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COMMENT

DETAR V. STATE†: STATUTORY INTERPRETATION AND HOW FAR OKLAHOMA COURTS ARE WILLING TO GO TO PROTECT CHILDREN FROM SEXUAL PREDATORS

Jordan Kimball*

INTRODUCTION

Protecting children from harmful adult behavior is growing as a public policy concern.[1] This growth is fueled, in part, by technological advances

† This Comment was selected for publication prior to the Oklahoma Court of Criminal Appeals order vacating and withdrawing the opinion based upon the Supreme Court's ruling in McGirt v. Oklahoma, 140 S.Ct. 2452 (2020). The Comment was published because the legal analysis remains a relevant discussion of Oklahoma law. [-EDS]

* Juris Doctor Candidate, Oklahoma City University School of Law, December 2022. Jordan would like to thank God, her family, her friends, Felix, and son Jr. for their unwavering love and support. She also owes a great deal of gratitude to the board of editors, her professors, and the English departments of Coweta, Southern Nazarene, and Northeastern State for paving her way.

1. Eric C. Shedlosky, *Protecting Children from the Harmful Behavior of Adults*, 98 J. CRIM. L. & CRIMINOLOGY 299, 326 (2007).

that bring an increase in challenges for the entities charged with safeguarding children.[2] From Fourth Amendment searches and seizures to statutes regarding sentencing, courts are increasingly tasked with the specific challenge of applying laws through the heightened sensitivity of crimes against children.[3] This challenge requires courts to lean heavily on statutory interpretation, a common practice that is unquestionably prone to scrutiny.[4] This Comment focuses on the use of statutory interpretation in convicting and sentencing individuals charged with sex crimes against children and how this practice reflects just how far Oklahoma authorities are willing to go to protect children from sexual abuse.[5]

In *Detar v. State*, the Oklahoma Court of Criminal Appeals held that a jury instruction imposing the "85% Rule" on an individual convicted of lewd or indecent proposals to a child under sixteen was proper after the appellant objected to the instruction.[6] The appellant's objection centered on the argument that "a *proposal* to commit lewd acts with a minor is not – absent express legislative text to the contrary – the same as 'lewd molestation.'"[7] The Court's analysis of the statutory language and historical use of the relevant statutes led to the conclusion that the jury instruction was not in error.[8] This conclusion was attributed to legislative ambiguity and the Court's power to use statutory interpretation to "give effect to the intention of the Legislature," particularly in the Legislature's strategic use of ambiguity in the relevant statutes.[9]

Part II of this Comment begins with the historical background of statutory interpretation, the relevant statutes, and other historically relevant documentation on the "85% Rule" and lewd or indecent proposals to children under sixteen. Part III describes and analyzes the facts, procedural history, and opinion of *Detar*, paying close attention to the

2. *See* Madeleine Mercedes Plasencia, *Internet Sexual Predators: Protecting Children in the Global Community*, 4 J. GENDER RACE & JUST. 15, 17-18 (2000).

3. *See generally* Daniel Armagh, *Search and Seizure of Electronic Evidence in Computer-Facilitated Crimes against Children*, 78 OKLA. B.J. 697 (2007) (discussing the constitutional and statutory requirements courts must consider regarding the search and seizure of electronic evidence in crimes against children).

4. Richard H. Fallon Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 307 (2019).

5. *See infra* Part IV.

6. Detar v. State, 2021 OK CR 9, ¶ 8, 489 P.3d 70, 74, *vacated, remanded, and withdrawn based on question of jurisdiction*, Detar v. State, 2021 OK CR 34 (depublished).

7. *Id.* ¶ 5, 489 P. 3d at 73.

8. *Id.* ¶ 8, 489 P.3d at 74.

9. *Id.* ¶ 4, 489 P.3d at 73.

majority's legal analysis in the case. Part IV addresses why the Court was correct in affirming the trial court's decision. This is followed by discussion on statutory interpretation, the "85% Rule" jury instruction alongside the use of the term "lewd molestation," and the precedent *Detar* set for convicting sexual predators in Oklahoma.

HISTORICAL BACKGROUND

Statutory Interpretation

"Words are 'inexact symbols' of meaning, and even in everyday communications, it is difficult to achieve one definite meaning."[10] Because statutes are carefully selected words enacted to serve as a source of authority, it is entirely understandable that the complex nature of these "inexact symbols" creates complications in how courts apply them.[11] Put simply, the "'intrinsic difficulties of language' are heightened in the creation of a statute, which is crafted by a complicated governmental process and will likely be applied to an unforeseeable variety of circumstances."[12] While history shows various approaches to resolving the difficulties of language as they pertain to the law, "[n]o simple approach to these problems is sensible, because words are not born with meanings."[13]

The majority approach takes the view that "[w]ords take their effect from contexts, of which there are many – other words, social conventions, the problems the authors were addressing."[14] The two main approaches to statutory interpretation today are purposivism and textualism,[15] and:

> [j]udges subscribing to these theories may employ different interpretive tools to discover [the legislature's] meaning, looking to the ordinary meaning of the disputed statutory text, its statutory context, any applicable interpretive canons, the legislative history

10. VALERI C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 1 (2018) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 YALE L.J. 509, 528 (1988)).

11. *Id.*

12. *Id.*

13. Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV., no. 1, 2004, at 1, 2.

14. *Id.*

15. BRANNON, *supra* note 10, at 2.

> of the provision, and evidence about how the statute has been or may be implemented.[16]

Historically, courts have employed a "common-law tradition of making law through judicial opinions, [where] a court reasons by example, applying general 'principles of equity, natural justice, and . . . public policy' to the specific circumstances before the court."[17] When approaching "a statutory dispute, courts generally do not simply determine, based on equity or natural justice, what would have been a reasonable course of action under the circumstances. Instead, the court must 'figure out what the statute means' and apply the statutory law to resolve the dispute."[18]

Oklahoma courts have consistently held 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."[19] *Lozoya v. State* established that:

> to ascertain the intention of the Legislature in the enactment of [a] statute, [a court] may look "to each part of the statute, to other statues upon the same or relative subjects, to the evils and mischiefs to be remedied, and to the natural or absurd consequences of any particular interpretation."[20]

Further, Oklahoma courts have held that when "legislature[s] enact[] a statute specifically designed to deal with [a] situation, it follows that [they] intended the statute to be used when applicable."[21] In *Detar*, Presiding Judge Kuehn employed these practices to apply relevant but ambiguous statutes to the conviction and sentencing of the appellant.[22] Specifically, Judge Kuehn followed Oklahoma precedent in assuming that the statutory ambiguity at issue was the intent of the Legislature so that the relevant

16. *Id.* at 2-3 (footnotes omitted).

17. *Id.* at 4 (quoting Norway Plains Co. v. Boston & Me. R.R., 67 Mass. 263, 267-68 (1854)).

18. *Id.* (footnotes omitted).

19. State *ex rel.* Mashburn v. Stice, 2012 OK CR 14, ¶ 11, 288 P.3d 247, 250 (citing Lozoya v. State, 1996 OK CR 55, ¶ 17, 932 P.2d 22, 28.; State v. Ramsey, 1993 OK CR 54, ¶ 7, 868 P.2d 709, 711.).

20. Lozoya v. State, 1996 OK CR 55, ¶ 20, 932 P.2d 22, 29.

21. Luster v. State, 1987 OK CR 261, ¶ 11, 746 P.2d 1159, 1161.

22. Detar v. State, 2021 OK CR 9, ¶¶ 3, 8, 489 P.3d 70, 73, 74.

statutes may be employed to address "the evils and mischiefs to be remedied" in this case.[23]

The 85% Rule and Lewd or Indecent Proposals to Children Under Sixteen

In the State of Oklahoma, individuals convicted of a crime enumerated in Okla. Stat. tit. 21, § 13.1 are required to serve a minimum percentage of their sentence.[24] This statute is commonly known as Oklahoma's "85% Rule":

> On March 1, 2000, legislation enacting Oklahoma's 85% Rule went into effect. This legislation was part of a "truth in sentencing" movement nationwide. One important goal of the "truth in sentencing" laws is to give jurors, and the general public, accurate information about sentencing. Armed with this information, jurors in jury-sentencing states like Oklahoma can confidently impose a sentence with some idea of the length of time a defendant will actually serve. . . .[25]

Of the various enumerated crimes in the statute, there are several crimes against children listed, to include "[l]ewd molestation of a child as defined in Section 1123 of this title."[26] Section 1123 makes it a felony to:

> 1. Make any oral, written or electronically or computer-generated lewd or indecent proposal to any child under sixteen (16) years of age, or other individual the person believes to be a child under sixteen (16) years of age, for the child to have unlawful sexual relations or sexual intercourse with any person; or
> 2. Look upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any lewd or lascivious manner by any acts against public decency and morality, as defined by law; or
> 3. Ask, invite, entice, or persuade any child under sixteen (16) years of age, or other individual the person believes to be a child

23. *Id.* ¶ 8, 489 P.3d at 74; *Lozoya*, ¶ 20, 932 P.2d at 29.
24. OKLA. STAT. tit. 21, § 13.1 (West 2011 & Supp. 2020).
25. Anderson v. State, 2006 OK CR 6, ¶ 11, 130 P.3d 273, 278.
26. tit. 21, § 13.1.

> under sixteen (16) years of age, to go alone with any person to a secluded, remote, or secret place, with the unlawful and willful intent and purpose then and there to commit any crime against public decency and morality, as defined by law, with the child; or
> 4. In any manner lewdly or lasciviously look upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any indecent manner or in any manner relating to sexual matters or sexual interest . . . .[27]

The title of Section 1123 reads, "Lewd or indecent proposals or acts as to child under 16 or person believed to be under 16—Sexual battery."[28] The legislative ambiguity, as mentioned in Parts III–IV of this Comment, stems from the fact that the language of the "85% Rule" contemplates "lewd molestation of a child" in violation of Section 1123. But, Section 1123 is void of the word "molestation," and there is no designation within the "85% Rule" of what constitutes "molestation" for purposes of sentencing.[29]

Prior to *Detar*, two notable Oklahoma cases addressed the statutory ambiguity in convicting lewd molestation, *Barnard v. State* and *Heard v. State*.[30] In *Barnard*, the defendant was convicted of "Making Lewd or Indecent Proposals to a Child in violation of 21 O.S.Supp.2006, § 1123(A)(1) after one former conviction (Count 1), and Using a Computer System or Network for the Purpose of Committing a Felony in violation of 21 O.S.2001, § 1958 (Count 2)."[31] On appeal, Barnard contested elements of the jury instructions given at trial as well as the length of his sentence, but did not specifically contest the application of the "85% Rule" to his sentencing.[32] With no objection to the "85% Rule," the Court addressed the application of the rule with brevity by assuming its applicability in the first footnote of the opinion.[33] Although not cited by the *Detar* opinion, the *Heard* case is certainly applicable.[34] In *Heard*, the

27. tit. 21, § 1123 (West 2011 & Supp. 2020).
28. *Id.*
29. *Id.; see* tit. 21, § 13.1.
30. Barnard v. State, 2012 OK CR 15, 290 P.3d 759; Heard v. State, 2009 OK CR 2, 201 P.3d 182.
31. *Barnard,* ¶ 1, 290 P.3d at 761.
32. *Id.* ¶ 1, 290 P.3d at 761-62.
33. *Id.* ¶ 1, 290 P.3d at 761, n.1.
34. *See* Detar v. State, 2021 OK CR 9, ¶ 2, 489 P.3d 70, 73, *vacated, remanded, and withdrawn based on questions of jurisdiction*, Detar v. State, 2021 OK CR 34, ¶ 1; *see also*

defendant plead guilty to "two counts of Lewd Molestation in violation of 21 O.S. Supp. 2006, § 1123" and later filed an application for post-conviction relief alleging "the facts underlying his plea of guilty to lewd molestation did not constitute a violation of the criminal statute charged."[35] While the trial court in *Heard* used a jury instruction to provide elements of lewd molestation, the Court ultimately came to the conclusion that Section 1123 did not specifically define the act, therefore the plain language of the statute allows for interpretation when applicable to sex crimes against children.[36] In light of these precedents, the *Detar* Court was charged with evaluating whether the appellant's acts, which did not involve physically touching the minor victim, constituted "lewd molestation" for the purpose of applying the "85% Rule."[37]

DETAR V. STATE

Facts

Sometime before September 2015, Justin Cecil Detar connected online with an eleven-year-old girl and a text exchange between the two ensued.[38] Detar was aware that the victim was underage and the text messages grew to become inappropriate.[39] After some time, two of the victim's relatives grew suspicious and upon inspection found the inappropriate text exchange.[40] Unbeknownst to Detar, the victim's relatives took over the text exchange and began responding to the messages, pretending to be the victim.[41] During the text exchange with the relatives, Detar proposed that the victim meet up with him for sexual intercourse and set a specified date, time, and location.[42] When Detar arrived at the specified location, he was met by law enforcement and was subsequently arrested.[43] Detar later admitted to sending the messages to the minor's phone.[44]

Heard v. State, 2009 OK CR 2, 201 P.3d 182.

35. *Heard*, ¶ 1, 201 P.3d at 182.
36. *Id.* ¶ 9, 201 P.3d at 183; OKLA. STAT. tit. 21, § 1123 (West 2011 & Supp. 2020).
37. *Detar*, 2021 OK CR 9, ¶ 5, 489 P.3d at 73.
38. *Id.*, ¶ 2, 489 P.3d at 73.
39. *Id.*
40. *Id.*
41. *Id*
42. *Id.*
43. *Id.*
44. *Id.*

Procedural History

In September 2015, Detar was charged in Tulsa County District Court Case No. CF-2015-4675 with lewd or indecent proposal to a child in violation of Okla. Stat. tit. 21, § 1123 and possession of child pornography in violation of Okla. Stat. tit. 21, § 1021.2.[45] At arraignment, Detar plead not guilty and later requested a jury trial.[46] After some instances where Detar failed to appear, a protective order was set in place as the parties awaited trial.[47]

Detar's jury trial began on April 23, 2019.[48] Detar admitted sending the messages to the underaged victim's phone prior to trial, but did not testify at trial.[49] The State provided an exhibit containing several of Detar's text messages, to include the exchanges with whom he believed to be the underaged victim.[50] A relative of the victim authenticated the messages she saw from Detar on the victim's phone and provided testimony about the conversation she had with Detar while pretending to be the underage victim.[51] A detective also testified about what he discovered on the victim's Facebook account.[52] Despite ample opportunity, Detar did not deny authorship of the messages.[53]

The State further provided evidence of Detar's suspended sentence from a prior conviction for accessory to murder, which was considered during the sentencing stage of trial as the charge in the case at bar was Detar's fourth felony.[54] The jury was instructed that "[Detar] must serve at least 85% of a sentence for lewd or indecent proposals to a child under sixteen before he could be considered for parole" under the "85% Rule."[55] On April 25, 2019, the jury found Detar guilty of the charge of lewd or indecent proposal to a child but found him not guilty of possession of child

45. *Id.* ¶ 1, 489 P.3d at 72.
46. *See id.*
47. Docket of *Detar v. State*, OSCN, (Sep. 3, 2015) https://www.oscn.net/dockets/GetCaseInformation.aspx?ct=Tulsa&number=CF-2015-4675.
48. Brief of Appellant at 1, Detar v. State, 2021 OK CR 9, 489 P.3d 70 (F-2019-351).
49. *Detar*, ¶ 2, 489 P. 3d at 73.
50. *Id.* ¶ 9, 489 P.3d at 74.
51. *Id.* ¶ 10, 489 P.3d at 75.
52. *Id.*
53. *Id.*
54. *Id.* ¶ 12, 489 P.3d at 75.
55. *Id.* ¶¶ 3, 5, 489 P.3d at 73.

pornography.[56] Because the minor victim was under the age of twelve, the jury recommended Detar serve twenty-five years.[57] Accordingly, the Honorable Dawn Moody, District Judge, sentenced Detar to twenty-five years in the Department of Corrections for the first count and acquitted him on the second.[58]

Detar timely appealed his conviction on May 10, 2019.[59] In his appeal, Detar (hereinafter also "Appellant") offered seven propositions, each challenging a different nuance of his jury trial.[60] The propositions are as follows: (1) "Appellant claims the trial court erred by instructing the jury that he must serve at least 85% of a sentence for lewd or indecent proposals to a child under sixteen before he could be considered for parole," (2) "Appellant challenges the admission of an exhibit containing his text messages with a person he believed to be the underage victim, as well as other messages," (3) Appellant claims that "the trial court erred in omitting to instruct the jury on mandatory sex-offender registration requirements," (4) "Appellant claims the trial court improperly admitted evidence of his prior conviction for accessory to murder during the punishment stage of the trial," (5) "Appellant claims that prosecutorial misconduct denied him a fair trial," (6) "Appellant claims that his trial counsel rendered ineffective assistance," and (7) "Appellant claims the accumulation of error in his case deprived him of a fair trial and due process of law."[61] In an opinion filed April 22, 2021, the Oklahoma Court of Criminal Appeals, through the Honorable Dana Kuehn, denied each of Detar's proposals and affirmed the "Judgement and Sentence of the District Court of Tulsa County."[62] In response to the ruling in *McGirt v. Oklahoma*,[63] Detar recently submitted a petition for rehearing, challenging subject-matter jurisdiction.[64]

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56. Brief of the Appellant at 1-2, *Detar*, 2021 OK CR 9, 489 P.3d 70 (F-2019-351).

57. *Detar*, ¶ 1, 489 P.3d at 72; Docket of *Detar v. State*, OSCN, (Sep. 3, 2015) https://www.oscn.net/dockets/GetCaseInformation.aspx?ct=Tulsa&number=CF-2015-4675.

58. *See Detar*, ¶ 1, 489 P.3d at 72.

59. Appellant's Notice of Intent to Appeal at 4, Detar v. State, 2021 OK CR 9, 489 P.3d 70 (F-2019-351).

60. *Detar*, 2021 OK CR 9, 489 P.3d 70.

61. *Id.*

62. *Id.* ¶ 16, 489 P.3d at 76.

63. *See* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

64. Appellant's Motion for Rehearing, Detar v. State, 2021 OK CR 9, 489 P.3d 70 (F-2019-351), *vacated based upon questions of state jurisdiction*, 2021 OK CR 34, 497 P.3d 1215.

Opinion

Detar "did not testify at trial, and [did] not dispute the sufficiency of the evidence to convict him on appeal."[65] The Court evaluated each of Detar's seven propositions in accordance with his procedure used in the lower court.[66]

While Presiding Judge Kuehn's analysis centers around Proposition One, the remaining propositions merit a brief discussion as part of how the Court approached Detar's conviction.[67] Detar's Propositions Two through Six were swiftly denied in no more than two paragraphs per proposition, with Proposition Seven receiving two simple sentences.[68] Detar's challenge of the admission "of an exhibit containing his text messages with a person he believed to be the underage victim, as well as other messages" as an abuse of discretion was denied because the messages were authenticated by two sources and Detar did not "deny authorship" of the messages.[69] The claim "that the trial court erred in omitting to instruct the jury on mandatory sex-offender registration requirements" was denied because the trial court's ruling was found to be consistent with *Reed v. State*, which "held that trial courts have no duty to instruct juries on the registration requirements for those convicted of certain sex crimes."[70] The claim that "the trial court improperly admitted evidence of [Detar's] prior conviction for accessory to murder during the punishment stage of the trial" because "this third felony conviction was unnecessary for the State to reach the '20 to life' punishment range" was denied on the basis "that the State is entitled to introduce more prior convictions than are strictly necessary for sentence enhancement."[71] Detar pointed to alleged prosecutorial misconduct, ineffective assistance, and accumulation of error as an attempt establish that he was deprived "of a fair trial and due process of law," but these claims were found to be without merit.[72]

As stated above, the bulk of the analysis on appeal concerned Detar's

65. *Detar*, ¶ 2, 489 P.3d at 73.
66. *Id.* ¶¶ 3-15, 489 P.3d at 73-76.
67. *Id.* ¶¶ 3-8, 489 P.3d at 73-74.
68. *Id.* ¶¶ 9-15, 489 P.3d at 74-76.
69. *Id.* ¶¶ 9-10, 489 P.3d at 74-75.
70. *Id.* ¶ 11, 489 P.3d at 75 (citing Reed v. State, 2016 OK CR 10, ¶ 19, 373 P.3d 118, 123).
71. *Id.* ¶ 12, 489 P.3d at 75 (citing Cooper v. State, 1977 OK CR 67, ¶ 7, 560 P.2d 1018, 1019).
72. *Id.* ¶ 15, 489 P.3d at 76.

first proposition, that "the trial court erred by instructing the jury that he must serve at least 85% of a sentence for lewd or indecent proposals to a child under sixteen before he could be considered for parole."[73] At trial, Detar's "counsel objected to this instruction, preserving the question for appellate review."[74] The analysis begins by stating the precise issue, "whether a lewd or indecent proposal, in violation of 21 O.S.Supp.2013, § 1123(A)(1), is a crime of '[l]ewd molestation of a child as defined in Section 1123' and thus subject to the 85% Rule, as the trial court instructed the jury."[75]

First, the Court addressed how to approach Detar's proposition as a claim against a jury instruction that is, at its core, an issue of the lower court's use of statutory interpretation.[76] The analysis states, "While jury instructions are generally within the broad discretion of the trial court, we review questions of statutory interpretation *de novo*."[77] Stated plainly, "[t]he basic purpose of statutory interpretation is to find and give effect to the intention of the Legislature."[78] Further, "[l]egislative intent is primarily determined from the plain and ordinary language of the statute."[79] Notable to the discussion at bar, Judge Kuehn emphasized that "[s]tatutes should be construed according to the fair import of their words, taken in their usual sense within the particular context, and with reference to the purpose of the law."[80]

The analysis then transitions to presenting the language of the relevant statutes.[81] Detar was charged under Section 1123(A)(1), which makes it a felony for a person to:

> knowingly and intentionally . . . [m]ake any oral, written or electronically or computer-generated lewd or indecent proposal to any child under sixteen (16) years of age, or other individual the person believes to be a child under sixteen (16) years of age, for

73. *Id.* ¶ 3, 489 P.3d at 73.
74. *Id.*
75. *Id.* ¶ 5, 489 P.3d at 73.
76. *Id.* ¶¶ 3-4, 489 P.3d at 73.
77. *Id.* ¶ 3, 489 P.3d at 73 (citation omitted) (citing Smith v. State, 2007 OK CR 16, ¶ 40, 157 P.3d 1155, 1169).
78. *Id.* ¶ 4, 489 P.3d at 73 (citing Gerhart v. State, 2015 OK CR 12, ¶ 14, 360 P.3d 1194, 1198).
79. *Id.* (citing Newlun v. State, 2015 OK CR 7, ¶ 8, 348 P.3d 209, 211).
80. *Id.* (citing Jordan v. State, 1988 OK CR 227, ¶ 4, 763 P.2d 130, 131).
81. *Id.* ¶ 5, 489 P.3d at 73.

> the child to have unlawful relations or sexual intercourse with any person . . . .[82]

The jury instruction given at the lower court relied on the "85% Rule," which was explained on appeal as:

> The relevant version of the "85% Rule," codified at 21 O.S.Supp.2014, § 13.1(18), provided (with emphasis added): "Persons convicted of . . . *Lewd molestation of a child as defined in Section 1123 of this title* . . . shall be required to serve not less than eighty-five percent (85%) of any sentence of imprisonment imposed by the judicial system prior to becoming eligible for consideration for parole."[83]

At the jury trial and on appeal, "[t]he State argue[d] that a lewd or indecent proposal is an 85% crime, citing a cursory footnote reference in *Barnard v. State* . . . ."[84] As discussed in Part II of this Comment, this footnote is fairly simple, stating "Making Lewd or Indecent Proposals to a Child in violation of 21 O.S.Supp.2006, § 1123(A)(1), is a crime that is subject to the 85% limit on parole eligibility set out in 21 O.S.Supp.2002, § 13.1. Barnard's jury was so instructed."[85] In response, "Appellant argue[d] that criminal statutes must be strictly construed against the State, and [took] the position that a *proposal* to commit lewd acts with a minor is not – absent express legislative text to the contrary – the same as 'lewd molestation.'"[86]

The opinion transitioned to address Detar's argument by stating, "[t]he crux of the problem here is that, despite what 21 O.S. § 13.1 says, the term 'lewd molestation' is *not* defined in Section 1123, or anywhere else in the Oklahoma Statutes for that matter."[87] Judge Kuehn began her analysis of the parties' arguments by discussing the history of Section 1123.[88] The analysis stated that:

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82. OKLA. STAT. tit. 21, § 1123(A)(1) (2011 & Supp. 2020).
83. *Detar*, ¶ 5, 489 P.3d at 73.
84. *Id.* ¶ 5, 489 P.3d at 73. (citing Barnard v. State, 2012 OK CR 15, ¶ 1, 290 P.3d 759, 761 n.1).
85. *Id.* ¶ 5, 489 P.3d at 73 n.3 (specifying the contents of the footnote the State references in Barnard v. State, 2012 OK CR 15, ¶ 1, 290 P.3d 759, 761 n.1).
86. *Id.* ¶ 5, 489 P.3d at 73.
87. *Id.* ¶ 6, 489 P.3d at 73.
88. *Id.* ¶¶ 6-8, 489 P.3d at 73-74.

> Since it was enacted in 1945, Section 1123 has proscribed a broad range of conduct – including not just the physical touching of a minor, but also proposals to a minor for such purposes, and even "look[ing] upon" a minor in a lewd or lascivious manner. This Court's use of the term "lewd molestation" in published opinions can be traced back as early as 1955.[89]

Judge Kuehn referenced *Lowrey v. State* as, "describing a defendant's crime as lewd molestation, but providing no details as to exactly what the conduct was."[90] The analysis went on to say that since *Lowrey*, lewd molestation "continues to be used to refer generically to crimes against children listed in Section 1123."[91] Judge Kuehn strategically cited *Munn v. State*, "where th[e] Court rejected a defendant's claim that driving a child to a secluded place and asking her to disrobe, at which point she fled, was insufficient to constitute 'lewd molestation.'"[92]

After situating the case at bar with precedent concerning treatment of the term "lewd molestation," the analysis transitioned back to focusing on statutory interpretation, stating that:

> Over the years, the list of crimes against children covered by Section 1123 has been expanded somewhat. (The statute now also covers other conduct such as sexual battery against victims who are at least sixteen years of age, and various acts with human corpses.) But the fact remains that all proscribed conduct involving children appears in a single section of law (see now, Paragraph A of Section 1123), without any clear attempt to differentiate in terms of severity of punishment between, say, actions and words. The crime of lewdly *looking upon* a minor is, and always has been, found in the very same clause or subsection that proscribes lewdly *touching one*.[93]

The analysis compared an earlier version of the statute with a later version,

89. *Id.* ¶ 6, 489 P.3d at 73-74.
90. *Id.* ¶ 6, 489 P.3d at 74. (citing Lowrey v. State, 1955 OK CR 131, ¶¶ 1, 5, 290 P.2d 785).
91. *Id.*
92. *Id.* (citing Munn v. State, 1969 OK CR 245, ¶¶ 10-13, 459 P.2d 628, 631-32).
93. *Id.* ¶ 7, 489 P.3d at 74.

stating "while it might make sense to distinguish, for punishment purposes, between (1) lewdly touching a minor, (2) proposing lewd acts to a minor, and (3) merely looking at a minor in a lewd fashion, the Legislature has not clearly done so."[94]

Judge Kuehn began the conclusion of her analysis by noting, "Section 1123 has always considered a perpetrator equally culpable, whether the conduct involved actual sex acts with a child, or merely proposing [the] same to the child."[95] She further asserted that "[a]ttempts to distinguish, for punishment purposes, between mere proposals and consummated acts are not supported by the statutory text."[96] Finally, Judge Kuehn stated, "Returning to the language of the 85% Rule, we believe that when the Legislature applied the Rule to those convicted of '[l]ewd molestation of a child as defined in Section 1123 of this title,' it intended to include all sex crimes against children that are mentioned therein" and the address of Detar's first proposition concluded with a holding that "the trial court's instruction was not in error" and "Proposition 1 [was] therefore denied."[97]

Two judges concurred in affirming Detar's conviction and sentence while dissenting to the majority's statutory interpretation and overall holding that the 85% Rule applied to Detar's charge of lewd or indecent proposals to a child under sixteen.[98] Both Judge Rowland and Judge Lewis articulated concern with the majority's use of statutory interpretation, noting that they believed the decision neglected to "construe statutes according to the plain and ordinary meaning of their language."[99] Judge Rowland compared the 85% Rule applied in *Detar* to other 85% Rules, such as "Section 13.1(5) [in which] all shooting, assault, or battery crimes listed in 21 O.S.2011, § 652 are specifically enumerated as covered by the 85% Rule."[100] His analysis hinged on the following quote: "The problem with [the majority's] reading of [Section 1123(A)] is that when the Legislature intends for the 85% Rule to cover all crimes in a given statutory section, it does so clearly and explicitly."[101] The majority and dissent both recognized that there is not a clear definition of "lewd molestation," which provides just enough statutory ambiguity for the

94. *Id.*
95. *Id.* ¶ 8, 489 P.3d at 74.
96. *Id.*
97. *Id.*
98. *Id.* ¶ 16, 489 P.3d at 76-77.
99. *Id.* ¶ 1, 489 P.3d at 76 (Rowland, V.P.J., concurring in part/dissenting in part).
100. *Id.* ¶ 3, 489 P.3d at 76 (Rowland, V.P.J., concurring in part/dissenting in part).
101. *Id.* (Rowland, V.P.J., concurring in part/dissenting in part).

majority's opinion to gain traction.[102] Further, both dissenting judges recognized that the application of the 85% Rule in Detar's case did not adversely impact the outcome of the case, as he was sentenced to just five years above the minimum time for the conviction of lewd or indecent proposals to a child under sixteen.[103]

ARGUMENT

The Court of Criminal Appeals in *Detar* correctly affirmed the trial court's decision by determining that the 85% Rule jury instruction was not in error considering the vague nature of the language from the Legislature. This statutory ambiguity provided a need for the Court to use statutory interpretation. In doing so, the Court provided a glimpse of how far Oklahoma authorities are willing to go to protect children from sexual predators.

Because the State in *Detar* heavily relied on *Barnard,* one may first narrow down the discussion to treatment of sex crimes against children at the county level, since both cases were appeals from jury trials in the District Court of Tulsa County.[104] Speaking as an intern with the juvenile division of the Tulsa County District Attorney's office, it is undeniable that the county takes considerable measures to address crimes against children. Tulsa County goes as far as to designate "Crimes Against Children" as one of the divisions of the Tulsa County District Attorney's office, which partners with the juvenile affairs division to ensure that children within the county are protected to the fullest legally permissible extent. Units dedicated to "crimes against children" are certainly far from rare within the United States, and it is telling that the two largest counties in Oklahoma, Oklahoma County and Tulsa County, both have divisions or units dedicated solely to investigating and prosecuting crimes against children. Analysis of the 85% Rule, lewd molestation, and the precedent set by *Detar* all clearly demonstrate Oklahoma's zero-tolerance approach towards sexual crimes against children.

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102. *Id.* ¶ 6, 489 P.3d at 73; *Id.* ¶ 3, 489 P.3d at 77 (Rowland, V.P.J., concurring in part/dissenting in part).

103. *Id.* ¶ 5, 489 P.3d at 77. (Rowland V.P.J., concurring in part/dissenting in part); *Id.* ¶ 7, 489 P.3d at 77 (Lewis J., concurring in part/dissenting in part).

104. *See* Barnard v. State, 2012 OK CR 15, ¶ 1, 290 P.3d 759, 761.; *see also Detar*, ¶ 1, 489 P.3d at 72.

Revisiting Part II's discussion of the historical approach to statutory interpretation, it is not uncommon for judges to be in the same position as Judge Kuehn with having to apply ambiguous statutes to a sensitive topic.[105] In keeping with the "common-law tradition of making law through judicial opinions," Judge Kuehn "[reasoned] by example, applying general 'principles of equity, natural justice, and . . . public policy' to the specific circumstances before the court."[106]

This case hinged on the fact that the statute Detar was charged with was entirely void of the term "lewd molestation," leaving Judge Kuehn with the responsibility to remain as true to the legislative intent as she believed it to be, just as what was expected of her as a District Judge in *Barnard*.[107] As her analysis stated, "the fact remains that all proscribed conduct involving children appears in a single section of law . . . without any clear attempt to differentiate in terms of severity of punishment between, say, actions and words."[108] Recall that Judge Rowland dissented to this approach, stating, "The problem with this reading of that passage is that when the Legislature intends for the 85% Rule to cover all crimes in a given statutory section, it does so clearly and explicitly."[109] While Judge Rowland's assertion certainly has merit, which he uses several Oklahoma criminal statutes to demonstrate, he did not address the idea that the vagueness of Section 1123 was the Legislature's attempt to allow for judicial discretion in sentencing sex crimes against a minor.[110] Detar's contentions were entirely void of issues with the vague nature of the statute itself or the Legislature's lack of distinction for punishment purposes, but instead merely objected to the fact that the trial court applied the 85% Rule under the "lewd molestation" section when his behavior did not fit within his own perception of what "lewd molestation" is.[111]

While Judge Kuehn recognized that "it might make sense to

105. *See generally Detar*, 2021 OK CR 9, 489 P.3d 70.

106. VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, GOALS OF STATUTORY INTERPRETATION: A HISTORICAL OVERVIEW 4 (2018); For an example of courts utilizing these theories, see Anderson v. State, 2006 OK CR 9, ¶ 11, 130 P.3d 273, 278.

107. *See Barnard*, 2012 OK CR 15, 290 P.3d 759.

108. *Detar*. ¶ 7, 489 P.3d at 74.

109. *Id.* ¶ 3, 489 P.3d at 76 (Rowland, V.P.J., concurring in part/dissenting in part).

110. *See id.* (Rowland, V.P.J., concurring in part/dissenting in part).

111. *See id.* ¶¶ 3, 5, 489 P.3d at 73; *see also* OKLA. STAT. tit. 21, § 13.1 (West 2011 & Supp. 2020).

distinguish, for punishment purposes, between (1) lewdly touching a minor, (2) proposing lewd acts to a minor, and (3) merely looking at a minor in a lewd fashion," she noted there was no differentiation from the Legislature for sentencing in Detar's case.[112] This lack of differentiation is furthered by the phrase "sexual battery" attached to the end, which appears to be all-encompassing of the behaviors listed therein.[113] With this lack of differentiation, the Court sought "to find and give effect to the intention of the Legislature."[114] The treatment of perpetrators of similar activity in other cited cases led Judge Kuehn to believe that what the Legislature intended with the broad language of the statute was for crimes, such as Detar's sexually explicit messages to the eleven-year-old victim, to be punished under the 85% Rule.[115]

The 85% Rule Instruction and Lewd Molestation

Statutes on minimum sentencing are common throughout the United States, particularly with crimes pertaining to violence, sexual abuse or exploitation, or adverse treatment of children.[116] In *United States v. Dobrowolski*, the Sixth Circuit Court of Appeals evaluated the constitutionality of minimum sentencing in a situation with similar facts.[117] The analysis in *Dobrowolski* similarly focused on Congressional intent and established that "Congress intended to impose lengthy mandatory-minimum sentences in cases such as Dobrowolski's, specifically because the attempted sexual enticement of a minor is a very serious crime, regardless of whether there is an actual minor who is victimized."[118] This quote on Congressional intent directly relates to Detar's argument and the overarching treatment of sexual crimes against children.[119] The *Dobrowolski* Court quoted the House Conference Report discussing legislation on minimum sentences:

112. *Detar*, ¶ 7, 489 P.3d at 74.
113. OKLA. STAT. tit. 21 § 1123(A)(1) (West 2011 & Supp. 2020).
114. *Detar*, ¶ 4, 489 P.3d at 73 (citing Gerhart v. State, 2015 OK CR 12, ¶ 14, 360 P.3d 1194, 1198).
115. *Id.* at ¶¶ 6-8, 489 P.3d at 73-74.
116. *Cf.* Anderson v. State, 2006 OK CR 6, ¶¶ 11, 17, 22, 130 P.3d 273, 278-82 (explaining that Oklahoma is a jury-sentencing state).
117. United States v. Dobrowolski, 406 F. App'x 11, 13 (6th Cir. 2010).
118. *Id.*
119. *See Detar*, ¶¶ 7-8, 489 P.3d at 74.

> The increased mandatory minimum sentences are responsive to real problems of excessive leniency in sentencing under existing law. For example, the offenses under chapter 117 of title 18, United States Code, apply in sexual abuse cases involving interstate movement of persons or use of interstate instrumentalities, such as luring of child victims through the Internet. Courts all too frequently impose sentences more lenient than those prescribed by the sentencing guidelines in cases under chapter 117, particularly in situations where an undercover agent rather than a child was the object of the enticement. Yet the offender's conduct in such a case reflects a real attempt to engage in sexual abuse of a child, and the fact that the target of the effort turned out to be an undercover officer has no bearing on the culpability of the offender, or on the danger he presents to children if not adequately restrained and deterred by criminal punishment.[120]

Detar's argument centered on the fact that he did not physically touch the minor victim.[121] His admission to sending the messages to the minor victim (and later to who he believed was the minor child) through text message and Facebook negated this lack of physical touch, however, and situated his case alongside what, for example, Congress intended to prevent by increasing minimum sentences of persons charged with sexual abuse, particularly "luring of child victims through the Internet."[122] Further, courts across the nation have consistently held that an individual does not have to actually communicate with a child to be convicted of unlawfully using technology to solicit from a child if the perpetrator did attempt to solicit from who they believed was a child.[123]

State statutes across the nation are divided in their approach to the concept of "lewd molestation."[124] For example, the State of Florida specifically differentiates between "lewd acts" and "lewd proposals," and defines "lewd molestation," in part, as "intentionally touch[ing] in a lewd

120. *Dobrowolski*, 406 F. App'x at 13 (citing H.R. REP. NO. 108–66, at 51 (2003)).
121. *See Detar*, ¶¶ 2, 5-6, 489 P.3d at 73.
122. *Dobrowolski*, 406 F. App'x at 13 (citing H.R. REP. NO. 108–66, at 51 (2003)).
123. Bolton v. State, 310 Ga. App. 801, ¶ 7, 714 S.E.2d 377, 379; Barnard v. State, 2012 OK CR 15, ¶ 12, 290 P.3d 759, 763-64.
124. Randall B. Carnahan, *An Examination of Wyoming's Indecent Liberties Statute and Proposals for Reform*, 2 WYO. L. REV. 529, 558-60 (2002).

or lascivious manner"[125] as Detar believed the definition to be in his case. Utah has a similar definition that specifically mentions "touching."[126] In 2019 the Children's Bureau of the U.S. Department of Health and Human Services (DHS) evaluated each state's treatment of child abuse and neglect through their individual statutes.[127] The report noted that, "Some states refer in general terms to sexual abuse, while others specify various acts as sexual abuse" and "[s]exual exploitation is an element of the definition of sexual abuse in most jurisdictions."[128] Further, the report notably shows the word "molestation" in the language of Alabama, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Louisiana, Maryland, Mississippi, New Hampshire, South Dakota, Tennessee, Utah, and Vermont statutes.[129] Tennessee in particular takes a similar approach to Oklahoma by leaving the term "molestation" open to apply generally to any lewd conduct towards a child.[130] California makes it a crime to "annoy or molest any child under 18 years of age," but does not define what it means to "molest."[131] Georgia defines molestation as "any immoral or indecent act to or in the presence of or with any child under the age of 16," again, providing a broad spectrum of acts that the term may apply to.[132] Although there are some states, like Louisiana, that break out the dictionary and apply what Detar thought to be the definition of "molestation" to their ambiguous statutory language, courts are not obligated to do so and many elect not to.[133] Oklahoma is clearly not in the minority in electing not to specifically define "molestation" within its statutory language.

With the surge of sex crimes that stem from adults preying on minor victims through online platforms, state legislatures have been charged with the task of adapting their child sex abuse laws in order to keep up with the impact of technological advances.[134] While each state has opted to create additional laws to tackle this problem, many states continue to use their

125. Drawdy v. State, 98 So. 3d 165, 171 (Fla. Dist. Ct. App. 2012) (quoting Fla. Stat. § 800.04(5)).

126. CHILDREN'S BUREAU, DEFINITIONS OF CHILD ABUSE AND NEGLECT 86 (2019), https://www.childwelfare.gov/pubpdfs/define.pdf.

127. *See id.*

128. *Id.* at 3.

129. *Id.*

130. Sissom v. State, 360 S.W.2d 227, 228 (Tenn. 1962).

131. CAL. PENAL CODE § 647.6 (West 2019).

132. GA. CODE ANN. § 16-6-4 (2021).

133. *See* P.D. v. S.W.L., 2007-2534, p. 6 (La. App. 1 Cir. 7/21/08), 993 So. 2d 240, 244.

134. *See* Plasencia, *supra* note 2.

current child sex abuse laws to convict adult predators within this technological age.[135] Okla. Stat. tit. 21, § 1040.13a, titled "Facilitating, encouraging, offering or soliciting sexual conduct or engaging in sexual communication with a minor or person believed to be a minor" specifically addresses these technological advances.[136] While Detar's acts could have been situated within the statutory language of Section 1040.13(a), which might have excluded the 85% Rule jury instruction as an option, the trial court elected not to do so.[137] It is clear that Tulsa County felt that Section 1123 was more applicable to Detar's situation and he was tried, convicted, and sentenced accordingly.[138] The choice of Section 1123 in *Detar* demonstrates Oklahoma authorities' willingness to apply strict sentences to adults that prey on minor victims, particularly when statutes imposing less-strict punishments were readily available and applicable.

Precedent for Convicting Sexual Predators in Oklahoma

As stated above, the State of Oklahoma has several institutions in place to safeguard children from sexual abuse and other predatory behavior from adults. While *Detar* was not the first case where an Oklahoma court gave the 85% Rule jury instruction to the charge of "Making Lewd or Indecent Proposals to a Child in violation of 21 O.S. § 1123(A)(1),"[139] Detar properly objected to the instruction and on appeal the Court found that the trial court's instruction was not error.[140] Tulsa authorities' choice in charging Detar in violation of Section 1123 instead of other applicable statutes was strategic and opened up the opportunity for application of the 85% Rule jury instruction.[141] While both the majority and dissent in *Detar* identify a lack of clarity in the statute, the holding, which has received no negative treatment at the time of this writing, clearly reflects Oklahoma's tendency to err on the side of strict punishment for adults that commit any kind of sexual abuse of a minor victim.[142] The holding in *Detar* strengthens the statutory interpretations used in *Barnard*

135. *See id.*
136. OKLA. STAT. tit. 21, § 1040.13a (West 2011 & Supp. 2020).
137. Detar v. State, 2021 OK CR 9, ¶ 9, 489 P.3d 70, 74; OKLA. STAT. tit. 21, § 1040.13a (West 2011 & Supp. 2021).
138. *Id.*
139. Barnard v. State, 2012 OK CR 15, ¶ 1, 290 P.3d 759, 761-62.
140. *Detar*, ¶ 1, 489 P.3d at 73.
141. *See id.*
142. *See id.*

and *Heard* by demonstrating that the intent of the Legislature was to enable Oklahoma courts to apply strict punishment to those who commit the array of sexual crimes against children through the ambiguity of the statute, not inhibit them.[143]

The Court's finding that the instruction was not in error sets precedent for future cases involving sexual abuse and other adult predatory behaviors, while simultaneously demonstrating just how far the state of Oklahoma is willing to go, both through its Legislature and courts, to protect children within its borders.[144] According to Oklahoma law, "[t]he quantum of proof for the elements of a crime defined by state statute is purely a question of state criminal law, a question to be resolved with binding precedent only by [the Court of Criminal Appeals]."[145] In *Detar,* the Court of Criminal Appeals made the determination that the historical use of lewd molestation to "refer generically to crimes against children listed in Section 1123" was not contrary to the plain language of the statute.[146] In doing so, the Court in *Detar* properly used its authority and discretion to establish that the "quantum of proof for the elements" of lewd molestation is defined by any lewd act toward a child, and as a result Oklahoma courts are bound by this decision until an act by the Legislature or the Court of Criminal Appeals determines otherwise.[147] While Detar argued that Judge Kuehn's analysis hinges on merely a footnote, one can conclude that the Court's analysis is part of a national approach to sexual crimes against children in applying harsh punishments to perpetrators, particularly when legislatures make these punishments readily available and generally applicable.[148]

CONCLUSION

In *Detar*, the Court concluded that the trial court's assessment of the appellant's charges was proper and in accordance with the legislative intent of the relevant statutes.[149] In reaching this conclusion, the Court correctly applied the applicable Oklahoma statutes and conducted

143. *See Barnard*, 2012 OK CR 15, 290 P.3d 759; *see also* Heard v. State, 2009 OK CR 2, 201 P.3d 183.
144. *Detar*, ¶ 11, 489 P.3d at 75.
145. State v. Tolle, 1997 OK CR 52, ¶5, 945 P.2d 503, 504-05.
146. *Detar*, ¶ 6, 489 P.3d at 74.
147. *See id.*; *Tolle,* ¶ 5, 945 P.2d at 504-05.
148. *Detar*, ¶ 5, 489 P.3d at 73.
149. *Id.* ¶ 16, 489 P.3d at 74.

statutory interpretation in accordance with the local and national discussions on sexual crimes against children.[150] The Court's conclusion was based on Detar's actions of intentionally soliciting sexual intercourse from a person whom he believed to be a minor under the age of sixteen, and whom he proceeded to meet for unlawful sexual activity at a date, time, and location of his choosing.[151]

While the Court's final decision may have stirred criticism in the discussion of statutory interpretation, it left no room for ambiguity on just how far the State of Oklahoma is willing to go to safeguard children from sexual abuse and predatory behavior by adults. This decision empowered the Oklahoma entities that are charged with the responsibility to protect children to perform their duties freely and with full confidence that their acts are protected by Oklahoma courts, as what appears to be intended by the Oklahoma Legislature. Tulsa County's treatment of the offender in *Detar* was not uncommon in the grand scheme of the national approach to sexual crimes against children and as technological advances continue to bring an increase in challenges for the entities charged with safeguarding children, the scope of how far states like Oklahoma are willing to go to protect children will continue to broaden.[152]

150. *Id.*
151. *Id.*
152. *See* Mercedes, *supra* note 2.