



# THE GAUNTLET

A LAW JOURNAL FOR THE  
OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION  
SPRING 2006

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The Oklahoma Criminal Defense Lawyers Association (OCDLA) mails *The Gauntlet* to approximately five hundred (500) members, law schools, law libraries and law professors. The OCDLA also sponsors / cosponsors approximately seventy (70) hours of Continuing Legal Education (CLE) each year and publishes *My Little Green Book*. *The Gauntlet* is a peer-reviewed, refereed journal in that all articles are reviewed by members of the OCDLA prior to publication; However, the articles do not necessarily reflect the views of the Organization. Please send any comments regarding the publication to **Jim Hankins, Editor**, e-dress at [jh@coylelaw.com](mailto:jh@coylelaw.com).

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# *THE PRESIDENT'S PAGE*

by

*DAVID OGLE*

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As President of the Oklahoma Criminal Defense Lawyers I want to let you know what an honor and pleasure it is to help lead this outstanding organization. I hope we will continue to meet our goal of making the OCDLA a true asset to your daily practice. Our approximate 400 members provide the OCDLA's greatest strength, and your participation adds to the entire group's benefits, including the *List Serve*, and our publications *The Gauntlet* and *Hot Sheets*. All of these are intended to keep the defenders of the Citizen Accused up-to-date on changes in the law and legal theories. As always, I encourage any of our membership to forward suggested topics to the OCDLA for future inclusion in these publications and sources. After all, the OCDLA can only continue to improve with the input of the talented lawyers in this organization.

And now some news. The third edition of *My Little Green Book* is now at the publisher's and is scheduled for delivery with membership renewals in 2006. *My Little Green Book* is published with the hope that each member will have easy and quick access to the Oklahoma Statutes and reference material in a convenient format. *My Little Green Book* is also provided by the OCDLA to each county law library in the state, as well as each district judge, associate judge and special judge as a desk reference. As always, *My Little Green Book* is **free** when you renew or join the OCDLA for 2006.

The OCDLA also expects to offer another year of outstanding CLE courses. On **January 20th**, the OCDLA hosted the extremely successful CLE Seminar entitled, "**My Client Doesn't Get It--Maybe There's a Reason.**" This CLE was offered in Oklahoma City and will cover the topics of Mental Health, Competency, Sanity, and Developmental Disabilities. We will provide a second seminar this year entitled "**Getting Ready for Trial—Don't Just Shoot From the Hip.**" This seminar will target Motions and Evidence that are essential for criminal law trial attorneys.

Most importantly, this past year we recognized several of our members who exhibited

particularly outstanding leadership and made exceptional contributions in the area of criminal defense litigation and to the OCDLA. As has been our custom in the past, we recognized these award winners during our annual meeting, which was held simultaneously with the Oklahoma Bar Association's meeting in November, 2005. I am most proud to recognize the following award winners:

**CLARENCE DARROW AWARD**  
**JACK DEMPSEY POINTER, OKLAHOMA CITY**

Jack was specifically nominated for and awarded the Clarence Darrow Award for his performance in obtaining two acquittals in the summer of 2005. In the first case, Jack's client was accused of lewd acts with a child under the age of sixteen. In light of the State's allegations, his client faced one of the most challenging trial environments in the state. Despite these challenges however, through his trial skills Jack overcame the adversity and the jury found his client not guilty. In the second case, Jack's client was accused of conspiracy to possess CDS with intent and conspiracy to launder money. The trial took place in federal court, Western District of Oklahoma. Only three of the twelve defendants went to trial. Throughout this complex trial, the government presented 42 witnesses and over 600 trial exhibits, however, Jack presented a concise and thorough cross-examination of the government's witnesses and in the end, Jack's client was acquitted.

Jack was nominated for this Award by David McKenzie, Tamra Spradlin, Tim Wilson, Scott Adams, Albert Hoch, Bob Ravitz, J.W.Coyle, III, Johnny Albert, Merle Gile, David Autry and Irvin Box, all prior Darrow Award winners.

**LORD ERSKINE AWARD**  
**PAUL D. BRUNTON, TULSA**

The Lord Erskine Award is reserved for those who have steadfastly placed the preservation of personal liberties over his or her personal gain or reputation. Paul's 35-year career in the defense of the Citizen Accused is full of examples where he has placed the interest of the Citizen Accused first. In 1972 Paul was appointed the Chief Public Defender for Tulsa County. In 1974 he decided to enter private practice and he also served in the Oklahoma House of Representatives. In 2001 Paul was chosen by the Tenth Circuit Court of Appeals as the Federal Public Defender for the Northern and Eastern Districts of Oklahoma. As you might imagine, Paul's track record is replete with courtroom and

appellate milestones. Over the years Paul has become known as one of the eminent Fourth-Amendment lawyers in the state.

Perhaps Paul's best professional virtue is his willingness to place a defendant's right to competent counsel in front of his own reputation. For instance, in the late 70's, while in private practice, Paul sued the entire Tulsa County District Court Bench. The Oklahoma Supreme Court unanimously held in his favor and found credible his claim—that Tulsa County and the Court Fund wrongfully held public defenders' salaries below the pay level of district attorney's offices. The Tulsa Court was not pleased with this result, and several years later the Court contemplated dissolving the Tulsa County Public Defender's office altogether. Paul again went to bat for his colleagues but this time he did it through the media. Paul was victorious again. As a result of Paul's efforts the Court dropped the agenda.

Paul was nominated for the award by Barry Derryberry, Skip Durbin, Julia O'Connell, Pete Silva, Jr., and Allen Smallwood.

**THURGOOD MARSHALL APPELLATE ADVOCACY AWARD**  
**GAIL GUNNING, NORMAN**

Gail joined the General Appeals Division of the Oklahoma Indigent Defense System in December of 1991. Throughout her tenure with OIDs, Ms. Gunning has been known for her clear and concise writing style. Ms. Gunning has persuaded the Oklahoma Court of Criminal Appeals to grant relief for numerous clients over the years. Ms. Gunning's dedication and successful defense of the substantial rights of the most needy and neglected clientele, the indigent criminal defendant, is remarkable.

Gail has a long history of success before the appellate court. Opinions issued over this last year particularly illustrate Ms. Gunning's effective appellate advocacy. In *Newton v. State*, No. F-2002-1546, the Court of Criminal Appeals reversed Newton's conviction and 458-year sentence for rape. Newton's case was remanded for a new trial because trial counsel remained silent when the trial court failed to excuse a police officer from the jury. In a certiorari appeal, *Perkis v. State*, No. C-2003-1247, Ms. Gunning's in-depth analysis prompted the Court to review the case for plain error. The Court found the kidnapping conviction and 10-year sentence should be reversed and dismissed because the victim was not "secretly" confined. The Court modified another count from First to Second-Degree Burglary, and reduced the sentence from 25 to seven years. Ms Gunning's brief in *McNeil*

*v, State*, No. F-2004-197, convinced the Court to hold that evidentiary harpoons and grossly improper testimony given by the officer were not cured by admonition of the trial court and that the error determined the verdict. Mr. McNeil’s case was reversed and remanded for a new trial.

Gail was nominated by Kimberly Heinze.

**PRESIDENT’S AWARD  
DEBORAH REHEARD, EUFAULA**

Past- President Doug Parr awarded Deborah Reheard for her work over the past 6 years on the Judicial Nominating Committee. Her efforts on the Committee were instrumental in the selection or the slating of potential judges that have been presented to the Governor. During her tenure the Committee helped fill over 50 vacancies across the state. Deborah, as Chair of the Committee (October 2003 through September 2004) slated three Supreme Court Justices and one Judge for the Court of Criminal Appeals.

Congratulations again on behalf of the OCDLA to each of these recipients of the 2005 awards. These are just a few of the outstanding examples of the fine work and professionalism that our members practice every day and over the course of their criminal practice careers. Again, it is an honor to have been given the opportunity to serve the OCDLA and I look forward to another year of our members’ success!

*J. David Ogle*  
President, OCDLA

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# JIM HANKINS

## The Next Generation

During the past five (5) years, *The Gauntlet* has made tremendous advances. On a regular basis, I receive accolades from judges and law schools regarding the quality of information that is found in our publication. But, we are on the advent of a “New Generation.”

After much recruiting, Jim Hankins has agreed to take over the position of Editor of *The Gauntlet*. With his knowledge and expertise as Editor of the weekly publication, *Oklahoma Criminal Defense Weekly*<sup>1</sup>, Jim is a natural fit to bring *The Gauntlet* into its next generation of publication.

Jim comes from an extremely diverse background. He did time at OSU in Stillwater and NWOSU in Alva, Oklahoma. After college, Jim pursued legal studies at the University of Oklahoma College of Law. With his affinity for legal research and writing, he landed a spot on The Oklahoma Law Review and published “Comment, Criminal Law: Criminal “Anti-Stalking” Laws: Oklahoma Hops on the Legislative Bandwagon,” 46 Okla. L. Rev. 109 (1993).

After graduating in 1993, Jim landed a position with Stephen Jones. He assisted in writing a Tenth Circuit habeas on Roger Dale Stafford (the Sirloin Stockade murders in Oklahoma City). Soon after the Stafford case, he assisted Jones in the Timothy McVeigh trial. In 1997, he opened his own firm and became a member of the Special Death Penalty Habeas Corpus Panel administered by the Federal Public Defender's Office. In his spare time, he taught as an adjunct professor for NWOSU's Enid campus.

In 2003 Jim left Enid to work in the law offices of John W. Coyle, III. Today, he is a solo practitioner, but shares office space with John Coyle in downtown Oklahoma City. Jim focuses almost exclusively on issues in Oklahoma criminal law and is currently the Editor of *The Criminal Defense Weekly*. More importantly, rumor is that Jim is an “excellent poker player....”

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<sup>1</sup> The Oklahoma Criminal Defense Weekly is a newsletter distributed via e-mail that is designed to keep Oklahoma criminal law practitioners updated, on a continuous, weekly basis on all new decisions, even the unpublished decisions, affecting the practice of criminal law from the Oklahoma Court of Criminal Appeals, the Tenth Circuit, and the United States Supreme Court. Jim can be contacted at [jh@coylelaw.com](mailto:jh@coylelaw.com) or by phone at (405) 232-1988.

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# U.S. SUPREME COURT UPDATE

by

**MIKE WILDS<sup>2</sup>**

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***Brown v. Sanders, No. 04-980 (Decided, January 11, 2006)***

The U.S. Supreme Court re-instated the death sentence of Ronald Sanders in a 5-4 ruling that overturned a decision by the U.S. Court of Appeals for the Ninth Circuit. The Court of Appeals had held that two of the aggravating factors used by the jury in its sentencing determination were invalid. Declaring that California is a "weighing state," the Court of Appeals held that the use of these invalid aggravating factors rendered the death sentence unconstitutional because the lower court had not found that such use was harmless to the defendant.

The U.S. Supreme Court dispensed with the "weighing state" consideration and held that:  
"An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances."

The Court found that in this case there were other aggravating factors fitting this description and therefore Sanders' death sentence was valid.

***BRADSHAW V. RICHEY, No. 05-101, (Decided Nov. 28, 2005)***

The Court granted the State's petition for a writ of certiorari, unanimously vacated the judgment of the U.S. Court of Appeals for the 6th Circuit, and remanded the case for further consideration.

Kenneth Richey, a citizen of both the U.S. and Great Britain, had been convicted in 1987 in Ohio of aggravated murder in the course of a felony, namely setting fire to a house. The state had shown that although his intended victims escaped, another person was killed in the fire, and by the state doctrine of "transferred intent" he was guilty of capital murder and was sentenced to death.

The Sixth Circuit granted habeas relief, holding that transferred intent was not a permissible theory for aggravated felony murder under Ohio law, and that he had been given inadequate

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<sup>2</sup> Mike Wilds is an Associate Professor for Northeastern State University. He can be contacted via wilds@nsuok.edu.

representation. The Supreme Court held that the Sixth Circuit erred in interpreting the Ohio law of transferred intent, and that it failed to adequately consider whether Richey's ineffectiveness of counsel claims were procedurally barred.

**PENDING U.S. SUPREME COURT DECISIONS**

***HILL V. CROSBY, No. 05-8794 (Cert. Granted January 2006)***

The U.S. Supreme Court granted a permanent stay of execution to Clarence Hill in Florida in late January. The Court will hear Hill's civil rights (42. U.S.C. 1983) challenge to the lethal injection procedures in Florida. According his brief, Hill argues that the chemicals used in lethal injection could inflict severe and unnecessary pain. Briefs are to be completed by April 2006. The two questions before the Court are:

1. Whether a complaint brought under 42 U.S.C. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?
  
2. Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. Sec. 1983?

***HOUSE V. BELL, No. 04-8990 (Oral Arguments January 11, 2006)***

This capital case challenges the standard of proof needed for claims of innocence based on new evidence. A Tennessee death row inmate claims that new DNA evidence proves he was wrongfully convicted. The issue before the Supreme Court is what standard should be used by federal courts to evaluate claims of innocence on the basis of newly discovered evidence.

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# TENTH CIRCUIT UPDATE

NOVEMBER, 2005–FEBRUARY, 2006

by

**JIM HANKINS<sup>1</sup>**

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**United States v. Kristl**, No. 05-1067 (10th Cir., February 17, 2006) (Published).

Guilty plea on a Possession of Firearm charge reversed for re-sentencing. This is the first case in which the Circuit conducted a post-Booker review for reasonableness. The Circuit held that a sentence within the Guidelines is subject to a rebuttable presumption of reasonableness. However, in this case the calculation by the District Court under the Guidelines was flawed and thus the remand.

**United States v. Bowen**, No. 04-4314 (10th Cir., February 15, 2006) (Published).

Jury trial conviction of one count of possession of meth with intent affirmed over claims of insufficient evidence to convict and faulty instruction on constructive possession, the District Court erred in concluding it lacked authority to adjust the sentence for a mitigating role in the offense, and a Booker claim. Noteworthy discussion and extensive case citation of the legal principles governing possession and constructive possession, including the jury instruction regarding possession given in this case.

**United States v. Price**, No. 05-5177 (10th Cir., February 14, 2006) (Published).

Price sought to have his federal drug sentence reduced in light of Booker, arguing that the District Court was empowered to modify his sentence under 18 U.S.C. 3582(c)(2) which allows sentence reductions in cases where the Sentencing Commission subsequently lowers the range. The Circuit denied relief, holding that section 3582 allows a reduction only when the Sentencing Commission lowers the range, not the Supreme Court. This holding is in line with all other circuits that have considered the issue.

**United States v. Davis**, No. 05-5013 (10th Cir., February 9, 2006) (Published).

Davis was convicted of multiple counts of conspiracy to commit bank robbery, aiding and abetting bank robbery, and several gun possession counts. Davis and an accomplice ran into a bank guard with extensive military training. The accomplice of Davis pulled a gun from his waistband and told everyone not to move. The bank guard pulled his weapon and opened fire, hitting the accomplice who fled toot sweet with Davis (Loyel Collier is one bad bank guard). **No relief for Davis on claims of sufficiency of the evidence, a jury instruction**

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<sup>1</sup> Jim Hankins is the Editor for *The Gauntlet* and *The Oklahoma Criminal Defense Weekly*. He can be contacted at [jh@coylelaw.com](mailto:jh@coylelaw.com) or by phone at (405) 232-1988.

addressing his "false exculpatory statements," and sentencing errors.

**Binford v. United States**, No. 05-6052 (10th Cir., February 7, 2006) (Published).

Binford, proceeding pro se, was convicted in both state and federal courts and raises issues **concerning the credit for time served and the power of the federal court to sentence him consecutively to a state court case that had not been adjudicated.** There is a circuit split on this issue as noted by the panel in this case, and the **Tenth Circuit holds that a federal District Court does have the power to impose a federal sentence to be served consecutively to a state court prison term not in being at the time of the federal sentence.** Also, this case discusses the law concerning when a federal prisoner actually begins serving his federal sentence and the interplay between a prisoner such as Binford prosecuted nearly simultaneously by the State and the feds. No relief for Binford in this case, but if you have a client in this position, take a look at this case.

**United States v. Arrieta**, No. 04-2350 (10th Cir., February 7, 2006) (Published).

Complex discussion of a federal jurisdictional issue dealing with the **legal definition of "Indian land" for purposes of federal criminal jurisdiction.** The stretch of road in this case in New Mexico was deemed Indian land under facts. But the real injustice in this case was the sentence. Arrieta entered into a plea agreement for 60 months. However, the District Court reduced it to one year and one day after receiving additional evidence. The Government appealed and the Circuit agreed that once the District Court accepted the plea agreement it was bound to impose the agreed upon sentence. Pretty harsh for Arrieta.

**United States v. Tidwell**, No. 05-7018 (10th Cir., February 2, 2006) (Unpublished).

Tidwell plead to possession of child porn in Oklahoma and was sentenced to 27 months. I included this case because the Circuit reversed and remanded for re-sentencing because the District Court found an enhancement by relying upon facts in the PSR that were contested by Tidwell. The enhancement centered around the ages of the children depicted in the images. Although Tidwell couched the claim under Booker, the Circuit held the issue really was not governed by Booker, but rather general sentencing error because Tidwell contested the age question and the Government produced no evidence other than the opinion of the probation officer in the PSR. The opinion makes clear that the District Court did not want to look at the images. The Government typically does not introduce the actual images during the sentencing proceeding but the Circuit held that the Government may do so at the re-sentencing. Tidwell may wish he had not appealed this case once those images come in.

**United States v. David A. (a juvenile)**, No. 04-2284 (10th Cir., February 3, 2006) (Published).

This is a case involving the Federal Juvenile Delinquency Act. This is only the second time I have noticed an opinion out of the Circuit dealing with federal juvenile law. In this case, David A. was accused of some heavy drug trafficking and the Government wanted to try him as an adult. The Circuit, in a very lengthy and detailed opinion, sets forth the legal landscape in this area and concludes ultimately that David A. will be tried as an adult.

**United States v. Crockett**, No. 04-4204 (10th Cir., January 31, 2006) (Published).

Complex tax fraud case affirmed on several grounds, but remanded for re-sentencing under Booker where the Government agreed that this should be done.

**United States v. Wolfe**, No. 04-2114 (10th Cir., January 31, 2006) (Published).

Lengthy opinion in a federal case where Wolfe got drunk, drove a car filled with some friends, and crashed the car, resulting in serious injury to herself and the deaths of two of the passengers (it happened on federal land so she was charged with involuntary manslaughter). The District Court departed upward in a big way and Wolfe was sentenced ultimately to 41 months. The Circuit **reverses here for re-sentencing based upon a pain-staking analysis of upward departures** and the extreme degree to which the District Court departed without sufficient explanation. I thought the reasons outlined by the District Court were explained pretty well but what do I know. Also, this opinion gets style points for repeatedly citing to a decision called United States v. Whiteskunk. Cool.

**United States v. Westover**, No. 03-3287 (10th Cir., January 30, 2006) (Published).

Yet another application of the **Plain Error standard in a case involving a Booker claim** where the accused did not contest the constitutionality of the Guidelines in the District Court but gets to use Booker because it was decided while the direct appeal was pending. The Circuit yet again recognizes the plain error but declines to grant relief and lists the factors that determine that outcome. This opinion is a little tighter and more well-presented than some others but I am still not sure why this one was chosen for publication.

**United States v. Cornelio-Pena**, No. 04-3478 (10th Cir., January 30, 2006) (Published).

Illegal re-entry after deportation case affirmed over Guidelines/Booker challenges. The Circuit addressed what it termed an issue of first impression in the federal circuit courts of appeals: whether solicitation to commit burglary is a "crime of violence" under the Guideline provision increasing the punishment in illegal re-entry cases. The Circuit held that it is and thus Cornelio-Pena cannot escape the dreaded 16-level enhancement.

**United States v. Batie**, No. 04-4299 (10th Cir., January 4, 2006) (Published).

Poor Batie was indicted for armed bank robbery and has proceeded to trial three times with each ending in a mistrial. When the Government went after him a fourth time the District Court got sick of it and dismissed on speedy trial and substantive due process grounds. The Circuit reversed and now Batie will have to defend yet again. Decent analysis of the speedy trial factors and substantive due process in criminal cases.

**United States v. Smith**, No. 04-5085 (10th Cir., January 4, 2006) (Published).

Guilty plea on felon in possession of a firearm charge and attacks on the Guidelines on appeal. **OCDLA Member Barry Derryberry** raises a neat issue of what to do when the application notes in the Guidelines suggest a broader interpretation than the plain language of the Guideline itself. The Circuit ultimately looks at the charging documents and the state court plea colloquy to determine that Smith had indeed been convicted of a drug offense that

could be used to enhance.

**United States v. Green**, No. 05-5053 (10th Cir., January 27, 2006) (Published).

Case out of Tulsa where cops executed a search warrant on Green's home and found a lot of dope and some guns. Green was convicted and raised several issues on appeal, all of which the Circuit rejected. However, there is a good discussion of **challenges to the composition of the jury pool and the time limits under federal law** governing when such objections can be raised.

**United States v. Robinson**, No. 04-7052 (10th Cir., January 26, 2006) (Published).

Traffic stop yielded a laundry list of bad items for Robinson and he was convicted of several drug counts (actually there were two separate arrests). No defense to the traffic stop, but Robinson raised some interesting issues regarding the jury instructions in federal drug cases but gets no relief. However, the Circuit did remand for re-sentencing on a Booker claim.

**Hamilton v. Mullin**, No. 04-5067 (10th Cir., January 24, 2006) (Published).

Oklahoma capital habeas case affirmed over several issues including prosecutorial misconduct, victim impact evidence issues, and other death penalty issues. The facts are particularly brutal in this case arising out of Tulsa.

**Hain v. Mullin**, No. 05-5039 (10th Cir., January 23, 2006) (en banc) (Published).

Do lawyers appointed under the Criminal Justice Act (a federal statute) to represent state death row inmates in federal habeas corpus proceedings get paid to represent them in state clemency proceedings? Well, the Tenth Circuit initially said, "no" in a panel opinion that was subsequently vacated, and a few other circuits have said "no" as well. However, in this case, the *en banc* Court does the condemned and counsel a favor by holding that payment is authorized under the statute. Very pleasant surprise for those of us who do this kind of work. I do not know if the Government will pursue this issue in the Supreme Court but I hope it does not (the Court denied cert. a couple of years ago on the issue when there was a circuit split so I hope they are still uninterested in resolving it now).

**United States v. Atencio**, No. 04-2325 (10th Cir., January 20, 2006) (Published).

Huge drug operation busted and charged as a continuing criminal enterprise and also conspiracy. The Circuit affirmed the CCE conviction but reversed the conspiracy (as the Government conceded) because the conspiracy is a lesser-included offense. Lengthy opinion detailing several trial issues but no winners or other noteworthy discussion that I could see.

**United States v. Briseno**, No. 03-8099 (10th Cir., January 18, 2006) (unpublished).

Traffic stop case that generated some discussion on the OCDLA list-serv because it appears to create tension or possibly be in conflict with McGaughey v. State, 2001 OK CR 33, 37 P.3d 130. Briseno is unpublished, but the concern was that an enterprising prosecutor may use it to persuade a state trial judge to rule against a motion to suppress. I do not read Briseno as being in conflict with McGaughey, but you may want to look at them (Briseno

involved an actual traffic violation that justified the detention and the questioning; McGaughey involved a case where the officer thought he saw a traffic violation but upon approaching the car found out he was mistaken).

**United States v. Angelos**, No. 04-4282 (10th Cir., January 9, 2006) (Published).

How often do you see four pages of names as *amicus curiae* in a criminal case? Well, you can see them in this case. Angelos was **convicted of multiple drug, firearms, and money laundering counts**. The Circuit engages in a very instructive analysis of a search warrant issue in which the scope of the warrant was ambiguous and the Circuit held the police exceeded the scope of the warrant, but some items were seized properly (large bags of marijuana found by "plain smell" during a protective sweep) and some were not. The Circuit held that the introduction of the items unlawfully seized was harmless. But the issue that garnered the attention of *amicus*, which included former federal judges, United States Attorney Generals, and high-ranking United States Department of Justice officials, concerned whether the 55-year sentence violated the Eighth Amendment's ban on cruel and unusual punishment. The Circuit recognized that the **Eighth Amendment contains a "narrow proportionality" principle** applicable to non-capital cases that precludes sentences that are grossly disproportionate to the crime. However, the Circuit canvassed the cases from the Supreme Court and held that this proscription applies only in extraordinary cases and that Angelos' sentence was not such a case. The Circuit engages in a very thorough treatment of this issue and when you read the cases cited by the Circuit panel you are left to wonder whether there really is a "proportionality principle" at all because the cases do not appear to support it (it looks like a "shock the conscience" standard in real-life application).

**United States v. Lott**, No. 04-6268 (10th Cir., January 5, 2006) (Published).

Lott was convicted of drug offenses and prior to sentencing he filed motions to remove trial counsel, alleging a breakdown in communications. These motions were denied. The Circuit affirmed the case with a decent discussion of the standards governing a motion for substitution of counsel.

**United States v. Cherry**, No. 05-1043 (10th Cir., December 28, 2005) (Published).

Jury conviction of possession w/intent to distribute crack. The Circuit affirms in a deplorable opinion that finds no error in the Government's introduction of Cherry's prior conviction for the distribution of drugs (to show intent in this case the Government claimed). It is difficult to see how such evidence could not be more prejudicial than probative.

**United States v. Moreno-Trevino**, No. 04-4144 (10th Cir., December 28, 2005) (Published).

Illegal re-entry case resolved by plea of guilty and affirmed on appeal over objections concerning the application of the Guidelines; and with a pretty good discussion of the "acceptance of responsibility" reduction in federal court.

**United States v. Marshall**, No. 04-2301 (10th Cir., December 23, 2005) (Published).

Guilty plea case on a charge of possession of meth w/intent to deliver; affirmed over Booker

claim that was preserved, but held harmless.

**United States v. Forsythe**, No. 04-1541 (10th Cir., December 23, 2005).

For some reason this opinion was on the Circuit's web site as being issued on February 15, 2006. In any event, this case is a nice winner and remand for re-sentencing based upon whether Forsythe's prior burglary conviction was a crime of violence. The statute was ambiguous and the Government attempted to use the preliminary complaint to show the burglary was of a home rather than a dwelling. The kicker in this case is that the Circuit remanded for re-sentencing on the record as it stands below and not a *de novo* re-sentencing hearing! This is quite a victory for Forsythe because the Government is limited to the record below and presumably will be precluded from introducing evidence showing the burglary qualified as a crime of violence.

**United States v. Herron**, No. 04-1232 (10th Cir., December 20, 2005) (Published).

**Felon in possession of a firearm** case that went to jury trial and is affirmed over a variety of claims. Most noteworthy in this case is that Herron requested and was granted a jury instruction (which is set forth in the opinion) on the **defense of innocent possession** of the firearm which is basically that Herron handled the gun with no illegal intent and got rid of it as quickly as possible. The jury did not buy it under the facts of the case, but note that this defense exists.

**United States v. Waldroop**, No. 04-6308 (10th Cir., December 19, 2005) (Published).

Convictions for bank fraud affirmed over sufficiency of the evidence and Booker claims (held harmless even though the District Court did rely on facts not found by the jury).

**United States v. Williams**, No. 04-3180 (10th Cir., December 19, 2005) (Published).

Guilty plea to drug distribution; Williams raised claims regarding sentencing which are rejected, including an enhancement for possession of a firearm (he argued no connection between the gun and the drug activity) and a Booker claim (no plain error).

**United States v. Alvarado**, No. 05-4064 (10th Cir., December 13, 2005) (Published).

Guilty plea case where Alvarado reserved a challenge to his motion to suppress stemming from a traffic stop where the sole basis for the stop was a single instance of crossing over the right "fog line" on a Utah highway in violation of a Utah statute that mandates that motorists must drive as nearly as practical inside a single lane. The opinion does not ever say what a "fog line" is, but it appears to be simply the right line of the roadway (I have never heard it referred to as a fog line). Terrible decision affirming the District Court's denial of the motion to suppress. Alvarado was unable to point to any weather or other impediment that would have caused his vehicle to cross the line and argued simply that it is impossible for motorists to remain wholly inside the lines every inch of the way on long interstate road trips. The Circuit did not buy it. Ugh.

**United States v. Deberry**, No. 04-1532 (10th Cir., December 13, 2005) (Published).

Not a winner, but excellent discussion of claims of **selective prosecution** in federal court. The District Court below ordered discovery on the claim and the Government refused to comply! The District Court dismissed the indictment with prejudice, but the Circuit reversed, holding that the two defendants in this case did not produce enough evidence to meet their burden under the legal test for such claims.

**United States v. Cole**, No. 04-3402 (10th Cir., December 12, 2005) (Unpublished).

Winner! Instructive case where the Circuit analyzes whether to enforce an **appeal waiver** provision in a plea agreement and held that the waiver will not be enforced under the facts of the case.

**United States v. Morales-Chaires**, No. 05-1190 (10th Cir., December 7, 2005) (Published).

Opinion involving a guilty plea to a charge of illegal re-entry into the country after deportation. This case found its way to publication because Morales-Chaires raised a novel argument that in some jurisdictions along the border there is a fast-track program where illegals charged with the same offense receive low sentences in exchange for waiving rights and speeding things along, and that there is therefore a sentencing disparity to his detriment. The Circuit did not buy it, deciding ultimately that the sentence was reasonable.

**Wilson v. Jones**, No. 02-6384 (10th Cir., December 7, 2005) (Published).

Prisoner brought a habeas action claiming that Oklahoma DOC (private prison) improperly wrote him up for a "Class X" misconduct and illegally took away his credits as a result by demoting him. The Circuit agreed! Complex discussion of DOC policies involved and you can also see just how bad prison administrators can be to an inmate (the write-up was for withdrawing funds from his mandatory savings account that is to be used for court-related items such as copying, filing fees, etc.).

**United States v. Dowell**, No. 03-1341 (10th Cir., December 6, 2005) (Published).

Convictions for destroying government property by fire and interfering with IRS officials affirmed over several claims, but noteworthy decision because it re-affirms that **a criminal defendant may challenge a confession by another witness, even a witness for the Government!** Rob Nigh told this to me years ago and I thought it was a very useful piece of knowledge. The standard is fairly high, the same as challenging a defendant's own confession as being coerced, but there is no standing issue because the defendant is actually asserting a constitutional Due Process claim that his trial would be fundamentally unfair if the coerced confession is used (because such a confession is not reliable). The Circuit recognized the right of Dowell to make such a claim but denied the claim under the facts of his case (his evidence of coercion was weak). It works like a Jackson v. Denno hearing (to challenge the defendant's own statements): you must request an evidentiary hearing on the issue in order to preserve the record (and you must make a credible showing of coercion). Still, if you have a case involving co-defendants or any witnesses that made statements to the police and the government wants to introduce such statements against your client, be sure to

realize that YOU can challenge the statements if there is a basis to believe that the statements were not the product of the person's free will.

**United States v. Collins**, No. 04-2002 (10th Cir., December 5, 2005) (Published).

Collins had a competency hearing and counsel was appointed to represent him at the hearing. Collins is apparently nuts and a breakdown in the attorney-client relationship occurred and counsel filed a motion to withdraw. The District Court heard the competency issue first and then heard the Motion to withdraw(?). Counsel understandably did nothing during the competency part and the Circuit held that Collins was deprived of his right to counsel at the competency hearing, with the added bonus that no retrospective competency hearing will be held, rather, the case is remanded for a new trial.

**United States v. Humphries**, No. 05-1255 (10th Cir., December 2, 2005) (Published).

**Another guilty plea in a felon-in-possession-of-a-firearm case** (it is amazing how aggressively the feds have been prosecuting these cases; if you have a client who has priors you need to advise them of the Armed Career Criminal Act because the feds ain't kidding, folks). The issue here was whether four juvenile priors were "related" under Guidelines and thus constituted a single prior conviction for enhancement purposes, or whether the priors count as four separate convictions. The District Court held they were four separate convictions and sentenced accordingly. The Circuit affirmed, instituting a deferential (rather than *de novo*) standard of review on such questions.

**United States v. Mitchell**, No. 04-4248 (10th Cir., November 21, 2005) (Published).

Search and seizure loser but with bad facts. Cops search hotel room when the clerk told them that the occupant checked out, was not there, and handed them a key to the room. Contested facts, but search upheld on the alternative bases of **abandonment and apparent authority**. Nothing really earth-shattering here.

**United States v. Visinaiz**, No. 04-4277 (10th Cir., November 16, 2005) (Published).

Conviction of second degree murder in Indian country affirmed over a slew of claims in a lengthy opinion. Notable because the opinion re-affirms the rule that a criminal defendant is entitled to jury instructions on his theory of the case if it is grounded in fact and law and failure to do so is reversible error (but not in this case).

**United States v. Sims**, No. 03-2151 (10th Cir., November 9, 2005) (Published).

Lengthy opinion in an internet chat room sting case where Sims was convicted of traveling in interstate commerce to engage in sex acts with a minor, attempted enticement of a minor, and transporting child porn. Interesting search issues raised by Sims, particularly one not addressed by the Circuit but it noted that the District Court suppressed a search of Sims's office computer when police initiated a search of it but it was actually performed by an office tech remotely through the server. There is also a lengthy discussion on a consent to search issue. Also, the cops served the search warrant a day after the date specified in the warrant, but this was held to be error not subject to suppression. Finally, the Circuit discusses the

**government's burden of proving that the images were in fact real children rather than computer-generated images.** The Circuit addresses the government's burden of proof, stating that the government has the burden, but it basically does not have to do anything other than present the images themselves. This looks like a cert. issue, but for now I think if you have such a case you must get an expert to attack the images as possibly being fakes.

**United States v. Pentrack**, No. 04-4143 (10th Cir., November 9, 2005) (Published).

Internet fraud case affirmed over several claims, including an enhancement where Pentrack was subject to a prior state court consent judgment which ordered him to stop committing consumer fraud (basically). Also, the Circuit reviewed the case for non-constitutional Booker error and found no plain error in the sentence.

**United States v. Geames**, No. 04-4266 (10th Cir., November 8, 2005) (Published),

Convictions affirmed over Brady claims and limiting cross-examination; but remanded for re-sentencing in light of Booker.

**United States v. Calderon**, No. 05-4011 (10th Cir., November 7, 2005) (Published).

Pro se appeal by Calderon who wanted to contest the guilty plea in his drug case. His lawyer filed an Anders brief stating there were no non-frivolous issues and the government did not respond. Not really sure why this case was selected for publication. The Circuit did address the merits of the claims because the government did not invoke the waiver provisions of the plea agreement, but nevertheless dismissed the appeal as frivolous.

**United States v. Hammons**, No. 05-6168 (10th Cir., November 1, 2005) (Unpublished).

Guilty plea case on a charge of felon in possession of a firearm. Hammons was sentenced under the Armed Career Criminal Act (the "ACCA") which has been prosecuted very aggressively by state and federal authorities (basically a convicted felon merely possessing a firearm). I included the case because Hammons was serving **state** prison time at the time of his **federal** sentencing and the federal court ran the federal sentence **consecutively** to the state time. The Circuit affirmed and stated that the decision to run time concurrent/consecutive is a matter of **judicial discretion** (although the sentencing court must give reasons). Be aware that your clients in federal court may get hammered in this manner.

**United States v. Nickl**, No. 04-3499 (10th Cir., November 1, 2005) (Published).

Lengthy opinion dealing with convictions for bank fraud and aiding and abetting (and jury acquittal of conspiracy counts). Notable for the discussion of Rule 605 (prohibiting the trial judge from being a witness) when defense counsel asked a question to a witness about her plea of guilty and the judge piped up without letting the witness answer the question and stated that he took the plea and was convinced that she plead guilty because she was. The Circuit reversed the aiding and abetting counts on this basis. The Circuit also found non-constitutional Booker error and remanded for re-sentencing.

**United States v. Ortiz**, No. 04-1228 (10th Cir., November 1, 2005) (Published).

The Circuit reverses the District Court's grant of a judgment of acquittal in this Clean Water Act case. The judgment of acquittal was entered because the District Court construed the Act as requiring that a defendant know that his negligent acts will result in pollutants that end up in protected water. The Circuit read the Act as not requiring this; but rather any act of ordinary negligence that releases pollutants into the protected waters.

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## U.S. CRIME LAB REFORM IN OTHER STATES ON THE HORIZON

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Lack of professionalism in crime labs has led to a number of crime lab reform bills to be proposed for the 2006 legislative session. Some of the bills filed to date in other states include:

**Illinois: H.B. 5241** (Durkin (R))

Requires the State Police crime labs to disclose all reports, notes, conversation logs, and quality assurance and quality control documentation to defense counsel.

**Missouri: H.B. 1330** (Baker, J. (D))

Would establish a Laboratory Oversight Committee.

**Missouri: S. 768** (Graham (D))

Would implement a variety of good criminal justice reforms to reduce wrongful convictions.

**New Hampshire: H.B. 1380** (Hammond (D))

Would establish a Forensic Science Oversight Commission.

**Virginia: H.B. 755** (McEachin (D))

Would require all DNA analyses offered as criminal evidence to be performed by laboratories accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board.

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Old Sparky T-Shirt	17.00	Gray Sweatshirt w/hood	45.00 (XXLG - 47.00)
Gray Sweatshirt w/o hood	40.00 (XXLG - 42.00)	Jeans Shirt	40.00 (XXLG - 42.00)
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# COURT OF CRIMINAL APPEALS

A Digest of Recent Published Opinions from the Oklahoma Court of Criminal Appeals

by

**CARI BROWN<sup>1</sup>**

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***BLONNER V. STATE, 2006 OK CR 1, \_\_\_ P.3d \_\_\_***

## **Mental Retardation**

New procedures were promulgated for use in all future pretrial hearings on the issue of mental retardation as defense to death penalty (overruling *Murphy v. State*, 54 P.3d 556 and *State ex. rel. Lane v. Bass*, 87 P.3d 629).

**Mental Retardation Definition:** A person is "mentally retarded," and therefore, not eligible for the death penalty:

- (1) if he or she functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others;
- (2) the mental retardation manifested itself before the age of 18; and
- (3) the mental retardation is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, social/interpersonal skills, home living, self-direction, academics, health and safety, use of community resources, and work.

**Burden of Proof:** The defendant has the burden to prove that he or she is mentally retarded, and therefore, not eligible for the death penalty, by a preponderance of the evidence.

**Intelligent Quotients:** IQs are one of the many factors that may be considered in determining if a defendant is mentally retarded, for purposes of eligibility for the death penalty, but are not alone determinative. No person shall be eligible to be considered mentally retarded, for purposes of eligibility for the death penalty, unless he or she has an intelligence quotient (IQ) of 70 or below, as reflected by at least one scientifically

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recognized, scientifically approved, and contemporary intelligent quotient test.

**Notice of Intent to Raise Mental Retardation Issue:** Where a defendant charged with capital murder claims mental retardation as a bar to the imposition of the death penalty, the defendant shall file a notice of intent to raise mental retardation as a defense to the imposition of the death penalty and motion to quash bill of particulars seeking the death penalty due to mental retardation within 60 days from the date the State files its bill of particulars or from the date of arraignment, whichever is later (overruling *Murphy v. State*, 54 P.3d 556).

After complete discovery on the issue of a defendant's mental retardation is afforded both parties and within 60 days from the date the notice of intent to raise mental retardation as a defense to the death penalty and motion to quash the bill of particulars seeking the death penalty is filed, the trial court shall schedule a jury trial on the issue, and if additional time to prepare is required, the trial court may schedule the trial later upon good cause shown (overruling *State ex. rel. Lane v. Bass*, 87 P.3d 629. Const. Art. 2, § 19).

**Jury / Bench Trial:** If the defendant waives his or her right on the record to a jury determination of mental retardation as a defense to the imposition of the death penalty, the issue may be tried to the bench and a hearing shall be conducted, and the judge's decision shall be made in open court and memorialized by written order.

Jury trials are to be composed of 12 jurors, summoned to determine the sole question of mental retardation. Const. Art. 2, § 19.

The potential jurors for the trial to determine the issue of defendant's alleged mental retardation as a defense to the imposition of the death penalty should not be death qualified, because the sole issue to be determined is whether the defendant is mentally retarded.

**Opening Statements:** The defendant, at the trial on the issue of mental retardation, shall open first, present evidence first, and have the opportunity to present the first and last closing arguments to the jury.

**Witnesses:** Each party may present witnesses relevant to determination of the issue of mental retardation.

**Evidence of Other Crimes:** Evidence must be relevant to be admissible. Evidence relating to other crimes is admissible to determine if a defendant is mentally retarded only to the extent it is relevant to refute the defendant's evidence of mental retardation.

**Jury Verdict:** If the jury finds the capital defendant is mentally retarded, the trial court shall enter an order in open court granting the defendant's motion to quash bill of particulars and the case shall proceed as a non-capital first degree murder case.

If the jury is unable to reach a verdict on the issue of a capital defendant's mental retardation, the trial court shall enter an order granting the defendant's motion to quash bill of particulars due to mental retardation, finding the defendant to be mentally retarded.

**Appeals:** Either the defendant or the State may appeal from the trial court's ruling on the issue of mental retardation, for the purposes of the defendant's eligibility for the death penalty, and the Court of Criminal Appeals will apply the preponderance of the evidence standard on appeal and conduct a *de novo* review of the trial court's factual findings.

To perfect an appeal from an order granting or denying a capital defendant's motion to quash a bill of particulars due to mental retardation, the petition in error, certified copy of the original record, transcript of proceedings and brief shall be filed with the clerk of the Court of Criminal Appeals within 60 days from the date the trial court enters the order.

***ANDERSON V. STATE, 2006 OK CR 6*** (Feb. 22, 2006)

**Jury Instructions:** This case held that the jury should be instructed that if a defendant is convicted, he will be required to serve 85% of his sentence. As stated by the court,

Since jurors are likely to assume that defendants would become parole eligible at a much earlier point in time, explaining the 85% Rule will avoid unnecessary and unfair prejudice to the defendant – due to juries “rounding up” their sentences, in an attempt to account for their uninformed guesses about the impact of parole. Thus instructing upon the 85% Rule will actually discourage jury speculation, while still respecting the separation between the judicial and executive branches. Although 85% of a given sentence may not be as readily calculable as perhaps 50% or 75%, the concept is clear, and there is no good reason not to provide Oklahoma’s sentencing juries with this critical information about how the sentences they give are required to be served.

The holding is prospective only.

***GOLDEN V. STATE, 2006 OK CR 2, \_\_\_ P.3d \_\_\_***

**Peremptory Challenges**

The court's failure to allow defendant the nine peremptory challenges allowed by statute violated his due process rights and constituted structural error requiring reversal of conviction (overruling, *Marrerro v. State*, 29 P.3d 580, *Spunaugle v. State*, 946 P.2d 246, *White v. State*, 726 P.2d 905, *Landrum v. State*, 486 P.2d 757).

**Double Jeopardy: Conspiracy**

Conspiracy is a separate and distinct crime from the underlying crime contemplated. Therefore, convictions for conspiracy to commit robbery and robbery-murder did not violate the prohibition against double jeopardy in that the crimes of conspiracy to commit a felony and first degree felony murder were separate and distinct crimes with totally dissimilar elements, each requiring proof of elements not contained in the other.

**Due Process: Confrontation: Expert's False Testimony**

The fact that a capital murder defendant was not able to confront an FBI examiner about her prior perjurious expert testimony, knowledge of which was not known at defendant's trial, did not violate defendant's confrontation and due process rights (The examiner had pled guilty to misdemeanor count of false swearing relating to expert testimony given in pre-trial hearing shortly before defendant's trial, but defendant could not show that he had been prejudiced by his inability to cross-examine).

**Due Process: Pretrial Hearings**

Capital murder defendant had no due process to be present for pretrial hearings, motion hearings, or in camera hearings, where defense counsel was present and the defendant failed to show how his presence was necessary at these various hearings, or how he was deprived of opportunity to defend his case by his absence.

**Evidence: Accomplice**

Accomplice testimony must be corroborated with evidence which, standing alone, tends to link defendant to the commission of the crime charged. 22 Okl.St. Ann. § 742.

An accomplice's testimony need not be corroborated in all material respects. The amount of corroboration required is simply at least one material fact of independent evidence which tends to connect the defendant with the commission of the crime. 22 O.S. 742.

The test used to determine whether a witness is an accomplice, and whether his testimony has to be corroborated is whether he could be indicted for the crime which the accused is being tried for. 22 O.S. 742.

**Evidence: *Brady* Violation**

To establish a *Brady* violation, the defendant must show that the prosecution suppressed evidence that was favorable to him or exculpatory, and that the evidence was material. For *Brady*, the question is not whether the verdict would more likely than not been different, but whether in absence of the evidence whether the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

The fact that cigarettes found in victim's vehicle belonged to victim's friend was not material,

and, thus, state's failure to disclose this fact prior to trial did not constitute *Brady* violation (the state did not use the cigarettes as evidence linking defendant to the crime).

**Juror Dismissal: Threatening Telephone Calls**

Trial court's decision not to excuse sitting jurors who received threatening telephone calls during the first stage proceedings was justified as jurors who had received these calls each indicated that calls would not affect his ability to be fair and impartial.

**Juror Dismissal: Burglary of Juror's House**

Trial court's decision not to excuse sitting juror whose home had been burglarized over a weekend trial recess in a capital murder prosecution was justified as juror told trial court that burglary of her home would not affect her ability to be fair.

**Juror Misconduct**

A claim of juror misconduct before a criminal case is submitted to a jury must be established by clear and convincing evidence.

**Jury Selection: Death Penalty Bias**

Trial court's dismissal for cause of prospective juror in capital murder prosecution was justified, as the juror clearly stated that he could not and would not vote for the death penalty under any circumstances.

**Searches and Seizures: Parent's House**

The failure of an affidavit in a search warrant indicating that the defendant in a capital murder case no longer lived at the address (his parent's house) was not material to finding of probable cause and even if affidavit had included this information, substantial basis existed for concluding that there was probable cause to support issuance of warrant.

To determine whether inaccuracies in an affidavit in a search warrant are material to the establishment of probable cause, a reviewing court must ask whether search warrant would have been issued if judge had been given accurate information.

**Sentencing: Aggravators**

To support "continuing threat" aggravator in a capital murder case, the state must present evidence showing defendant's behavior demonstrated a threat to society and a probability that threat would continue to exist in the future. 21 O.S. 701.12(7).

**MCGEE V. STATE, \_\_\_ P.3d \_\_\_, 2006 WL 20520, Okla.Crim.App.,2006.**

**Conspiracy**

The elements of a conspiracy are: (1) an agreement to commit the crime or crimes, and (2) an overt act by one or more of the parties in furtherance of the conspiracy, or to effect its purpose. 21 O.S. 421, 423. To have a conspiracy, there must be at least two parties who have agreed to commit a crime.

A conspiracy may be proved by circumstantial evidence from which its existence may be fairly inferred.

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## **DOG SNIFFS AIRPLANE PASSENGERS**

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Last week when I flew to Chicago, I noticed a gentleman with a black Labrador Retriever under the seat. Somewhat curious, I asked what the dog was doing on the plane. Bob, the gentleman, responded that he was an Air Marshall and the dog was a sniffer dog.

Then, he commanded the dog, "Search." The lab walked down the aisle and sat down next to a young lady. Bob smiled and told me that his dog had just hit on a lady in row seven that had some marijuana on the plane. He would arrest her when the plane lands.

The lab continued down the aisle to row ten, set down and raised his front paw. Bob revealed that the dog had hit on a man carrying ecstasy and that airport officials would arrest him when we land.

Just then, the lab ran back to his owner, Bob, and began to poop all over the aisle. Quite concerned, Bob whispered, "Crap. There's a bomb on the plane."

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# COURT OF CRIMINAL APPEALS UNPUBLISHED OPINIONS

A Digest of recent unpublished opinions from the Oklahoma Court of Criminal Appeals  
submitted by

**Katrina Legler<sup>1</sup>**

and prepared by

**CINDY DANNER** (Chief of general Appeals for OIDS) and  
**TERRY ANDERSON** (Administrative Secretary for OIDS General Appeals)

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Rule 3.5(C)(3) provides that unpublished opinions may be cited provided a copy of the unpublished opinion is attached to the brief. To locate unpublished opinions, go to the OIDS website located at [http://www.state.ok.us/~oids/coca\\_unpub.htm](http://www.state.ok.us/~oids/coca_unpub.htm).

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## UNPUBLISHED OPINIONS OCT. 2005

### DOUBLE JEOPARDY/DOUBLE PUNISHMENT

***McCartney, Benny Paul v. State*, COCA Case No. F-2004-1002 (October 26, 2005)**

Convictions for Possession of Methamphetamine w/ Intent to Distribute and Possession of CDS violate double punishment provisions. Dissent clarifies that the Court finds double punishment even where multiple charges are filed under different statutes in the drug code.

### JURY INSTRUCTIONS, OTHER; JURY DELIBERATIONS

***Johnson, Darrell Robert v. State*, COCA Case No. F-2003-1084 (October 31, 2005)**

Deliberations after one juror backed out of verdict were coercive under circumstances of case. Trial judge failed to give OUJI deadlocked jury instruction after poll revealed need for further deliberations. Reversed and remanded for new trial.

### REVOCACTION /ACCELERATION DECISIONS

***Duckett, Brian Anderson v. State*, COCA Case No. RE-2004-812 (October 3, 2005)**

State cannot permanently extend a defendant's suspended sentence simply by failing to hold a sentencing hearing after an application to revoke has been filed and the defendant has either confessed the application or the District Court finds the application has merit. Indefinite

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<sup>1</sup> Katrina Legler has been an Appellate Attorney for the Criminal Appeals Division for the Oklahoma Indigent Defense System since 1996. She can be contacted via [katrina@oids.state.ok.us](mailto:katrina@oids.state.ok.us) or at (405) 801-2727.

postponement of a defendant's sentencing pursuant to an application to revoke cannot extend the expiration time for a suspended sentence. Remanded with instructions to dismiss.

#### **SEARCH AND SEIZURE**

***Gille, Ryan Lee v. State, COCA Case No. M-2004-802 (October 21, 2005)***

Arresting officer did not have the requisite reasonable suspicion of criminal activity to justify the investigatory stop of Appellant. Reversed and remanded with instructions to dismiss.

#### **YOUTHFUL OFFENDER**

***S.H. v. State, COCA Case No. J-2005-542 (October 25, 2005)***

State failed to present clear and convincing evidence that Appellant would not reasonably complete the plan of rehabilitation or the public would not be protected if the accused were to be sentenced as a youthful offender. Order for Defendant to stand trial as adult reversed.

### **UNPUBLISHED OPINIONS**

**NOV. 2005**

#### **EVIDENCE: SUFFICIENCY**

***McGee, Christopher Dwayne v. State, COCA Case No. F-2004-527 (November 23, 2005)*** Evidence insufficient to support conviction for conspiracy to distribute CDS. Conspiracy count reversed and dismissed.

#### **GUILTY PLEA DECISIONS**

***McCarthy, Allen Eugene v. State, COCA Case No. C-2005-78 (November 28, 2005)***

Plea by defendant unable to make bond was not knowingly and voluntarily entered, where delay in lab results, which later were found to be favorable, was coercive factor in entry of plea. Petitioner permitted to withdraw plea and proceed to trial.

***Martin, Sherice S. v. State, COCA Case No. C-2004-850 (November 30, 2005)***

Factual basis for accepting guilty plea insufficient on one count.

#### **JURY DELIBERATIONS: SENTENCING**

***Taylor, Craig LaFranz v. State, COCA Case No. F-2004-825 (November 28, 2005)***

Note during deliberations demonstrated jury was influenced by extraneous prejudicial information in assessing sentence. Sentence modified from life imprisonment to 20 years.

#### **SENTENCE: EXCESSIVE**

***Bonomelli, James Robert v. State, COCA Case No. F-2004-161 (November 15, 2005)***

Consecutive sentences modified to be served concurrently, reducing total sentence imposed from 100 years to 40 years.

***Fryar, Gerald Lamar v. State, COCA Case No. F-2004-1217 (November 23, 2005)***

Twenty year sentence for walking away from a work center was so disproportionate as to shock the conscience of the Court. Modified to 10 years.

## **UNPUBLISHED OPINIONS**

**Dec. 2005**

### **GUILTY PLEA DECISIONS**

***Libera, Stephen Mark v. State, COCA Case No. C-2004-1017 (December 16, 2005)***

Plea was not knowingly and intelligently entered when Petitioner believed plea agreement was that the recommendation of the PSI would be followed regarding probation. Trial court abused discretion in denying the motion to withdraw plea when the court did not follow the recommendation of the PSI. Certiorari granted.

### **GUILTY PLEA DECISIONS: INEFFECTIVE ASSISTANCE OF COUNSEL**

***McCubbin, Jonathan Andrew v. State, COCA Case No. C-2004-1108 (December 9,***

**2005)** Conflict between counsel and client resulted in client not having effective representation at evidentiary hearing. Remanded for new hearing on Motion to Withdraw Plea.

### **GUILTY PLEA DECISIONS: SENTENCE, ABUSE OF DISCRETION**

***Watkins, Timothy Mark v. State, COCA Case No. C-2004-1156 (December 27, 2005)***

Trial court abused its discretion in refusing to allow Defendant to withdraw Alford plea , when court failed to follow sentencing recommendation of the State. Certiorari granted.

### **JURY INSTRUCTIONS: MISLEADING, CONFUSING**

***Trammell, Stanley Norris v. State, COCA Case No. F-2004-1112 (December 16, 2005)***

Trial court erred in failing to give self-defense instructions in first degree murder case. Reversed and remanded for new trial.

### **PRO SE: CONTINUANCE**

***Lewis, Marion v. State, COCA Case No. F-2004-577 (December 22, 2005)***

Trial Court's refusal to grant a continuance deprived defendant, proceeding pro se, of the ability to call witnesses and to present a defense. Reversed and remanded for new trial.

### **SEARCH & SEIZURE: EVIDENCE**

***Milligan, Eddie Don v. State, COCA Case No. F-2003-1241 (December 23, 2005)***

Helicopter's low fly-over of defendant's property violated reasonable expectation of privacy; evidence derived from subsequent search of property should have been suppressed.

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# LEGISLATIVE UPDATE

by

**DEB REHEARD**

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## NEED TO CONTACT YOUR LEGISLATOR?

You can locate your state and federal legislators by entering your address and zip code on the state site <http://www.lsb.state.ok.us>. Copies of the full text of bills may be downloaded from the Legislative Services Bureau web site at <http://www.lsb.state.ok.us>.

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### **SB 1807 Lamb**

Senate Judiciary Committee - DO PASS (Title Stricken)

**This is the Attorney General's response to *Blonner v. State*, 2006 OK CR 1** (*see* Court of Criminal Appeals section of this *Guantlet*). The legislation provides that:

- \* The Attorney General's determination of mental retardation of a person accused of murder that would remove that person from death penalty eligibility.
- \* The IQ score must be 70 or below and it must have evidence of manifestation prior to age 18. Anyone ever scoring a 76 would be excluded.
- \* Notice of intent to raise mental retardation must be given at least 90 days after formal arraignment or within 90 days after the filing of the Bill of Particulars, whichever is later.
- \* There shall be a hearing before the court, and if the court finds they are not mentally retarded, the matter shall be submitted for jury consideration.

### **HB 2599 Wright**

Status: House Judiciary Committee

**Provides for a "Guilty But Mentally Ill" verdict.** If returned, treatment will be provided until the treating professional determines it is no longer needed or until expiration of the sentence, whichever occurs first. Treatment shall be a condition of probation, conditional discharge, parole, or conditional release so long as the defendant requires treatment for the mental illness in the opinion of the treating professional of the defendant. The burden of proof for GBMI would be a "preponderance of the evidence

that they were mentally ill at the time of the crime.”

**SB 1471 Paddack**

Status: Senate A&B, Public Safety & Judiciary Committee - DO PASS (Title Stricken)  
**Creates the Oklahoma Innocence Commission** to review cases in which persons were exonerated after conviction. The commission is to identify the causes for the erroneous convictions and recommend remedial steps to avoid future mistaken convictions. The Commission will consist of eight (8) persons.

**SB 825 Corn**

Status: Public Safety and Judiciary Committee - DO PASS

- **Creates a speedy trial timetable of 120 days on Aggravated Trafficking cases.**
- Excludes these defendants from pre-trial release absent GPS monitoring.
- Changes the quantities necessary for Aggravated Trafficking cases to:
  - Marijuana - 100 pounds,
  - Cocaine - 1 pound
  - Methamphetamine - 340 grams (12.14 oz.)
- Amends the punishment to not less than 15 years and makes it an 85% crime.

**HB 2615 Calvey**

Status: House Corrections Committee - no hearing date set

**Amends the Make My Day Law. Creates a presumption that justifies using deadly force against an intruder in their dwelling or vehicle** or if the intruder removes or attempts to remove another from their dwelling or vehicle against their will if that person is reasonably in fear of imminent great bodily harm. The presumption doesn't apply if the offender had a right to be in the dwelling or vehicle, the person using force is engaged in an unlawful activity, the "intruder" is a peace officer in the performance of their official duties.

**HB 2840 Steele**

Status: House Health and Human Services Committee

Creates the **Kelsey Briggs Act**. This act provides:

1. If a child's attorney's determination as to the best interests of the child is different than that of the child, the attorneys shall make both interests known to the court.
2. CASAs are to complete a training program and submit to a criminal background check prior to taking a case.
3. It provides for uniform orders to be developed by the AOC and to be used in all deprived cases.
4. Allows the Director of DHS through the D.A. to object to the release of a child from state custody within 48 hours of the order releasing the child.
5. Allows OCCY to provide sworn testimony regarding placement or release of a child, if it is believed there is a serious risk of danger to the health or safety of the child.

6. Creates the Oklahoma Children and Juvenile Law Reform Committee to look seriously at the reformation of the laws and procedures regarding juveniles and children.

**SB 1037 Paddack**

Status: Senate Judiciary Committee - DO PASS

Creates the **Caitlin Wooten Act**.

- Prohibits possession of firearms or ammo by anyone convicted of misdemeanor DV or anyone subject to a VPO.

- Provides that bail may be denied for:

- \* capital offenses
- \* violent offenses
- \* crimes punishable by Life or LWOP
- \* crimes charged AFC two (2) or more felonies, and
- \* CDS crimes where the maximum punishment is at least 10 years.

**SB 1037 Paddack**

**Prohibits certain persons from possessing firearms**; allows bail to be denied under certain circumstances; authorizes the Attorney General to create the crime victim and witness notification and victim protective order system.

**SB 1042 McIntyre**

**Modifies voting rights of felons.**

**SB 1321 Crain**

Status: Senate Judiciary Committee - DO PASS (Title Stricken)

**Provides statewide jurisdiction for District Judges and Associate District Judges**

**SB 1503 Coffee**

Status: Senate Judiciary Committee - DO PASS

**Prohibits cross examination of victims and victim designees who appear personally at sentencing.**

**SB 1790 Lerblance**

Senate A&B, Public Safety and Judiciary Committee - DO PASS (Title Stricken)

**Provides Legislative intent that juries be instructed regarding the 85% service of time for the 21 O.S. Section 13.1 crimes.** The bill also provides that persons convicted of a large number of sex crimes shall be ordered to community supervision for at least 3 years upon any release from incarceration in DOC and that it shall not be construed to reduce the length of imprisonment of an offender.

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# NUGGETS OF GOLD

## MINED FROM THE OCDLA CHATROOM

by  
**Jessica Saffa<sup>1</sup>**

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*We have received an enormous amount of praise from OCDLA members who use our OCDLA Chatroom on a daily basis. Many queries are answered in merely a matter of minutes. Often, OCDLA members provide excellent motions and briefs. Below, we have reprinted a few of the comments, motions and briefs for those of you who did not have time to glance at them. If you are not a member of the Chatroom, you should be. You can join by contacting Brandon Pointer at (405) 232-5959 or via e-mail at [Kingmullet\\_99@yahoo.com](mailto:Kingmullet_99@yahoo.com).*

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**QUERY:** I have a prelim in Logan county Friday afternoon. Police execute search warrant on home. Mom and dad were charged with maintaining when drugs and paraphernalia were found in son and daughter's rooms, no where else in the home was any evidence of drug use, para, found.

**OCDLA Board of Director Terry Hull responds:** Take a look at OUJI-CR (2d) 6-12, setting out elements of Maintaining. These are probably fact issues to be sorted out at preliminary and/or trial, but how many rooms in the dwelling are we talking about (separate rooms or a single bedroom for son and daughter – oh, that’s creepy, isn’t it??). What is the situation with the room(s) – locks on doors, parents come in routinely or not, and where exactly within each room(s) was the contraband found. This is something like a dominion and control issue, although you are looking to see if the requirements of “keeping or maintaining” as to the parents versus as to only the children (which is then a simple possession case). What was the basis of the warrant – accusations regarding the son and/or daughter or accusations more broadly involving the parents? Finally, be mindful that the OUJI-CR will require the trier of fact to be notified that the mere possession of limited quantities of CDS by someone who maintains a house for their personal use will not be enough to make out this offense beyond a reasonable doubt. Be sure to look at the instruction carefully.

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<sup>1</sup> Jessica Saffa is a senior at Northeastern State University. She can be contacted at (918) 449-6532.

**QUERY:** Client has 1989 non-violent Felony Deferred (successfully completed). Charges were dismissed in 1991 on successful completion, but not yet expunged from OSCN (I'll take care of that with a 991(c) expungement. He has no other felony or misdemeanor arrests, convictions or pending charges.

Now, under 22 OS 18 (8), he would appear to qualify for expungement, but one of the 'requirements' is that the person has received a "full pardon." My client was never convicted of anything, so there's nothing to "pardon." Surely this does not mean that anyone who successfully completes a deferred, just not within a year of arrest, cannot qualify for an OSBI expungement of the arrest record, *while* anyone who gets convicted or does time could get pardoned then get the arrest expunged ???

Or, do these just fall under 18(4) as "dismissed on the merits"?

**OCDLA Board of Director Catt Burton responds:** I have dealt with this before and discussed it with OSBI more times than I can count. Their philosophy is that the law was written to specifically exclude deferred people from this section of the law because "they" got the benefit of having a deferred. They are also of the opinion that one needs to seek a pardon to get the benefit of this section. Note: a couple of very well-connected political types have been able to do that for their deferred clients, however, when I tried on one, Cary Pirrong from the parole board sent mine back and said that my client did not need a pardon.

So, you have a couple of choices,

- 1) File your 18/19, see if you lose and then appeal. Or if you win, they will appeal it.
- 2) Get the DA to re-file a dismissal with "Dismissed on the Merits" on it, or
- 3) Try to get a pardon and then file for an 18/19.
- 4) Help me get the law changed to add this.

Good luck!

**QUERY:** Does anyone have some generic information regarding DNA analysis.

**OCDLA Member Cari Brown responds:** Take a look at the National Institute of Justice Web site at <http://www.ncjrs.org/pdffiles1/nij/209493.pdf>. This site has a small, understandable, 8-page overview of DNA analysis. The booklet, entitled "Identifying Victims Using DNA: A Guide for Families," describes the sources of DNA that forensic scientists might use, and explains the differences between nuclear and mitochondrial DNA.

**QUERY:** Client charged with a misdemeanor assault on a police officer in 1998 and a warrant was issued. Nothing else ever happens on the case for the next five years and the client remains in the city and then ultimately moves away. The charge is still sitting there with no activity. In arguing that five years past after the time of the issuance of the warrant with no activity, I am now looking into ways to dispose of the case. The way I read Speedy Trial, it applies to felonies or those who are held without bond. Is there another mechanism to get rid of this case for failure to prosecute? Many thanks.

**OCDLA Member Terry Hull responds:** Speedy Trial rights apply to ALL criminal prosecutions. I know there are judges who don't believe this, but there is no distinction between felonies or misdemeanors. Nor is it limited to those who are held without or unable to make bond – the incarcerated vs. not-incarcerated status of the defendant goes to the prejudice factor, which is only one of several factors to be weighed.

Try *Doggett v. U.S.*, 112 S.Ct. 2686 (1992) – *Doggett* holds that once a period of time elapses between becoming the “accused” (i.e., you are arrested OR charges are filed, WHICHEVER COMES FIRST) and being actively prosecuted, the “prejudice” factor is presumed and need not be shown with specificity. *Doggett* controls the 6th Amendment Speedy Trial issue (and does a good job explaining and harmonizing the Supremes’ prior Speedy Trial decisions). I always have to PUSH *Doggett* in the court’s face to overcome some lingering belief from “back in the day” about people who are not incarcerated having no Speedy Trial violations, etc. other oddities that were fairly well swept away by the *Doggett* opinion (at least when there is a delay as long as that in *Doggett*). Also make sure you calculate the amount of delay in *Doggett* that was attributable to the government (some was and some was not, and I can’t recall right now whether the magic number was 6 years or 8).

However, there is a totally reeking opinion by Court of Criminal Appeals, decided after *Doggett*. It is *Ellis v. State*, decided on 09/05/2003, sorry I don’t have the citation. The facts are just so unique and weird that the decision should be applicable to very few situations – doesn’t sound like it is applicable to yours because the State apparently did NOTHING in your seven-year interim between charge and arrest.

I’m sending an old Motion to Dismiss & Brief in Support. It was written prior to *Ellis*. Again, I think *Ellis* is far less applicable in cases where the period of time between charge being filed and defendant being arrested is due solely to sloth and not to ongoing investigative efforts by the prosecution. (Note: The **Motion to Dismiss for Lack of Speedy Trial and Brief In Support** follows on the next page).



charge). The State is responsible for undertaking reasonable efforts to secure the presence of a defendant for trial. The lack of diligence on the part of the State in failing to prosecute Mr. and Mrs. CLIENT for over 3 years is a violation of their rights to a speedy trial:

Dismissal is the only remedy when the right to a speedy trial is violated. "[S]uch severe remedies are not unique in the application of constitutional standards. In light of the policies which underlie the right to a speedy trial, dismissal must remain, as Barker noted, 'the only possible remedy.' Ibid."

Strunk v. United States 412 U.S. 434, 439-440, 93 S.Ct. 2260, 2263 (1973), invoking Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972). Because the delay is so excessive in Mr. and Mrs. CLIENT's cases, and because the excessive delay had already occurred when they were arrested, dismissal is the only remedy under Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686 (1992) and Strunk.

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#### STATEMENT OF FACTS

The Information in these cases were filed against Mr. and Mrs. CLIENT on July 11, 2000 and warrants for their arrest were issued contemporaneously. (See Court files in CF-00-205 & CF-00-206)

On September 3, 2003 Mr. CLIENT was arrested on this warrant at his home in Enid where he had lived for 31 years. This was the first notice he had that these charges were filed against him. The warrant for CF-00-205 against Mrs. CLIENT was never served as she immediately turned herself in when she learned of Mr. CLIENT's arrest on September 3, 2003. The warrants were placed on NCIC by the Logan County Sheriff's office on July 13, 2000, over three years prior to Mr. CLIENT's arrest.

Thus, a period of 3 years and 3 months elapsed between the time Mr. and Mrs. CLIENT became the accused (July 11, 2000) and the time the State made its first effort to actually prosecute them for the charge filed against them (September 3, 2003). Both lived openly in Enid for over 60 years, both lived under their true and correct names during this period, both maintained a valid driver's license at all times, their home address where Mr. CLIENT was arrested was listed on the warrants, both have been very active members of the First Assembly of God Church in Enid, Mrs. CLIENT for approximately 35 years and Mr. CLIENT for about 20 years, Mrs.

CLIENT was a realtor in Enid for approximately 20 years, and Mr. CLIENT worked for Burlington Northern Santa Fe Railroad for over 40 years.

It is hardly possible for law enforcement to say they could not find Mr. or Mrs. CLIENT on these felony warrants. There exists neither the exercise of due diligence by the State nor any valid reason for its excessive delay in these cases.

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### ARGUMENT AND AUTHORITY

The State's lack of diligence and good faith in pursuing the prosecution of Mr. and Mrs. CLIENT's case for 3 years and 3 months has violated their constitutional rights to a speedy trial. The Sixth Amendment, applicable to the states through the Fourteenth Amendment, guarantees an accused the right to a speedy trial. In Wilson v. District Court of Oklahoma County, 471 P.2d 939, 942 (Okl.Cr. 1970), the Court of Criminal Appeals cited Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988 (1967) for the rule that the Sixth Amendment, applicable to the states through the Fourteenth Amendment, guarantees an accused the right to a speedy trial.

Two years later, the four factors the Wilson Court found must be considered in a speedy trial analysis became the law of the land in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972). The four factors which must be considered are: 1) length of delay, 2) reason for delay, 3) the defendant's assertion of his right, and 4) prejudice to the defendant. Even at this time, both the Wilson and the Klopfer Courts noted the close relationship between factors #1 and #4; to wit: as the length of delay increases, so to does the presumption of prejudice to the defendant until at some point no showing of prejudice need be made.

In 1992, the Supreme Court settled the issue of the integral relationship between factors #1 and #4, holding that a 6 year delay attributable to the government's sloth (characterized by the Court as "six times as long as that generally sufficient to trigger judicial review") constituted such an egregious length that the showing of prejudice was made entirely by the length of the delay itself. Doggett v. United States, 505 U.S. at 658.

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### Length of Delay

Doggett holds that the first Barker factor -- length of delay -- entails a double inquiry. First, "[s]imply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial'

delay...” *Id.* at 651-652, 112 S.Ct. at 2690. The *Doggett* Court noted that post-accusation delay is generally found to be “presumptively prejudicial” at least as it approaches one year. *Id.* at 652 fn.1, 112 S.Ct. at 2691 fn.1 (emphasis added). It also found the 6 year delay attributable to the government to be “six times as long as that generally sufficient to trigger judicial review.” *Id.* at 657-658, 112 S.Ct. at 2694. See also, *United States v. Samson*, 1993 WL 350182 (D. Guam 1993) (18 month delay “well exceed[ed]” whatever period of delay is needed to trigger the speedy trial analysis under *Barker*); *Barker v. Wingo*, 407 U.S. 514, 533, 92 S.Ct. 2182, 2193-2194 (5 year delay is “extraordinary”).<sup>2</sup>

The second part of this inquiry is “the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim.” *Doggett*, 505 U.S. at 652, 112 S.Ct. at 2691. This part of the inquiry equates length of delay with prejudice to the defendant, because “the presumption that pretrial delay has prejudiced the accused intensifies over time.” *Id.* The longer the delay beyond one year, the greater the presumption of prejudice to the defendant.

In the *Doggett* case, Mr. Doggett was indicted on federal drug charges in 1980 but left the United States before his arrest could be effected. The government discovered Doggett was imprisoned in Panama and requested that he be returned to the United States but never followed up on its request. After tracing him to Columbia, the government gave up all effort to find him and, thus, was unaware that he returned to the United States 2 years later in 1982. From that point he lived openly under his true name – indeed, a simple credit check in 1988 revealed an outstanding warrant for him and he was thereupon arrested some eight and one-half years after his indictment. Because he had been absent from the country for two of those years, the speedy trial delay attributable to the government was only six years. 505 U.S. at 647, 657-658, 112 S.Ct. at 2688, 2694.

And even before *Doggett*, the Supreme Court found an 18 month delay between indictment and trial, occasioned by the government and with a mistrial intervening, obviated the need to

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<sup>2</sup>Oklahoma seems to have arrived at 1 year for those incarcerated and 18 months for those on bond as the analysis triggering point, at least for purposes of state law; it has done this by mandating the courts to review cases in which the defendant is either incarcerated pretrial or on bond pretrial for 1 year / 18 months after the filing of charges. See 22 O.S. §812.1. This statute does not speak to the situation in the present case, where a defendant is not even arrested during the period of delay -- this omission is due, no doubt, to the impossibility of mandating judicial review of cases when the defendant is not even extant due to the State’s failure to pursue an arrest after filing charges.

examine for particularized prejudice in Klopfer v. North Carolina, 386 U.S. 213, 217-218, 87 S.Ct. 988, 990-991 (1967).

The delay in arresting Mr. and Mrs. CLIENT for 3 years and 3 months after the Information was filed is three times more than the delay which is presumptively prejudicial, and it certainly triggers an examination of the other Barker factors. The excessive length of delay also equates with a finding of prejudice to them.

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#### Reason for Delay

In Doggett, the reason for delay was found to be, simply, government negligence in not pursuing Doggett. 505 U.S. at 652-654, 112 S.Ct. at 2691. Although negligence is a more neutral reason for delay than deliberate bad faith, it is still required to be considered because “the ultimate responsibility for such circumstances must rest with the government rather than with the defendant”. Barker v. Wingo, 407 U.S. at 531, 92 S.Ct. at 2192.

Doggett lived openly under his true name for over 6 of the 8 1/2 year delay between his charge and arrest. During this time, he was not incarcerated and made no demand for speedy trial because he had no idea that charges had been filed against him until he was arrested 8 1/2 years later. The only reason he was not prosecuted during this time is that the prosecution simply made no effort to find him:

“For six years, the Government’s investigators made no serious effort to test their progressively more questionable assumption that Doggett was living abroad, and, had they done so, they could have found him within minutes. While the Government’s lethargy may have reflected no more than Doggett’s relative unimportance in the world of drug trafficking, it was still findable negligence, and the finding stands.”

Doggett v. United States, 505 U.S. at 652-653, 112 S.Ct. at 2691.

Mr. and Mrs. CLIENT never attempted to hide from authorities. Authorities knew where to find them during the 3 year period the warrants were outstanding. Having lived at the same residence for over 31 years and in the same community for over 60 years creates very deep roots and ties which makes a person findable within minutes. Obviously Mr. and Mrs. CLIENT lived at the same residence when the investigation was ongoing and it is undisputed the police knew of this address, or should have known, as the alleged victim is the great granddaughter of Mrs.

CLIENT and the chief prosecuting witness for the State is the granddaughter of Mrs. CLIENT.

The reason for the delay in prosecuting these cases is, at best, simple negligence on the part of the State. It is, at worst, utter disregard for due process of law and the liberty interests of citizens. The delay between being charged and being arrested is to be attributed solely to the State.

#### Defendants' Assertion of Their Rights

As to Mr. and Mrs. CLIENT's assertion of their rights to a speedy trial, the answer is again found in Doggett. In Doggett, there was no evidence indicating the defendant knew of his indictment until the moment of his arrest. Due to ignorance of the indictment, Doggett was "not to be taxed for invoking his speedy trial right only after his arrest." 504 U.S. at 654, 112 S.Ct. at 2691.

Mr. and Mrs. CLIENT also had no knowledge the instant charge was filed until Mr. CLIENT's arrest for it in September 2003. They could not have asserted a right they did not know they had and, like Doggett, cannot "be taxed for invoking his speedy trial right only after his arrest." And, like Doggett, the excessive unnecessary delay had already occurred by the time he was arrested and Mrs. CLIENT became aware of the warrant.

#### Prejudice to the Defendants

The Supreme Court in Doggett recognized that general delay which approaches one year is presumptively prejudicial. 505 U.S. 647, 652 n.1,658. This was further recognized by the 10<sup>th</sup> Circuit in United States vs. Gomez, 67 F.3d 1515, 1521 (10<sup>th</sup> Cir. 1995)(Although they have not established a "bright line beyond which pretrial delay will trigger a Barker analysis" they are cognizant of the one year "presumptively prejudicial" delay recognized in Doggett.) The United States Supreme Court in presuming that the prejudice at 1 year further presumes that the prejudice has intensified over time. 505 U.S. at 652.

The primary point of contention in Doggett was the government's claim that no speedy trial violation had occurred because Doggett had not shown "precisely how he was prejudiced by the delay between his indictment and trial." 505 U.S. at 654, 112 S.Ct. at 2692. The Doggett Court answered by holding that impairment of the accused's ability to effectively defend is the "most serious" form of prejudice because it "skews the fairness of the entire system". Id.

However, the Doggett Court also held that "specifically demonstrable [and] affirmative

proof of particularized prejudice is not essential to every speedy trial claim” because “excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or, for that matter, identify.” 505 U.S. at 655, 112 S.Ct. at 2692-2693. Doggett clarifies Barker by explaining that “Barker explicitly recognized that impairment of one’s defense is the most difficult form of speedy trial prejudice to prove because time’s erosion of exculpatory evidence and testimony ‘can rarely be shown.’” Id. Thus it was that Doggett was entitled to the dismissal of charges because the delay in his case was so great, in and of itself, as to constitute unalterable prejudice -- to him, to the government, and to the fundamental administration of justice.

Like the delay in Doggett, the length and reason for delay in Mr. and Mrs. CLIENT’s cases have not only triggered the necessity of a speedy trial analysis, but additionally support a finding against the State on the prejudice factor. Under the law of the land as expressed clearly in Doggett, Mr. and Mrs. CLIENT should not be held to proving particularized prejudice because their actions IN NO WAY contributed to the 3 year and 3 month delay between the filing of charges and arrest, and because they could nowise satisfy a proof standard made impossible by that very delay.

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### CONCLUSION

An accused has a constitutional right to a speedy trial. This right is afforded to the accused by both the United States and Oklahoma Constitutions. In the instant case, the State has neglected its duty to diligently prosecute Mr. and Mrs. CLIENT. The delay is three times longer than that necessary to merely trigger a speedy trial claim. Specific prejudice has also been occasioned by the delay and how it came about. It does, therefore, constitute a clear violation of Mr. and Mrs. CLIENT’s rights to a speedy trial. As such, the proper remedy is the dismissal of charges under Barker v. Wingo, supra, under Strunk v. United States, supra, and under Doggett v. United States, supra.

DATED this \_\_\_\_ day of \_\_\_\_\_ 200\_\_.

Respectfully submitted,

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Amber McLaughlin Gill, OBA # 12116

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**Practical Forms**

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IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA  
UNITED STATES OF AMERICA,

	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CR-1990-170-01
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

UNOPPOSED APPLICATION FOR  
ORDER FOR PSYCHIATRIC EXAMINATION

Kent Eldridge, on behalf of Defendant John Doe, applies to the Court pursuant to Title 18, United States Code, §4241, *et.seq.* for an Order for Psychiatric Examination to determine whether the defendant may be presently suffering from a mental disease or defect rendering him mentally incompetent to the extent he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense and whether the defendant at the time of the commission of the acts constituting the offense, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.

Edward Kumiega, Assistant United States Attorney for the government does not oppose this application. This application is supported by defendant's conduct and demeanor, both in and out of court. Defendant reports he is hearing voices constantly. Defendant has a long list of treatment for mental illness, including hospitalizations and medications. Counsel for John Doe, believes, based on conversations with Mr. Doe that there is reasonable cause to believe that he is

suffering presently from a mental disease or defect rendering him mentally incompetent to the extent counsel is concerned that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense and/or that at the time of the commission of the acts constituting the offense, as a result of a severe mental disease or defect, he was unable to appreciate the nature and quality or the wrongfulness of his acts.

Respectfully submitted,

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KENT ELDRIDGE, OBA #2663  
Kent Eldridge, PC  
1100 N. Shartel  
Oklahoma City, Oklahoma 73103  
405-235-6565  
ATTORNEY FOR DEFENDANT  
John Doe

### **CERTIFICATE OF SERVICE**

A copy of this Unopposed Application for Order for Psychiatric Examination was served on counsel for plaintiff, Ed Kumiega, on Thursday, February 23, 2006, by mailing a copy postage prepaid via U.S. Mail as follows: Mr. Edward Joseph Kumiega, Assistant United States Attorney, United States Department of Justice, 210 Park Avenue, Suite 400, Oklahoma City Oklahoma 73102-5602.

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Kent Eldridge, OBA#2663  
1100 N. Shartel  
Oklahoma City, Oklahoma 73103  
405-235-6565  
ATTORNEY FOR DEFENDANT  
John Doe

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**Practical Forms**

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**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,            )  
  )  
                  Plaintiff,                    )  
  )  
v.    )        Case No. CR-1990-170-01  
  )  
John Doe,                                    )  
  )  
                  Defendant.                )

**ORDER FOR PSYCHIATRIC EXAMINATION**

Upon consideration of the unopposed application of Defendant John Doe, pursuant Title 18, United States Code, §4241, *et.seq.* to determine whether the defendant may be presently suffering from a mental disease or defect rendering him mentally incompetent to the extent he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense and whether the defendant at the time of the commission of the acts constituting the offense, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Having considered said application,

IT IS ORDERED, that Defendant John Doe, be committed to the custody of the Attorney General, not to exceed \_\_\_\_\_ days for an examination by at least one qualified psychiatrist or psychologist to determine:

Whether the defendant may presently be suffering from a mental disease or defect

rendering him mentally incompetent to the extent he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. Title 18, United States Code §4241; *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) and whether the defendant at the time of the commission of the acts constituting the violation of conditions of supervised release, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Title 18, United States Code §17(a).

IT IS FURTHER ORDERED that the examiner shall prepare and file with the Court the reports prescribed in 18 U.S.C. § 4247(b) and (c), with copies provided to counsel for the defendant and to plaintiff's counsel. Said report should include (1) the defendant's history and present symptoms; (2) a description of the psychiatric, psychological, and medical tests that were employed and their results; (3) the examiner's findings; and (4) the examiner's opinion as to diagnosis, prognosis, and whether the defendant is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him, or to assist properly in his defense; whether he was insane at the time of the offense charged; whether he is suffering from a mental disease or defect as a result of which his release would create substantial risk of bodily injury to another person or serious damage to property of another; or whether he is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility.

IT IS FURTHER ORDERED the United States Marshal for the Western District of Oklahoma shall notify the United States Bureau of Prisons of this Court's order as soon as possible and upon completion of said examination return Defendant John Doe, to this Court for further proceedings. The Court recommends the evaluation be conducted at a Federal Medical Center. Pursuant to Title 18, United States Code, §3161(h)(1)(A), the Court orders this period of time be deemed excludable under the provisions of the Speedy Trial Act. Title 18, United States Code §3161, et seq.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

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HONORABLE JUDGE CAUTHRON  
UNITED STATES DISTRICT JUDGE  
WESTERN DISTRICT OF OKLAHOMA

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**Practical Forms**

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IN THE DISTRICT COURT FOR OKLAHOMA COUNTY  
STATE OF OKLAHOMA

State of Oklahoma,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CF-200x-618x
	)	
John Doe,	)	
	)	
Defendant.	)	

**DEFENDANT'S MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE  
AND TO DISMISS CASE AND BRIEF IN SUPPORT**

COMES NOW the defendant in the above-entitled cause and moves this Court to suppress the evidence in this case because it was obtained in violation of the defendant's rights under Article II Section 20 § 30 of the Oklahoma Constitution and the Fourth Amendment to the United States Constitution. Counsel for the defendant inadvertently filed a draft of this motion and brief on May 12, 2004. This Motion and Brief in support supplants that one.

**FACTS**

On November 2nd, 2003, the defendant was involved in an altercation in the parking lot of the "Well Club" a bar located within the corporate limits of the City of Oklahoma City. Both Oklahoma City Police and Bethany Police responded to a call regarding the altercation. Bethany police personnel arrived first; however, by the time Bethany police arrived, the defendant had already left the scene and was driving deeper into Oklahoma City.

Notwithstanding they were without jurisdiction in Oklahoma City, Bethany Police Officers solicited a description of the vehicle the defendant was driving from patrons at the Well Club. Thereupon, they pursued the defendant deeper into Oklahoma City. Upon seeing a vehicle approximating the description they received at the Well Club, Bethany Officers engaged their

emergency equipment and performed a traffic stop of the defendant. A subsequent search of the defendant by Officer Rogers of the Bethany Police Department discovered that the defendant possessed the CDS that formed the basis for his arrest. A more extensive search of the defendant at the county jail revealed additional CDS. In all, the defendant was found to be in possession of slightly over ¼ ounce of marijuana and less than a gram of cocaine.

While still in custody at the Oklahoma County jail, the defendant confessed to the matters already set forth.

### **ARGUMENTS AND AUTHORITIES**

A police officer's authority as a police officer is coextensive with the territorial jurisdiction of the entity employing him:

We reaffirm the general rule that a peace officer's authority cannot extend beyond his jurisdiction. There are certain exceptions to this rule: 1) hot pursuit; 2) when one municipality has requested the assistance of another municipality's officers; and 3) service of an arrest warrant. Otherwise, once outside the city limits of the municipality by which they are employed, the officer acts as a private citizen with no authority greater than that of a private citizen.

*Staller v. State*, 1996 OK CR 48; 932 P.2d 1136 (citations omitted).

While it is true that a police officer enjoys the same right to make a citizen's arrest as any private citizen, Officer Rogers employed his "special powers" as a police officer when he engaged his emergency equipment and compelled the Defendant to pull over for a traffic stop when he was without any authority to conduct a traffic stop in Oklahoma City.

Once he left Tulsa, Officer Kinney was acting outside his jurisdiction, and as such, outside the scope of his authority as a police officer. . . . Officer Kinney cannot be said to be merely a private citizen since he was acting under color of law. When he got out of his car, Kinney showed appellant his badge and told her he was a police officer."

*Phipps v. State*, 1992 OK CR 32 at 9; 841 P.2d 591.

By compelling the defendant herein to pull over via the apparent but, in fact, illusory color of state law, Officer Rogers illegally seized the Defendant. All that occurred afterwards is fruit of the poisonous tree. *See, Dale v. State*, 2002 OK CR 1; 38 P.3d 910; *see also, Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407(holding that an illegal arrest makes post arrest admissions

consequent of the illegal arrest inadmissable). Accordingly, the confession also must be suppressed.

Furthermore, the defendant's subsequent confession is inadmissible as evidence against him. "[T]he defendant was arrested illegally and held in custody illegally during which time he gave, without benefit of counsel, an incriminating statement which was the direct result of an 'come at by the exploitation of that illegality.'" *Bynum v. State*, 1971 OK CR 389; 490 P.2d 531.

WHEREFORE, because the arrest of the Defendant's arrest was unlawful, the evidence arising therefrom should be suppressed and this case should be dismissed.

Respectfully Submitted,

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Chad Moody OBA# 17979  
217 N. Harvey, Suite 100  
Oklahoma City, OK 73102  
Ph: (405) 231-4343  
Fax: (405) 236-2970

### **CERTIFICATE OF SERVICE**

This is to verify that on the \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_, I hand-delivered a true and correct copy of the above and foregoing to:

Joe Bob, Oklahoma County District Attorney

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Chad Moody OBA# 17979  
217 N. Harvey, Suite 100  
Oklahoma City, OK 73102  
Ph: (405) 231-4343  
Fax: (405) 236-2970

**DUI JURY TRIALS:  
MORE ON REFUSAL JURY INSTRUCTIONS <sup>1</sup>**  
by  
**Charles L. Sifers <sup>2</sup>**

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The most common jury trial on a DUI case - probably nationwide - is one with a refusal of a test; not a failure of a test. While the Oklahoma Uniform Jury Instructions provide clear direction to the fact finder in a DUI or DWI case where there has been breath/blood test,<sup>3</sup> the OUJI's are tomb-silent on instruction or direction to the Jury on how to "handle" evidence of a *refusal* of such a test. Most prosecutors shovel this fact of refusing the test to the jury, NOT like they might communicate the color of your client's shirt on the night of the arrest, but as an absolute, beyond-ALL-doubt PROOF that he was intoxicated and he knew it. Why would ANYBODY refuse to show the officer that he was NOT under the influence by taking a test unless he knew he would fail it miserably?<sup>4</sup> Consequently, I have always believed that this was a giant, gaping hole in the OUJI's that needed correction. A trial of a DUI refusal MUST have some instruction to balance this inference.

The last *Gauntlet* contained a jury instruction that I had recently gotten approved and that

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<sup>1</sup> This article is a follow-up to the one published in the last issue of *The Gauntlet*.

<sup>2</sup> Oklahoma City Attorney Sifers is a regular contributor to *The Gauntlet* on DUI issues. He is the Board Certified in DUI Defense (the first of only TWO in Oklahoma) by the National College for DUI Defense under the American Bar Association's Specialization in this field of law.

<sup>3</sup> See OUJI 6-18 (DUI elements with a test); OUJI 6-23 (Driving While Impaired elements); and, OUJI 6-24 (Chemical Test Evidence Defined for both DUI and DWI).

<sup>4</sup> By the way: do **NOT** let this type of burden-shifting occur at ANY time during a trial, whether you have a refusal instruction in place or not. Always file a motion *in limine* to control this behavior. And, be very angry if it is attempted by your prosecutor. Demand a mistrial if it occurs.

went back into the deliberation room.<sup>5</sup> This was in Oklahoma County District Court and Judge James Croy sustained my motion to have it included in the OUJI's in that case. That case ended in an acquittal. In January of this year, another judge in Oklahoma County District Court - this time a *district* judge<sup>6</sup> - approved the use of, what I am led to believe from the prosecutors in that case, that **same** instruction. The instruction in question follows below:

Evidence has been introduced of the Defendant's refusal to take a test to determine the blood alcohol in his body at the time of arrest. You must determine if this refusal constitutes an inference of guilt.

To find that the Defendant's refusal constituted an inference of guilt, you must find beyond a reasonable doubt that:

First, the Defendant refused the test;  
Second, with a consciousness of guilt; and,  
Third, in order to avoid arrest or conviction of the crime with which he is now charged.

If, after a consideration of all the evidence on this issue, you find that the Defendant refused the test with a consciousness of guilt and in order to avoid arrest or conviction, then this refusal is a circumstance which you should consider with all the other evidence in this case in determining the question of the Defendant's guilt or innocence.

However, if you have a reasonable doubt that the Defendant refused the test due to a consciousness of guilt and/or to avoid arrest or conviction of the crime, then the refusal to take the test is not a factor for you to consider in your determination of guilt or innocence. *See Harris v. State*, 1989 OK CR 15, 773 P.2d 1273, at ¶8 -¶10, at 1277-78 (Judge Lumpkin, specially concurring).

That case ended in an acquittal as well.<sup>7</sup> I can not say that this instruction actually *helped* in EITHER case, but it sure could not have hurt.

However, Greg Mashburn, the Chief Prosecutor over misdemeanors in that county and the manger over most DUI trials there, approached me the evening of the *Patterson* acquittal and advised

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<sup>5</sup> See *DUI Refusal: Jury Instructions, The Gauntlet*, Fall, 2005.

<sup>6</sup> Judge Croy is a *special* district judge.

<sup>7</sup> See *State v. Patterson*, CM 2003-4943, Oklahoma County District Court, Judge Don Deason.

me that he was "tired" of my "little instruction" and would be doing a reserved question of law in that case to the COCA about that instruction. He is not particularly happy that his office has LOST the last three (3) DUI jury trials with refusals tried in that courthouse in the past year.<sup>8</sup> Apparently, his office's argument or problem with it is "intent" language of it. His argument is that DUI is NOT an intent crime and this language is inappropriate and creates a burden upon the prosecution that is not required by law.<sup>9</sup> As of this writing, I do not know if he has followed through with that promise/threat or not.

However, while I believe that the instruction is both NEEDED and legally SOLID, the COCA just *might* disagree with me. Certainly, a review of all the DUI related cases that have come down from our appellate courts in the past year would suggest that, even if his argument is as weak as a cat's back, it could most EASILY find favor at the hill. In the meantime, we should, therefore, use this instruction while we can.<sup>10</sup>

When you use this instruction, follow it with the one below, too. It "ties up" the matter even more solidly, IF your jury does find that your client intended to evade capture or conviction.

If, after a consideration of all the evidence on this issue of refusal of a chemical test, you find that the Defendant refused the test with a consciousness of guilt and in order to avoid arrest and conviction, then this refusal is a circumstance which you should consider with all the other evidence in this case in determining the question of the Defendant's guilt or innocence.

However, in your consideration of this evidence, this refusal can not be given greater weight, or inference, by you in your determination of any guilt or innocence of the Defendant than that which might be afforded if the State had introduced a chemical test which the Defendant had in fact taken and failed.

*See Harris v. State*, 1989 OK CR 15, 773 P.2d 1273, at ¶8 -¶10, at 1277-78 (Judge Lumpkin, specially concurring). *See also, South Dakota v. Neville*, 459 U.S. 553, 564 (1983)("[T]he

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<sup>8</sup> The third trial did NOT use this instruction.

<sup>9</sup> Of course, that argument totally misses the point of this instruction. It is based on "flight" instructions. Further, until refusal of a test becomes a crime in and of itself (which, by the way, is a "movement" in the legislatures around the nation right now), that "intent" argument is misplaced.

<sup>10</sup> Soap box here: More of these cases - particularly refusals - **should** be tried by the defense bar.

State wants [a motorist] to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test.").

This second instruction completes the first one.

If your judge still refuses to allow these above instructions OR if this matter actually gets to the hill and - surprise! - it is ruled as unavailable, I've got another one for you to use.

Evidence has been introduced of the Defendant's refusal to take a test to determine the blood alcohol in his body at the time of arrest. In your consideration of this evidence, this refusal can not be given greater weight, or inference, by you in your determination of any guilt or innocence of the Defendant than that which might be afforded if the State had introduced a chemical test which the Defendant had in fact taken and failed.

*See South Dakota v. Neville*, 459 U.S. 553, 564 (1983)("[T]he State wants [a motorist] to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test.").

This one, I believe, will be MUCH harder for your judge to disallow.

Keep trying this cases. As each month passes, I see recommendations of the D.A.'s get more and more tough on DUI cases, whether refusals or failed tests. This is a responsibility of all of us who represent DUI cases. The only why that we will can "push" them back on this is to stand up to them. If we start trying some of these cases and whipping some ass, maybe we will see some better deals offered.

# CONSENT SEARCH LAW IN A NUTSHELL

by

**Barry L. Derryberry**

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This column consolidates what you need to know in addressing consent to searches by police. This covers Fourth Amendment consent, not Fifth Amendment consent. If you would like to have my more comprehensive source material, contact me at the above e-dress.

Valid consent must be voluntary, which strictly speaking is comprised of three aspects: it must be unequivocal/specific, voluntary, and free from coercion. These components are reflected in *United States v. McRae*, 81 F.3d 1528, 1537 (10th Cir. 1996), which expresses a two-step test for determining the voluntariness of a consent: "First, the government must proffer 'clear and positive testimony that consent was unequivocal and specific and freely and intelligently given.' Furthermore, the government must prove that this consent was given without implied or express duress or coercion." Oklahoma's controlling constitutional provision tracks federal law (see e.g., *Long v. State*, 706 P.2d 915 (Okla. Cr. 1985) and *State v. Kudron*, 816 P.2d 567 (Okla. Cr. 1991)). The 10th Circuit and the OCCA agree there is no presumption against the validity of consent to a search.

**Schneckloth v. Bustamonte, 93 S.Ct. 2041 (1973)**- This is the leading Supreme Court case, followed in Oklahoma cases such as *Dale v. State*, 38 P.3d 910 (Okla. Cr. 2002), which holds that consent may "not be coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth* provides the familiar totality of circumstances rule, but should also be remembered for focusing on the *subjective* perspective of the consenting subject, and inviting the defense lawyer to conceive of factors which highlight coercion. There's lots of good language to lace briefs with:

"...the question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not

establish such knowledge as the sine qua non of an effective consent.”

“In examining all the surrounding circumstances to determine if in fact consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.”

“In determining whether a defendant's will was over-borne in a particular case, the Court has assessed the totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused... his lack of education... or his low intelligence... the lack of any advice to the accused of his constitutional rights... the length of detention... the repeated and prolonged nature of the questioning... and the use of physical punishment such as the deprivation of food or sleep... In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted...”

Besides the factors in *Schneckloth*, here are other factors to consider when cross-examining an officer:

- whether consent request occurs during the suspect's detention. *United States v. Nicholson*, 983 F.2d 983, 988 (10th Cir. 1993)
- whether the person granting consent expresses discomfort during the search or expresses a desire to halt the search. *United States v. McRae*, 81 F.3d 1528, 1537 (10th Cir. 1996)
- whether multiple officers are present. *United States v. Winningham*, 140 F.3d 1328, 1332 (10th Cir. 1998)
- Language or tone of voice indicating that compliance with the officer's request might be compelled can prove the difference between consensual encounter and seizure. *United States v. Mendenhall*, 100 S. Ct. 1870 (1980)
- Trooper “leaning over and resting his arms on the driver's door when he asked for consent to search” suggested a lack of voluntariness, even if the behavior was not designed to intimidate. *United States v. McSwain*, 29 F.3d 558, 563 (10th Cir. 1994)

**Burden of Proof-** *State v. Kudron*, 816 P.2d 567 (Okla. Cr. 1991), is the primary Oklahoma

case. It says:

The state has the burden to show that the defendant knowingly and intelligently waived his rights to a search warrant.

Before a court holds that a citizen has waived such protection [as the Fourth Amendment], there should be convincing evidence to that effect. The trier of fact should be slow in finding intentional and voluntary relinquishment of immunity from search without a warrant when from the evidence the matter is somewhat in doubt.

The 10th Circuit has held that there must be clear and positive testimony that consent was ‘unequivocal and specific’; further, that it was truly and intelligently given.

However, *Kudron* lets the state off without an actual burden. Is it preponderance? Clear and convincing? That answer is provided by *State v. Goins*, 84 P.3d 767, 771 (Okla. Cr. 2004): “This Court uses the same test for the voluntariness of consent as is used in federal courts; the test for voluntariness is to be judged from a totality of the circumstances... When the State claims that there is consent, the proof offered by the State must be ‘*clear and convincing* that the waiver was a free and voluntary act.’” (*Emphasis added*) Thus it is important that your motion to suppress cite *Kudron* and *Goins* for their combined burden of proof features. *But see Reeves v. State*, 818 P.2d 495 (Okla. Cr. 1991) (“The burden rests upon the prosecution to prove adequate authority by a preponderance of the evidence in third party consent cases.”)

A good bright line rule to remember is that acquiescence won’t fly: “...where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority.” *Florida v. Royer*, 103 S.Ct. 1319, 1324 (1983) *Kudron* echoes this, holding that a hand gesture did not amount to consent. *See also Johnson vs. United States*, 333 U.S. 10 (1948).

**Consent Following Fourth Amendment Violation-** When consent follows an illegal detention, the government must prove that consent is sufficiently an act of free will to purge the primary taint of the illegal detention. This burden is “heavier” than the burden applicable where consent follows a legal detention. Three factors must be analyzed, as set forth in *Brown v. Illinois*,

95 S. Ct. 2254, (1975)):

- the temporal proximity of the illegal detention and the consent,
- any intervening circumstances, and
- the purpose and flagrancy of the officer's unlawful conduct.

The *Brown* test was applied and invalidated consent in *McGaughey v. State*, 37 P.3d 130, 141-42 (Okla. Cr. 2001), which the officer obtained after his basis for a traffic stop fizzled. A similar result occurred in *United States v. McSwain*, 29 F.3d 558 (10th Cir. 1994). These cases are uncooperative with the brevity of this article and need to be read for what they can offer. For instance, in *Brown* the time between the illegal detention and consent was a couple of hours, which should make the factor a shoe-in if a shorter interim is involved. Frequently, but not always, reading of *Miranda* rights will be a curative intervening circumstance.

Where an officer was outside his police jurisdiction acting in an officer capacity, the OCCA has been swift to find that obtained consent is invalid. See *United States v. Sawyer*, 92 P.3d 707 (Okla. Cr. 2004); *Phipps v. State*, 841 P.2d 591 (Okla. Cr. 1992)

*Dale v. State*, 38 P.3d 910 (Okla. Cr. 2002)- Once cops were improperly on defendant's curtilage, his consent to search was invalid considering the Fourth Amendment violation, the number of agents, their manner of dress, their carrying semi-automatic weapons, and the presence of a police helicopter immediately overhead.

*State v. Hansen*, 63 P.3d 650 (Utah Sup. Ct. 2002)- consent given after completion of a traffic stop was invalid. The court found that the defendant was illegally seized when the officer began questioning him about alcohol, drugs, and weapons. The officer's questions exceeded the scope of the initial traffic stop. While the defendant's consent was voluntary, the consent was invalid because it was obtained by police exploitation of a prior illegality. The purpose behind the officer's illegal conduct was to obtain consent to search the vehicle, there were no intervening factors between the misconduct and the consent, and the temporal proximity between the police illegality and defendant's consent was very close.

**Third Party Consent-** In general, anyone with joint access to residential premises can consent to search of the premises. *United States v. Matlock*, 94 S.Ct. 988 (1974) This depends on

the reasonableness of the assumption that “any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.” *Id.*, 94 S.Ct. at 993 n. 7

*Matlock* addresses the situation where the owner is absent. This year, in *Georgia v. Randolph*, the U.S. Supreme Court will decide “whether an occupant may give law enforcement valid consent to search the common areas of the premises shared with another, even though the other occupant is present and objects to the search.”

In *Johnson v. State*, 905 P.2d 818 (Okla. Cr. 1995), the owner was present. Cops gained consent from the driver, who was not the owner, and did not bother to get consent from the passenger, when they knew he was the owner. The OCCA said: “...a person whose property is the object of a search should have controlling authority to refuse consent to the search. Where the known owner is present, the driver has only apparent, not actual, authority, and his consent is invalid as a matter of law.” “The fact that [the officer] was aware of who owned the car is crucial to our holding.” *Cf. Fields v. State*, 808 P.2d 79 (Okla. Cr. 1991) (Co-owner of house who did not live in it and did not have key could not give consent to enter and search); *Farmer v. State*, 759 P.2d 1031 (Okla. Cr. 1988) (Hotel clerk could not let cops search room which defendant was still leasing); *U.S. v. Davis*, 332 F.3d 1163 (9th Cir. 2003) (Lessee and occupant of apartment did not have authority to consent to search of defendant’s gym bag which was under his bed.)

**Foreign Language-** Police increasingly encounter people who don’t speak English, and try to bridge the gap with Spanglish and pantomime. The OCCA has not announced governing legal principles, and Tenth Circuit jurisprudence on the subject barely registers compared to *Urioso v. State*, 910 So. 2d 158 (Ala. Crim. App. 2005). *Urioso* canvasses other jurisdictions that have addressed the situation and concludes: “Urioso plainly did not understand enough English to give a knowing and voluntary consent to search his vehicle. Thus, Officer Woods should have radioed for a law-enforcement officer fluent in Spanish in order to ensure that Urioso understood what he was being asked to do.”

**Scope of Consent-** “[W]here a suspect does not limit the scope of a search, . . . an officer

is justified in searching the entire vehicle”. *United States v. Wacker*, 72 F.3d 1453 (10th Cir. 1995)

The key Supreme Court case is *Florida v. Jimeno*, 111 S. Ct. 1801 (1991), which adopted an objective reasonableness test: “what would the typical reasonable person have understood by the exchange between the officer and the suspect?” The Court upheld the opening and search of a brown paper bag inside the car. The Court drew a line at locked containers: “it is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk.” *Id.* at 251-52.

*United States v. Wald*, 216 F3d 1222 (10th Cir. 2000)- “A review of the videotape recording of the traffic stop reveals that [Sgt.] Mangelson asked... the following question: ‘You wouldn't mind if I take a quick look, would you?’ One or both of the defendants responded, ‘No.’ A reasonable observer of this exchange would not likely conclude that Wald gave Mangelson permission to search the vehicle's trunk.”

*United States v. Osage*, 235 F.3d 518, 522 (10th Cir.2000)- Consent to search car and luggage did not furnish permission to destroy containers found therein. Officer found tamale cans and thought their labels and contents were suspicious. He opened one can, rendering the container useless. “We therefore hold that, before an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search, the officer must obtain explicit authorization, or have some other, lawful, basis upon which to proceed.”

### **Specific Cases**

*State v. Baxter*, 528 P.2d 347 (Okl.Cr. 1974)- Officers investigating report of possible rape or kidnapping at state park stopped vehicle coming from park. As one officer talked to the driver, another officer saw a Geritol bottle on the transmission hump. The officer seized the bottle and opened it. Pills were in the bottle, described as vitamins by the driver. The driver said the officers could take as many as they wanted. After a lab determined the pills contained LSD, the driver was charged. The officers lacked probable cause to seize the bottle. “[S]uch seizure could not have been made lawful by the defendant’s consent to search the bottle.” Thus the search of the bottle was tainted and inadmissible.

*Poe v. State*, 483 P2 1190, 1191 (Okl.Cr. 1971)- Consent to search coerced by officer’s

threat that he would impound car: “The defendant was arrested and removed to an adjacent parking lot. He was informed that if he did not consent to a search of his automobile, it would be impounded and a search warrant obtained. The defendant then consented to the search and certain items were obtained from the automobile... We are of the opinion that threatening to impound a vehicle and to obtain a search warrant is coercion.”

*State v. Boyd*, 64 P.3d 319 (Kan. 2003)- Search of passenger’s purse during traffic stop violated Fourth Amendment when passenger tried to get purse from car prior to search consented to by driver.

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## REQUESTS FOR DRIVING RECORDS

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Certified copies of driving records are available for \$13.00 per record. Uncertified copies may be requested for \$10.00 per record. The report will contain all entries to the driving record for three (3) years prior to the date of request, as required by Oklahoma Statute. Driving records are available at motor license agents throughout the state, or from the Department of Public Safety (DPS). Certified copies are *only* available from DPS. **The telephone number for DPS driving records is 405-425-2262.**

Mail requests to Oklahoma Department of Public Safety Attn: Driving Records P.O. Box 11415 Oklahoma City, OK 73136. No electronic requests are accepted. Requests for driving records must be accompanied by a cashier's check or money order, which **MUST BE** drawn on a bank within the United States and payable in U.S. Dollars, **and a Records Request form**. If you are requesting information on someone other than yourself, **you must also include a Consent to Release form**. Please include a self-addressed stamped envelope.

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## OCDLA ITEMS FOR SALE

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### *Members in the News*

## **DEB REHEARD TO SERVE ON THE BOARD OF GOVERNORS FOR THE OBA**

OCDLA Board Member, Deb Reheard, was recently appointed to serve a one-year term on the OBA's Board of Governors. She was officially sworn to duty at the Oklahoma Supreme Court courtroom in the State Capitol on January 13<sup>th</sup>, 2006.

She is a solo practitioner in Eufaula since 1991, practicing primarily in the areas of civil and criminal trials and appeals, family law and bar discipline. Deb is also a member of the Oklahoma Reining Horse Association, currently serving as its vice president.

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