



IN THE SUPREME COURT OF THE STATE OF OKLAHOMA FILED

SUPREME COURT  
STATE OF OKLAHOMA

DEC - 6 2016

MICHAEL S. RICHIE  
CLERK

OKLAHOMA ASSOCIATION OF )  
BROADCASTERS, INC., )

Plaintiff/Appellant, )

v. )

CITY OF NORMAN, NORMAN POLICE )  
DEPARTMENT, DISTRICT ATTORNEY )  
OFFICE FOR THE TWENTY FIRST JUDICIAL )  
DISTRICT, )

Defendants/Appellees. )

No. 113,973  
For Official Publication

ON CERTIORARI FROM THE COURT OF CIVIL APPEALS,  
DIVISION II

¶0 On October 30, 2014, Plaintiff filed a request under the Open Records Act, 51 O.S.2011, § 24A.8(A), for a video of an incident which resulted in a criminal defendant voluntarily appearing in district court for an arraignment hearing, being ordered to the custody of his attorney and to the Sheriff's department. Defendants denied the request. Plaintiff filed petition for declaratory judgment, injunctive relief, and mandamus. Defendants filed motions to dismiss. District Court, the Honorable Thad Balkman, presiding, granted the motion. Plaintiff appealed. The Court of Civil Appeals affirmed in part, reversed in part, and remanded the proceedings. Plaintiff petitioned for certiorari, which this Court granted and ordered additional briefs.

COURT OF CIVIL APPEALS' OPINION VACATED IN PART;  
JUDGMENT REVERSED; CAUSE REMANDED WITH INSTRUCTIONS.

David McCullough and S. Douglas Dodd, Doerner, Saunders, Daniel & Anderson, LLP, Tulsa and Norman, Oklahoma, for Appellant.

Jeff H. Bryant, Rickey J. Knighton II, Jeanne M. Snider, and Kristina L. Bell, Office of the City Attorney, Norman, Oklahoma, for Appellees City of Norman and Norman Police Department.

Greg Mashburn, Carol Price Dillingham, James B. Robertson, and Heather Darby, Office of the Cleveland County District Attorney, Norman, Oklahoma, for Appellee District Attorney Office for Twenty First Judicial District of Oklahoma.

Taylor, J.,

¶1 Section 24A.8(A) of the Open Records Act (the Act), 51 O.S.2011, § 24A.8(A)(2), required law enforcement agencies "to make available for public inspection . . . [f]acts concerning [an] arrest, including the cause of arrest and the name of the arresting officer . . . ." The questions presented to this Court are whether there was an arrest in the underlying criminal proceeding for purposes of the Act and whether the Act entitles Plaintiff to a copy of a surveillance video depicting the cause of the arrest. We answer in the affirmative.

#### I. STANDARD OF REVIEW

¶2 Although a judgment granting a motion to dismiss is subject to *de novo* review, *Estate of Hicks v. Urban East, Inc.*, 2004 OK 36, ¶ 5, 92 P.3d 88, 90, a motion to dismiss will be treated as one for summary judgment when matters outside the pleadings are presented and not excluded. 12 O.S.2011, § 2012(B). Here, Defendants presented a record in a criminal case and provided a video recording at the hearing on the motion to dismiss. The district court, rather than exclude the video, made it part of the record and ordered it to be preserved. The district court implicitly treated the motion to dismiss as one for summary judgment.

¶3 We review a summary judgment under a *de novo* standard as it presents a question of law. *Pickens v. Tulsa Metro. Ministry*, 1997 OK 152, ¶ 7, 951 P.2d 1079, 1082. If it appears that there is no substantial issue of material fact and that one party, including the non-moving party, is entitled to judgment as a matter of law,

a court shall render judgment for that party. Rules for District Courts of Oklahoma, 12 O.S.2011, ch. 2, app., r. 13(e).

## II. FACTS

¶4 On July 25, 2014, a Norman, Oklahoma restaurant's surveillance video captured an incident depicting Joe Mixon striking a female. The Norman Police Department (Department) was called to the location, investigated, and obtained and reviewed the surveillance video. On Friday, August 15, 2014, a Department detective filed an affidavit of probable cause seeking an arrest warrant for Mixon. The detective stated probable cause existed based on interviews completed by other officers, injuries sustained by the victim, and the surveillance video of the incident which he described in detail. The same day, the Cleveland County District Attorney (District Attorney) filed a criminal information, referencing the same incident number as the probable cause affidavit and alleging that Mixon committed the misdemeanor crime of Acts Resulting in Gross Injury, 21 O.S.2011, § 22, when he struck the female. On August 18, 2014, Mixon voluntarily appeared in district court to answer the charge and was arraigned. At the same time, the district court ordered Mixon to be processed by the Cleveland County Sheriff's Department and to remain in custody pending his posting a bond.

¶5 Also on August 18th, KWTW News 9, a member of the Oklahoma Association of Broadcasters (Association), requested a copy of the surveillance video from Department and District Attorney, referencing the Act, 51 O.S.2011, §§

24A.1–29. On September 3, 2014, the City Attorney for the City of Norman (City) emailed KWTN News 9 that, barring changes, such as the judge ordering the video sealed, he did “not know of a reason why [Department] would not be willing to make copies of the Mixon video available for public inspection and copying after November 1.” Without furnishing copies of the video, on September 4, 2014, Department allowed KWTN News 9 and other media to view the video. Association was not present at this viewing.

¶6 On October 30, 2014, Mixon entered an Alford Plea<sup>1</sup> to the criminal charge. The same day, Association made a request under the Act for a copy of the surveillance video from Defendants and KWTN News 9 renewed its request. District Attorney responded, informing Association that it no longer had the video as it had given the video to the victim. City told KWTN News 9 that Department had delivered a copy of the video to the City Attorney, who placed it in a litigation file.

### III. PROCEDURAL HISTORY

¶7 On November 3, 2014, Association filed a petition for declaratory judgment and writ of mandamus, in the Cleveland County District Court, seeking a copy of the video. Department and City filed a joint motion to dismiss which was later joined by District Attorney.<sup>2</sup> Defendants urged, among other things not preserved for review

---

<sup>1</sup> See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). An Alford plea is one wherein a defendant accepts a criminal penalty without admitting guilt. *Id.*

<sup>2</sup> District Attorney's Office included in his response to the petition a motion to dismiss based on its allegation that it no longer had a copy of the video, that the suit is moot since Department allowed viewing earlier, that Association had failed to name an indispensable party, and that the

in this appeal, see *Hough*, 1993 OK 112, ¶ 1, 867 P.2d at 440, that Section 24A.8(A) only requires Defendants to allow inspection, not to provide a copy of the video. Association filed a response. Defendants filed a reply additionally urging that Section 24A.8(A)(2) only provides access if a criminal defendant was arrested. The Defendants' position was that Mixon was not arrested.

¶8 On February 20, 2015, the district court held a hearing on Defendants' motion to dismiss. The district court ordered in advance that no recording of the hearing would be allowed and that the surveillance video be shown in open court at the hearing. City and Department told the district court that if it reviewed the docket for Mixon's misdemeanor case, the court would see that Mixon "voluntarily appeared to answer for the charge," no arrest warrant was issued, and there was not an arrest. The district court granted Defendants' motion to dismiss stating (1) the video does not depict an arrest or the cause of an arrest; (2) Department is not required to allow copying under the 2011 Act; (3) the Department properly returned the video to its owner; and (4) that Association does not possess a clear legal right to relief for mandamus to be granted. On April 30, 2015, the district court's journal entry ordered "that the subject surveillance video, which is now part of the court record, be preserved."

---

District Attorney's Office was an improper party. District Attorney's Office "specifically denie[d] that [the] charges 'were the result of the incident shown and recorded in the video.'" None of these issues are properly before this Court. *Hough v. Leonard*, 1993 OK 112, ¶ 1, 867 P.2d 438, 440 (Issues not raised for appellate review are not a proper basis for reversing the judgment.).

¶9 Association appealed, raising several issues. However, none of the parties appealed the district court's finding that the video was part of the record in this case or its order that the video "be preserved pending further action by the Plaintiff." The Court of Civil Appeals reversed in part and remanded for further proceedings, finding that there was no arrest triggering a duty to provide access to the surveillance video under Title 51, Section 24A.8(A)(2). The Court of Civil Appeals remanded the proceedings for a determination of whether the public's interest in access to the video outweighs Defendants' reasons for denying access under Title 51, Section 24A.8(B), which provides for a balancing of interest when disclosure is not required under Section 24A.8(A). In dicta, the Court of Civil Appeals found that the video was part of the court's records; but, because the Cleveland County Court Clerk was not a party to the litigation, "a petition for declaratory, injunctive and mandamus relief as against the court clerk" was premature.

¶10 On February 25, 2016, three days after the Court of Civil Appeals issued its opinion and while the matter was still pending in the appellate courts, the district court issued an order reversing its finding that the video was part of the court's record. Association filed a petition asking this Court to assume original jurisdiction and "issue an extraordinary writ directing the [district court] to immediately withdraw [its] February 25, 2016 Order removing a public record from the custody and control of the court clerk in" this matter. Application to Assume Original Jurisdiction, Petition for Extraordinary Writ, and Brief in Support, *Okla. Ass'n of Broads., Inc. v. Balkman*,

No. 114,827 (Okla. March 22, 2016). This Court assumed jurisdiction and prohibited the district court from enforcing the February 25, 2016 order, citing Oklahoma Supreme Court Rule 1.37, 12 O.S.2011, ch. 15, app. 1, and ordering the Association “be allowed to proceed in accordance with the Open Records Act . . . .” *Okla. Ass’n of Broads., Inc. v. Balkman*, No. 114,827 (Okla. May 9, 2016).

¶11 Association filed a Petition and an Amended Petition for Writ of Certiorari which are substantially identical except for extraneous, irrelevant attachments to the Petition.<sup>3</sup> This Court ordered briefs on certiorari issues.

#### IV. ANALYSIS

¶12 Before analyzing the issues raised in the petition for certiorari, we are compelled to address the district court’s order making the video part of the court record in this case and ordering its preservation. See Okla. Const. art. VII, § 4. Even though the finding that the surveillance video was part of the court record and the order that it should be preserved were not appealed, the Court of Civil Appeals addressed the issue. Even after the Court of Civil Appeals agreed that the video was part of the record in these proceedings, Defendants did not seek review before this Court of the finding that it was part of the court record or of the order that the video be preserved. The finding that the video was part of the record in these proceedings is final and is no longer disputable. *Hough*, 1993 OK 112, ¶ 1, 867 P.2d at 440. Also,

---

<sup>3</sup> Association moved to redact or seal the extraneous attachments claiming they “are covered by either the Attorney Client Privilege or are Attorney Work Product materials” unrelated to this case. The motion is denied.

Defendants have admitted that at least one of them has retained a copy of the video and provided a copy at the hearing. Defendants have not asserted before this Court that the video is unavailable because it is in a litigation file.

¶13 One of a district court clerk's primary duties is to take custody of and preserve all materials that are part of a court's proceedings. See 12 O.S.2011, §§ 22, 29, 33; 12 O.S.2011, ch. 15, app. 1, rr. 1.28 and 1.33. Attorneys are officers of the court. 5 O.S.2011, ch. 1, app., art.1, § 2. When Defendants failed to seek review of the district court's finding that the video was part of the record and order to be preserved, the issue became final compelling the attorneys in this proceeding to observe their duty and submit the video to the court clerk for preservation as part of the record in this proceeding. We would not be faced with this issue if the district court had followed the better practice of having the video marked as an exhibit before finding it to be a part of the court record and for the court to retain a copy of the video to place in the court clerk's custody.

¶14 We now turn to the issues preserved for our review. Section 24A.8(A)(2) requires (1) a law enforcement agency (2) to allow inspection of a record (3) that contains facts concerning an arrest or the cause of arrest. Defendants implicitly define themselves as law enforcement agencies, and Plaintiff does not contest that they are.<sup>4</sup> Defendants do not contest that the video falls within Section 24A.8's scope

---

<sup>4</sup> City would have the district court and this Court assume that it is a law enforcement agency for purposes of the Act. Title 51, Section 24A.3(5) defines a law enforcement agency as "any public body charged with enforcing state or local criminal laws and initiating criminal



of being a record of facts.<sup>5</sup> We laid any question of a video being a record to rest in *Fabian & Assocs. v. State ex rel. Dep't of Pub. Safety*, 2004 OK 67, ¶ 10, 100 P.3d 703, 705, wherein we found that the Act's definition of a record was sufficiently broad to include "any method of memorializing information."

#### A. Arrest

¶15 The first issue presented for resolution here is the breadth of the term "arrest" as used in Section 24A.8(A)(2). This is an issue of statutory construction. In construing a statute, our goal is to determine the Oklahoma Legislature's intent. *Heldermon v. Wright*, 2006 OK 86, ¶ 12, 152 P.3d 855, 859. The Legislature's expressed policy for the Act is to vest the people of Oklahoma "with the inherent right to know and be fully informed about their government." 51 O.S.2011, § 24A.2. The Legislature's emphatic message to government agencies is, unless otherwise

---

prosecutions, including, but not limited to, police departments, county sheriffs, the Department of Public Safety, the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control, the Alcoholic Beverage Laws Enforcement Commission, and the Oklahoma State Bureau of Investigation." Because defining the City otherwise does not alter the outcome of our decision here, for purposes of this opinion only and without reaching a decision on the issue, this Court will assume that all Defendants are law enforcement agencies.

<sup>5</sup> Title 51, Section 24A.3(1) defines "record" to mean

all documents, including, but not limited to, any book, paper, photograph, microfilm, data files created by or used with computer software, computer tape, disk, record, sound recording, film recording, **video record** or other material regardless of physical form or characteristic, created by, **received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies**, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property. . . .

(Emphasis added.)

specifically excluded, the public must have prompt and reasonable access to records. See *Fabian*, 2004 OK 67, ¶¶ 11-12; 100 P.3d at 705; *City of Lawton v. Moore*, 1993 OK 168, ¶¶ 5-6, 868 P.2d 690, 704-05. Because of the strong public policy allowing public access to governmental records, we must construe the Act's provisions to allow access unless an exception clearly applies, and the burden is on the public agency seeking to deny access to show a record should not be made available. *Citizens Against Taxpayer Abuse, Inc. v. City of Oklahoma City*, 2003 OK 65, ¶ 12, 73 P.3d 871, 875. We are mindful of the Act's policy, the Legislature's intent, and the burden of proof in our determination of the breadth of the term "arrest" as used in the Act.

¶16 In ascertaining the Legislature's intent, a court looks "to each part of an act, to other statutes upon the same or relative subjects, to the evils and mischiefs to be remedied, and to the natural and absurd consequences of any particular interpretation." *Blevins v. W.A. Graham Co.*, 1919 OK 147, ¶ 8, 182 P. 247, 248. Words will be given their common meaning unless a contrary legislative intent plainly appears. 25 O.S.2011, § 1; *Welch v. Crow*, 2009 OK 20, ¶ 10, 206 P.3d 599, 603.

¶17 In Title 22, Section 186 of the Oklahoma Statutes, the Legislature defined "arrest" as taking a person into custody, "that he may be held to answer for a public offense." And in Section 190, the Legislature determined that an "arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer." In so defining arrest, the Legislature adopted the common

meaning of the term. See *Arrest*, *Black's Law Dictionary* 100 (5th ed. 1979) ("To deprive a person of his liberty by legal authority"); *Arrest*, *American Heritage Dictionary* 129 (2nd coll. ed. 1982) ("To seize and hold under authority of the law"). Custody, or restriction of liberty, is the linchpin in determining whether an arrest occurred. *United States v. Leal-Felix*, 665 F.3d 1037, 1043 (9th Cir. 2011) (citing *Berkemer v. McCarty*, 468 U.S. 420 (1984)).

¶18 When Mixon appeared at the arraignment, the district court ordered that he remain in the custody of his attorney and ordered him to appear at the Cleveland County Sheriff's Department and remain in its custody until he posted bail. Mixon was not free to do as he pleased or to ignore the court's order. He was in custody so that he could be held to answer for the misdemeanor crime of Acts Resulting in Gross Injury, 21 O.S.2011, § 22. Mixon was unquestionably in custody, and thus arrested for purposes of the Act, when the district court restricted his freedom.

¶19 Defendants argue (1) that an arrest must be without consent and against the will of the defendant, citing *Castellano v. State*, 1978 OK CR 107, ¶ 6, 585 P.2d 361, 364; and (2) that, pursuant to Title 22, Section 187, the arrest must be made by a police officer. Defendants conclude that if either of these two elements are absent, there is no arrest. We reject Defendants' arguments.

¶20 In *Fabian*, 2004 OK 67, 100 P.3d 703, this Court addressed the issue of whether audio tape recordings of driver's license revocation hearings were facts concerning an arrest or the cause of an arrest. The plaintiff represented defendants

in both the revocation hearing and the associated criminal proceeding. *Id.* ¶ 3, 100 P.3d at 704. The plaintiff sought the recordings so that he could use them in the criminal proceedings. *Id.* This Court agreed that the recordings of the revocation hearing were “tapes contain[ing] facts concerning the arrest” and must be open to the public. *Id.* ¶ 14, 100 P.3d at 706. This Court made no distinction between arrests of those criminal defendants coercively taken into custody by an officer and those who voluntarily appeared before the court.

¶21 Even if we determined that an arrest must be made by a police officer, and Mixon was not arrested when placed in custody by the court, Defendants' argument would nonetheless fail. When Mixon appeared at the Cleveland County Sheriff's Department and had to remain there until he posted bail, he submitted to the custody of an officer, which Title 22, Section 190 specifically allows.

¶22 Just as criminal statutes are generally construed liberally in favor of a defendant, *Graham v. Miracle*, 1976 OK 162, ¶ 6, 556 P.2d 605, 606, we must construe the term “arrest,” as used in the Act, liberally in favor of access to public records to effectuate the Legislature's intent. *Heldermon*, 2006 OK 86, ¶ 12, 152 P.3d at 859. Adding additional elements to the definition of arrest and its common meaning would thwart the Act's underlying legislative policy. It would allow law enforcement agencies to give preferential treatment to select defendants by allowing them to submit to a court rather than forcibly restraining them, and thus, suppressing videos depicting those defendants' violent and unbecoming behavior, while exposing

the same or similar violent and unbecoming behavior of another, equally or even less culpable, defendant. If a law enforcement agency could notify a defendant of a pending arrest and allow that defendant to appear in court rather than have an officer execute a warrant, the agency could avoid the mandates of the Act. We will not attribute the Legislature with such a discriminatory intent. See *Powers v. Dist. Ct. of Tulsa Cty.*, 2009 OK 91, ¶ 28, 227 P.3d 1060, 1078.

¶23 The Act requires the release of records unless an exception exists. Here, Mixon was arrested, and the video is a record of the facts leading up to the arrest. Section 24A.8(A) of the Act requires the video be made available to the public, including Association, and Defendants have failed to show an exception which would allow them to deny access.

#### B. Copying of the Record

¶24 When a statute is unambiguous, its language will be applied without further inquiry as to its meaning. *Ball v. Multiple Injury Tr. Fund*, 2015 OK 64, ¶ 6, 360 P.3d 499, 502. But if a literal construction leads to a conflict with other provisions within an act, this Court will reconcile the statutes using rules of statutory construction. *Id.* This Court will consider the context of ambiguous language and will not limit its consideration to one word or phrase. *Id.* An inept word choice will not be construed in a manner to defeat the obvious purpose of a legislative enactment. *Zaloudek Grain Co. v. Compsource Okla.*, 2012 OK 75, ¶ 7, 298 P.3d 520, 523 (quoting *TRW/Reda Pump v. Brewington*, 1992 OK 31, ¶ 5, 829 P.2d 15, 20).

¶25 The 2011 version of Section 24A.8(A) requires law enforcement agencies make enumerated records available for “inspection.” Defendants urge that, because this provision does not include copying, they are only required to allow Association to inspect the video, which they have yet to do. Were we to consider Section 24A.8(A) out of context, we might agree with Defendants. But we must consider other provisions of the Act as well as the Legislature’s intent.

¶26 Sections 24A.5 and 24A.6 of the Act provide that public bodies make their records available for “inspection, copying, or mechanical reproduction” unless specific exemptions apply. These provisions require public bodies, including Defendants, see 51 O.S.2011, § 24A.3(2), to provide times for the public, not only to inspect its records but, to copy the records. *Id.* §§ 24A.5, 24A.6. These provisions requiring public bodies to allow copying, as well as inspection, of their records are in direct conflict with Section 24A.8(A) under Defendants’ theory that Section 24A.8(A) requires them to allow only inspection.

¶27 Conflicts between statutory provisions will be resolved in favor of a construction which promotes, rather than limits, the Legislature’s intent and an act’s purpose. See *Am. Airlines, Inc. v. State ex rel. Okla. Tax Comm’n*, 2014 OK 95, ¶ 33, 341 P.3d 56, 64; *Zaloudek Grain Co.*, 2012 OK 75, ¶ 7, 298 P.3d at 523. Here as we previously noted, the Act’s purpose is to allow the public access to public records. This purpose is furthered, not by restricting access by allowing public bodies to deny copies to the people of Oklahoma, but by requiring public bodies to

allow copying. There are times when close inspection cannot be made by being allowed to view a video one time, but requires a copy which can be repeatedly viewed and subjected to scrutiny for a detailed analysis of an incident or to determine things such as a video's authenticity. To reconcile Section 24A.8(A) with Sections 24A.5 and 24A.6, we are compelled to define the public's right to inspect a record as used in Section 24A.8(A) as including their right to obtain a copy of the record.

¶28 The Legislature recognized this ambiguity between Section 24A.8(A) and Sections 24A.5 and 24A.6 when it amended Section 24A.8(A) to specifically include copying. 2014 Okla. Sess. Laws 896-97. This was not the first time the Legislature amended the Act's language to make it conform more closely with its purpose. In *Oklahoma City News Broadcaster Association, Inc. v. Nigh*, 1984 OK 31, ¶¶ 8, 14, 683 P.2d 72, 74, 76, this Court held that the records of the Governor's Mansion Account were not open to the public because they were not required by law to be kept. The Legislature promptly amended the Act during its next legislative session to allow inspection and copying of all records of public bodies whether or not required by law to be kept. 1985 Okla. Sess. Laws 1643-44.

¶29 Defendants urge that Section 24A.8(A) creates an exemption for law enforcement agencies from Sections 24A.5 and 24A.6. We cannot agree. Section 24A.5, not only requires public bodies to allow copying but, allows a public body to recover the costs of copying a record. If Section 24A.5 does not apply to law

enforcement agencies, as Defendants advocate, they would be unable to recover costs pursuant to the Act after the 2014 amendment to Section 24A.8(A) requiring them to allow or provide copies of their records, including videos, since the amendment does not make provisions for law enforcement agencies to recover costs.

¶30 Resolving the ambiguity in favor of the Act's purpose and the Legislature's intent, we find that Title 51, Section 24A.8(A) of the 2011 Oklahoma Statutes must be read to allow copying as well as inspection of records of an arrest, including facts concerning an arrest. To do otherwise would ignore Sections 24A.5 and 24A.6 of the Act. Defendants have not provided how they would be prejudiced by allowing Association a copy of the surveillance video. Further, if this Court were to construe Section 24A.8(A) to disallow Association a copy of the video, Association could merely file another request since the amended version is now effective and clearly requires Defendants to allow Association copies. See 2015 Okla. Sess. Laws 1407-11.

## V. CONCLUSION

¶31 The undisputed facts show that Association is entitled to judgment as a matter of law and entitled to a writ of mandamus. *Chandler (U.S.A.), Inc. v. Tyree*, 2004 OK 16, ¶ 24, 87 P.3d 598, 604-605. Mixon was arrested and the surveillance video contains facts concerning the arrest. The video was ordered to be a part of the



court record and preserved by the attorneys. The Defendants must allow Association a copy of the surveillance video. This Court need not address Defendants' other arguments as they are not properly before this Court.

¶31 The Court of Civil Appeals' opinion is vacated in part and remains controlling to the issues not presented in the petition for certiorari and addressed by this Court. The district court's judgment is reversed. On remand, the district court is ordered to enter judgment for Association consistent with this opinion and without delay.

**COURT OF CIVIL APPEALS' VACATED IN PART; JUDGMENT REVERSED;  
CAUSE REMANDED WITH INSTRUCTIONS.**

**CONCUR: Combs, C.J., Gurich, V.C.J., and Watt, Winchester, Edmondson,  
Taylor, and Reif, JJ.**

**CONCUR IN RESULT: Kauger, J.**

**DISSENT: Colbert, J.**