



**ORIGINAL**

**IN THE SUPREME COURT OF THE STATE OF OKLAHOMA**

**Supreme Court Case No. 119908 (Companion with Case No. 119907)**

(oc)

**OKLAHOMA DEPARTMENT OF CORRECTIONS,**

**Petitioner/Appellant,**

**FILED  
SUPREME COURT  
STATE OF OKLAHOMA**

**v.**

**OCT 30 2023**

**CINDY BYRD,**

**JOHN D. HADDEN  
CLERK**

**in her official capacity as State Auditor and Inspector of the State of Oklahoma;  
BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF  
TULSA, OKLAHOMA; and TULSA COUNTY CRIMINAL JUSTICE AUTHORITY,**

**Respondents/Appellees.**

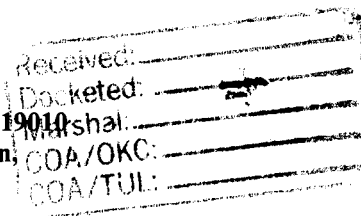
**TULSA COUNTY RESPONDENTS/APPELLEES' PETITION FOR REHEARING**

**Opinion by the Honorable Dustin P. Rowe, Vice-Chief Justice – Filed October 10, 2023  
Appeal from Okla. Cty Case No. CV-2020-1476  
Honorable Don Andrews, Judge**

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**October 30, 2023**

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I.  
THE LEGISLATURE REMEDIED AN UNCONSTITUTIONAL  
REIMBURSEMENT CAP BY DIRECTING THE STATE AUDITOR  
TO DETERMINE THE "ACTUAL DAILY COST," A DEFINED TERM

As interpreted by this Court for the past one hundred years (*see* Section III, p. 10 below), Article 21 of the Oklahoma Constitution<sup>1</sup> erects an iron door from floor to ceiling between state institutions and county assets. It then locks that door and prohibits the state from having access to the county's property. The per diem reimbursement cap (\$27 per prisoner per day) in 57 O.S. § 38 transformed Article 21's closed iron door into a Dutch door, opened the top half, and allowed the state to reach in and take from the county's treasury anything above the \$27 cap to house its state prisoners in county jail. The Attorney General, the Oklahoma County District Court and the Court of Civil Appeals found § 38's reimbursement cap to be an unconstitutional incursion by the state into county resources.<sup>2</sup> This Court denied certiorari review.<sup>3</sup> The Court's Opinion does not expressly take issue with any of this existing precedent.

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<sup>1</sup> "Educational, reformatory, and *penal institutions* and those for the benefit of the insane, blind, deaf, and mute, and such other institutions as the public good may require, *shall be established and supported by the State* in such manner as may be prescribed by law." Okla. Const. art. 21, § 1 (emphasis added).

<sup>2</sup> *See* 2011 OK AG 8, ¶ 26 (the state "must pay to counties an amount not exceeding a per diem of twenty-seven dollars (\$27.00), *unless that per diem amount is not sufficient to fully reimburse a county's cost of housing a prisoner*. In such instances, the requirement in Section 1 of Article XXI of the Oklahoma Constitution that the state support penal institutions would require the State to fully reimburse the county.") (Emphasis in original); 2017 OK AG 3, ¶ 5 ("The Oklahoma Constitution ... requires the State alone to support state prisons, and *no* county funding shall be used") (emphasis added). *Board of Co. Comm'rs of Bryan County v. Dept. of Corrections ("Bryan County")*, 2015 OK CIV APP 86, ¶ 35, 362 P.3d 241, 249:

Statutory duties, however, cannot overcome the requirements of the Oklahoma Constitution or require unconstitutional actions. If, as was previously held by the Supreme Court, Article 21, Section 1, forbids any use of county funds to support the state penal system, we cannot interpret the various statutes detailing the duties of a county or sheriff to inmates as requiring an unconstitutional result. We therefore find that these statutes do not create a continued county funding responsibility after the date of judgment and sentence. ... Requiring counties to devote any of their own funding to support the state penal system thus violates Article 21.

*See also Board of County Comm'rs of the County of Bryan v. Oklahoma Dept. of Corrections*, Order Granting Declaratory Judgment, ¶¶10-13, filed Sept. 25, 2013, Oklahoma County Case No. CV-2012-1272 (quoted by *Bryan County* at 2015 OK CIV APP 86, ¶ 4, 362 P.3d 241, 243-44).

<sup>3</sup> *Cert. denied*, Oklahoma Supreme Court Case No. 112,277 (Oct. 5, 2015).

Oklahoma's Legislature responded to the unconstitutionality of § 38's reimbursement cap by amending the statute in 2017 to allow counties to apply for daily costs in excess of the \$27 cap; if the Department of Corrections ("DOC") "rejects [a] county's actual daily cost application, then the *actual daily cost* reimbursement shall be determined by the State Auditor and shall be imposed beginning the next fiscal year." 2017 Okla. Sess. Laws ch. 260, § 2 (emphasis added). The Legislature had already defined "actual daily cost" three years earlier in 57 O.S. § 561.1(E) *regarding per prisoner per day calculations for housing state prisoners*, and had specifically used the phrase "actual daily cost" in that subsection since 2006.

*This legislative definition of "actual daily cost" applies as a matter of law to the Legislature's use of the same phrase three years later in its amendment to § 38.* In 2014, the Legislature defined the phrases "budgeted average daily cost" and "actual average daily cost" in § 561.1(E) to "include *all direct and indirect costs* incurred by the [DOC];" and in that subsection's penultimate sentence, the legislature abbreviates those phrases as "budgeted daily cost" and "*actual daily cost.*" 2014 Okla. Sess. Laws ch. 84, § 1 (emphasis added). The *budgeted* daily cost per inmate is determined "[a]t the beginning of the fiscal year;" whereas, the *actual* daily cost per inmate is determined "[a]fter the close of each fiscal year." *Id.*

It costs the same amount for a county to house a state prisoner as it does for a county to house a prisoner serving time in the county jail for a misdemeanor. The two costs are identical, and whatever direct and indirect costs are incurred to house the one, the same costs are also incurred to house the other. The county's expenditure of local taxpayer funds to secure *state prisoners* from escape, protect them from harm, keep them alive and provide for their every need inures to the benefit of the *state penal institutions*, not to the county.

The *statutory* use of a *county* jail to house *state* prisoners sentenced to custody in the *state* penal system is problematic in light of this Court’s century-long precedent interpreting Article 21 of the *Constitution*. Article 21 prohibits direct or indirect support, in whole or in part, of an Article 21 institution with county resources. When they were originally enacted, 57 O.S. §§ 37 and 38 were only to be used in an emergency: when “all [state] correctional facilities reach maximum capacity.” 1981 Okla. Sess. Laws ch. 1291, § 2. Arguably, requiring the state to fully reimburse counties for the use of their jails satisfies Article 21. But anything less than *full reimbursement* for housing the state’s prisoners tips the matter into unconstitutional waters.

Jails are already difficult to operate and a drain on county taxpayers. No branch of government, but only a vote of the people, can relieve the state of its birthright obligation to establish and support its own penal institutions. Ours is a “government of laws, and not of men.” *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Were this Court to sever Article 21’s protection since statehood of the local fisc, an unseemly license would then exist for *all state institutions* to outsource their unwanted costs to local communities in every possible way.

In the exercise of its jurisdiction to interpret a statute, the Court’s Opinion lifts the phrase “actual daily cost” out of its constitutional, statutory and carceral accounting context, hones in on the word, “actual,” and with the aid of a dictionary, states that “actual” means “existing in fact or reality;” and following a less than natural progression of ideas, the Court’s Opinion declares that such daily costs mean costs “that are directly attributable to the cost of housing a DOC inmate, *as opposed to costs incurred* by a county regardless of whether it houses a DOC inmate.” *Oklahoma Dept. of Corrections v. Byrd*, 2023 OK 97, ¶ 28. But there has never been a day when the Tulsa County Jail has not been bursting at the seams with DOC inmates. The Court’s analysis, intended to be grounded “in fact or reality,” requires by its very

terms a hypothetical: Suppose there were no state prisoners awaiting transfer to the DOC in the Tulsa County Jail .... *but that has never been the case*. The State Auditor’s § 38 determination was based on Tulsa County’s FY2019 financial records, which she reviewed in 2020; she did not review estimated or budgeted costs, but rather actual expenses incurred.<sup>4</sup>

Respondents/Appellees Board of County Commissioners of the County of Tulsa, Oklahoma (“BOCC”), and the Tulsa County Criminal Justice Authority (“TCCJA”) (collectively, “Tulsa County”), respectfully suggest the Court’s Opinion needs corrected and clarified. Specifically, Tulsa County requests the Court withdraw its Opinion, and substitute an Opinion that finds that the Legislature’s definition of “actual daily cost” in 57 O.S. § 561.1(E) controls the interpretation to be given § 38’s use of the same phrase as a matter of law; that the State Auditor’s § 38 determination is consistent with the statute’s meaning as so construed; that because § 38 as interpreted on Rehearing and as applied by the State Auditor provides *full reimbursement* to the county, there is no violation of Article 21; and that the stay entered in companion case No. 119,907 be lifted and the Supreme Court direct the Writ of Mandamus granted by the District Court issue without delay.

Tulsa County petitions this Court for rehearing pursuant to Okla. Sup. Ct. R. 1.13 and 1.182, and submits this brief in support.

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<sup>4</sup> There was never a day in fiscal year 2019 that Tulsa County did not house state prisoners. It is undisputed that *Tulsa County housed an average of seventy-seven (77) state prisoners daily in FY2019*. See Tulsa County Exhibit 26 to Motions for Summary Judgment, *filed* April 6, 2021 (Vol. 3 of 3) (daily count of DOC inmates “Lex Ready”)[ROA 15]; and DOC’s Exhibit P to Motion for Summary Judgment, *filed* March 4, 2021 (State Auditor’s Tulsa County Incarceration Rate Calculations, Average Daily Population, DOC inmates). The State Auditor also rightfully reduced by almost ten percent (10%) the total operating costs of the Tulsa County Jail by excluding costs unrelated to housing prisoners. See e.g., Exhibit K, p. 13, attached to DOC’s Motion for Summary Judgment, *filed* March 4, 2021 (excluding \$3,603,271.63 in jail operating costs having nothing to do with housing prisoners, specifically, the costs for court guards to transport prisoners and secure them from escape while in transport and in court, the costs of extraditions, and the costs of out-of-county travel)[ROA 10]. The State Auditor also excluded an additional half million or so of the jail’s operating costs as either not applicable to housing prisoners or unverified. See *Id.*, Exhibit N, p.2.



II.  
“ACTUAL DAILY COST” IS A DEFINED TERM

The Court’s Opinion completely ignores the Legislature’s pre-existing use of the phrase “*actual daily cost*” in 57 O.S. § 561.1(E) dealing with carceral accounting costs, and the Legislature’s 2014 definition of that phrase to mean “*all direct and indirect costs.*”<sup>5</sup> See 2014 Okla. Sess. Laws ch. 84, § 1.

When the Legislature amended 57 O.S. § 38 in 2017 to have the State Auditor determine the actual daily cost reimbursement, it is reasonable to assume the Legislature intended its understanding of both direct and indirect costs in 57 O.S. § 561.1(E) to carry over to § 38. The Legislature had defined “actual daily cost” per inmate in Section 561.1(E) to include “all direct and indirect costs” which, in accordance with 25 O.S. § 2, is applicable to Section 38 and is “binding on the courts.” *Wall v. Marouk*, 2013 OK 36, ¶ 12, 302 P.3d 775, 782. It is an integral part of the law in Oklahoma that “[w]henver the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.” 25 O.S. § 2; *Wall, supra*, at ¶ 12, 302 P.3d at 782 (recognizing definition of term contained in statute codified in Title 63 as applicable to same term when used in statute codified in Title 12).

To properly evaluate a private prison contractor’s “daily rate,” the DOC is required to calculate its costs per prisoner per day based on facility security level (maximum, medium, minimum, community). See 57 O.S. § 561.1(E). In January of every year, the DOC is required to “present to the State Board of Corrections at its January meeting comparative data on *budgeted daily cost versus actual daily cost* ....” 57 O.S. § 561.1(E) (emphasis added); Exhibit

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<sup>5</sup> This was before the District Court on Motion for Summary Judgment, but inadvertently overlooked by the Court on certiorari review. See Tulsa County’s Motion for Summary Judgment, pp. 17-18, filed April 30, 2021, and undisputed material facts nos. 15-17 and exhibits in support. The Court’s Opinion on this point is silent.

19, p. 30 of 32, to Tulsa County's Exhibits in Support of its Motion for Summary Judgment, filed April 30, 2021 (Vol. 2 of 3) (DOC's FY2020 actual daily cost by security level as adopted by the Board of Corrections)[ROA 14].

In 2014, the Legislature amended 57 O.S. § 561.1(E) to clarify that both the budgeted and the actual average daily costs per inmate "***shall include all direct and indirect costs*** incurred by the [DOC]."

At the beginning of each fiscal year, the Department of Corrections shall determine the budgeted average daily cost per inmate. The budgeted average daily cost per inmate shall include all direct and indirect costs incurred by the Department. There shall be a separate computation of budgeted average daily cost for maximum security, medium security, minimum security, and community facilities. This information shall be presented to the State Board of Corrections for informational purposes only. After the close of each fiscal year, the Department shall determine the actual average daily cost per inmate for the operational costs at each major category of correctional facility. The actual average daily cost per inmate shall include all direct and indirect costs incurred by the Department. There shall be a separate computation of the average daily rate for maximum security, medium security, minimum security, and community facilities. The Department shall present to the State Board of Corrections at its January meeting comparative data on ***budgeted daily cost versus actual daily cost***, and, after appropriate review and analysis, the Board shall adopt as a final action of the Board an average daily cost per inmate by facility category for the immediately preceding fiscal year.

2014 Okla. Sess. Laws ch. 84, § 1 (bold italics emphasis added, omitted text in ~~strikethrough~~, new text in underline).

Lest there be any confusion, actual daily cost and actual "average" daily cost are the same thing. The former is simply an abbreviated version of the latter. Section 561.1(E) requires data establishing the actual daily cost to be presented to the State Board of Corrections each January. By the plain language of the statute, this data is that which is compiled during the required end of fiscal year determination of the actual average daily cost. In 57 O.S. § 561.1(E) the Legislature used both expressions, while later in 57 O.S. § 38 the Legislature used

only the abbreviated version, “actual daily cost.” Both total the actual costs after they are incurred and divide the total of those costs by the number of inmate days whose incarceration generated the cost in order to derive an average cost per inmate during a subject time period.

Following pronouncements about the \$27 reimbursement cap being unconstitutional (*see fn.2 above*), and the filing of numerous lawsuits challenging the DOC’s continued practice of using an unconstitutional reimbursement cap, the Legislature amended § 38 to conform to Article 21. “When ascertaining legislative intent the Court must presume that when adopting the amendment, the Legislature had knowledge of the law as it previously existed and had in mind the judicial construction which had been placed on that law. *Prettyman v. Halliburton Co.*, 1992 OK 63, ¶ 21, 841 P.2d 573 (citations omitted).

The old law should be considered, the evils arising under it, and the remedy provided by the amendment, and that construction of the amended act should be adopted which will best repress the evils and advance the remedy.

*Poafpybitty v. Skelly Oil Co.*, 1964 OK 162, ¶ 14, 394 P.2d 515. By *including all direct and indirect costs* of housing incurred, and *excluding no housing costs*, the amendment as so interpreted solves the unconstitutional reimbursement problem. The county receives full reimbursement, and the state penal institutions stand on their own, without *any* county support.

Full reimbursement carries out expressed legislative intent, treats everyone fairly and adheres to Article 21’s requirement that the state support its penal system. Former DOC Director, Justin Jones, testified that Jail time is more like maximum security than other DOC security levels. *See* Affidavit of Justin Jones, ¶¶ 5-6, Ex. 3 to Tulsa County’s Exs in Support of its Motion for Summary Judgment, April 30, 2021 (Vol. 1 of 3)[ROA 13]. ***DOC’s FY2020 daily cost to house maximum-security prisoners in its own facilities was \$108.17 per prisoner per day.*** *Id.*, Ex. 19, p. 30 (Vol. 2 of 3)[ROA 14]. ***DOC’s FY2020 daily cost to house***

*community security prisoners (historically, DOC's lowest cost security level) was \$64.42 per prisoner per day. Id.* The next year, FY2021, the State Auditor's § 38 rate determination would apply *\$63.42 per prisoner per day* to state prisoners housed in the Tulsa County Jail, an amount which is still less than it costs the DOC to house state prisoners.

The Court's Opinion also ignores that Respondent *BOCC is required by statute to pay the sheriff his "reasonable charge" to house state prisoners. See 57 O.S. § 60* ("Whenever a prisoner is committed for crime, or in any suit in behalf of the state, the county board shall allow the sheriff his reasonable charge for supplying such prisoners."). As noted by the Court in *Board of County Comm'rs of County of Bryan v. Oklahoma Dept. of Corrections*, 2015 OK CIV APP 86, ¶¶ 28-29, 362 P.3d 241, 248:

In setting a *maximum* ceiling for reimbursement, the Legislature inherently contemplated that a county may exceed this amount in actual costs. Otherwise, the ceiling would be superfluous. The Legislature will not be presumed to have done a vain and useless act in the promulgation of a statute. *In re Sup. Ct. Adjudication*, 1979 OK 103, ¶ 6, 597 P.2d 1208. Thus, the Legislature either intended for counties to make up any excess cost from the counties' own funds, or to require them to reduce the cost of housing a state inmate to less than \$27 per day.

A county, however, does not have complete control of the cost of housing state inmates in county facilities [citing 57 O.S. § 60].

The BOCC must pay the sheriff's "reasonable charge" for housing state prisoners; whereas, the Court's Opinion limits the BOCC's state reimbursement to only *some* of the sheriff's costs.<sup>6</sup>

The Court's Opinion also fails to acknowledge or take into account the reality that counties are not required to operate a jail.

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<sup>6</sup> The Court's Opinion misstates that Oklahoma law requires reimbursement of the county at \$27.00 per day. *DOC v. Byrd*, at ¶¶ 1, 34. The statute actually states that the DOC "shall reimburse any county which is required to retain an inmate pursuant to ... Section 37 of this title *in an amount not to exceed* Twenty-seven Dollars (\$27.00) per day." 57 O.S. 2017, § 38 (emphasis added). Interestingly, the opposite approach is taken in § 37 regarding contracts between a county and the DOC to house state prisoners: such contracts "*shall in no event be less than* the per diem rate provided for in Section 38 of this title." 57 O.S. 2017, § 37(A)(2) (emphasis added).

Every county, by authority of the board of county commissioners and at the expense of the county, shall have a jail *or access to a jail in another county* for the safekeeping of prisoners lawfully committed.

*A county may enter into contracts with private prison contractors* to provide and operate jail facilities for the county.

57 O.S. § 41.

The Court's Opinion wholly and completely fails to address the dozens of counties in Oklahoma who are, or may choose to become, under contract with private prison contractors to operate the county's jail. Counties can also house their prisoners in another county's jail. Sections 37 and 38 are statutes of general application throughout the state, and the Court's Opinion assumes that every county will operate its own jail; that simply is not the law, nor the state of county jails in Oklahoma. Many counties simply pay their private prison contractor a "per diem" invoice, the same way DOC pays its private prison contractors. *Full reimbursement* would pay that invoice; whereas, the Court's Opinion offers no direction at all.

In 57 O.S. 2017, § 37(F), the "actual daily cost" reimbursement in § 38 is referred to as "the per diem rate," clearly indicating an average daily rate applicable prospectively beginning the next fiscal year. The legislative intent underlying the per diem rate in 57 O.S. 2017, § 38 is expressed in the statute itself, not only with the Legislature's defined term, "actual daily cost," but by § 38's express directive that the per diem rate be used "to defray expenses of equipping and maintaining the jail and payment of personnel." Any interpretation of "actual daily cost" that leaves out *any* of these expenses or *any* "direct or indirect costs" violates the expressed legislative intent. The state cannot, by statute, stow away its prisoners in the county jail. Article 21 requires the state to pay its own freight.<sup>7</sup>

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<sup>7</sup> The state cannot overcome its Article 21 obligation with mere statutes, for example, by requiring "the sheriff of each county to provide bed clothing, washing, board and medical care when required, and all necessities for the comfort and welfare of prisoners as specified by the standards promulgated [by the state]," 57 O.S. § 52, requiring

### III.

#### ARTICLE 21'S CENTURY-LONG PROTECTION OF THE LOCAL FISC: LOGAN COUNTY, MORRIS, STEPHENS COUNTY, BATTLES, MALIBIE AND JORDAN

Because Article 21 of the Constitution expressly requires state penal institutions be established and supported by the state, any statute using county resources to assist state penal institutions must be read in light of Article 21. *See* fn.1 above. The meaning of Article 21 is settled law in Oklahoma. This provision of our state's constitution was first interpreted in *Board of County Comm'rs of Logan County v. State*, 1927 OK 40, 254 P. 710, which interpretation has consistently been repeated by the Oklahoma Supreme Court.

In *Logan County*, the state filed suit against the board of county commissioners seeking to enforce the "Lunacy Law of 1917," which law "relat[ed] to the admission of the insane to state hospitals, and provid[ed] for the charges for the care and maintenance of such patients, to be paid, in certain instances, by the county in which such patients may reside." *Id.* at ¶ 1, 254 P. at 711. The state sought county money to pay for "costs and charges incurred by the confinement [of 97 persons from Logan County] in the Central State Hospital for the Insane at Norman." *Id.* at ¶ 3, 254 P. at 711. Article 21, of course, provides that "institutions ... for the benefit of the insane ... shall be established and supported *by the State*." (Emphasis added).

The Court in *Logan County* explained its understanding of the constitutional provision at issue:

The mandatory provisions of the Constitution of this state are that such insane hospitals shall be "established and supported by the state." . . . The Constitution, of course, does not expressly inhibit the power the Legislature has assumed to exercise, but an express inhibition is not necessary. *The affirmation of a distinct policy upon any specific point in a state Constitution implies the negation of any power in the Legislature to establish a different policy. The presumption is that the positive provisions of a Constitution are mandatory, and not merely*

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the sheriff to house *state* prisoners, 57 O.S. §§ 37, 38, and then requiring the BOCC to reimburse the sheriff his reasonable costs in doing so, 57 O.S. § 60, while refusing to reimburse the BOCC for such expenses on the ground that they would have been incurred anyway.

*directory*, and there is nothing to overcome this presumption, as to the provisions under consideration.

*Id.* at ¶ 9, 254 P. at 712 (emphasis added). After examining the underlying wisdom of placing institutions for the “restraint, confinement, medical attendance, and peculiar care and treatment” of insane persons beyond the reach of local taxpayers, the *Logan County* Court concluded:

We must conclude, therefore, that it is the duty of the state, not only to establish such hospitals for the insane, but also to support or sustain such hospitals, and to “supply them with funds for the means of continuing,” and that ***any attempt of the Legislature to require the counties of the state to support and maintain such hospitals, or any patients therein, is contrary to the intention of the Constitution, and is void.***

Some contention is made that the words “in such manner as may be prescribed by law,” at the close of article 21 of the Constitution, authorizes the enactment of the legislation under consideration. We see no merit in this contention. This phrase merely provides that the manner of supporting such institutions by the state may be prescribed by law. By no stretch of imagination can we see where it negatives the idea that such institutions are to be supported by the state. That ***support must come from the state, and the burden cannot be shifted, either directly or indirectly onto the shoulders of the counties.***

*Id.* at ¶¶ 12 & 13, 254 P. at 712 (emphasis added).

Three years later, in *St. Louis-San Francisco Ry. Co. v. Morris*, 1930 OK 247, ¶ 13, 288 P. 306, 307, the Oklahoma Supreme Court found that institutions for the treatment of tuberculosis are included within the meaning of Article 21, and held that said constitutional provision “places the burden of maintaining such institutions upon the state, and the ***Legislature is without authority to make the counties of the state liable for any portion of the expenses necessary to their maintenance.***” (Emphasis added). Consequently, the statute under consideration which sought to place said tax burden on the counties was found unconstitutional and inoperative. *Id.*

In *Chicago, R.I. & P. Ry. Co. v. Excise Bd. of Stephens County*, 1934 OK 392, ¶ 7, 34 P.2d 274, 276, the Oklahoma Supreme Court reiterated that Article 21 of the Oklahoma Constitution “prevent[s] a county from contributing *in whole or in part* to the support and maintenance of a state institution.” (Emphasis added). The statute under consideration in *Stephens County* levied an ad valorem tax to create a crippled children’s fund to pay a number of legitimate expenditures as may be authorized by proper county authorities; however, “[i]n so far as the act by implication may be said to authorize the payment of any part of the crippled children’s fund to the University Hospital, a state institution, for the care of crippled children, the same violates the provisions of article 21, *supra*, and is unconstitutional and void.” *Id.* at ¶ 10, 34 P.2d at 276. The Court in *Stephens County* ***struck down as unconstitutional that part of the statute which sought access to county funds to support a state institution***, but allowed the remainder of the statute to “be enforced as to the constitutional and valid portions thereof.” *Id.* (Emphasis added).

In *Battles v. State ex rel. Oklahoma Commission for Crippled Children*, 1951 OK 313, ¶ 9, 244 P.2d 320, 322-23, the legislature made a second run at county resources to fund the state’s University Hospital. It created a state commission to function as a claims administrator for those furnishing treatment to resident county crippled children, including children at the state’s University Hospital. Use of the commission as an intermediary protected the identity of the claimants seeking warrants from county funds; there was no way to tell which county warrants had been requested by the commission to pay claims submitted by the state’s University Hospital. *Id.* Quoting *Stephens County*, the Court in *Battles* reiterated:

Under article 21 of the Constitution, the University Hospital, a state institution maintained by the state, must be maintained at the expense of the state. ***In so far as [the statute under consideration] attempts to impose a portion of the burden of maintenance on the county, it is unconstitutional and inoperative.***



*Id.* at ¶ 8, 244 P.2d at 322 (emphasis added). The entire statute in *Battles* was deemed inoperative as no portions could be saved without causing results not contemplated by the legislature. *Id.* at ¶ 12.

In *State ex rel. Dept. of Human Services v. Malibie*, 1981 OK 18, 630 P.2d 310, the legislature made yet another run at county resources to fund a state institution providing treatment to crippled children. The Crippled Children's Act at issue in *Malibie* created a program that provided statewide services managed, controlled and administered by a state board comprised of state officers. The state argued that *it employed internal procedures to prevent it from using local tax revenue* for services rendered by a state institution or for the administration costs of the state program. *Id.* at ¶ 19, 630 P.2d at 315-16.

The *Malibie* Court rejected the state's "we won't touch it" arguments because the legislation at issue granted a state institution under Article 21 access to county resources for its ongoing support and maintenance. *Id.* at ¶¶ 26-30, 630 P.2d at 317-18. What the constitution prohibits, the statute allows; the statute, therefore, is unconstitutional.

First, even assuming that the Department, through its internal procedures, could avoid spending ad valorem taxes for services rendered in State institutions, and for administration costs, the existence of such internal procedures does not keep the statute from being unconstitutional. *Under the statutory scheme county funds may be used to support State institutions, thus, the statute violates the provisions of Article 21, Section 1*, which require that State funds, not county funds, be expended to support and maintain state institutions.

*Malibie* at ¶ 27, 630 P.2d at 317 (emphasis added). Furthermore, to the extent that the legislation allowed the Department of Human Services to account for the expenditure of county funds in a way not directly supporting a state institution, its use of county funds nevertheless *indirectly* supports the state institution and for that reason, too, the statute violated Article 21.

The legislation at issue in *State ex rel. Jordan v. City of Bethany*, 1989 OK 30, ¶ 1, 769 P.2d 164, 165, required political subdivisions to pay a fee for autopsies performed by the office of the State Medical Examiner “in an effort to establish the cause of certain enumerated unexplained deaths.” The Court in *Jordan* reasoned that because “political subdivisions are funded from ad valorem assessments, it makes little difference if the statutorily mandated contribution is classed as a ‘fee,’ service charge, or, as in *Malibie*, a required minimum appropriation. *The end result is the same: the Legislature is attempting to divert municipal and county revenues to assist in the funding, or partial funding, of state services. Such a practice is prohibited by ... the Oklahoma Constitution.*” *Id.* at ¶ 10, 769 P.2d at 166 (emphasis added).

#### IV.

#### WITHOUT EXPLANATION, THE COURT’S OPINION ABANDONS ITS CENTURY-LONG PRECEDENT TO CRAFT AN UNCONSTITUTIONAL REIMBURSEMENT LIMITATION

This Court’s longstanding history of interpreting Article 21, coupled with recent Attorneys General and lower court opinions applying such precedent to § 38, established that the \$27 reimbursement cap in § 38 violated Article 21’s prohibition on the use of county resources to directly or indirectly support the state’s penal institutions.<sup>8</sup> The cited authorities hold that the statute is, to that extent, unconstitutional.

The interpretation of “actual daily cost” put forth in the Court’s Opinion, coupled with its footnoted declaration of constitutional conformity, directly contradicts *Malibie, supra*, in

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<sup>8</sup> The Court’s Opinion falsely equates 57 O.S. § 42’s use of the word “prison” to mean the state’s penal institutions used to punish felons. *See DOC v. Byrd*, ¶ 1, n.1. The common jails in the several counties are used to house pretrial detainees and uncooperative witnesses, and to punish misdemeanor defendants. 57 O.S. § 42(4)’s provision that “[t]he common jails in the several counties ... shall be used as prisons ... [f]or the confinement of persons who *may* be sentenced to imprisonment in the state prison, until they shall be removed thereto” (emphasis added), references post-conviction felons, *pre-sentencing*. Once sentenced to incarceration in the State prison system, the sheriff is directed by 22 O.S. § 980 to deliver the prisoner to DOC at its Lexington reception center upon receipt of the Judgment and Sentence. Even if § 42 were to be interpreted as the Opinion suggests, no mere statute can overcome Article 21 of the Constitution. The tail does not wag the dog.

which this Court found that a statute that “*establishes a method for indirectly supporting State institutions*” violates Article 21. *Malibie* at ¶ 28, 630 P.2d at 317-18 (emphasis added).

This is so because the use of [local resources] to support noninstitutional and nonadministrative aspects of the State program enables the State to use more of its own funds, as well as Federal funds, to support State institutions used in the program. For this reason, we hold that the statutory mandate constitutes an indirect means of supporting and maintaining State institutions, which, as we have seen above, violates Article 21, Section 1, of the Oklahoma Constitution.

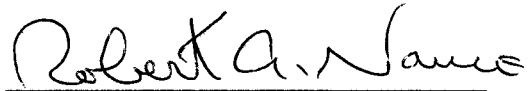
*Id.* See also *Logan County, supra*, at ¶ 13, 254 P. at 712 (Article 21’s burden to support state institutions cannot be shifted, either directly or indirectly, onto the shoulders of the counties).

V.  
CONCLUSION

Tulsa County respectfully suggests that the State Auditor’s application of the “actual daily cost” in her § 38 determination comports to the Legislature’s definition of that phrase in 57 O.S. § 561.1(E) as including “all direct and indirect costs” of housing prisoners incurred by the county; that such definition applies as a matter of law to the 2017 amendment of 57 O.S. § 38 and its use of the same phrase; and that her § 38 determination provides full reimbursement, requires the state’s penal institutions stand on their own, and satisfies both § 38 and Article 21 in doing so.

WHEREFORE, Tulsa County respectfully requests the Court withdraw its Opinion, and substitute an Opinion consistent with the arguments herein; that the COCA Opinion be vacated and the District Court’s decision modified to conform to the Supreme Court’s Opinion on Rehearing; and that the stay entered in companion case No. 119,907 be lifted and the Supreme Court direct that the Writ of Mandamus granted by the District Court issue without delay.

Respectfully submitted,



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CERTIFICATE OF SERVICE

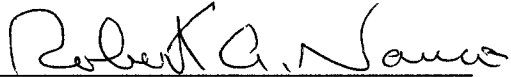
I hereby certify that on the 30th day of October, 2023, a true and correct copy of the foregoing document was emailed and deposited in the U.S. Mail with proper postage prepaid to the following:

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