwise ordered by the Court, within sixty days from the date that the notice to transmit record on appeal was filed by the Clerk of the Court.<sup>100</sup> The appellee's answer brief, unless otherwise provided, must be filed within sixty days from the date that the appellant's brief was filed with the Clerk of the Court.<sup>101</sup> The parties must file an original and ten copies of each brief with the Clerk of the Court and must provide a copy to the adverse party, except when the adverse party is the Attorney General. In such a case, the Clerk of the Court must transmit a

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94. Rule 1.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

95. Rule 1.9(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

96. Rule 1.4(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

97. Rule 1.4(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

98. Rule 3.2(A)-(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

99. Rule 3.2(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

100. Rule 3.4(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

101. Rule 3.4(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

copy to the Attorney General.<sup>102</sup>

A reply brief by the appellant in response to the appellee's answer brief is permitted but must be filed within twenty days of the answer brief and is limited to ten pages.<sup>103</sup> A supplemental brief is also permitted by leave of Court if it is necessary to present new authority on issues previously raised.<sup>104</sup> Once a party is granted permission to file a supplemental brief, the brief must be filed within fifteen days from the date the request to file was approved.<sup>105</sup> The supplemental brief is also limited to ten pages.<sup>106</sup>

If an appeal is not perfected within the required time frame and no extensions have been granted, the opposing party may make a motion to have the appeal dismissed.<sup>107</sup> If the opposing party makes a motion to dismiss, the party must serve notice of the motion, accompanied by a supporting brief or argument, on appellant.<sup>108</sup> The Court can *sua sponte* dismiss the appeal.<sup>109</sup> If an appeal is dismissed, the Clerk of the Court will notify all interested parties and return all records to the trial court.<sup>110</sup> Such a dismissal constitutes a default of the appeal by the appellant.<sup>111</sup>

### C. Capital Cases

Section 9 of the *Rules of the Oklahoma Court of Criminal Appeals* sets forth rules specifically for capital cases. In capital cases, trial counsel still must file a notice of intent to appeal and designation of the record in

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102. Rule 3.4(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

103. Rule 3.4(F)(1)-(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

104. Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

105. *Id.*

106. Rule 3.4(F)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

107. Rule 3.12(B)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

108. Rule 3.12(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

109. Rule 3.12(B)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

110. Rule 3.12(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

111. Rule 3.12(B)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

accordance with Rules 2.1 and 1.14.<sup>112</sup> The Petition in Error for a capital case has a longer time frame and is to be filed within six months instead of ninety days.<sup>113</sup> A complete stenographic record of all proceedings must also be filed with the Clerk of the Court within six months of the date the sentence was imposed.<sup>114</sup> The Court has a mandatory sentence review procedure proscribed in Rule 9.4 for all capital cases and requires oral arguments in all capital cases pursuant to Rule 9.3(F).<sup>115</sup>

The appellant's brief in chief must be filed within 120 days of the filing of the notice of the record from the Clerk of the Court.<sup>116</sup> The appellee's brief in chief must be filed within sixty days of the filing of the appellant's brief in chief.<sup>117</sup> Both briefs must contain discussions regarding the two issues that the mandatory review procedure makes determinations on, which are: "(1) [w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, and (2) whether the evidence supports a jury's or judge's finding of a statutory aggravating circumstance."<sup>118</sup> A reply brief may be filed by the appellant responding directly to the appellee's brief in chief within twenty days of the appellee filing the brief in chief and is limited to twenty pages in length.<sup>119</sup> Supplemental briefs are also permitted from either party, but the submitting party must obtain approval first.<sup>120</sup> If the request is approved, the order approving the submission of a supplemental brief will contain the date it must be filed by and page limitations for any response to the supplemental brief.<sup>121</sup> Supplemental briefs are limited to ten pages.<sup>122</sup>

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112. Rule 9.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

113. Rule 9.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

114. Rule 9.2(C)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

115. Rule 9.2(F), 9.4, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

116. Rule 9.3(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

117. *Id.*

118. Rules 9.3(B), 9.4, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

119. Rule 9.3(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

120. Rule 9.3(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

121. *Id.*

122. *Id.*



*D. Oral Arguments*

All capital cases shall have oral argument automatically set.<sup>123</sup> All other cases, except those on the accelerated docket, must request an oral argument in an application to be filed at the same time that the brief is filed.<sup>124</sup> However, the Court may set an oral argument if it is the opinion of the judges that an oral argument would be beneficial or necessary for the determination of the issues presented in the appeal.<sup>125</sup> The Court will give notice to all interested parties by an order or any other form of communication deemed proper providing the time, date, and place for the oral argument.<sup>126</sup> Oral arguments may be heard by any number of judges.<sup>127</sup>

When oral arguments are granted for noncapital cases, each side shall have thirty minutes to present their oral argument with an additional ten minutes for rebuttal by the appellant or the moving party in the original proceedings.<sup>128</sup> In capital case oral arguments, each party is allowed a maximum of forty-five minutes with an additional fifteen minutes for rebuttal by the appellant.<sup>129</sup> The appellant or moving party is entitled to open and conclude the argument of the case.<sup>130</sup> In all appeals assigned to the accelerated docket, each party is allotted only fifteen minutes to argue with no additional time for rebuttal by the appellant or the moving party.<sup>131</sup> Propositions of error included in the briefs but not argued during oral argument are not deemed waived for consideration.<sup>132</sup> For guidance on the general proper procedure and techniques to craft an oral argument, review *An Advocate Persuades* which provides step-by-step instructions on how

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123. Rule 3.8, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Rule 3.9, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

129. Rule 9.3(F), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

130. Rule 3.9, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

131. Rule 11.2(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

132. Rule 9.3(F), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

to create, prepare, and present an oral argument.<sup>133</sup>

### *E. How to Use Standards of Review*

Accurate, well-drafted standards of review are essential in all appeals. The Court requires that all assignments of error contain a concise statement of the applicable standard of review supported by citations to authority.<sup>134</sup> The Court decides the merits of an assignment of error based on the applicable standard of review. An appellant can inadvertently waive a valid proposition by failing to comply with Court rules.<sup>135</sup> The following discussion of several common standards of review focuses on the current formulations the Court utilizes along with the history and progression of the rules to aid in crafting persuasive case-specific rule statements. Due to the limited nature of this Guide, the following discussion of multiple standards of review is not all-inclusive and does not include every standard used by the Court.

#### 1. Abuse of Discretion

The Abuse of Discretion standard of review is the standard used when the appellant raised an objection to an act or omission that occurred during the trial and the trial judge made an adverse ruling on the record, thus preserving the alleged error for appellate review.<sup>136</sup> The Court defines an Abuse of Discretion as “a clearly erroneous conclusion and judgement, one that is clearly against the logic and effect of the facts,”<sup>137</sup> or stated another way, “any unreasonable or arbitrary action taken without proper

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133. JOAN M. ROCKLIN ET AL., AN ADVOCATE PERSUADES, 311-54 (2016).

134. Rule 3.5(A)(5)-(C)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018).

135. *E.g.*, Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018); *Armstrong v. State*, 1991 OK CR 34, ¶¶ 21-24, 811 P.2d 593, 599.

136. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 (“This Court reviews a trial court’s decision . . . for an abuse of discretion.”); *Gomez v. State*, 2007 OK CR 33, ¶ 5, 168 P.3d 1139, 1141 (“We review a trial court’s denial of a suppression motion for abuse of discretion.”); *Davis v. State*, 2011 OK CR 29, ¶ 86, 268 P.3d 86, 113 (“The admissibility of photographs is a matter within the trial court’s discretion . . .”).

137. *Neloms*, ¶ 35, 274 P.3d at 170 (quoting *Stouffer v. State*, 2006 OK CR 46, ¶ 60, 147 P.3d 245, 263). *See also* *Vanderpool v. State*, 2018 OK CR 39, ¶ 32, 434 P.3d 318, 326.

consideration of the facts and law pertaining to the matter at issue.”<sup>138</sup> When the Court reviews a ruling that is based on facts determined at trial, the Court will “defer to the trial court’s findings of fact unless they are not supported by competent evidence and are therefore clearly erroneous.”<sup>139</sup> The Court then reviews *de novo* the legal conclusion made based on those facts.<sup>140</sup>

When drafting an assignment of error for Abuse of Discretion, focus on the rulings the trial court made and illustrate exactly why that ruling was an abuse of the wide discretion provided to the trial court. The best way to illustrate the trial court abused its discretion is to use a case illustration with a case that the Court found an abuse of discretion. Therefore, building a foundation on case law is essential to creating a strong argument and can help alleviate some of the burden imposed by the standard of review. As a reminder, unpublished Oklahoma Court of Criminal Appeals opinions are not binding but are persuasive and useful when building a foundation for an Abuse of Discretion argument.

## 2. Plain Error

The Plain Error standard of review is the standard used when appellant failed to raise an objection at trial to an alleged error preventing the trial judge from making a ruling, thus resulting in waiving the challenged error for all but Plain Error review.<sup>141</sup> This standard of review is extremely common and a very difficult standard to prove.<sup>142</sup> The Plain Error standard of review was articulated by the Court in 1994 in *Simpson v. State*.<sup>143</sup> The *Simpson* Court determined that “an ‘error’ is a deviation from a legal rule” expounding to encompass plain errors which are “errors affecting

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138. *Neloms*, ¶ 35, 274 P.3d at 170 (citing *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 19, 241 P.3d 214, 225). *See also Vanderpool*, ¶ 32, 434 P.3d at 326.

139. *Gomez*, ¶ 5, 168 P.3d at 1141-42 (citing *Seabolt v. State*, 2006 OK CR 50, ¶ 5, 152 P.3d 235, 237).

140. *Id.* *See Bramlett v. State*, 2018 OK CR 19, ¶ 10, 422 P.3d 788, 793.

141. *Grissom v. State*, 2011 OK CR 3, ¶ 64, 253 P.3d 969, 991.

142. *See Mason v. State*, 2018 OK CR 37, ¶¶ 16, 22, 24, 28, 433 P.3d 1264, 1270-73 (failure to request an instruction; failure to object to testimony at trial); *Vanderpool*, ¶¶ 21, 37, 40, 434 P.3d at 323-27 (failure to renew pretrial challenge to evidence; failure to object to the introduction of evidence; failure to attempt to raise a challenge); *Musonda v. State*, 2019 OK CR 1, ¶¶ 5-6, 12, 435 P.3d 694, 695-96 (failure to object at trial to alleged discovery error).

143. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693.

substantial rights [that] were not brought to the attention of the court.”<sup>144</sup> The Court found that statutory law provided a legal basis for raising such errors that were not preserved during trial court proceedings and determined that the Court would reverse when the error was a “fundamental error.”<sup>145</sup> The Court defined “fundamental errors” as “errors which go to the foundation of the case, or which take from a defendant a right which was essential to his defense.”<sup>146</sup>

Over the past twenty-four years, the Court has refined the Plain Error standard of review into a three-part test. The three-part test consists of: (1) the existence of an actual error; (2) the error is plain or obvious; and (3) the error affected the outcome of the proceedings.<sup>147</sup> A recent articulation of the Plain Error standard of review was in 2019 in *Musonda v. State*:

To be entitled to relief under the plain error doctrine, [Appellant] must show the existence of an actual error (i.e., deviation from a legal rule), that is plain or obvious, and that affects his substantial rights, meaning the error affected the outcome of the proceeding. If these elements are met, this Court will correct plain error only if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice.<sup>148</sup>

This standard of review, although the most commonly used in an appeal, is extremely difficult to meet.

When using this standard of review, the application of the rule to the facts of the case should emphasize the serious effects of the error on the defendant and the fairness of the proceedings.<sup>149</sup> The argument must show that the error prejudiced the defendant such that it cannot be found that the error was harmless beyond a reasonable doubt.<sup>150</sup> While drafting the

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144. *Simpson*, ¶ 10, 876 P.2d at 694 (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)).

145. *Simpson*, ¶ 11, 876 P.2d at 694-95.

146. *Id.* ¶ 12, 876 P.2d at 695 (quoting *Rea v. State*, 1909 OK CR 160, 105 P. 386) (first time defining an application of fundamental error in Oklahoma).

147. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

148. *Musonda v. State*, 2019 OK CR 1, ¶¶ 5-6, 435 P.3d 694, 695-96 (internal citations omitted).

149. *See Barnes v. State*, 2017 OK CR 26, ¶¶ 7-14, 408 P.3d 209, 213-16.

150. *Malone v. State*, 2007 OK CR 34, ¶ 42, 168 P.3d 185, 203 (“Although we find plain error in the trial court’s failure . . . we do not hesitate to conclude that this error was harmless beyond a reasonable doubt in this case.”).

assignments of errors subject to the Plain Error standard of review, keep in mind that any errors subject to Plain Error review could be referred to in another section to bolster an ineffective assistance of counsel claim for failing to object at trial or in an accumulation of error claim to add all of the individual assignments of error, which do not individually require reversal, together to show that reversal is required.

### 3. Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution provides for the right “to have the Assistance of Counsel for his [or her] defence.”<sup>151</sup> The United States Supreme Court decided the landmark case *Strickland v. Washington* in which the Supreme Court announced the analysis used for judging claims for Ineffective Assistance of Counsel.<sup>152</sup> The *Strickland* Court announced that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”<sup>153</sup> The Supreme Court then broke the analysis into two parts which are stated by the Oklahoma Court of Criminal Appeals as “requir[ing] an appellant to show: (1) that counsel’s performance was constitutionally deficient; and (2) that counsel’s deficient performance prejudiced the defense.”<sup>154</sup> The Oklahoma Court of Criminal Appeals reviews such claims *de novo* “to determine whether counsel’s constitutionally deficient performance, if any, prejudiced the defense so as to deprive the defendant of a fair trial with reliable results.”<sup>155</sup>

The first prong of the test requires that counsel’s performance, whether it is trial or appellate counsel if being used in a writ or application in post-conviction relief, is constitutionally deficient. The *Strickland* Court stated that “the proper standard for attorney performance is that of reasonably effective assistance.”<sup>156</sup> To prove Ineffective Assistance of Counsel, a defendant must prove “that counsel’s representation fell below

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151. U.S. CONST. amend. VI.

152. *Strickland v. Washington*, 466 U.S. 668 (1984).

153. *Id.*

154. *Vanderpool v. State*, 2018 OK CR 39, ¶ 49, 434 P.3d 318, 329 (citing *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 185, 198).

155. *Mason v. State*, 2018 OK CR 37, ¶ 36, 433 P.3d 1264, 1274-75.

156. *Strickland*, 466 U.S. at 687.

an objective standard of reasonableness.”<sup>157</sup> The Oklahoma Court of Criminal Appeals begins the analysis “with the strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance” requiring that the defendant show the “representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy.”<sup>158</sup>

To prove deficient performance, the *Strickland* Court referenced the duties of a lawyer and stated that proving a lawyer breached such duties was a good indicator of deficient performance.<sup>159</sup> A lawyer owes to his or her client the duty of loyalty, the duty to avoid conflicts of interest, the duty to advocate zealously, and the duty to consult, to list a few.<sup>160</sup> The Oklahoma Court of Appeals reviews deficient performance by determining “whether counsel exercised the skill, judgment and diligence of a reasonably competent defense attorney in light of his overall performance.”<sup>161</sup> Examples of successful cases in Oklahoma showing constitutionally deficient counsel are an attorney who failed to utilize available legal knowledge and resources to present a defense, an attorney who was proven to be under the influence of intoxicants during the representation of a client, and an attorney who failed to present any mitigating evidence during the second-stage sentencing of a capital case.<sup>162</sup>

The second, and most challenging, prong requires the defendant to prove that counsel’s performance was prejudicial to the defense and that it had an actual adverse effect on the defense.<sup>163</sup> The reason the second prong is the most challenging prong of the test is that if the Oklahoma Court of Criminal Appeals can dispose of an Ineffective Assistance of Counsel claim on the grounds of lack of prejudice, it will do so.<sup>164</sup> The *Strickland* Court encouraged such a course of action observing that it was the easiest and most time efficient prong to dispose the claim on.<sup>165</sup> To prove prejudice, an appellant must affirmatively prove “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the

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157. *Id.* at 688.

158. *Vanderpool*, ¶ 49, 434 P.3d at 329.

159. *Strickland*, 466 U.S. at 688.

160. *Id.*

161. *Smith v. State*, 2006 OK CR 38, ¶ 35, 144 P.3d 159, 167.

162. *Id.*; *Fisher v. State*, 2009 OK CR 12, 206 P.3d 607.

163. *Strickland*, 466 U.S. at 693.

164. *Vanderpool v. State*, 2018 OK CR 39, ¶¶ 51-52, 434 P.3d 318, 329.

165. *Strickland*, 466 U.S. at 697.

proceeding would have been different.”<sup>166</sup> The *Strickland* Court defined “reasonable probability” as being “a probability sufficient to undermine confidence in the outcome.”<sup>167</sup> The Oklahoma Court of Criminal Appeals, relying on federal case law, further defined “reasonable probability” as requiring that “[t]he likelihood of a different result must be substantial, not just conceivable.”<sup>168</sup> An example of a successful case in Oklahoma showing prejudice is *Smith v. State* where the appellant proved that counsel’s failure to use the Battered Woman Syndrome Defense was prejudicial because it would have likely resulted in appellant’s acquittal.<sup>169</sup>

Unless the appellant can affirmatively prove both prongs, “it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable” and thus cannot be reversed.<sup>170</sup> The first prong can be satisfied by identifying the specific acts or omissions of counsel that were not the result of reasonable professional judgment and comparing those acts or omissions to the American Bar Association’s Model Rules of Professional Conduct or title 5 of the Oklahoma Statutes to show that they were not those that a reasonable attorney would make.<sup>171</sup> The second prong is the part of the analysis that needs the most support and the strongest argument to show prejudice. The analysis must show that it is “reasonably likely” that the result would have been different but for counsel’s unprofessional errors.<sup>172</sup> One way of showing, or at least bolstering, the argument of prejudice is to argue that any waiver of claims that might have occurred could not have been the result of reasonable professional judgment and thus prejudiced the defendant by requiring a higher burden to prove those assignments of errors.<sup>173</sup>

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166. *Id.* at 694.

167. *Id.*

168. *Vanderpool*, 2018 OK CR 39, ¶ 49, 434 P.3d 318, 329 (citing *Harrington v. Richter*, 562 U.S. 86 (2011)).

169. *Smith v. State*, 2006 OK CR 38, ¶¶ 45-46, 144 P.3d 159, 168-69.

170. *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 185, 206 (quoting *Ryder v. State*, 2004 OK CR 2, ¶ 85, 83 P.3d 856, 875 (quoting *Strickland*, 466 U.S. at 687)).

171. *Strickland*, 466 U.S. at 690. *See also Smith*, ¶ 1, 144 P.3d at 169 (C. Johnson, J. concurring).

172. *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

173. However, as stated above in the statutory rule section, each waived claim, or assignment of errors, must be set out separately in the brief supported by citations to authorities and the record for the Court to consider those claims pursuant to Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018).

## 4. Sufficiency of the Evidence

The Sufficiency of the Evidence standard of review covers challenges to the sufficiency of the evidence used to convict the defendant, not the admissibility of the evidence.<sup>174</sup> The United States Supreme Court recognized the constitutional requirement for such challenges in *Jackson v. Virginia*.<sup>175</sup> The Supreme Court held that “due process requires a reviewing court to determine ‘whether, after reviewing the evidence in the light most favorable to the [state], any rational trier of fact could have found the . . . elements of the crime.’”<sup>176</sup> The Oklahoma Court of Criminal Appeals has adopted the *Jackson* standard and recently used it in *Mason v. State* reciting the standard as: “challenges to the sufficiency of the evidence [are reviewed] in the light most favorable to the State and [the Court] will not disturb the verdict if any rational trier of fact could have found the essential elements of the crime charged to exist beyond a reasonable doubt.”<sup>177</sup> The Court has expounded on this standard by explaining that the “Court does not reweigh conflicting evidence or second-guess the fact-finding decisions of a jury.”<sup>178</sup> When reviewing the evidence presented at trial, the Court also accepts all reasonable inferences and credibility choices of the jury, does not make distinctions between direct and circumstantial evidence, and views all of the pieces of evidence together.<sup>179</sup>

Challenges to the sufficiency of evidence are difficult due to the great deference the Court gives the trial finder of fact.<sup>180</sup> The Court, and the United States Supreme Court, gives fact finders the full benefit of the doubt that they followed all instructions and even assigns a rebuttable

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174. The admissibility of evidence should be challenged under an abuse of discretion standard of review as it was the judge’s discretion as to whether the evidence was admitted or not. *See Vanderpool v. State*, 2018 OK CR 39, ¶¶ 29-38, 434 P.3d 318, 325-27.

175. *Jackson v. Virginia*, 443 U.S. 307 (1979). *See also Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04 (quoting *Jackson*, 443 U.S. at 319).

176. *Spuehler*, ¶ 7, 709 P.2d at 203-04 (quoting *Jackson*, 443 U.S. at 319).

177. *Mason v. State*, 2018 OK CR 37, ¶ 13, 433 P.3d 1264, 1269 (citing *Head v. State*, 2006 OK CR 44, ¶ 6, 146 P.3d 1141, 1144).

178. *Mitchell v. State*, 2018 OK CR 24, ¶ 11, 424 P.3d 677, 682 (citing *Day v. State*, 2013 OK CR 8, ¶ 13, 303 P.3d 291, 298; *Coddington v. State*, 2006 OK CR 34, ¶ 70, 142 P.3d 437, 456).

179. *Mason*, 2018 OK CR 37, ¶ 13, 433 P.3d at 1269.

180. *See Rutan v. State*, 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849 (“This Court accepts all reasonable inferences which tend to support the jury’s verdict.” (citing *Scott v. State*, 1991 OK CR 31, ¶ 4, 808 P.2d 73, 76)).



presumption to that notion.<sup>181</sup> Since trial courts use Oklahoma Uniform Jury Instructions and the juries are presumed to follow those instructions when weighing the evidence to determine guilt or innocence, a challenge to the sufficiency of the evidence will need to be extremely well-crafted with a good reason rebutting the fact finder presumption.

### 5. Constitutionality Challenges

Challenges to the constitutionality of statutes are reviewed *de novo* by the Oklahoma Court of Criminal Appeals.<sup>182</sup> The burden is on the challenger to prove that the statute is unconstitutional.<sup>183</sup> The Court affords great “defer[ence] to . . . the government and indulge[s] every presumption in favor of the constitutionality of an act of the Legislature.”<sup>184</sup> One way to attack a statute is to use the Void-for-Vagueness Doctrine. This doctrine holds that:

[i]t is fundamental that statutes creating criminal offenses must be drawn in language sufficient to apprise the public of exactly what conduct is forbidden. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.<sup>185</sup>

However, a statute is not vague “if reasonable people would know their conduct is at risk.”<sup>186</sup> When determining whether a statute is vague, the Court will determine whether the statute “contain[s] any further definition of . . . terms or provide[s] guidance as to the prohibited conduct,” or provides fair notice as to what conduct is and is not prohibited by the statute.<sup>187</sup> When using the Void-for-Vagueness Doctrine, identify specifically what terms are not defined well enough to provide fair notice

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181. See *Ryder v. State*, 2004 OK CR 2, ¶ 83, 83 P.3d 856, 875; *Zafiro v. United States*, 506 U.S. 534, 540 (1993).

182. *Vanderpool v. State*, 2018 OK CR 39, ¶ 40, 434 P.3d 318, 328; *State v. Cooper*, 2018 OK CR 40, ¶ 9, 434 P.3d 951, 954.

183. *Vanderpool*, ¶ 40, 434 P.3d at 329.

184. *Weeks v. State*, 2015 OK CR 16, ¶ 17, 362 P.3d 652, 654 (citing *State ex. rel. Mashburn v. Stice*, 2012 OK CR 14, ¶ 12, 288 P.3d 247, 250-51).

185. *State v. Saunders*, 1994 OK CR 76, ¶ 6, 886 P.2d 496, 497.

186. *Weeks*, ¶ 18, 362 P.3d at 655.

187. *Id.* ¶ 21, 362 P.3d at 656 (citing *Hayes v. Mun. Court of Okla. City*, 1971 OK CR 274, ¶ 6, 487 P.2d 974, 976).

for the conduct prohibited.

Another way to attack the constitutionality of a statute is to claim the statute violated the Due Process Clauses of the Federal and State Constitutions.<sup>188</sup> The Court held in *Vanderpool v. State* that “Oklahoma’s Due Process provisions are the same as those found in the Federal Constitution.”<sup>189</sup> The Court also found that the protections afforded by the Due Process Clause in regard to criminal law are “narrowly based on the recognition that, beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.”<sup>190</sup> The Court further found that a statute only violates the Due Process Clause “when it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>191</sup> These fundamental principles are notice and an opportunity to be heard.<sup>192</sup>

A constitutionality challenge can either be a challenge on the face of the statute or to how it is applied to the defendant; both challenges are questions of law and subject to *de novo* review.<sup>193</sup> While the Court has conducted reviews of both kinds of challenges, Judge Lumpkin wrote a special concurrence in *State v. Cooper* to emphasize that the United States Supreme Court has expressed a preference for analyzing constitutionality claims on an as applied basis.<sup>194</sup> Judge Lumpkin further explains that the preference for an as applied analysis is because it allows for partial invalidation, rather than full invalidation, which permits the reviewing court to only invalidate that which reaches too far and violates constitutional protections.<sup>195</sup> While there is a preference for as applied challenges, Judge Kuehn explained the justification for the use of facial challenges to be used when “under no set of circumstances could the statute be valid.”<sup>196</sup>

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188. U.S. CONST. amends. V, XIV; OK. CONST. art. II, § 7.

189. *Vanderpool v. State*, 2018 OK CR 39, ¶ 43, 434 P.3d 318, 329 (citing *Horn v. State*, 2009 OK CR 7, ¶ 14, 204 P.3d 777, 781).

190. *Id.* (citing *Medina v. California*, 505 U.S. 437, 443 (1992)).

191. *Id.*

192. *Horn*, ¶ 21, 204 P.3d at 783 (quoting *Hatch v. State*, 924 P.2d 284, 209 n.3 (Okla. Crim. App. 1996)).

193. See *Vanderpool*, ¶ 40, 434 P.3d at 329 (citing *Weeks v. State*, 2015 OK CR 16, ¶ 17, 362 P.3d 652, 654); *State v. Cooper*, 2018 OK CR 40, ¶ 9, 434 P.3d at 954.

194. *Cooper*, ¶ 2, 434 P.3d at 957 (Lumpkin, PJ, special concurrence).

195. *Id.* ¶ 3, 434 P.3d at 957 (quoting *Brockett v. Spokane Arcade, Inc.*, 472 U.S. 491, 504 (1985)).

196. *Cooper*, ¶ 1, 434 P.3d at 958 (Kuehn, J., special concurrence) (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008)).

When drafting an assignment of error challenging the constitutionality of a statute, the first determination to be made is whether the challenge will be a facial challenge, arguing that under no circumstance the statute is valid, or as applied, arguing that specific sections as applied are unconstitutional. Once the type of challenge is determined, the argument must illustrate either why the statute is vague as to not provide notice of what conduct is prohibited or whether it violates due process by not providing notice and an opportunity to be heard. When crafting either argument, remember that “[s]tatutes are to be construed to determine the intent of the Legislature, ‘reconciling provisions, rendering them consistent and giving intelligent effect to each’” provision.<sup>197</sup> The strongest argument will couple an accurate statutory interpretation with thorough analysis of how the challenged statute is unconstitutional on its face or as applied.

## 6. Waiver of Rights

The validity of a waiver of a right is evaluated under a voluntariness and knowing standard and “[w]hat suffices for waiver [of a right] depends on the nature of the right at issue.”<sup>198</sup> A defendant may waive his or her right, but “[t]here must be a clear showing that the waiver was competent, knowing and intelligent.”<sup>199</sup> Generally waiver of a right, whether constitutional or statutory, “will not be presumed from a silent record.”<sup>200</sup> However, the Court of Criminal Appeals recently stated that “[w]hile under the best circumstances, . . . waiver of a statutory right would . . . be knowing and voluntary as evinced by the record, such is not required.”<sup>201</sup> The trial court bears the burden of preserving a waiver on the record with any doubts as to whether waiver occurred resolving in the favor of the

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197. *G.W. v. State*, 2018 OK CR 36, ¶ 8, 433 P.3d 1283, 1285 (quoting *Lozoya v. State*, 1996 OK CR 55, ¶ 17, 932 P.2d 22, 28).

198. *G.W.*, ¶ 7, 433 P.3d at 1285 (citing *New York v. Hill*, 528 U.S. 110 (2000)). *See also Hinsley v. State*, 2012 OK CR 11, ¶ 5, 280 P.3d 354, 355-56.

199. *Hinsley*, ¶ 5, 280 P.3d at 355 (citing *Long v. State*, 2003 OK CR 14, ¶ 3, 74 P.3d 105, 107; *Bench v. State*, 1987 OK CR 191, ¶ 6, 743 P.2d 140, 142).

200. *Watson v. State*, 2010 OK CR 9, ¶ 12, 234 P.3d 111, 114 (citing *Miranda v. Arizona*, 384 U.S. 436, 475-76 (1966); *Valega v. City of Oklahoma City*, 1988 OK CR 101, ¶ 5, 755 P.2d 118, 119; *Van White v. State*, 1999 OK CR 10, ¶ 31, 990 P.2d 253, 265; *Branham v. State*, 1971 OK CR 32, ¶¶ 3-4, 480 P.2d 281, 282).

201. *G.W.*, ¶ 7, 433 P.3d at 1285 (citing *United States v. Gomez*, 67 F.3d 1515, 1520 (10th Cir. 1995)).

defendant.<sup>202</sup>

When drafting an assignment of error argument that a waiver of a right was not made voluntarily or knowingly, the first step is to determine whether it is a constitutional right or a statutory right. Constitutional rights are assigned more protections. Specifically, identifying whether you are challenging a constitutional or statutory right will help craft a better argument and indicate the protections the Court should afford such a right. Once the determination is made what type of right was allegedly waived, the remainder of the analysis should cite to specific areas in the record where the waiver was not recorded or where the recorded discussion was deficient.<sup>203</sup> If possible, include in the discussion examples of conduct by the defendant which were inconsistent with waiving the right to rebut the opposition's use of Judge Lewis's view that conduct by a party is sufficient reason to say whether or not the right was waived.<sup>204</sup> Also, keep in mind while drafting the assignment of error that the concepts of "waiver" and "forfeiture" are not the same.<sup>205</sup> Waiver is a difficult error to argue especially since district judges "ensure sufficient waiver by informing [the] defendant[] on the record of the nature of the right and consequences of waiver"; thus, when drafting ensure that the record is fully reviewed before attempting a waiver assignment of error.<sup>206</sup>

## 7. Harmless Error

The Harmless Error standard of review is used after the Court rules there was an error in the proceedings to determine whether the error harmed the defendant in such a way that it cannot be deemed harmless and, therefore, requires some form of relief to be granted.<sup>207</sup> The United States Supreme Court determined in *Arizona v. Fulminante* that "most constitutional errors can be harmless."<sup>208</sup> The *Fulminante* Court assigned

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202. *Hinsley*, ¶ 5, 280 P.3d at 355-56 (quoting *Valega*, ¶ 5, 755 P.2d at 119).

203. See *Watson*, ¶ 12, 234 P.3d at 114; Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2018).

204. *G.W.*, ¶ 1, 433 P.3d at 1286 (Lewis, V.P.J., concurring in part and dissenting in part) (citing *Randolph v. State*, 2010 OK CR 2, ¶ 27, 231 P.3d 672, 681).

205. *Id.* ¶ 6, 433 P.3d at 1288 (Kuehn, J., concurring in part and dissenting in part).

206. *Hinsley*, ¶ 5, 280 P.3d at 355-56 (citing *United States v. Robertson*, 45 F.3d 1423, 1432 (10th Cir. 1995)).

207. *Dunn v. State*, 2018 OK CR 35, ¶ 13, 434 P.3d 1, 4 (citing *Watson v. State*, 2010 OK CR 9, ¶ 16, 234 P.3d 111, 115).

208. *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991).

“a strong presumption that errors which occur during trial are subject to harmless error analysis.”<sup>209</sup> However, the United States Supreme Court articulated the errors that require automatic reversal as:

a faulty jury instruction on reasonable doubt, intentional racial discrimination in selection of grand jurors, denial of the right to a public trial, denial of the right to self-representation, improper exclusion of qualified capital jurors, exposure to improper publicity which wholly denies the defendant an impartial jury, failure to afford a defendant the right to counsel, and the lack of an impartial trial judge.<sup>210</sup>

The Supreme Court “has restricted use of structural error[s], with its requirement of automatic reversal, to a limited class of cases.”<sup>211</sup> Structural errors are a “violation of a right granted by the Constitution, rather than a violation of due process by failure to afford a right granted by state statute.”<sup>212</sup> Errors that do not require automatic reversal are subject to a Harmless Error analysis.<sup>213</sup>

The Harmless Error analysis will only find a constitutional error to be harmless if it is determined beyond a reasonable doubt that the error did not contribute to the verdict.<sup>214</sup> The burden is placed on the State to prove the error was harmless beyond a reasonable doubt.<sup>215</sup> The Court first must determine whether the denial of a constitutional or statutory right occurred.<sup>216</sup> Once it is determined that an error has occurred, the Court assesses whether the alleged error, “along with the evidence presented . . . prejudiced the defendant.”<sup>217</sup> While the burden is on the State to prove that

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209. *Duclos v. State*, 2017 OK CR 8, ¶ 11, 400 P.3d 781, 784 (quoting *Robinson v. State*, 2011 OK CR 15, ¶3, 255 P.3d 425, 428).

210. *Id.* (internal quotes and citations omitted).

211. *Id.* (quoting *Johnson v. United States*, 520 U.S. 461, 4688-69 (1997)).

212. *Id.*

213. *Id.* ¶ 13, 400 P.3d at 785.

214. *See Dunn v. State*, 2018 OK CR 35, ¶ 13, 434 P.3d 1, 4 (citing *Watson v. State*, 2010 OK CR 9, ¶ 16, 234 P.3d 111, 115). *See also Van White v. State*, 1999 OK CR 10, ¶ 32, 990 P.2d 253, 265.

215. *Van White*, ¶ 32, 990 P.2d at 265 (citing *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991)).

216. *Duclos*, ¶¶ 10-13, 400 P.3d at 784-85; *Barnes v. State*, 2017 OK CR 26, ¶¶ 8-12, 408 P.3d 209, 214-15.

217. *Robinson v. State*, 2011 OK CR 15, ¶ 3, 255 P.3d 425, 428 (citing *Fulminante*, 499 U.S. at 307-08).

the error was harmless, the Court takes into consideration the fact that an appellant does not even attempt to show how he or she was prejudiced.<sup>218</sup>

When drafting an assignment of error for the denial of a constitutional or statutory right, first identify the type of error it was, automatic reversal or subject to Harmless Error analysis. If correctly identified as automatic, then the analysis is complete. If the error was not a denial of a constitutional right that requires automatic relief, then it is subject to Harmless Error analysis. In writing this portion, emphasize the State bears the burden of proving that the error was harmless; however, also show how the error affected the outcome and prejudiced the appellant. The Court has implicitly shifted some of the burden onto the challenger and thus a good assignment of error will thoroughly show the proper standard of review and how the appellant was prejudiced.<sup>219</sup>

### 8. Cumulative Error

The Cumulative Error assignment of error and standard of review is structurally the last proposition of error in a brief as it alleges that there were so many errors, that if one of the errors alone was found not enough to warrant relief, the cumulative effect of all of the errors should warrant relief.<sup>220</sup> The Court articulates this standard as being “[w]hen there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the [appellant].”<sup>221</sup> The Court will grant relief only if the accumulation of the irregularities denied the appellant a fair trial despite the fact that singly none of the errors required relief.<sup>222</sup> The Cumulative Error standard of review requires the Court to find some errors that have some effect on the fairness of the trial or the rights of the defendant. If the Court does not find a single error, it will quickly deny the Cumulative Error proposition.<sup>223</sup>

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218. See Duclos, ¶ 17, 400 P.3d at 785.

219. *Id.*; Grissom v. State, 2011 OK CR 3, ¶ 25, 253 P.3d 969, 979.

220. See *Bechtel v. State*, 1987 OK CR 126, ¶ 12, 738 P.2d 559, 561.

221. *Vanderpool v. State*, 2018 OK CR 39, ¶ 53, 434 P.3d 318, 329 (citing *Bechtel*, ¶ 12, 738 P.2d at 561).

222. *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732 (citing *Bechtel*, ¶ 12, 738 P.2d at 561).

223. *Neloms v. State*, 2012 OK CR 7, ¶ 40, 274 P.3d 311, 315 (“[W]e have found just one error . . . and that error was harmless . . . there is no accumulation of error upon which to base a finding of cumulative error.”); *Engles v. State*, 2015 OK CR 17, ¶ 13, 366 P.3d 311, 315 (“As we find no error, there is no accumulation of errors.”); *Vanderpool*, ¶ 53, 434 P.3d at 329 (“[A] cumulative error argument has no merit when this Court fails to

## 9. Scrivener's Errors

While there is no standard of review for a Scrivener's Error, the Scrivener's Error proposition generally requires the challenger to follow the proper procedure before the Court will correct the error itself.<sup>224</sup> The proper procedure for correcting a Scrivener's Error is for the appellant to submit a motion directly to the district court that originally issued the document for issuance of an order *nunc pro tunc* correcting the Scrivener's Error.<sup>225</sup> If the district court denies the relief sought, then the appellant may seek relief with the Court of Criminal Appeals who will then determine whether the district court abused its discretion by not issuing such relief.<sup>226</sup> If the proper procedure is not followed, the Court will generally instruct the appellant to follow the proper procedure without issuing any relief. Due to this, it is generally a waste of time and space in a brief to raise this proposition of error if the proper procedures are not followed. However, if the proper procedures are followed, resulting in the district court denying relief, then raise a Scrivener's Error as a proposition.

## IV. CONCLUSION

Drafting direct criminal appeals is an art that takes practice. When drafting an appeal to the Oklahoma Court of Criminal Appeals, an appellant must follow all of the court rules and use the Court's current case law when drafting rule statements and arguments. The Court is keen on finding waiver and will quickly dispose of an assignment of error for failing to comply with court rules. If possible, have a peer read through the draft to ensure that the appeal is complete and that there are no errors that were overlooked during the editing process. This Guide is only a starting point for any individual who has never drafted an appeal to the Court of Criminal Appeals before, who is out of practice, or who just wants a refresh on the Court's current case law and rules. While all of the information contained within the Guide was current as of January 2019, a drafter should always verify the currency of the information before submitting an appeal.

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sustain any of the other errors raised by the appellant.”).

224. *Grimes v. State*, 2011 OK CR 16, ¶ 21, 251 P.3d 749, 755 (citing Rule 10.1(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011)).

225. *Grimes*, ¶ 21, 251 P.3d at 755; *Winbush v. State*, 2018 OK CR 38, ¶ 15, 433 P.3d 1275, 1280 (citing *Grimes*, ¶ 21, 251 P.3d at 755).

226. *Grimes*, ¶ 21, 251 P.3d at 755.