

# THE GAUNTLET

THE LAW JOURNAL OF THE OKLAHOMA CRIMINAL DEFENSE  
LAWYERS ASSOCIATION  
SPRING 2009



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## TABLE OF CONTENTS

<i>Article</i>	<i>Contributor</i>	<i>Page</i>
The President's Page	Andrea D. Miller	4
Oklahoma Court of Criminal Appeals—Published	Michael R. Wilds	6
Oklahoma Court of Criminal Appeals—Unpublished	Cindy Brown Danner	12
Tenth Circuit Update	James L. Hankins	17
United States Supreme Court Update	James L. Hankins	38
Other Cases of Note	James L. Hankins	43
Interrogations and False Confessions—What Attorneys Should Know From the Social Sciences	Shawn Roberson, Ph.D.	57
Committee Assignments		72
Nuggets of Gold	Michael R. Wilds	73
Points for Driving Violations	Jeff Sifers	81

*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/co sponsors approximately seventy (70) hours of Continuing Legal Education (CLE) each year and publishes My Little Green Book. The Gauntlet is a peer-reviewed journal. All articles are reviewed by members of the OCDLA prior to publication; however, the articles do not necessarily reflect the views of the OCDLA. Please send any comments regarding The Gauntlet to James L. Hankins, Editor, at [jameshankins@ocdw.com](mailto:jameshankins@ocdw.com).*

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# THE PRESIDENT'S PAGE

by

**ANDREA D. MILLER**

*President, Oklahoma Criminal Defense Lawyers Association*

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Dear members,

We are pleased to bring you the Spring edition of *The Gauntlet*. I hope you find it interesting and helpful to your practice.

I want to take this opportunity to talk a little about the future of OCDLA. During my tenure as President of this wonderful organization, I have focused on two main areas: membership and modernization. On the membership front, it is difficult to gauge how much progress we have made because we receive membership renewals and new member applications throughout the year. I believe that we have increased our numbers, but we still need to do better. Just imagine the increase in membership if each current member recruited one new member this year, and convinced one former member to re-join. We would be significantly larger than we are now and, with the increased membership would come the ability to better further OCDLA's mission.

Our success in modernizing the organization is a little easier to gauge. The OCDLA website, [www.ocdlaoklahoma.com](http://www.ocdlaoklahoma.com), is up and running. The web site features a members section that contains a directory of current members, and the most recent edition of *The Gauntlet*. We are also working on creating a brief bank that will be accessible through the members section as well. Registration for the "member's only" section is simple and can be done by clicking on the "member's only" tab at the top of the homepage and following the directions. Once our site administrator has registered your username and password, you will have access. The website is very much a work in progress. Please feel free to contact anyone on the leadership page with suggestions about how to make the site more useful.

I anticipate in the next few months the decision will be made to transmit *The Gauntlet* in electronic format. We are also working on the revival of the OCDLA "hot sheets" in electronic format. These are timely alerts to significant decisions and rule changes from state and federal appellate courts. Finally, work is in progress to create a software version of *My Little Green Book* making that invaluable tool even more user friendly.

The officers and board members of OCDLA have undertaken an ambitious agenda in an attempt to make sure the organization stays up to date and relevant in today's criminal defense practice. However, I assure you that as we make decisions on how to update various aspects of the

organization we will do it with the purpose and mission of the organization in mind. Making changes does not mean departing from the bedrock principles on which OCDLA was built.

Thank you for your continued support of OCDLA!

*Andrea Digilio Miller*  
OCDLA President

Check out the new web site of the *Oklahoma Criminal Defense Lawyers Association* at:

[www.ocdlaoklahoma.com](http://www.ocdlaoklahoma.com)

# OKLAHOMA COURT OF CRIMINAL APPEALS-- PUBLISHED OPINIONS

by

**MICHAEL R. WILDS<sup>1</sup>**

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## CONFESSIONS

*State v. Pope*, 2009 OK CR 9

In determining whether confession is the product of the maker's free and unconstrained choice, the court looks to the totality of the circumstances surrounding it, including the defendant's character and the details of the interrogation. State must prove that defendant's waiver of Miranda rights was (1) the product of a free and deliberate choice rather than intimidation, coercion, or deception, and (2) made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

## CONSPIRACY

OUJI Revised – 2009 OK CR 5

### **OUJI-CR 2-19A CONSPIRACY – CO-CONSPIRATORS ARE JOINTLY LIABLE**

When a conspiracy is entered into to do an unlawful act, the conspirators are responsible for all that is said and done in furtherance of the conspiracy by their co-conspirators. If two or more persons conspire to commit a crime, each is criminally responsible for the acts of **his/her** co-conspirators in furtherance of the conspiracy, or where the connection between the acts and the conspiracy is reasonably apparent.

Therefore, if you find beyond a reasonable doubt that **[Name of Defendant]** was a member of a conspiracy, and that **another/other conspirator(s)** committed the crime of **[Specify Crime]** in furtherance of, or as a foreseeable consequence of, the conspiracy, then you may find **[Name of Defendant]** guilty of **[Specify Crime]**, even though **[Name of Defendant]** may not have participated in any of the acts that constitute the crime of **[Specify Crime]**.

## DEATH PENALTY

OUJI Revised – 2009 OK CR 5

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**OUJI-CR 4-77**  
**DEATH PENALTY PROCEEDINGS - CIRCUMSTANTIAL EVIDENCE -**  
**EXCLUDING REASONABLE THEORIES OTHER THAN**  
**EXISTENCE OF AGGRAVATING CIRCUMSTANCE**

The State relies **[in part]** upon circumstantial evidence for proof of the aggravating **circumstance(s)** of **[Specify the Aggravating Circumstance(s) That Is/Are Applicable]**. In order to warrant a finding of any aggravating circumstance or circumstances upon circumstantial evidence, each fact necessary to prove the existence of the circumstance must be established by the evidence beyond a reasonable doubt. All the facts necessary to such proof must be consistent with each other and with the conclusion the State seeks to establish. All of the facts and circumstances, taken together, must be inconsistent with any reasonable theory or conclusion other than the existence of the aggravating circumstance. All of the facts and circumstances, taken together, must establish to your satisfaction the existence of the aggravating circumstance beyond a reasonable doubt.

**EVIDENCE - ADMISSIONS - SEX ABUSE**

*James v. State*, 2009 OK CR 8

Admission of evidence concerning child victim's claim of sexual abuse pursuant to statutes permitting evidence of other, specified offenses of a sexual nature did not violate defendant's constitutional protection from ex post facto laws; enactment of statutes did not affect the quantum of evidence necessary to support defendant's conviction.

**EVIDENCE - ANONYMOUS TIPS**

*Nilsen v. State*, 2009 OK CR 6

A traffic stop is an investigatory detention which is analyzed according to the principles set forth in *Terry*. In order to conduct a lawful investigatory stop of a vehicle, the detaining officers must have, based on all the circumstances, a particularized and objective basis for suspecting the particular person stopped of criminal activity. When tip comes from an unknown informant, the anonymous tip must be sufficiently corroborated to furnish reasonable suspicion that defendant was engaged in criminal activity so as to justify investigatory detention of defendant.

**EVIDENCE - MURDER 1**

*Rutan v. State*, 2009 OK CR 3

Evidence was sufficient to prove first degree murder based on the use of unreasonable force where death of a minor occurred when defendant put tape over the victim's eyes and mouth, and numerous individuals stated that defendant used excessive force when disciplining victim.

**EVIDENCE - 911 RECORDINGS**

*Jones v. State*, 2009 OK CR 1, 201 P.3d 869

Probative value of audio recording of 911 emergency call, which captured the sounds of gunshots and screams inside house during multiple murders, was not substantially outweighed by danger of undue prejudice.

## EVIDENCE - SEXUAL PROPENSITY

*Horn v. State*, 2009 OK CR 7

Allowing admission of sexual propensity evidence in prosecutions for sexual offenses does not violate due process or defendant's right to a fundamentally fair trial.

## EVIDENCE - WARRANTLESS ENTRY

*Burton v. State*, 2009 OK CR 10

To justify a warrantless entry of a residence to conduct a protective sweep, the suspicion of danger must be clear and reasonable in light of all surrounding circumstances because officers of the law are not given free reign to conduct sweep searches on the pretense that a dangerous situation might be imminent. When the state seeks to rely on evidence discovered through a warrantless search, the state carries the burden of showing that the circumstances of the situation fell within one of the specific exceptions to the warrant requirement.

## HEARSAY – CHILD WITNESS

*Folks v. State*, 2008 OK CR 29 (Dec. 19, 2008).

Admission of a DVD containing a child's recorded statements to officials regarding sex acts falls within the statutory exception for statements made by a child victim regarding sexual abuse and was not an abuse of discretion where the child was not coerced or led in any manner to testify in certain way. The Court looked to the trustworthiness of the statements and whether the child was coerced or lead the victim to testify in a certain manner. 12 O.S. 2803.1(1).

## IMPEACHMENT - PRIOR INCONSISTENT STATEMENTS

OUJI Revised – 2009 OK CR 5

### **OUJI-CR 9-20**

#### **EVIDENCE - IMPEACHMENT BY PRIOR INCONSISTENT STATEMENTS**

Evidence has been presented that on some prior occasion **(the defendant)/([Name of Witness])(made a statement)/ (acted in a manner)** inconsistent with **his/ her** testimony in this case. This evidence is called impeachment evidence and it is offered to show that the **defendant's/witness's** testimony is not believable or truthful. If you find that **(a statement was made)/(the acts occurred)**, you may consider this impeachment evidence in determining what weight and credit to give the testimony of **(the defendant)/(that witness)**. You may not consider this impeachment evidence as proof of innocence or guilt. You may consider this impeachment evidence only to the extent that you determine it affects the believability of the **defendant/witness**, if at all.

[However, if you find the statements of **(the defendant)/ ([Name of Witness])** were made **[Specify When, Where, and To Whom the Statements Were Made]**, the statements may also be considered as proof of innocence or guilt.]

## INEFFECTIVE ASSISTANCE OF COUNSEL

*Wiley v. State*, 2008 OK CR 30 (Dec. 29, 2008).

Defense counsel was unprepared, failed to comply with discovery requirements, failed to have

DNA independently tested, failed to know the names of his witnesses, failed to interview all alibi witnesses, failed to know the proper sentencing range, and abruptly concluded *voir dire* despite advice from the trial court. According to the two prong test, 1) Counsel's performance was deficient, and 2) Counsel's performance prejudiced the defense, there was a "reasonable probability" that, but for any unprofessional errors by counsel, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

### **MANDATORY POST-IMPRISONMENT SUPERVISION**

OUII Revised – 2009 OK CR 5

#### OUJI-CR 10-13C MANDATORY POST-IMPRISONMENT SUPERVISION

You are advised that if you recommend a sentence of imprisonment for two years or more, **[Name of Defendant]** shall be required to serve a term of post-imprisonment community supervision under conditions determined by the Department of Corrections, in addition to the actual imprisonment. The term of post-imprisonment community supervision shall be for at least three years, and if you recommend a sentence of imprisonment for two years or more, I will determine the actual term of post-imprisonment community supervision after your verdict.

### **LEWD MOLESTATION**

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

Defendant could be convicted of lewd molestation even though he did not see young girls' naked bodies or naked private parts when he followed girls into store and positioned himself so as to see under their dresses and see their panties, which was his admitted intent. The statute governing offense of lewd molestation does not require the child's body or private parts looked upon, touched, mauled, or felt to be naked. The elements according to 21 O.S. 1123 are that the defendant (1) was at least three years older than the victim, (2) knowingly and intentionally, (3) looked upon, touched, mauled, or felt (4) the body or private parts (5) of any child under 16 years of age, and (6) in a lewd or lascivious manner. 21 O.S. 1123.

### **SELF DEFENSE**

OUII Revised – 2009 OK CR 5

#### OUJI-CR 8-15 DEFENSE OF PERSON - JUSTIFIABLE USE OF DEADLY FORCE AGAINST INTRUDER

A person is justified in using force that is intended or likely to cause death or great bodily harm to another person who **(was in the process of unlawfully and forcefully entering)/(unlawfully and forcibly entered) a dwelling/residence/(occupied vehicle)** if the person using the force knew or had reason to believe that an unlawful and forcible entry **(was occurring)/(had occurred)**.

**OR**

A person is justified in using force that is intended or likely to cause death or great bodily harm if the person against whom the force was used **(had attempted to remove)/(was attempting to remove)**

another person against the will of that other person from a **dwelling/residence/(occupied vehicle)** and the person using the force knew or had reason to believe that an unlawful and forcible **removal/(attempt to remove) (was occurring)/(had occurred)**.

[A person is not justified in using force if:

The person against whom the force is used **(has the right to be in)/(is a lawful resident of) the dwelling/residence/(occupied vehicle)**, such as an owner, lessee, or titleholder), and there is not a **(protective order from domestic violence in effect)/(a written pretrial supervision order of no contact)** against that person.

**OR**

The person or persons sought to be removed are **children/grandchildren/(in the lawful custody/( under the lawful guardianship)** of the person against whom the force is used.

**OR**

The person who uses force is **(engaged in)/(using the dwelling/residence/(occupied vehicle)** to further an unlawful activity. ]

["Dwelling" means a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people.]

["Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.]

["Vehicle" means a conveyance of any kind, whether or not motorized, which is designed to transport people or property.]

## **SELF DEFENSE**

OUJI Revised – 2009 OK CR 5

### OUJI-CR 8-15A DEFENSE OF PERSON - RIGHT TO STAND YOUR GROUND

A person has no duty to retreat and has the right to stand **his/her** ground and meet force with force, including deadly force, if **he/she** is not engaged in an unlawful activity and is attacked in any place where **he/she** has a right to be, if **he/she** reasonably believes it is necessary to do so to prevent **(death/(great bodily harm) to himself/herself/ another)/(the commission of a forcible felony)**.

## **SIXTH AMENDMENT – RIGHT TO CONFRONTATION**

*Folks v. State*, 2008 OK CR 29 (Dec. 19, 2008).

Admission of the DVD containing a child's recorded statements to officials regarding sex acts did not violate defendant's right of confrontation as the statement was found to be trustworthy, and the child victim testified at trial and was subject to cross-examination.

*Hampton v. State*, 2009 OK CR 4

The right to confrontation of witnesses in revocation proceedings is no greater than the constitutional due process right to confrontation. 'Although the substantial trustworthiness test governs whether hearsay evidence can be considered in revocation proceeding, revocation cannot be based entirely upon hearsay evidence.

## **PENALTY ENHANCEMENT – CDS**

*Watts v. State*, 2008 OK CR 28, 194 P.3d 133 (Dec. 5, 2008).

The first offense of maintaining a dwelling where a controlled dangerous substance was kept carries no minimum term and is punishable for a term not exceeding five(5) years' imprisonment. The sentence enhancement provision states that if the subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment for five (5) years, or any less term, then person convicted of such subsequent offense is punishable by imprisonment for term not exceeding ten years. Hence, the enhancement provisions under 63 O.S. 2-404 relating to maintaining a dwelling where CDS was kept were not applicable, but rather 21 O.S. 51.1 (i.e., the general sentence enhancement statute) was.

**VOIR DIRE - CHALLENGES FOR CAUSE**

*Jones v. State*, 2009 OK CR 1, 201 P.3d 869

The proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Prospective juror employed by police department did not harbor actual bias such that trial court was required to excuse him from jury, in first-degree murder prosecution.

**Patrick A. Williams**  
**CRIMINAL DEFENSE INSTITUTE**

The annual Criminal Defense Institute will be held this year on Thursday & Friday, June 25 & 26, 2009, at the Reed Convention Center in the Sheraton in Midwest City, Oklahoma.

OCDLA members are entitled to a discounted tuition rate. Contact Susan Dubbs at 405.325.3386 or [sdubbs@ou.edu](mailto:sdubbs@ou.edu), or you can get more information at the OCDLA web site at: [www.ocdlaoklahoma.com](http://www.ocdlaoklahoma.com).

# OKLAHOMA COURT OF CRIMINAL APPEALS

## RECENT UNPUBLISHED OPINIONS GRANTING RELIEF

*A digest of unpublished opinions available at the Oklahoma Indigent Defense System website<sup>2</sup>*

*by*

**CINDY BROWN DANNER**

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### **JULY 2008**

***Fajardo, Eduardo Rivera. v. State, COCA Case No. F-2007-690 (July 24, 2008)***

(Prosecutorial Misconduct; Sentence, Excessive) Unspecified prosecutorial misconduct and erroneous combination of repeat-offender sentencing options required modification of sentence.

***Long, Bryan William, Jr. v. State, COCA Case No. F-2007-636 & C-2007-743 (July 15, 2008)***

(Drug Court; Sentence, Abuse of Discretion) Error to change sentence upon termination of drug court in a way that increased the sentence originally imposed. District court is limited in 12 month judicial reviews to downward sentencing modifications.

***Lopez, Jacqueline E. v. State, COCA Case No. S-2008-53 (July 1, 2008)***

(State Appeal, Evidence, Sufficiency) No abuse of discretion in magistrate's decision to sustain demurrer to child abuse charge where facts showed parent parked on a roadside and passed out, with minor children and contraband in vehicle.

***Sanders, Barbara Denise v. State, COCA Case No. RE-2007-850 (July 18, 2008)***

(Revocation/ Acceleration; Due Process) Defendant's credit for time served prior to sentencing meant that two-year suspended sentence ended 270 days earlier than two calendar years from the date of sentencing. Application to revoke filed after expiration of sentence (when credit for time served was applied), was not timely filed, and District Court lacked jurisdiction to revoke.

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<sup>2</sup> The opinions are available at [www.oids.ok.gov](http://www.oids.ok.gov) under the link to "Unpublished COCA Opinions." Case summaries are written and edited for the OIDS website by Cindy Brown Danner, Chief of the OIDS General Appeals Division, and compiled and formatted by Terry Anderson, division secretary.

## **AUGUST 2008**

### ***Bandy, Jason L. v. State, COCA Case No. S-2007-1212 (August 6, 2008)***

(State Appeals; Evidence, Expert Testimony) Trial court's suppression of results of DUI blood test affirmed because testing was not done pursuant to statutory provisions. State's appeal failed to show that suppressed evidence formed a substantial part of the proof of case against defendant for negligent homicide.

## **SEPTEMBER 2008**

### ***Barry, Michelle Ann v. State, COCA Case No. F-2007-336 (September 25, 2008)***

(Ineffective Assistance of Counsel) Trial counsel's failure to even attempt to limit the admission of highly prejudicial evidence at trial was unreasonable and deficient. Reversed and remanded for a new trial.

### ***Carr, Kendall Dewayne v. State, COCA Case No. F-2006-1208 (September 23, 2008)***

(Jury Selection) Defendant forced to use a peremptory to remove an objectionable juror (a police officer), which forced him to keep an unsuitable juror. Reversed and remanded for a new trial.

### ***Dorr, Donald & Tanya v. State, COCA Case No. F-2007-616 (September 19, 2008)***

(Search and Seizure) After aerial observation, law enforcement went onto defendants' property without a warrant and found marijuana growing. State did not present any evidence to show necessity or exigent circumstance. Reversed and dismissed.

### ***Marler, Jeffrey v. State, COCA Case No. F-2007-575 (September 25, 2008)***

(Sentence, Excessive; Statutory Construction) Judgment on child porn modified to a violation of a more specific statute. Sentence modified.

### ***Roundtree, Walter v. State, COCA Case No. F-2007-767 (September 3, 2008)***

(Sentence, Abuse of Discretion) Trial court's absolute refusal to even consider concurrent terms in the event of a jury conviction is an abuse of discretion. Sentences modified to run concurrently.

## **OCTOBER 2008**

### ***Brown, Tony Carnell v. State, COCA Case No. F-2007-987 (October 10, 2008)***

(Jury Instructions, Lesser Offenses; Evidence, Expert Testimony) Trial court should have given lesser included offense instructions of unlawful entry for second degree burglary charge, and tampering with motor vehicle for the attempted larceny of motor vehicle charge. Error for State's witness to testify that based on neurolinguistic training, the defendant lied in his statement. Reversed and remanded for new trial.

***Hayes, Robert Dewayne III v. State, COCA Case No. F-2007-340 (October 24, 2008)***

(Double Jeopardy/ Double Punishment) Convictions for both felony murder and the underlying felony of shooting with intent to kill violated Section 11 prohibition against double punishment. Count of Shooting with Intent to Kill dismissed.

***Hunter, Ricky Louis v. State, COCA Case No. F-2007-856 (October 10, 2008)***

(Double Jeopardy/ Double Punishment) Convictions for lewd or indecent proposal and using a computer to commit the offense violated Section 11 prohibition against double punishment.

***Morphew, Kristopher Lee v. State, COCA Case No. F-2007-201 (October 10, 2008)***

(Jury Instructions, Misleading/Confusing) Jury instruction on the crime of second-degree “depraved mind” murder was flawed because OUJI definitions of “imminently dangerous conduct” and “depraved mind” were omitted. Plain error resulted in reversal and remand for new trial.

***Putman, Clifford v. State, COCA Case No. S-2008-176 (October 9, 2008)***

(State Appeal; Search and Seizure) Trial Court’s order suppressing evidence State obtained from locked safe inside motel room where defendant was arrested upheld.

***White, Leroy Jr. v. State, COCA Case No. F-2007-1162 (October 9, 2008)***

(Fines, Fees and Costs) Fines imposed at sentencing without jury input were vacated.

**DECEMBER 2008**

***Combs, Franklin Savoy v. State, COCA Case No. C-2008-448 (December 22, 2008)***

(Guilty Plea Decisions; Evidence, Sufficiency) Factual basis for grand larceny from a building not sufficiently established in *Alford* plea because the amount of property issue was not established. Certiorari granted.

***Drennon, III, L.V. v. State, COCA Case No. F-2007-1253 (December 11, 2008)***

(Jury Instructions, Misleading/Confusing; Sentencing) Jury instructions incorrectly set forth the range of punishment. Sentence modified.

***Evans, Marvis v. State, COCA Case No. F-2007-848 (December 19, 2008)***

(Double Jeopardy/ Double Punishment; Sentence, Excessive) Simultaneous convictions for robbery with firearms and pointing a firearm violated prohibition against double punishment.

**JANUARY 2009**

***Belvin, Timothy Ray v. State, COCA Case No. F-2008-229 (January 13, 2009)***

(Evidence, Sufficiency) Element of force required by 21 O.S. Section 1123 (lewd acts with child) not sufficiently proven at trial. One count reversed with instructions to dismiss.

***State v. M.H., COCA Case No. J-2008-800 (January 16, 2009)***

(Youthful Offender) State failed to rebut evidence that Defendant should receive treatment as a Youthful Offender.

## **FEBRUARY 2009**

### ***Rayls, Leonard Allen v. State, COCA Case No. F-2008-329 (February 27, 2009)***

(Bench Trial, Sixth Amendment) Waiver of right to jury trial must be clear, unambiguous, knowing and intelligent, and on the record. Absent any record that the right was personally waived, the case must be remanded for new trial.

### ***Richardson, Robert Lee Jr. v. State, COCA Case No. C-2007-1009 (February 24, 2009)***

(Guilty Plea Decisions) Trial court erred in failing to hold a hearing on the Motion to Withdraw Plea before denying the motion. Remanded for a hearing.

### ***Smallen, Robert Lee v. State, COCA Case No. S-2008-761 (February 5, 2009)***

(State Appeals; Sixth Amendment; Evidence, Sufficiency) Evidence insufficient that rights to silence and assistance of attorney were waived. District Court Order suppressing statements and videotaped interview affirmed.

## **MARCH 2009**

### ***Birmingham, Joe Lee v. State, COCA Case No. F-2008-214 (March 13, 2009)***

(Sentence, Excessive) Trial court's failure to sufficiently instruct the jury of the applicability of the 85 percent rule, was prejudicial. Sentences modified.

### ***Daniels, Alan v. State, COCA Case No. C-2008-593 (March 2, 2009)***

(Guilty Plea Decisions; Sentence, Excessive) Acceleration from five-year deferred to life imprisonment for underlying offense of a single inch-and-a-half marijuana plant shocked the conscience of the court. Modified to five years.

### ***Rumbaugh, Jack Richard v. State, COCA Case No. F-2007-1165 (March 27, 2009)***

(Drug Court; Sentence, Abuse of Discretion) Termination of Drug Court was abuse of discretion, where time for fulfilling sanction requirements had not expired, and defendant was employed, sober, and making progress. Reversed with instructions to reinstate into the Drug Court Program.

### ***Thornbrugh, Matthew v. State, COCA Case No. F-2008-287 (March 25, 2009)***

(Evidence, Sufficiency) Mere possession of a radio capable of receiving police transmissions is not sufficient to prove that it was "operated." Reversed with instructions to dismiss.

### ***Welch, Fred Bennett v. State, COCA Case No. F-2007-993 (March 27, 2009)***

(Ineffective Assistance of Counsel; Evidence, Other Crimes) Counsel ineffective for promising Defendant would testify, then not calling him as a witness. Also, other crimes evidence regarding alleged molestation of child not admissible when crime charged involved an adult victim. Reversed and remanded for new trial.

## **Oklahoma Criminal Defense Weekly**

James L. Hankins, *Publisher*

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### **DISCOVERY ALERT!**

Susan C. McVey, Director, Oklahoma Department of Libraries, posed this question to the Attorney General:

“Are e-mails, text messages, and other electronic communications made in connection with the transaction of public business, the expenditure of public funds or the administration of public property, subject to the Oklahoma Open Records Act and the Records Management Act when they are created, received, transmitted, or maintained by public officials on privately owned equipment and communication devices?”

The Attorney General answered, “Yes,” in a published opinion found at 2009 OK AG 12 (A.G. Op., May 13, 2009). In a prior opinion, the Attorney General had opined that such communications generated on public equipment was subject to disclosure under those acts, but this question presented another facet of the issue of whether such communications on privately owned devices were also subject to such disclosure.

What does this mean? It appears to mean that communications made by police officers on their private cell phones, laptops, and e-mails may be subject to disclosure. The defense bar should re-tool the standard discovery motion to include these items.

# TENTH CIRCUIT UPDATE

by

JAMES L. HANKINS<sup>3</sup>

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*The Tenth Circuit typically produces many more opinions than either the Supreme Court or the Oklahoma Court of Criminal Appeals. I have presented its output over the last few months in chronological order in order to give the reader a sense of the issues that arise in the circuit.—Ed.*

**United States v. Pinson**, No. 07-6013 (10th Cir., September 17, 2008) (Published): **Federal Sentencing Guidelines; Reasonableness:** According to the panel, Pinson was "a mentally-ill inmate with a propensity for making grandiose threats." He was convicted of one count of threatening to harm the President of the United States. Following his conviction, but prior to sentencing, he falsely told the district court that another inmate intended to kill his sentencing judge. He also sent a letter to the Chief Judge for the Western District in which he threatened to injure a juror who had served on his trial. He was charged and plead on these counts as well. The sentencing court varied upward and imposed the statutory maximum on each of the three counts, to be served consecutively, for a sentence of 240 months. AFFIRMED "though not without some qualms about" the sentence. Of course, even though the forensic staff at the mental hospital in Fort Worth determined that Pinson "had not experienced any significant period of effective psychological functioning since early childhood" he was found competent to stand trial. As to the issues in this case, there was: 1) no plain error when the trial court reversed itself on the day of trial concerning the admission of certain evidence (since Pinson did not ask for a continuance or otherwise show that any evidence he had would have been material and favorable to his case); 2) no error in the jury instructions on the intent element of the crime; and 3) his above-the-Guidelines sentence was not unreasonable even though the upward variance was "unusually large, even by post-*Gall* standards."

**United States v. Sells**, No. 07-7047 (10th Cir., September 15, 2008) (Published): **Federal Sentencing Guidelines; Reasonableness:** Sells was convicted by jury of Conspiracy to Possess Meth w/Intent to Distribute, Knowingly Maintaining a Place for the Manufacture of Meth, and Felon in Possession of Ammunition. The sentence was vacated on appeal and the case remanded for re-sentencing where the trial court re-imposed the same 360 month sentence. AFFIRMED over his claims of procedural and substantive reasonableness. The trial court properly attributed to Sells the drug amounts produced by the conspiracy and the sentence was substantively reasonable because it

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is no longer than necessary to satisfy the purposes of 18 U.S.C. sec. 3553(a)(2).

***United States v. Phillips***, No. 07-3135 (10th Cir., October 1, 2008) (Published): **Immigration:** Phillips was an attorney in Kansas who ran a law firm centered around immigration law (his wife worked there also and was a co-defendant in the case). The accusation was that they had willingly made a false statement to a federal agency in violation of 18 U.S.C. sec. 1001 and eight counts of immigration fraud in violation of 18 U.S.C. sec. 1546(a). The panel REVERSED the immigration fraud convictions based on a statutory construction that excluded the documents at issue. However, all other convictions were affirmed.

***United States v. Mendoza***, No. 07-3181 (10th Cir., October 1, 2008) (Published): **1. Federal Sentencing Guidelines; Reasonableness; 2. Standards of Review:** After being convicted of drug offenses, the District Court varied downward from the Guidelines minimum of 324 months to 240 months. The Government appealed, seeking a remand for re-sentencing. "Reviewing only for plain error, we affirm Mendoza's sentence." The panel re-affirmed that a party must raise challenges to the procedural reasonableness of a sentence in order to preserve the issue for review and the Government did not do so here.

***United States v. Schene***, No. 07-6177 (10th Cir., September 29, 2008) (Published): **Child Porn:** Possession of child porn case AFFIRMED over claims of: 1) sufficiency of the evidence that the images were produced using materials in interstate commerce; 2) sufficiency of the evidence that Schene committed the crime; 3) abuse of discretion regarding evidence of gender and homosexuality; and 4) abuse of discretion in admitting images of child pornography and related exhibits.

***United States v. Sharkey***, No. 08-3115 (10th Cir., October 7, 2008) (Published): **Federal Sentencing Guidelines:** Sharkey plead guilty to one count of Distribution of Cocaine Base (Crack) within 1,000 feet of a school. He did not appeal, even though the plea agreement reserved the right to appeal certain determinations regarding sentencing. His subsequent motion to vacate his sentence pursuant to 28 U.S.C. 2255 was dismissed as untimely. He attacked his sentence yet again, this time pursuant to 18 U.S.C. 3582(c), which allows reduction "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission...if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Sharkey lost on this last point because the change that benefited him did not change the low end of the Guidelines range in his case.

***United States v. Arrington***, No. 08-4018 (10th Cir., October 14, 2008) (Unpublished): **Searches and Seizures; Apparent/Common Authority:** This is a rare winner in an unpublished opinion from the Circuit. Arrington was estranged from his wife and tried to reconcile. Arrington drove to his wife's workplace and picked her up and for some reason Arrington's mother, Pansy Arrington was with them. They stopped at a Jiffy Lube where Arrington and the wife got out and talked. Arrington learned that she had cheated on him and he then stabbed himself in the forearm with a pocketknife. They then went to a mall where Pansy went shopping. Arrington took a gun out of the trunk of his car and asked the wife to shoot him. She refused. Finally, they stopped at a hotel. When they tried to check in, neither Arrington nor the wife had ID to check in, so Pansy registered the room in her name and the wife paid cash. Pansy left and the clerk handed the room key to Jeremy. Jeremy moved in three or four bags of luggage on a cart, but the wife brought only her purse and cell phone because

she had to return to work. Once Arrington and his wife were in the room alone, Arrington held a gun to his head and threatened suicide if the wife left, but she did in fact leave, and called her father and the police. In the meantime, Arrington left the room and told the clerk to remove the wife's name from the registry. He began walking and was picked up shortly by the police and transported to the hospital to treat his arm. The wife told the police what happened. The police met the wife and her father at the hotel so they could retrieve weapons from the room. The clerk refused to give the wife a key because her name had been removed from the registry. The police officer present called a supervisor and requested a warrant, but was told he could not get one. The officer then explained the situation to the desk clerk who finally gave him a key. They entered the room and found guns. **HELD:** The District Court's denial of Arrington's motion to suppress is REVERSED since the wife did not have actual authority to consent to the search of the hotel.

***United States v. Hernandez-Noriega***, No. 07-1393 (10th Cir., October 17, 2008) (Published): **Immigration:** Defendant had been deported but had reentered the U.S. He was found in the U.S. while he was incarcerated on state charges in Colorado. He entered a plea to being a previously deported alien found within the U.S. His sentence was enhanced because "the defendant committed the instant offense while under any criminal justice sentence." He argued this was unfair because his crime was not "committed" while he was locked up and the enhancement should not apply when an alien is involuntarily incarcerated at the time he is found in the U.S. However, the Circuit was unpersuaded and AFFIRMED the enhancements under these facts. The legal rule is that the offense is first committed at the time of reentry and continues to the time when the defendant is arrested for the offense.

***Boyle v. McKune***, No. 06-3025 (10th Cir., October 16, 2008) (Published): **Habeas Corpus; Evidentiary Hearings:** Boyle is a state prisoner in Kansas who was convicted of sex crimes and sentenced to 424 months. Boyle sought habeas relief in federal court which was denied, but the Circuit granted a certificate of appealability on two issues: 1) whether Boyle's trial counsel was ineffective for failing to interview or investigate witnesses for the defense, and 2) whether Boyle's appellate counsel provided ineffective assistance. The panel answered both in the negative and also denied his request for an evidentiary hearing, holding that he had not met the "prejudice" prong of the IAC analysis in his assertion that trial counsel failed to procure expert witnesses.

***United States v. Means***, No. 07-7112 (10th Cir., October 24, 2008) (Unpublished): **Guilty Pleas; Federal.** Means pled guilty to conspiracy in a murder-for-hire scheme. In this appeal, brought under 28 U.S.C. 2255, he argued that the district court lacked subject matter jurisdiction because his conduct did not involve the interstate use of a communications facility as required under federal law. The district court denied relief on the basis that Means had waived this argument by pleading guilty, but granted a COA on the issue. In this opinion, the Circuit ultimately denied relief on the merits, but made a subtle yet important legal distinction in holding that Means did not waive this argument. The district court construed the claim as a non-jurisdictional attack on the sufficiency of the government's evidence on the interstate facility element of the offense. However, the Circuit held that, "Means is not claiming the government's proof of an element of the offense is lacking but rather its proof (to which he admitted) did not constitute a federal offense at the time of his plea." Thus, review of the claim is **NOT** barred by waiver. Unfortunately for Means, the panel construed the statute in accord with the majority of circuits to hold that it requires only "use of an interstate

commerce facility, not interstate use of such facility."

**United States v. Martinez-Barragan**, No. 06-2333 (10th Cir., October 21, 2008) (Published): **Federal Sentencing Guidelines; Reasonableness:** In this Illegal Re-Entry case, Martinez-Barragan challenged the procedural and substantive reasonableness of his 77-month sentence which is at the bottom of the Guidelines range. As to the procedure, the panel rejected his claims that the district court treated the Guidelines as mandatory, the district court failed to explain adequately its basis for decision, and that the district court applied the wrong standard in seeking to impose a sentence that was reasonable under the "parsimony principle" of section 3553(a) which mandates a sentence sufficient but not greater than necessary to effectuate the purposes of sentencing. As to the substantive attack, the panel reiterated that a defendant need not object to the length of the sentence in order to preserve a claim attacking it, but in this case the sentence fell within the Guidelines range as was presumptively reasonable.

**United States v. Poole**, No. 07-7080 (10th Cir., October 31, 2008) (Published): **Verdicts:** The Court's summary: "John Poole appeals his conviction for assault resulting in serious bodily injury on the basis that the jury's verdict was impermissibly ambiguous. Mr. Poole points to the fact that, in addition to finding him guilty of assault resulting in serious bodily injury, the jury proceeded to find him guilty of the lesser included offense of simple assault---and did so despite the district court's instruction that the jury should consider the lesser offense only if it found Mr. Poole not guilty of, or could not reach a verdict on, the greater offense. As it happens, however, the district court took measures, all without contemporaneous objection, sufficient to render the verdict free of any reasonable claim of ambiguity. Accordingly, we affirm." The district court brought the jury into court and told them that the lesser offense was a "nullity" and then polled the jury if that was their verdict and all said yes. Significantly, trial counsel did not object to the district court's resolution of the problem and the client gets punished here on plain error review.

**United States v. Harper**, No. 08-3215 (10th Cir., October 31, 2008) (Published): **Habeas Corpus; Certificate of Appealability:** In this appeal, the Tenth Circuit joins the other circuits to have considered the question of whether a Certificate of Appealability is required in order for a defendant to appeal a dismissal by the district court of a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255.

**Punchard v. Jeffries**, No. 08-2147 (10th Cir., October 30, 2008) (unpublished): This appeal is dismissed on the basis that it is wholly frivolous and "Appellant's brief is gibberish."

**United States v. Husted**, No. 08-6010 (10th Cir., November 5, 2008) (Published): (Henry, C.J., Briscoe, Lucero): **Sex Offender Registration:** Conviction under the Sex Offender Registration and Notification Act ("SORNA") is REVERSED: "We conclude that SORNA cannot apply to a defendant whose interstate travel is complete prior to the effective date of the Act."

**United States v. Fay**, No. 08-5009 (10th Cir., November 12, 2008) (Published) (Briscoe, Brorby, and Ebel): **Supervised Release:** In this revocation of supervised probation case, the revocation is AFFIRMED over Fay's claims that the district court committed plain error by not requiring Fay to orally and explicitly admit his guilt in open court, and also in refusing to run the revoked sentence

concurrently with a completed state court sentence. The district court does not have the authority to order a sentence to be served concurrently with a discharged sentence.

*United States v. Benally*, No. 08-4009 (10th Cir., November 12, 2008) (Published) (Kelly, McConnell, and Tymkovich): **Jurors**: (Benally was convicted by jury of assaulting an officer of the Bureau of Indian Affairs with a dangerous weapon. The next day, one of the jurors came forward with a charge that the jury deliberations had been tainted by racial bias and other inappropriate considerations. HELD: The prohibition found in Rule 606(b) precludes juror testimony of racial bias "of the kind alleged in Mr. Benally's trial, and the Sixth Amendment does not require an exception."

*United States v. Alapizco-Valenzuela*, No. 07-3327 (10th Cir., November 12, 2008) (Published) (Tacha, Holloway, and Holmes): **Federal Sentencing Guidelines; Variance**: Defendant was convicted of transporting illegal aliens for private financial gain and was sentenced to 72-months. AFFIRMED over claims of error involving a two-level enhancement for detaining an alien involuntarily through coercion or threat, or in connection with a demand for payment; and also the district court's decision to grant the motion of the government for an upward departure and upward variance.

*United States v. Thompson*, No. 07-6238 (10th Cir., November 12, 2008) (Published) (Hartz, McWilliams, and McConnell): **Searches and Seizures; Consent**: Fact-intensive search and seizure case where four squad cars from the Oklahoma City PD went to a "high crime area" along I-35 and noticed four or five people standing in the parking lot of a 7-11 store. Officer Zepeda parked his squad car approximately 12 feet behind Thompson's car, possibly blocking him in. When the police pulled in, Thompson was "coming out of the store with a drink and doughnut and walking towards his car." Officer Zepeda, in uniform with gun holstered, approached Thompson without any particularized grounds for reasonable suspicion ("because he was the only one that wasn't running") and asked Thompson if he could speak to him. After receiving "consent," he asked Thompson if he had anything illegal to which Thompson "became nervous" and did not answer. Officer Zepeda then told him to relax and repeated the question. This time, Thompson responded, "I have a gun in my back pocket." Although the panel stated in footnote 1 that this area might gain "greater clarity" if the legal test were framed in terms of whether the officer's behavior was coercive rather than whether a reasonable person would feel free to disregard the police (which the panel described as unrealistic), the panel nevertheless affirmed the denial of Thompson's motion to suppress in this disgusting opinion which continues to uphold the fiction that these types of encounters are "consensual."

*United States v. Kaufman*, No. 06-3099 (10th Cir., November 12, 2008) (Published) (Henry, C.J., Brorby, McConnell): **Confrontation/Cross-Examination**: Odd facts involving the strange practice of the Kaufman House Residential Care Treatment Center, an unlicensed group home for the mentally ill in Kansas, which involved working in the nude on a farm outside of Newton. Upon spotting the two nude workers, deputies initiated an investigation of the Kaufman's and their claimed legitimate psychotherapy technique of directing the severely mentally ill to perform sexually explicit acts and farm labor in the nude. Unfortunately for the Kaufman, they billed Medicare for such treatments and this resulted in unwanted attention from the federal government. The Kaufman (Dr. Kaufman and his wife) were indicted for a myriad of charges including involuntary servitude and forced labor, health care fraud, mail fraud, and obstructing a federal audit and they were duly

convicted by a jury. The district court sentenced Dr. Kaufman to a spectacular sentence of 360 months (up from the Guidelines range of 160-210 months). Mrs. Kaufman was sentenced to 84 months (down from the range of 135-168 months). The principal contention was an order by the trial court that the Kaufmans could not make eye-contact with the mentally ill complaining witnesses during their trial testimony. Unfortunately, this error was not preserved and was not "plain" enough to result in reversal. In addition, Mrs. Kaufman's sentence was procedurally unreasonable because the district court did not make findings sufficient to refuse to apply several enhancements.

*Hicks v. Franklin*, No. 07-7084 (10th Cir., November 17, 2008) (Published) (Judges Kelly, McConnell, and Gorsuch): **Guilty Pleas; State:** This case arose out of Johnston County, Oklahoma, where the facts indicated that Hicks made his family vacate his trailerhouse while he cooked a batch of meth. When the cook was completed, some of the liquid in a jar ended up on a hot plate in the kitchen where it exploded, burning and ultimately causing the death of Hicks's wife. Hicks denied putting the jar on the hot plate or ever intending to do so. He eventually plead guilty to Murder in the Second Degree and was sentenced to Life. In this habeas case, Hicks challenged whether his plea was voluntary because he was misled by statements made by the trial judge and did not understand fully the nature of the crime: HELD: The guilty plea was not knowing and voluntarily entered because he was not provided notice of the nature of the charge against him. Writ granted with instructions for the district court to vacate its judgment of dismissal and grant the writ so as to allow Mr. Hicks to withdraw his guilty plea.

*Sandoval v. Ulibarri*, No. 07-2082 (10th Cir., November 24, 2008) (Published) (Lucero, Holloway, and McConnell): **Habeas Corpus; Non-Capital:** State prisoner from New Mexico challenged his convictions for Aggravated Battery and Shooting at a Motor Vehicle in this habeas petition. Oddly enough, there was no trial transcript produced in the case and for some weird reason Ulibarri did not raise the sufficiency of the record as an issue. AFFIRMED over his claims of: 1) IAC for failure to investigate and prepare adequately an expert witness; 2) confrontation when the State was allowed to produce preliminary hearing transcript testimony when defense counsel stipulated to good faith efforts by the State to find the witness; 3) a *Brady* claim where the evidence allegedly concealed was neither material or exculpatory; and 4) denial of his request for an evidentiary hearing.

*United States v. Hunter*, No. 08-4010 (10th Cir., December 2, 2008) (Published) (Tacha, Hartz, and DeGiusti, District Judge, W.D. Okla., sitting by designation): **Crime Victims' Rights Act:** This is not strictly a criminal case. It deals with the Crime Victims' Rights Act of 2004. Hunter sold a gun to Talovic. Talovic went on a shooting spree and killed a woman. The parents of the murdered woman sought to be treated as victims of Hunter's crime (the selling of the gun) under the CVRA. The District Court denied such status on the basis that the murder was not a proximate cause of the crime of selling the gun. The parents sought a writ of mandamus and the Tenth Circuit denied it. In this appeal, the parents are seeking to appeal their status again in a direct appeal to the Tenth Circuit. HELD: "We hold that individuals claiming to be victims under the CVRA may not appeal from the alleged denial of their rights under that statute except through a petition for a writ of mandamus as set forth by 18 U.S.C. 3771(d)(3)."

*United States v. Rhodes*, No. 08-2111 (10th Cir., December 5, 2008) (Published) (Briscoe, Ebel, and Hartz): **Federal Sentencing Guidelines; Proportionality:** Rhodes was sentenced in 1997 on a count

of Conspiracy to Possess w/Intent to Distribute Crack Cocaine. Following the 2007 amendments by the Sentencing Commission to the crack cocaine Guidelines, he sought and was granted a modification of sentence under 18 U.S.C. 3582(c)(2). "Rhodes now appeals his modified sentence, claiming the district court erred in concluding that it lacked the authority to impose a sentence below the amended guideline range. We exercise jurisdiction pursuant to 28 U.S.C. sec. 1291 and affirm." Basically, Rhodes argued that *Booker* allows below-Guidelines sentences in these circumstances, but the panel held that it did not.

*United States v. Rice*, No. 07-5149 (10th Cir., December 12, 2008) (unpublished) (Briscoe, Brorby, & Ebel): **Death of Appellant:** Rice appealed his conviction for being a Felon in Possession of a Firearm. While the direct appeal was pending, the warden of the prison where Rice was incarcerated informed the court that he had died. What effect does that have on a case? The rule is that the death of the appellant not only abates the appeal (which you might expect), but also "all proceedings had in the prosecution from its inception." Thus, the panel remanded to the District Court with directions to vacate the judgment of conviction and dismiss the underlying indictment. Although this situation does not happen very often, it is important to remember that a client can at least avoid the indignity of a felony conviction in death if this occurs.

*United States v. Ford*, No. 07-1176 (10th Cir., December 11, 2008) (Published) (Tymkovich, Gorsuch, & Parker, Senior District Judge from New Mexico, by designation): **1. Prosecutorial Misconduct; Brady Issues; 2. Entrapment:** This is a fractured opinion with a concurrence by Judge Parker and a dissent by Judge Gorsuch. The summary in the main opinion states: "Stan Taran Ford was convicted for [sic] illegally selling or possessing a machine gun. Ford's primary defense at trial was entrapment. After he was convicted, Ford alleged the government failed to produce multiple emails sent between him and the informant. The district court found that three undisclosed emails existed, but denied a post-trial motion to set aside the conviction, concluding that these emails would not have affected the outcome of the trial. We agree with the district court that in light of all the evidence presented at trial, the emails were not sufficiently material to cast doubt on the jury's verdict." **NOTE:** The primary issue is the disclosure of exculpatory evidence under Brady and the panel re-affirmed the rule that the duty to disclose "extends to investigators assisting the prosecution." **NOTE:** Judge Gorsuch noted that Ford was a Denver firefighter with no criminal record and no known involvement with illegal firearms until he was approached by the undercover government agent who repeatedly solicited his assistance in procuring illegal weapons. In his view, the suppressed evidence was material to the issue of entrapment and he would remand for a new trial.

*United States v. West*, No. 06-4284 (10th Cir., December 10, 2008) (Published) (Briscoe, Ebel, & McConnell): **Federal Sentencing Guidelines; Crime of Violence:** West was sentenced to 235-months for Felon in Possession of a Firearm under the ACCA. The panel affirmed the predicates under the ACCA constituted "violent felonies" for purposes of the Act. Thus, the District Court did not err in holding that West's prior convictions for Engaging in a Criminal Enterprise and for Failing to Stop at an Officer's Command under Utah law were proper enhancement convictions under the ACCA. However, West also contested the *factual* accuracy of the PSR concerning three other enhancements. By doing so, West invoked the District Court's Rule 32 fact-finding obligation. Since the District Court did not resolve adequately these factual disputes, the case is remanded for it to do so. **NOTE:** In light of the Supreme Court's decision in *Begay v. United States*, 128 S.Ct. 1581

(2008), which outlined the legal landscape of what constitutes a "violent felony" under the ACCA, the panel applies *Begay* in a very thorough and detailed fashion.

***United States v. Hinckley***, No. 07-7107 (10th Cir., December 9, 2008) (Published) (Kelly, McConnell & Gorsuch): **Sex Offender Registration**: In this fractured opinion, a conviction for failing to register as a sex offender is AFFIRMED over several claims including: 1) SORNA criminalizes conduct that occurred prior to its enactment (the majority adopted the opinion of the Eighth Circuit regarding the applicability of convictions for conduct occurring during the "gap period" between SORNA's enactment and the Interim Rules of the AG); 2) *Hinckley* was not required to register under SORNA until February 28, 2007 (the date the AG issued the Interim Rule clarifying SORNA retroactivity); 3) *Ex Post Facto* punishment (the panel viewed failure to register as a continuing offense; 4) a Due Process claim attacking improper notice; and 5) the non-delegation doctrine where Congress delegated improperly to the AG the power to determine SORNA's retroactivity; and 6) an attack under the Commerce Clause. **NOTE**: Judge Gorsuch concurred, but wrote separately to address statutory construction issues because parts of SORNA are ambiguous. Judge McConnell dissented on the basis that the restrictive language in 42 U.S.C. 16913(d) is not ambiguous. This is a tough issue and I suspect the Supreme Court will address this issue based upon the split of authority.

***United States v. Arreola***, No. 07-2168 (10th Cir., December 8, 2008) (Published) (Kelly, Anderson & Murphy): **Federal Sentencing Guidelines; Abuse of Trust**: *Arreola*, an employee of the Los Alamos National Laboratory, plead guilty to embezzlement and making false statements on a payment claim form. In this appeal, she asserted that the District Court erred in enhancing her sentence based upon abuse of a position of trust. AFFIRMED. Although *Arreola* was not a manager or a large-dollar-contract administrator, she did have \$100,000 signature authority to make discretionary purchases for goods and services.

***United States v. Lawrence***, No. 08-6034 (10th Cir., December 8, 2008) (Published) (Kelly, Seymour & Murphy): **Sex Offender Registration**: *Lawrence* was convicted pursuant to a conditional guilty plea of Failure to Register as a Sex Offender. In this appeal, he challenged his convictions on *Ex Post Facto* grounds, Commerce Clause grounds, and Due Process grounds. AFFIRMED for the same reasons as in *Hinckley*, above. **NOTE**: Judge Murphy (not Seymour!) dissented on *Ex Post Facto* grounds for much the same reasons as Judge McConnell did in *Hinckley*. Thus, there are now two opinions on this, both split with different judges dissenting. Looks like an excellent candidate for *en banc* review.

***United States v. Parker***, No. 07-3364 (10th Cir., December 16, 2008) (Published) (Henry, C.J., Ebel & Gorsuch): **Voice Identification**: *Parker* was convicted and sentenced to 85 months for using a cell phone to convey false information about alleged attempts to blow up certain buildings. AFFIRMED over his claims regarding: 1) "voice-identification evidence" when a police officer was allowed to opine for the jury that he believed that the voice on the 911 calls was *Parker's*; 2) sufficiency of the evidence; and 3) sentencing issues.

***Young v. Sirmons***, No. 07-5130 (December 16, 2008) (Published) (Henry, C.J., Briscoe & Lucero): **Habeas Corpus; Capital Habeas Cases**: This Oklahoma capital case is AFFIRMED on federal

habeas on issues involving: 1) IAC for failing to investigate and present mitigation evidence during the penalty phase; 2) improper victim impact evidence; and 3) cumulative error. NOTE: Chief Judge Henry concurred in part and dissented in part, parting from the majority on the IAC issue because "neither the jury, the state court, nor the federal district court ever heard the mitigating evidence that Mr. Young seeks to present." He would therefore remand for an evidentiary hearing on the prejudice component of the IAC claim.

***United States v. Hahn***, No. 07-5117 (10th Cir., December 18, 2008) (Published) (Hartz, Seymour & O'Brien): **Conditions of Probation:** Hahn was an ATM technician in Oklahoma who shorted ATM money for his own use and was caught. Several months after these crimes he was arrested for unrelated state offenses of two counts of lewd and indecent proposal to a child. On these state counts, he was sentenced to consecutive terms of 7 and 12 years. On the federal count of misapplication of financial institution funds, he plead guilty and was sentenced to 18-months followed by 5 years of supervised release, to run consecutively to the state sentences. The court also imposed some conditions of supervised release relating to sex offenders. AFFIRMED over his claims of: 1) incorrect calculation of loss and restitution; 2) error in ordering his federal time to run consecutively to the state time (this is discretionary with the District Court and no abuse of discretion occurred); 3) the sex offender conditions are AFFIRMED even though the underlying offense is not a sex offense.

***United States v. Dejean***, No. 07-6281 (10th Cir., January 9, 2009) (Published) (Henry, C.J., Briscoe & Lucero): **Searches and Searches; Public Safety:** OKC police officers spotted three persons sitting in a car in the driveway of a house in a high crime area. They approached and noticed a man in the backseat on the passenger side holding a baseball bat; Dejean was sitting sideways in the front passenger seat with the door open and his feet outside the door. Dejean was caught by surprise, his eyes widened, and he began "stuffing" something in the car. Officers drew down on him and asked what he had been stuffing and Dejean replied, "some weed." Dejean was arrested, cuffed, and in the car the officers found four bags of marijuana and a gun. Dejean was subsequently indicted on charges of Possession w/Intent, Possession of a Firearm in Furtherance of a Drug Trafficking Crime, and being a Felon in Possession of a Firearm. His motion to suppress (and therefore his convictions) are AFFIRMED over his claims that: 1) the officers lacked reasonable suspicion to detain him; 2) questioning him at the scene without *Miranda* warnings; and 3) that the search of the car was conducted without a warrant. **NOTE:** The case is notable because it invoked the "Public Safety" exception to the *Miranda* rule and extended *Quarles* to the facts of the case.

***United States v. Hooks***, No. 08-7021 (10th Cir., January 9, 2009) (Published) (Tacha, Holloway & Seymour): **Possession of Firearm by Felon:** Hooks and a co-defendant were convicted by a jury of Felon in Possession of a Firearm. Officers set up a safety checkpoint at the intersection of state highway 9 and state highway 52 in McIntosh County, Oklahoma. A Dodge pickup truck with dark tinted windows approached slowly. It stopped and, after officers directed the driver to roll down the window, the driver did so. The driver was Hooks and the passenger was a man named Ferrell. The officer saw a revolver "lodged in the seat next to the driver's right leg." The officer yelled, "Gun!" and drew down, but the truck sped away. The truck was stopped about a mile away and the next day the gun was found (it had been thrown from the window). Both Hooks and Ferrell attacked their convictions based upon sufficiency of the evidence. The panel rejected the claim as to Hooks, but

REVERSED the conviction of Ferrell on this basis.

*United States v. Parker*, No. 07-6239 (10th Cir., January 9, 2009) (Published) (Murphy, McKay & Tymkovich): **1. Restitution; 2. "Bad Acts"**: Parker and two co-defendants were accused of participating in a "scheme to sell defective airplane engines" by improperly overhauling small aircraft and falsely representing to customers that the engines met FAA standards. AFFIRMED over his claims of: 1) improper admission of "bad acts" evidence; 2) sufficiency of the evidence; 3) improper hypothetical questions during cross-examination of Parker's character witnesses; 4) procedural and substantive attacks on the sentence; and 5) the restitution amount failed to provide an offset for the core value of the engines.

*United States v. Hollis*, No. 07-3293 (10th Cir., January 6, 2009) (Published) (O'Brien, McConnell & Tymkovich): **Ineffective Assistance of Counsel**: Hollis was convicted by a federal jury of Conspiracy and Drug charges and sentenced to 262 months. He appealed and the circuit affirmed. While his certiorari petition was pending in the Supreme Court, the Court decided *Apprendi*. Hollis wanted his appellate lawyer to raise an *Apprendi* claim in the certiorari petition but counsel told him he could raise it in a 2255 claim (and did not raise it in the petition). HELD: Although it was arguably deficient performance for appellate counsel to fail to raise the issue in the certiorari petition, Hollis cannot show prejudice because on plain error review he would not have received any relief.

*United States v. Clarkson*, No. 08-4054 (10th Cir., January 6, 2009) (Published) (Murphy, McKay & Gorsuch): **Drug Dogs**: Interesting case where the district court held that it need not determine whether a drug dog was in fact trained properly because the officer reasonably believed it. In essence, the district court applied the *Leon* good faith exception. HELD: The good faith exception under *Leon* does NOT apply in this situation and the district court erred in concluding that the reasonable reliance by the officer on the drug dog's reliability warranted a finding of probable cause.

*United States v. Cook*, No. 07-1487 (10th Cir., December 31, 2008) (Published) (Gorsuch, McKay & Baldock): **Federal Sentencing Guidelines**: Cook plead guilty to Possession of a Firearm by a Felon in return for the Government dismissing another charge of Possessing an Unregistered Sawed-Off Shotgun. These charges stemmed originally in the state courts and a state court judge actually found probable cause for the crime of "menacing" as well. In the PSR (you guessed it) there was a four-level increase based upon the state court finding of probable cause for felony menacing. HELD: The district court did not err in relying upon affidavits and police reports to find menacing by a preponderance of the evidence.

*United States v. Barraza-Ramos*, No. 08-3027 (10th Cir., December 30, 2008) (Published) (Tacha, Kelly & Holmes): **Federal Sentencing Guidelines; Crime of Violence**: Barraza-Ramos was tagged with a 192-month sentence after pleading guilty to unlawful reentry by a deported alien previously convicted of an aggravated felony. HELD: Reversed and remanded for resentencing because the prior conviction of felony aggravated battery is not categorically a crime of violence under Florida law.

*United States v. Montgomery*, No. 06-4300 (10th Cir., December 30, 2008) (Published) (Tymkovich, Gorsuch & Holmes): **Federal Sentencing Guidelines; Upward Departure**: In a case

where Montgomery was convicted of Possession of a Firearm by a Felon and the District Court added two-levels in an upward departure because his wife used the gun he possessed illegally to commit suicide, the upward departure is AFFIRMED.

*United States v. Algarate-Valencia*, No. 08-2022 (10th Cir., December 30, 2008) (Published) (Tacha, Lucero & O'Brien): **Federal Sentencing Guidelines**: Sentence in an illegal reentry case is AFFIRMED over claims that counsel was not given enough time to represent Algarate-Valencia at sentencing (but counsel did not object to the limited time he was given so it was reviewed for plain error) and that the judge did not explain adequately the sentence. However, the panel considered it a close question whether 30 seconds is enough time to be heard at sentencing, but affirmed in light of the fact that counsel filed a lengthy sentencing memorandum in the case and did not object to the limitation.

*Smith v. Workman*, No. 05-6206 (10th Cir., December 30, 2008) (Published) (Tacha, Kelly & Holmes): **Habeas Corpus; Capital Habeas Cases**: Oklahoma capital habeas case is AFFIRMED over claims including: 1) failure to provide a psychiatric expert violated *Ake* and whether counsel was ineffective for failing to raise an *Ake* claim; 2) whether counsel was effective at the penalty phase; 3) and whether the State failed to provide exculpatory evidence under *Brady* (holding that this claim is procedurally barred).

*United States v. Zuniga*, No. 07-3333 (10th Cir., January 16, 2009) (Published) (Tacha, Kelly & Holmes): **Federal Sentencing Guidelines; Crime of Violence**: Sentence under the Armed Career Criminal Act is AFFIRMED over Zuniga's claim that his prior conviction for Possession of a Deadly Weapon in a Penal Institution did not qualify as a "violent felony."

*United States v. Villarreal-Ortiz*, No. 07-3321 (10th Cir., January 12, 2009) (Published) (Tacha, Holloway & Holmes): **Statutory Construction**: Villarreal-Ortiz plead guilty to the offense of being a deported alien "found" in the United States. HELD: This is a continuing offense and thus his criminal history points were increased properly because he was on probation while continuing to commit the offense. This is just a nonsense opinion that countenances an awkward and reality-defying interpretation of a federal criminal statute for the purpose of allowing the Government to increase the sentence for illegals.

*United States v. Wilfong*, No. 07-6214 (10th Cir., December 23, 2008) (Published) (Hartz, McWilliams & McConnell): **Restitution**: Wilfong plead guilty to making a bomb threat at Tinker AFB with resulted in the evacuation of a building at the base for several hours. Part of the sentence was restitution. The panel stated: "The question before us is whether the restitution may include compensation for the employee work hours lost as a result of the evacuation. We conclude that it can." There you have it.

*United States v. Rodriguez-Rodriguez*, No. 07-2214 (10th Cir., December 23, 2008) (Published) (Tacha, Lucero & O'Brien): **Searches and Seizures; Traffic Stops**: Officers stopped a car for failure to have a tag light. The twist here is that there were two vehicles driving in tandem. When the first was stopped for the tag light, the other accelerated away and the first vehicle took a while to stop in order to make sure the second vehicle drove away. Not surprisingly, the panel AFFIRMED, stating,

"Sufficient evidence that two vehicles are driving in tandem plus evidence that one vehicle contains contraband can provide probable cause sufficient to support arresting the driver of the other vehicle." The tandem driving in this case was strong enough that the discovery of marijuana in one vehicle created probable cause to stop the other vehicle.

*United States v. Dennis*, No. 08-8000 (10th Cir., December 22, 2008) (Published) (Kelly, Tymkovich & DeGiusti): **Federal Sentencing Guidelines; Crime of Violence**: In a felon in possession of a firearm case, a prior conviction under Wyoming law for "taking immodest, immoral or indecent liberties with a minor" is not a "crime of violence" for sentencing enhancement purposes.

*United States v. Zubia-Torres*, No. 08-2067 (10th Cir., December 22, 2008) (Published) (Henry, C.J., McKay & McConnell): **Waiver**: In this illegal re-entry case, a sentence was enhanced by a prior drug crime. On appeal, Zubia-Torres argued that the enhancement did not apply. However, since the error was not preserved below, review was for plain error. The actual issue in the case, and the reason why it was published, was whether trial counsel actually waived the error below (and therefore no review at all is available), or whether the issue was simply forfeited by not preserving it (which would still allow review for plain error). The panel articulated in detail the standards governing what constitutes forfeiture and waiver.

*Taylor v. Workman*, No. 07-7030 (10th Cir., January 30, 2009) (Published) (Kelly, McConnell & Gorsuch): **Habeas Corpus; Capital Habeas Cases**: Excellent opinion in an Oklahoma capital habeas case where the panel granted the writ on the basis that the jury was given an erroneous instruction on the lesser-included offense of second-degree murder that was not harmless.

*United States v. Turner*, No. 07-1318 (10th Cir., January 26, 2009) (Published) (Hartz, Holloway & Seymour): **Possession of Firearm by Felon**: Conviction for felon in possession of ammunition is AFFIRMED over claims involving: 1) suppression (officers had probable cause to arrest and whether there was a violation of Colorado law is irrelevant under the new SCOTUS decision in *Moore*); 2) failure of the District Court to give requested jury instructions on possession; and 3) a Sixth Amendment claim where the District Court limited cross-examination concerning an ATF form (not surprising since defense counsel orchestrated the witness filling out the form).

*United States v. Peggy Franklin-El*, No. 07-3257 (10th Cir., February 3, 2009) (Published) (Holmes, McKay & Baldock): **Sufficiency of the Evidence**: Franklin-El appeals her convictions on fifty-two counts of health care fraud and one count of obstruction of justice. The principal issue on appeal is whether sufficient evidence supports these convictions. She also contended that the charges were unconstitutionally vague. Convictions and sentences AFFIRMED.

*United States v. Johnnie Franklin-El*, No. 07-3259 (10th Cir., February 3, 2009) (Published) (Holmes, McKay & Baldock): **Obstruction of Justice**: This is a companion case to the one above (Peggy and Johnnie were husband and wife and charged together). Like Peggy's case, the panel affirmed the sufficiency of the evidence claim, but REVERSED a count of obstruction of justice.

*United States v. DeShazer*, No. 07-8023 (10th Cir., February 6, 2009) (Published) (Tacha, McWilliams & McConnell): **Insanity; Competency**: DeShazer was convicted of Interstate Stalking

and Carrying a Firearm During a Crime of Violence and sentenced to *480 months*. In this appeal, he argued (through counsel) that he was not competent to stand trial, that he should not have been permitted to represent himself at trial, and that his pre-trial detention without mental-health treatment violated his right to Due Process. AFFIRMED. Check out footnote number 2 which will give you a flavor of how doomed this appeal was in the first place.

*United States v. Begay*, No. 08-2149 (10th Cir., February 9, 2009) (Unpublished) (Kelly, Holloway & Briscoe): **"Bad Acts"**: This is an instructive opinion on "other crimes" evidence under federal Rule 414 in a child sexual assault case. After holding an evidentiary hearing, the District Court ruled that the evidence sought to be introduced by the Government was unfairly prejudicial under Rule 403 and excluded it. The Government appealed and the panel AFFIRMED. NOTE: The key here is that the trial court ruled in Begay's favor in the court below and he thus had a deferential standard of review.

*United States v. Vazquez*, No. 08-4044 (10th Cir., February 10, 2009) (Published) (Briscoe, Ebel & Hartz): **Searches and Seizures; Traffic Stops**: This is a traffic stop case which resulted in the prosecution and conviction of Vazquez for Possession of Methamphetamine w/Intent. He raised two issues on appeal attacking the initial stop of his car and the duration of the search; and a claim involving expert testimony by a law enforcement officer. As to the search issue, this is another decision from the panel that signals the demise of virtually any protection under the Fourth Amendment for motorists as the facts indicate a clear pretext stop and detention which is rationalized by the panel in the old familiar ways that we have seen in the cases. As to the expert testimony of law enforcement which related primarily to the ways in which drug traffickers seek to foil detection, there were no objections at trial and thus the panel had no problem disposing this claim on plain error review.

*United States v. Navarrete-Medina*, No. 08-2014 (10th Cir., February 10, 2009) (Published) (Henry, McKay & McConnell): **Federal Sentencing Guidelines; Reasonableness**: Navarrete-Medina plead guilty to unauthorized re-entry in the United States as a previously deported alien. He sought a downward departure and/or variance from the advisory Guideline range of 77-96 months on the basis that he entered the country illegally merely to seek necessary medications for his HIV condition. The District Court rejected the request and sentenced him to 96 months based primarily on his extensive criminal history which included several re-entry crimes and numerous theft-related offenses. HELD: Navarrete-Medina has not rebutted the presumption of reasonableness since the sentence falls within the properly calculated Guidelines range. AFFIRMED.

*United States v. Friedman*, No. 07-4118 (10th Cir., February 10, 2009) (Published) (Kelly, Seymour & Murphy): **Federal Sentencing Guidelines; Reasonableness**: After pleading guilty to bank robbery which carried a Guidelines range of 151-188 months, the District Court "varied dramatically" and imposed a sentence of 57 months. The Government appealed this sentence as substantively unreasonable. HELD: "Based on the record in this particular case, we agree with the government and conclude, even given the highly deferential abuse-of-discretion standard of review, that the sentence imposed by the district court is substantively unreasonable." The holding appears to be based upon Friedman's extensive criminal history and his reluctance to accept responsibility.

*United States v. Yanez-Rodriguez*, No. 08-2100 (10th Cir., February 10, 2009) (Published) (Kelly, Holloway & Briscoe): **Federal Sentencing Guidelines; Reasonableness**: Yanez-Rodriguez entered a plea of guilty to illegal re-entry after deportation and was sentenced to 144 months. AFFIRMED over his claims that the Government breached the plea agreement to recommend a sentence at the lower end of the Guidelines range, the Guidelines range was calculated incorrectly, and that the upward variance of the District Court was substantively unreasonable.

*United States v. Sanchez*, No. 08-5047 (10th Cir., February 10, 2009) (Published) (Hartz, Holloway & O'Brien): **1. Searches and Seizures; Search Warrants; Detention of Occupants; 2. Searches and Seizures; Search Warrants; Sufficiency; 3. Searches and Seizures; Incident to Arrest**: Search This is another horrible search and seizure case out of the circuit. Sanchez was standing by a vehicle in the driveway of the house of Omar Silvar when police officers arrived to execute a search warrant for the house. An officer ordered him to get down, but he fled. He was apprehended quickly and a search of his person yielded incriminating evidence. About an hour later, after police has searched the house, Sanchez was "formally arrested." The issue in the case was the suppression motion filed by Sanchez and the panel AFFIRMED the denial, holding that: 1) the search warrant for the house was lawful even though the affidavit for the warrant provided no direct evidence of criminal conduct at the house; if law enforcement officers have probable cause to believe that a person is a supplier of illicit drugs, then the officers have probable cause to search the person's home for such contraband and evidence(!); 2) officers executing a search warrant of a home may detain persons they encounter standing by a vehicle in the home's driveway; 3) in Oklahoma if such a person flees the officers after being ordered to get down, the officers have probable cause to arrest him for violation of a statute prohibiting obstruction of an officer performing his duties; and 4) officers may search the person of one who is apprehended after such flight, even though the apprehended person is not formally arrested until the search of the home has been completed and the formal arrest is not for the offense of obstructing an officer. NOTE: In this case, there was no evidence that Sanchez had been in the home to be searched, but the panel did not find this fact "compelling" and expanded Supreme Court precedent to cover a case such as this one.

*United States v. Vidal*, No. 07-2026 (10th Cir., February 13, 2009) (Published) (Lucero, McWilliams & McConnell): **Guilty Pleas; Federal**: Vidal was charged with a drug crime and entered a guilty plea to the charge, "because [the police] found the drugs." During the plea colloquy, she seemed to say that she did not know drugs were in the car, but was simply pleading guilty because they were found in the car. The issue was whether her plea was knowing and intelligent in light of the facts. The panel held that it was. AFFIRMED.

*United States v. Flanders*, No. 08-6056 (10th Cir., February 19, 2009) (unpublished): **Federal Sentencing Guidelines; Reasonableness**: This is a routine affirmance of a sentence where the Guidelines range called for 51-63 months, but the District Court varied upward and imposed a sentence of 77 months. I include it because of the flair and drama contained in Judge O'Brien's concurring opinion: "In a series of ceremonial rites the leveling forces of the guidelines, their hearthstone, were sacrificed on the altar of sentencing discretion and appellate courts rendered impotent. *See Spears v. United States*, 129 S. Ct. 840 (2009); *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *United States v. Booker*, 543 U.S. 220 (2005)." The funny part is that Judge O'Brien acts like he would have actually granted relief to poor

Flanders if only he had the authority to do so.

***United States v. Dozier***, No. 08-4086 (10th Cir., February 11, 2009) (Published) (O'Brien, McKay & Gorsuch): **Federal Sentencing Guidelines**: Dozier was on probation in state court. When he was arrested and prosecuted in the federal system for being a felon in possession of a firearm, his state probation was revoked. The District Court enhanced 3 points under USSG sec. 4A1.1(a), treating the revocation as a sentence of imprisonment exceeding one year and one month. Dozier objected, arguing that USSG sec. 4A1.2(a)(1) excludes the sentence imposed following the revocation of his probation. Of course, the panel would not dare interpret the Guidelines in a manner that would actually benefit Dozier and thus AFFIRMED. You know you are in trouble when the court makes statements like this: "[The sentence for the probation revocation] is imposed as a consequence of the defendant's breach of probation terms but is not punishment for the breach." Not punishment for the breach? Odd way to look at it.

***United States v. Brown***, No. 08-8043 (10th Cir., February 27, 2009) (Published) (Briscoe, Murphy & Hartz): **Federal Sentencing Guidelines; Crack Cocaine**: Brown was convicted of distribution of crack cocaine and sentenced under the Guidelines. His case was affirmed on direct appeal. He subsequently filed a motion for reduction of his sentence pursuant to 18 U.S.C. sec. 3582(c)(2) based on retroactive application of an amendment to the Guidelines. However, the District Court at the original sentencing actually varied downward in Brown's favor and essentially gave Brown the benefit of the new amendment. In denying his motion for a further reduction, the District Court found that the sentence Brown actually received (165 months) is lower than the sentence he would have received pursuant to the amendment (even with the amendment, the Guidelines range would have been 188 to 235 months). The bottom line is that the sentence Brown actually received is "lower than the Sentencing Guidelines range had Amendment 706 been in effect at the time of Brown's sentencing." In this appeal, Brown proceeded *pro se* arguing that the District Court erred in denying his motion to modify. The panel was not persuaded. AFFIRMED.

***United States v. Pappan***, No. 07-8020 (10th Cir., February 27, 2009) (Unpublished) (O'Brien, Baldock & McConnell): **Federal Sentencing Guidelines; Crime of Violence**: Pappan was sentenced on a firearm and two drug counts, but his sentence was enhanced as a "career offender" under USSG 4B1.1(a). However, the career offender enhancement was based in part on a conviction for escape when he failed to return to a halfway house or work-release program. This appears to be the first case from the circuit in the wake of *Chambers v. United States*, 129 S. Ct. 687 (2009), which held that these "failure to report" escape convictions can not be considered as "crimes of violence" under the Armed Career Criminal Act. The panel held that the reasoning of *Chambers* applied in the context of the "career offender" enhancement and remanded to the District Court to determine whether his prior conviction for escape was a crime of violence.

***United States v. Nacchio***, No. 07-1311 (10th Cir., February 25, 2009) (*en banc*) (Published): **Experts**: This is a very lengthy 5-4 *en banc* opinion that vacates the split panel's grant of relief to Nacchio, the former CEO of Qwest Communications, based upon improper exclusion of a defense expert. The opinion rests upon an interpretation of the discovery requirements of Rule 16 of the Federal Rules of Criminal Procedure as it relates to disclosures of expert methodology in terms of a *Daubert/Kumho* analysis of the reliability of the conclusions of the expert witness. The District

Court held that the defense failed to disclose the methodology to comply with *Daubert* and Rule 702 and thus excluded the expert as a defense witness. In this opinion, the five-judge majority affirmed the District Court. The majority characterized the ruling of the District Court as grounded in *Daubert*/Rule 702, rather than Rule 16, and found no abuse of discretion by the District Court in excluding the testimony. In a sharp dissent, Judge McConnell (joined by Henry, C.J., Kelly, and Murphy), characterized the holding of the majority as the exclusion of the expert was the fault of the defendant for failing to establish the foundation for his testimony in advance of putting him on the stand or to file a motion for permission to establish the foundation through testimony. But, according to the dissent, the rules of criminal procedure (unlike the rules of civil procedure) "do not require a criminal defendant to establish the foundation for expert testimony through advance written submissions." The District Court made the mistake applying the rule in civil cases to this criminal case and wrongly excluded the testimony. Chief Judge Henry also penned a dissent that is well worth reading.

*United States v. French*, No. 07-5147 (10th Cir., February 24, 2009) (Published) (Briscoe, Porfilio & Baldock): **Criminal Justice Act**: This is actually a CJA matter presented to the court by Tulsa attorney William D. Lunn. Lunn represented a client pursuant to CJA appointment at a resentencing. He submitted a bill for \$7,420.75 which was approved by the magistrate. Judge Payne disagreed with the magistrate and approved only the statutory maximum of \$1,500.00. Lunn appealed to the circuit for some sort of review, but the panel held that it lacked jurisdiction over such matters. All the other circuits to have decided the issue came down the same way, so the result here is not surprising. Bottom line is that the fee determination decision is basically unreviewable.

*United States v. Winder*, No. 07-6208 (10th Cir., February 24, 2009) (Published) (Briscoe, Baldock & Holmes): **Searches and Seizures; Traffic Stops**: After a traffic stop (speeding with a subsequent high speed chase), Winder was charged with various drug and firearms counts and sentenced to 324 months with 300 months consecutive for a firearm count. AFFIRMED over his claims of: 1) suppression of evidence because the stop was unlawful since there was a policy of the police department to not ticket motorists (like Winder) traveling less than ten miles over the speed limit; 2) denial of the two-level retroactive Guidelines change regarding crack cocaine (no plain error); and 3) and sufficiency of the evidence on the Possession w/Intent count (police found baggies of drugs packaged for individual sale, baggies of varying sizes, and a digital scale) and the carrying a firearm count.

*United States v. Tafoya*, No. 08-2113 (10th Cir., February 24, 2009) (Published) (Kelly, Holloway & Briscoe): **Double Jeopardy/21 O.S. 11**: During Tafoya's trial for Felon in Possession of a Firearm, the District Court restricted testimony that could be used by the Government. The prosecutor asked an open-ended question to a police witness who then proceeded to discuss the forbidden evidence (it dealt with potential other crimes evidence). The defense moved for a mistrial that was granted. When Tafoya was indicted again, the defense sought to preclude further prosecution on the basis of double jeopardy. The District Court held that further prosecution was allowed because, although the prosecutor may have been negligent in his question, he did not act with intent to goad the defense into seeking a mistrial. AFFIRMED. The panel also adopted the procedure from the Seventh Circuit that allows the District Court to simply question the lawyers without holding an evidentiary hearing.

*United States v. Rooks*, No. 07-7029 (10th Cir., March 4, 2009) (Published) (Briscoe, Seymour & Hartz): **Federal Sentencing Guidelines; Crime of Violence**: Rooks argued that his conviction for "Third Degree Sexual Assault" under Texas law was not a crime of violence that would trigger sentencing enhancements for his conviction for felon in possession of a firearm. He particularly argued that this crime was actually an attempt under Texas law. The panel was not persuaded and, applying the most recent authority from the Supreme Court, AFFIRMED.

*United States v. Rogers*, No. 07-6299 (10th Cir., March 3, 2009) (Published) (Briscoe, Baldock & Holmes): **Searches and Seizures; Consent**: Rogers was convicted of several drug and firearms related counts. AFFIRMED over his claims of error relating to: 1) exclusion of evidence in the form of a hotel departure log and associated testimony from the hotel manager; 2) whether Rogers was "seized" in the hallway outside of his hotel room (the panel held that the encounter was consensual); 3) sufficiency of the evidence; 4) prosecutorial misconduct during closing arguments (that the officer walked into the hotel "alone, armed with a cross on his belt and a gun on his side, into the belly of the beast like a surgeon aiming for the cancer as he came across it"), but since there was no objection there was no plain error; and 5) no cumulative error.

*United States v. Poe*, No. 07-6237 (10th Cir., March 3, 2009) (Published) (Briscoe, McWilliams & Lucero): **Searches and Seizures: 1) Bounty Hunters and 2) Standing**: The summary says it all: This case requires us to answer a question of first impression in this Circuit: Do bounty hunters constitute state actors for purposes of the Fourth Amendment when they conduct a search in the course of seeking out a bail-jumper? We conclude that bounty hunters do not qualify as state actors when, as here, they act without the assistance of law enforcement and for their own pecuniary interests.

*Jones v. Commissioner of Internal Revenue*, No. 08-9001 (10th Cir., March 27, 2009) (Published) (Tacha, Baldock & O'Brien): Not a criminal case, but an interesting legal question regarding the tax value/consequences of donating, as a charitable donation, discovery material received as part of a criminal case. The panel concluded ultimately: "Because Taxpayer had no basis in the discovery material, he is precluded from claiming any income tax deduction for his charitable donation."

*Douglas v. Workman*, No. 01-6094 (10th Cir., March 26, 2009) (Published) (Henry, C.J., Seymour & Ebel): **Prosecutorial Misconduct; Presenting False Testimony**: This is a very lengthy capital habeas case where the panel granted first stage relief to Oklahoma death row inmates Yancy Lyndell Douglas and Paris Lapriest Powell on the basis that ex-Oklahoma County prosecutor Brad Miller cut a deal with a snitch witness and then denied it at trial and indeed through the appeals process. The agreement between Miller and the snitch was tacit. The panel noted that four circuits construe Brady as requiring disclosure of such tacit agreements and the Tenth Circuit panel agreed: "Like the majority of our sister circuits, we conclude that Brady requires disclosure of tacit agreements between the prosecutor and a witness. A deal is a deal---explicit or tacit. There is no logic that supports distinguishing between the two."

*United States v. Gonzales*, No. 06-8082 (10th Cir., March 16, 2009) (Published) (McConnell, Seymour & Ebel): **Possession of Firearm by Felon**: Gonzales entered a guilty plea to felon in possession of a firearm and was sentenced to 15 years based upon his three prior "violent felonies"

which included a burglary under Wyoming law. The burglary counts as a violent felony.

***United States v. Williams***, No. 08-3159 (10th Cir., March 18, 2009) (Published) (Lucero, Ebel & Tymkovich): **Federal Sentencing Guidelines; Crime of Violence:** Williams plead guilty to bank robbery and was deemed a career criminal. In this appeal, he challenges the finding that his prior conviction for battery on a police officer under Oklahoma law qualified as a "crime of violence." It does.

***United States v. Baldrige***, No. 07-5121 (10th Cir., March 18, 2009) (Published) (Hartz, Holloway & O'Brien): **Money Laundering:** Baldrige was a county commissioner in Rogers County, Oklahoma, from 2003 through 2006. He was eventually prosecuted for a multitude of crimes involving a scheme to file false claims with the county for payment. His convictions are AFFIRMED over several claims including: 1) prosecutorial misconduct in insinuating that Baldrige was a homosexual (no objection so only plain error review); 2) sufficiency of the evidence of conspiracy (the spokes lacked a rim, as the analogy goes), fraud and money laundering; 3) sufficiency of the evidence of his convictions for persuading two witnesses to lie to investigators.

***United States v. Benally***, No. 08-4009 (10th Cir., March 23, 2009) (Published): **Jurors:** Benally, a Native-American, was convicted by a jury whose foreman and another juror concealed racist views and stereotypes of Native Americans during voir dire and then later openly espoused those views during deliberations. The panel denied relief based upon the prohibition in Rule 606(b) that prevents testimony from jurors on deliberations. In this opinion, four judges dissent from the denial of *en banc* review (Henry, C.J., Briscoe, Lucero, and Murphy). **NOTE:** According to Judge Briscoe, the Ninth Circuit and the D.C. Circuit have held to the contrary on this issue.

***United States v. Caldwell***, No. 07-6251 (10th Cir., March 30, 2009) (Published) (Hartz, McWilliams & McConnell): **Joinder:** Caldwell was convicted of three counts of using wire communications to defraud mortgage lenders. The panel AFFIRMED over claims of: 1) sufficiency of the evidence; 2) admission of evidence of loans not charged in the indictment; 3) improper joinder with three co-defendants; and 4) denial of his motion to sever his trial.

***United States v. Caldwell***, No. 07-6254 (10th Cir., March 30, 2009) (Published) (Hartz, McWilliams & McConnell): **Money Laundering:** This is the appeal of Gayle Caldwell, wife of the defendant in the case above, who was charged with substantially the same counts as her husband in the mortgage fraud scheme. The panel affirmed all counts except a conviction for Money Laundering.

***United States v. Pech-Aboytes***, No. 08-4124 (10th Cir., April 17, 2009) (Published) (Briscoe, Ebel & Gorsuch): **Federal Sentencing Guidelines; Safety Valve:** In this guilty plea case, Pech-Aboytes was on probation for 36-months when he committed his meth-related drug crime which knocked him out of consideration for a "safety-valve" reduction. He hired a lawyer in California where the probation case was and got an order *nunc pro tunc* shortening the length of the probation to a length that excluded the date upon which he committed the federal crime. Of course, since this is federal court, the district judge refused to accept it because the order shortening the probation term was grounded in reasons unrelated to innocence or errors of law. The panel agreed for much the same reasons as an Eighth Circuit case. AFFIRMED.

*United States v. Serafin*, No. 07-8086 (10th Cir., April 14, 2009) (Published) (Kelly, Tymkovich & DeGiusti): **Federal Sentencing Guidelines; Crime of Violence**: Possession of an unregistered weapon does not constitute a crime of violence under 18 U.S.C. sec. 924(c)(1).

*United States v. Egbert*, No. 07-4180 (10th Cir., April 14, 2009) (Published) (Kelly, Seymour & Murphy): **1. Federal Sentencing Guidelines; Leader/Organizer Enhancement; 2. Federal Sentencing Guidelines; Serious Bodily Injury**: This "hate crime" case involved three members of the National Alliance (white supremacists) located in Utah who beat up people at two locations. Each defendant raised several claims. The panel found: 1) that the evidence was insufficient to support the finding of the District Court that one of the victims suffered serious bodily injury (as opposed to bodily injury); and 2) there was insufficient evidence that one of the defendants was a leader or organizer. Thus, sentences for two of the defendants are vacated and remanded.

*United States v. Morris*, No. 07-8099 (10th Cir., April 14, 2009) (Published) (Kelly, Tymkovich & DeGiusti): **Possession of Firearm by Felon**: Morris burgled an apartment, taking a rifle in the process. He plead guilty to one count of being a Felon in Possession of a Firearm. The PSR recommended a four-level enhancement for use or possession of the firearm in connection with another felony (the burglary). Morris objected to this four-level enhancement on the ground of "over-counting." The gist of his argument is that the "other felony offense" must be separate and distinct from the possession of the firearm. However, since Morris did not raise this aspect of the objection specifically before the trial court, review is for plain error only. It appears to matter not since the panel analyzed the issue and concluded that there was no error, plain or otherwise.

*United States v. Scoville*, No. 07-8094 (10th Cir., April 8, 2009) (Published) (Kelly, Tymkovich & DeGiusti): **Federal Sentencing Guidelines; Crime of Violence**: Scoville's previous convictions qualify as "crimes of violence" under the ACCA. The priors were all burglaries under Ohio law.

*United States v. Patterson*, No. 05-6386 (10th Cir., April 7, 2009) (Published) (Kelly, Lucero & Tymkovich): **Federal Sentencing Guidelines; Crime of Violence**: This case was remanded to the panel in light of *Chambers v. United States* which held that "walk-away" escapes were not crimes of violence. Unfortunately for Patterson, he had multiple prior crimes of violence to qualify as a career offender, thus it does not matter whether his failure to report back to jail on time counts as a crime of violence because even if it does not, it would not change the sentence.

*United States v. Erickson*, No. 08-4025 (10th Cir., April 6, 2009) (Published) (Henry, C.J., Hartz & O'Brien): **Judges/Bias/Recusal**: This case involves convictions for Obstructing a Federal Grand Jury by "the submission of backdated contract extensions (or "change orders") in response to a grand-jury subpoena for records[.]" AFFIRMED over their claims of: 1) sufficiency of the evidence; 2) a Brady claim; and 3) bias of the trial judge.

*United States v. Uscanga-Mora*, No. 07-4248 (10th Cir., April 24, 2009) (Published) (Henry, C.J., McWilliams & Gorsuch): **Federal Sentencing Guidelines; Leader/Organizer Enhancement**: In this drug case (guilty plea), Uscanga-Mora raised the issue of the legality of a two-level enhancement under 3B1.1(c) for being an organizer, leader, manager, or supervisor in any criminal activity involving fewer than five participants. He argued that the district court did not explain adequately

its reasons for imposing the enhancement and also that the enhancement was not supported by sufficient evidence. As to the adequate reasoning claim, the panel torpedoed this by noticing that, although defense counsel objected to the enhancement, he did not raise any claim about the adequacy of the explanation of the district court. Thus, review was for plain error and none was found. The panel stated: "Of course, plain error review should not be like a hidden mantrap, encountered without warning yet often deadly." The panel then went on to apply plain error in this case like a hidden mantrap, encountered without warning and deadly. AFFIRMED.

*United States v. Biglow*, No. 08-3155 (10th Cir., April 20, 2009) (Published) (Lucero, Baldock & Murphy): **Searches and Seizures; Search Warrants; Sufficiency**: Grant of a motion to suppress is reversed in this ghastly opinion. The District Court found that the affidavit in support of the search warrant failed to establish probable cause because there was no evidence of a nexus between the alleged criminal activities and the place to be searched (a residence). The panel embarked on a lengthy discussion about a possible "conflict" among its nexus precedents but then decided that there really was not a conflict and simply deferred to the decision of the issuing magistrate in this case.

*United States v. Fred*, No. 08-2052 (10th Cir., April 20, 2009) (unpublished): **Interrogations/Fifth Amendment**: Denial of motion to suppress oral and written statements is REVERSED in this sharp opinion. Fred's step-daughter had accused him molestation and he was told by social services that he would need to speak with the FBI (the crime occurred in Indian Country). Fred drove to the FBI office and was interviewed by two agents in a conference room. They refused to allow his wife to be present. Fred was not advised of his *Miranda* rights and gave statements during the interview that lasted about an hour and half. He was not cuffed or arrested. The District Court concluded that Fred was not in custody and therefore *Miranda* was not required. The panel disagreed, stating that even though Fred showed up voluntarily for the interview, he was nevertheless "in custody" because agents advised him that he would be allowed to leave once the interview was completed.

*United States v. Otero*, No. 08-2154 (10th Cir., April 28, 2009) (Published) (McConnell, Holloway & Baldock): **Searches and Seizures; Search Warrants; Sufficiency**: Otero was a mail carrier who was convicted of mail fraud. She moved to suppress two documents found on her computer at her home on the ground that the search warrant lacked particularity. The district court agreed and ordered the documents suppressed. The Government filed this interlocutory appeal. The panel agreed with the district court that the warrant was invalid, but applied *Leon* and reversed the suppression order. **NOTE**: Although the end result is bad for Otero, there is good language in this opinion concerning the language of search warrants for computers and just how specific they need to be.

*United States v. Dryden*, No. 08-3310 (10th Cir., April 30, 2009) (Published) (Hartz, McKay & O'Brien): **Federal Sentencing Guidelines**: Dryden was denied a sentence modification based on the retroactive application of the amendments to the crack cocaine Guidelines on the basis that the amended Guideline would not have reduced the sentencing range in his case. On appeal, he raised what the panel described as "the novel argument" that the Commission's policy statement resulted from an unconstitutional delegation of legislative authority to restrict the delegation of the federal courts. The panel brushed this contention aside on the basis that the policy statement is actually based upon, and does nothing more than reiterate, a statutory limitation on resentencing. Thus, Congress itself has authorized the limitation and not the Commission on its own authority.

*United States v. Urbano*, No. 08-3147 (10th Cir., April 29, 2009) (Published) (Lucero, Baldock & Murphy): **Possession of Firearm by Felon**: In this felon-in-possession case, the panel reviewed the elements of the statute, 18 U.S.C. 922(g)(1), and recognized that the firearm possessed must be in or affecting interstate commerce. At trial, Urbano requested the full version of Tenth Circuit Pattern Jury Instruction 1.39 which defines interstate commerce. The District Court refused and gave an altered instruction which redacted this language: "[a]ll that is necessary is that the natural and probable consequences of the acts the defendant took would be to affect interstate commerce." Thus, the District Court instruction focused on the gun in interstate commerce where Urbano's requested instruction focused on his actions and whether they affected interstate commerce. Basically, all the Government has to show is that the firearm had traveled across state lines in the past. Thus, in felon-in-possession cases, Instruction 1.39 is not to be given in its entirety, and the panel approved the instruction given by the trial court in this case.

*Poolaw v. Marcantel, et. al.*, No. 07-2254 (10th Cir., May 4, 2009) (Published) (Lucero, Anderson & O'Brien): **Searches and Seizures; Warrantless**: This is a civil rights action under 42 U.S.C. 1983 where an unconstitutional search and seizure is at issue. According to the panel, a sheriff's deputy was killed and in the manhunt that followed, the plaintiffs were detained and search "based on little more than [their] status as [the suspect's] in-laws." The panel held that these actions violated the Fourth Amendment, but Judge O'Brien penned a vigorous dissent.

*United States v. Cornejo-Sandoval*, No. 08-2070 (10th Cir., May 5, 2009) (Published) (McConnell, Holloway & Baldock): **Insanity/Competency**: Drug convictions affirmed over claims that the defendant was not competent to be tried.

*United States v. James*, No. 08-1292 (10th Cir., May 5, 2009) (Published) (Barrett, Anderson & Brorby): **Restitution**: This is a fairly complicated restitution case involving mortgages. Amazingly, the panel reviewed for plain error and actually found some reversible error in some of the restitution orders and reduced the restitution order in part.

*United States v. Landers*, No. 08-6105 (10th Cir., May 5, 2009) (Published) (Lucero, McWilliams & Tymkovich): **Insanity/Competency**: Pithy opening paragraph by the panel: "In an attempt to gain release from federal prison, Russell Dean Landers coordinated a scheme to extort the prison's warden and other federal officials by placing liens on their property. Instead of gaining release, though, Landers gained only jury convictions---one for mailing threatening communications, and another for conspiring to impede federal officials in the performance of their duties." AFFIRMED over claims of competency to stand trial, refusal to allow Landers to employ an expert for purposes of a psychological evaluation, and imposing a sentence twelve months above the applicable Guidelines range.

# UNITED STATES SUPREME COURT UPDATE

by

JAMES L. HANKINS<sup>4</sup>

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**Moore v. United States**, No. 07-10689 (U.S., October 14, 2008): **Federal Sentencing Guidelines:** Pithy *per curiam* opinion reversing the Eighth Circuit in a case where the district court stated that it felt constrained by then-current law to not depart from the disparate treatment of offenders regarding crack/powder cocaine. *Kimbrough* was decided while Moore's cert petition was pending and the Supreme Court remanded to the Eighth Circuit which affirmed. The Court felt that the Eighth Circuit failed to give meaning to the statement of the district court and again reversed the Eighth Circuit.

**Hedgpeth v. Pulido**, No. 07-544 (U.S., December 2, 2008): **Standards of Review:** A criminal conviction based on a general verdict may be set aside if the jury was instructed on alternative theories of guilt and may have relied upon an invalid theory. However, the Ninth Circuit held that this circumstances was "structural error" and therefore not subject to harmless error analysis. Not surprisingly, all the parties involved in this case and the Court agreed, the result of which was this *per curiam* opinion.

**Oregon v. Ice**, No. 07-901 (U.S., January 14, 2009): **Concurrent/Consecutive Sentences:** Under the *Apprendi* line of cases, there is no Sixth Amendment error when a judge (rather than a jury) orders sentences to run consecutively. **NOTE:** The *dissenters* in this opinion were Justices Scalia, Souter, Thomas, and Roberts(!)

**Herring v. United States**, No. 07-513 (U.S., January 14, 2009): **Searches and Seizures; Exclusionary Rule:** An arrest warrant for Herring was in a law enforcement database and he was arrested, a search thereto yielding drugs and a gun. However, it was found that the warrant had been recalled months earlier but the computer files were not updated. HELD: The exclusionary rule does NOT apply. "When police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search, rather than systemic error or reckless disregard of constitutional requirements, the exclusionary rule does not apply."

**Chambers v. United States**, No. 06-11206 (U.S., January 13, 2009): **Federal Sentencing Guidelines; Crime of Violence:** Under the Armed Career Criminal Act, which mandates 15 years for a felon unlawfully in possession of a firearm who has three prior convictions for certain drug

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crimes or "violent" felonies, a conviction for failing to report for weekend confinement does not qualify as a "violent" felony or escape.

***Jimenez v. Quarterman***, No. 07-6984 (U.S., January 13, 2009): **Habeas Corpus; Statute of Limitations/Equitable Tolling**: Where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not "final" for AEDPA purposes until the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking certiorari review of that appeal. Thus, the one-year statute of limitations is tolled during this time.

***Waddington v. Sarausad***, No. 07-772 (U.S., January 21, 2009): **Habeas Corpus; AEDPA Deference (Not Met)**: Habeas case where the Ninth Circuit is reversed for granting the writ on a jury instruction issue out of the state of Washington on the bases that the decision of the state courts was not objectively unreasonable (the issue was whether a statute on accomplice liability was ambiguous).

***Spears v. United States***, No. 08-5721 (U.S., January 21, 2009) (*per curiam*): **Federal Sentencing Guidelines**: A District Court substituted a 20:1 quantity ratio in a drug case for the 100:1 ratio per the Guidelines and sentenced Spears to the minimum. The Eighth Circuit twice reversed. In this *per curiam* opinion, the Supreme Court reversed the Eighth Circuit, concluding that the decision conflicts with *Kimbrough* which held that cocaine Guideline, like all others, was advisory only.

***Nelson v. United States***, No. 08-5657 (U.S., January 26, 2009) (*per curiam*): **Federal Sentencing Guidelines; Reasonableness**: This is a rebuke of the Fourth Circuit, the purpose of which appears to be to underscore that, unlike the Circuit Courts of Appeal, federal district courts may not presume the Guidelines range to be reasonable. The opinion stated, "Our cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable." The Fourth Circuit affirmed on the basis that the District Judge did not treat the Guidelines as mandatory. The Court found this to be true, but beside the point since the Guidelines are not only not mandatory, they are also not to be presumed reasonable.

***Arizona v. Johnson***, No. 07-1122 (U.S., January 26, 2009): **Searches and Seizures; Pat Downs**: More misery for the Fourth Amendment from a unanimous Court. In this traffic stop case, police pulled over a car for registration and insurance-related reasons. In making the stop, officers had no reason to suspect anyone in the vehicle of criminal activity. Three officers approached the three persons in the car and while one officer questioned the driver, another noticed that Johnson had a blue bandanna on (*i.e.*, he was a Crips) and was carrying a scanner. She then ordered him out of the car to question him on his gang affiliation and of course she patted him down and found a weapon. The Arizona Court of Appeals held that although Johnson was lawfully seized when the officers stopped the car, the separate questioning amounted to a distinct consensual encounter which precluded a pat down unless she had reason to suspect that he was involved in criminal activity (even if she suspected that he was armed). The Court clarified that Johnson was seized and not free to go. The key to this case appears to be that it was undisputed that the officer had reasonable suspicion that Johnson was armed and dangerous.

**United States v. Hayes**, No. 07-608 (U.S., February 24, 2009): **Possession of Firearm by a Felon:** Hayes was convicted back in 1994 of simple battery, but it was against his ex-wife. Fast-forward to 2004 when police responded to a 911 call and found him in possession of a gun. He was prosecuted by the feds under 18 U.S.C. sec. 922(g)(9) which prohibits such possession by people who have been convicted previously of "a misdemeanor crime of domestic violence." Hayes argued that his prior battery conviction did not count because a domestic relationship was not an element of the crime under state law. The Fourth Circuit agreed with him, but here the Supreme Court REVERSED and held that although the domestic relationship must be prove beyond a reasonable doubt, it need not be an actual element of the statute in order to qualify as a prior conviction under section 922(g)(9). An utterly absurd decision.

**Puckett v. United States**, No. 07-9712 (U.S., March 25, 2009): **Standards of Review:** In a plea agreement case, if the Government breaches the agreement, defense counsel must object in the District Court. Failure to do so forfeits the claim for all but plain error review under Rule 52(b).

**Knowles v. Mirzayance**, No. 07-1315 (U.S., March 24, 2009): **1. Habeas Corpus; AEDPA Deference; Not Met; 2. Ineffective Assistance of Counsel:** This appears to be a routine rebuke of the Ninth Circuit which held that, in a murder trial in which insanity was a defense, it was IAC for counsel to abandon the defense at the second stage because there was no tactical advantage for doing so. The Court reversed the Ninth Circuit, holding that it failed to apply the deference under the AEDPA by applying an incorrect legal standard to the IAC claim here, i.e., holding counsel deficient because there was nothing to lose by pursuing the insanity defense.

**Vermont v. Brillon**, No. 08-88 (U.S., March 9, 2009): **Speedy Trial:** Brillon was prosecuted for felony domestic assault as a habitual offender. Over a three year period he was represented by six appointed lawyers who served varying tours of duty representing this most difficult client. Brillon was convicted at jury trial and moved to reverse on the grounds of denial of his right to a speedy trial. The Vermont Supreme Court agreed and reversed, attributing the delay of appointed counsel to the State. In this opinion, the Supreme Court reversed, holding: "Assigned counsel, just as retained counsel, act on behalf of their clients, and delays sought by counsel are ordinarily attributable to the defendants they represent." Justices Breyer and Stevens dissented on the grounds that the case did not present squarely the issue for which certiorari was granted and thus the writ was granted improvidently.

**Harbison v. Bell**, No. 07-8521 (U.S., April 1, 2009): **Criminal Justice Act:** Resolving a circuit split, the Court held that counsel appointed by the federal courts are authorized to represent state death row inmates in state clemency proceedings.

**Rivera v. Illinois**, No. 07-9995 (U.S., March 31, 2009): **Peremptory Challenges/Batson:** In an Illinois jury trial, a trial judge disallowed a peremptory challenge by a defendant on the basis that it was discriminatory in violation of *Batson*. This was later found to be an erroneous ruling. The unanimous Court held that automatic reversal is not required as long as all jurors on the case were qualified and unbiased.

**Corley v. United States**, No. 07-10441 (U.S., April 6, 2009): **Interrogations/Fifth Amendment:** Prior cases of the Court hold that when a confession is obtained by law enforcement when they delay presenting the arrestee before a magistrate, the confession is not admissible. This was the federal rule for many years (the so-called *McNabb-Mallory* rule) until 1968 when Congress enacted 18 U.S.C. sec. 3501 in response to *Miranda*. This statute declares basically that confessions are admissible if voluntarily given and provides a six-hour time limit for confessions that occur after arrest. **HELD:** Section 3501 did not supplant entirely the *McNabb-Mallory* rule; thus, confessions given more than six hours after arrest when the person is not taken before a magistrate must be suppressed.

**Arizona v. Gant**, No. 07-542 (U.S., April 21, 2009): **Searches and Seizures; Incident to Arrest:** Gant was arrested during a traffic stop for driving on a suspended license. He was cuffed and locked in a patrol car during which time officers searched his car and found cocaine in a jacket pocket. The legal basis for this search was that it was incident to arrest. The Arizona Supreme Court reversed on the basis that Gant was secured in the patrol car at the scene. In this amazing opinion, the Supreme actually agreed and reigned in the proliferation of case law that had that allowed searches incident to arrest under these circumstances. The Court held that police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest. NOTE: Justice Scalia's concurrence is worth a read.

**Cone v. Bell**, No. 07-1114 (U.S., April 28, 2009): **Habeas Corpus; Procedural Default:** Although this case might appear to deal with a *Brady* violation, it is not a *Brady* case; rather, it is a fairly convoluted case dealing with the complex terrain of procedural default in federal habeas litigation. Cone was sentenced to death for a double-murder in Tennessee. After a direct appeal, and then a round of post-conviction appeals, Cone *pro se* raised a *Brady* claim in a second post-conviction proceedings in state court. The state court denied the petition summarily, concluding that the issues were "previously determined" or waived. Cone appealed to the Tennessee Court of Criminal Appeals which also concluded that his *Brady* claim had been "previously determined" when in fact it had not been addressed by any court. However, the case was remanded, Cone was given the benefit of counsel, and in the interim new procedural rules allowed a defendant to view the prosecutor's file. Upon review of the file, Cone found that there were witnesses interviews and police reports that would have helped his insanity/drug use defense (which was his only defense at trial). For some unknown reason, the State urged the state appellate courts to dismiss the *Brady* claim because it had already been determined by the Tennessee Supreme Court on direct, or by the Court of Criminal Appeals in the first PC. However, in federal habeas proceedings the State took the stance that the *Brady* claim had never been raised in State court (and was thus procedurally defaulted), which was inconsistent with its previous argument in state court that the claim had been "previously determined." Eventually, the Sixth Circuit acknowledged finally that Cone had raised the *Brady* claim in state court (*i.e.*, exhausted it), but nevertheless held that the claim was barred because the Tennessee courts had concluded that the claim was "previously determined." The Supreme Court framed the issue as: Whether a federal habeas claim is procedurally defaulted when it is twice presented to the state courts. The answer is: No. Apparently, the Sixth Circuit is the lone circuit to hold otherwise and this appears to be the reason why the Supreme Court granted *certiorari*. The Supreme Court analyzed the *Brady* claim and rejected it on the merits as to guilt/innocence, but remanded to the district court to consider whether the error might have affected the sentence.

**Kansas v. Ventris**, No. 07-1356 (U.S., April 29, 2009): **Interrogations/Sixth Amendment**: This case deals with application of the exclusionary rule for impeachment purposes. The police planted an informant in the same cell as Ventris who allegedly overheard him make incriminating statements. At trial, Ventris testified that another person committed the crimes which was contradictory to what the informant heard. Even though the State conceded that there was a Sixth Amendment violation in obtaining the statement, it was nevertheless permissible to use the statement (via the jailhouse informant) to impeach Ventris once he took the stand.

**Dean v. United States**, No. 08-5274 (U.S., April 29, 2009): **Scienter**: Dean was convicted of conspiring to commit a bank robbery and discharging the firearm during the armed robbery. Dean alleged that the discharge of the firearm was accidental, and therefore the mandatory minimum of 10 years should not apply since he had no intent to discharge it. HELD: Section 924(c)(1)(A)(iii) requires no separate proof of intent; thus, the mandatory minimum applies if a gun is discharged in the course of a violent or drug trafficking crime, whether on purpose or by accident.

**Flores-Figueroa v. United States**, No. 08-108 (U.S., May 4, 2009): **Statutory Construction**: 18 U.S.C. 1028 forbids knowingly using a means of identification of another person (identity theft). In this case, Flores-Figueroa, a Mexican citizen, gave his employer counterfeit social security and alien registration cards containing his name but the identification numbers of others. He moved for acquittal on the basis that the Government failed to prove that he knew the numbers were assigned to others. The Government argued that "knowingly" just meant that he knew he was using something unlawful, not that he knew he was using numbers assigned to others. The Court agreed with Flores-Figueroa, holding that the statute requires that he knew the "means of identification" he used belonged to "another person" under the statute.

## INMATE LOCATOR

This link is brought to you by OCDLA past-President Barry Derryberry:

<https://www.vinelink.com/vinelink/siteInfoAction.do?siteId=37000>

The site states that it is a “service provided by the Oklahoma Attorney General’s Office in conjunction with law enforcement agencies across the state.” Anyone can check out the custody status of inmates within Oklahoma’s 77 county jails as well as DOC (but not information about pardons and paroles).

# OTHER CASES OF NOTE

by

JAMES L. HANKINS<sup>5</sup>

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*NOTE: The cases below are from other jurisdictions, but are either a winner for the defense and/or otherwise notable to practitioners of criminal law. I hope you can use some of them.—JLH.*

**United States v. Glynn**, No. 06-Cr-580 (S.D.N.Y., September 22, 2004): **Experts; Ballistics:** Glynn's first trial ended in a mis-trial after the jury became deadlocked. In this Order, the trial court dealt with expert opinion testimony of the government's ballistic expert to the effect of "to a reasonable degree of ballistic certainty" a bullet recovered from the body of the victim and shell casings recovered from two related crime scenes came from firearms linked to Glynn. Glynn objected to the testimony on the basis that the field of ballistics is not sufficiently reliable under *Daubert/Kumho Tire*. In this Order, District Judge Jed S. Rakoff held that ballistics was not a "science" but that such opinion testimony is nevertheless admissible, although the witness must avoid stating his conclusion in terms of "certainty" and may only say that it is "more likely than not."

**United States v. Triumph Capital Group, Inc.**, No. 06-4970-cr (2nd Cir., September 25, 2008): **Prosecutorial Misconduct; Brady Issues:** Racketeering counts REVERSED on a *Brady* claim where the Government suppressed the notes of an agent during a proffer session with a witness.

**United States v. Kerley**, No. 07-1818-cr (2nd Cir., September 25, 2008): **1. Rule of Lenity; 2. Federal Sentencing Guidelines; Vulnerable Victim:** Kerley was ordered to pay child support to his twin girls. Since he did not do it, he was tried and convicted of two counts of Willful Failure to Pay Child Support. HELD: 1) no error in refusing his "good faith" instruction since the instructions as a whole captured the essence of good faith; 2) the second count is reversed since the statute is ambiguous whether Congress meant that a unit of prosecution should be each child or violation of an order, thus the RULE OF LENITY applies in this case in favor of Kerley; 3) the "vulnerable victim" enhancement does not apply under these circumstances.

**United States v. Hodson**, No. 07-5504 (6th Cir., September 19, 2008): **Searches and Seizures; Search Warrants; Sufficiency:** Solid search and seizure winner characterized by the panel as follows: "In this appeal, which arises from the district court's denial of a criminal defendant's motion to suppress evidence seized pursuant to a warrant, we must decide whether a suspect's ostensibly admitting to having engaged in child molestation is sufficient, without more, to establish probable cause to search that suspect's home for child pornography. Because we conclude that it is not, we

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REVERSE the district court's denial of the suppression motion, VACATE the conviction, and REMAND this case for further proceedings consistent with this opinion." NOTE: The panel held also that *Leon* did not save the warrant.

***State v. Powell***, No. SC07-2295 (Fla., September 29, 2008): **Interrogations/Fifth Amendment**: Interesting *Miranda* winner in which the standard *Miranda* card used by the Tampa Police Department was held invalid because it did not explicitly state that Powell had the right to have an attorney present during questioning. NOTE: It might be a good idea to check the *Miranda* cards used by your local jurisdiction and compare them to the one used in this case (it is set forth verbatim in the opinion).

***Wickham v. State***, SC05-1012 (Fla., September 25, 2008): **Judges/Bias/Recusal**: Capital case remanded on the basis that the trial judge should have been disqualified. This case contains unusual facts, including the fact that Wickham's counsel, against whom he filed IAC claims, ran for judge and served as a trial court judge for many years, as did his wife. The Florida Supreme Court held there existed the appearance of bias.

***Mason v. Mitchell***, No. 05-4511 (6th Cir., October 3, 2008): **Habeas Corpus; Capital Habeas Cases**: Capital habeas case penalty phase winner where the death penalty is vacated on an IAC claim for failure to conduct a reasonable background investigation.

***Kerrigan et al. v. Commissioner of Public Health***, No. SC-17716 (Conn., October 28, 2008) (the officially released date for publication in the *Connecticut Law Journal*): **Same-Sex Marriage**: The Connecticut Supreme Court holds that a state statute banning same-sex marriages is unconstitutional.

***United States v. Farley***, No. 07-CR-196-BBM (N.D. Ga., September 2, 2008): **Excessive Sentence**: Farley entered a plea to crossing a state line with intent to engage in a sexual act with a person who has not attained the age of 12 years. He was caught in an internet sting and there was not in fact any minor involved at all, but rather a police officer posing as a minor. For this, Farley faced a sentence range of 30 years to life (the prior law had a range of any term of years of life; the Adam Walsh Child Protection and Safety Act of 2006 increased the sentence to include the mandatory minimum of 30 years. In this opinion, the Court recognized that, unless such a sentence was constitutionally infirm, the only way to sentence Farley below the minimum would be upon the Government's motion for departure for substantial assistance or via the safety valve rule, neither of which applied in this case. **HELD**: The 30-year mandatory minimum sentence under the specific facts of his case "is so grossly disproportionate to his crime as to constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution." The Court described the case as one that involved no actual harm, no actual child, no prior instances of impropriety, and a low risk of recidivism. **NOTE**: This is a brave opinion and makes sense, but if you use it, be sure to make sure it is still good. The precedent from the Supreme Court in this area is very deferential to the congressional decision regarding sentences and I suspect this one will be reversed. Also, the Court pointed out that the crime of murder of a child in the course of raping the child carries death, life, or any term of years with no mandatory minimum. Odd.

***United States v. Banks***, No. 07-3348 (7th Cir., October 9, 2008): **Prosecutorial Misconduct; Brady Issues:** District Court did not abuse its discretion in granting a new trial on multiple drug counts on the basis that the government failed to disclose that the DEA chemist, Theresa Browning, who testified to an analysis of the drugs, was under investigation at the time for professional misconduct involving the misuse of a government credit card. NOTE: Judge Easterbrook dissented. NOTE: The panel noted the importance of the standard of review in the context the issue presented as a motion for new trial (abuse of discretion) rather than a straight constitutional analysis under the Due Process Clause/*Brady*.

***Johnson v. Bagley***, No. 06-3846 (6th Cir., October 10, 2008): **Habeas Corpus; Capital Habeas Cases:** Another capital habeas case where the death penalty is vacated on an IAC claim involving trial counsel's failure to investigate mitigation evidence. The panel described the investigation as "anemic and leaderless" that suffered from at least three conspicuous flaws: 1) failing to interview Johnson's mother; 2) failing to read the large number of files obtained from the Ohio Department of Human Services; 3) and no one was apparently in a leadership role in the mitigation investigation.

***United States v. Leonel Mejia, a/k/a "Little Chino,"*** No. 05-2856 (2nd Cir., October 6, 2008): **Experts:** Gang-related crimes reversed on the basis of error in the form of testimony from Hector Alicea, an investigator with the New York State Police, regarding the gang's "enterprise structure and the derivation, background and migration of the MS-13 organization, its history and conflicts...as well as its hierarchy, cliques, methods and activities, modes of communication and slang." The panel presented an excellent discussion of Rule 702 and "officer experts," noting that such an expert may "stray" in two ways: 1) by testifying about the meaning of conversations in general, beyond the interpretation of code words; and 2) by interpreting ambiguous slang terms based on knowledge gained through involvement in the case rather than by reference to the "fixed meaning" of those terms "either within the narcotics world or within this particular conspiracy." In this case, the panel did not quarrel with the District Court's ruling that Alicea was an expert on gangs, but reversed on the basis that his testimony exceeded the bounds of Rule 702 and the Confrontation Clause.

***Newman v. Metrish***, No. 07-1782 (6th Cir., October 6, 2008): **Sufficiency of the Evidence:** Habeas relief is AFFIRMED in a murder case on the basis of insufficient evidence because there was "neither direct nor circumstantial evidence placing Newman at the scene of the crime[.]" A drug dealer was killed. The next day, a gym bag was found on the side of the road containing the murder weapon. The bag and its contents were linked to Newman, but apparently no other evidence tied Newman to the murder.

***Taylor v. Cain***, No. 07-30709 (5th Cir., October 13, 2008): **Confrontation/Cross-Examination:** Taylor was convicted in Louisiana state courts of Murder in the Second Degree and sentenced to Live without parole. In this habeas corpus case, the Fifth Circuit panel AFFIRMED the grant of habeas relief on the basis that the introduction of hearsay evidence violated his Sixth Amendment rights and the error was not harmless.

***United States v. Ogando***, No. 05-0236 (2nd Cir., October 20, 2008): **Sufficiency of the Evidence:** The introductory paragraph says it all: "Defendant-Appellant, a livery cab driver hired to pick up a drug courier at the airport, challenges the sufficiency of the evidence supporting his conviction for

conspiracy to import ecstasy, importing ecstasy, conspiracy to distribute and possess with intent to distribute ecstasy, and possession with intent to distribute ecstasy. Because the evidence was insufficient to demonstrate the specific intent element of each of these offenses, we reverse."

*United States v. Kapelioujnyj*, No. 07-3353 (2nd Cir., October 22, 2008): **Sufficiency of the Evidence:** Convictions for conspiracy to sell stolen property are reversed on the basis that the Government failed to prove that the defendant believed that the stolen property was worth at least \$5,000.00, and also on the basis that the Government failed to prove the defendant was involved in a conspiracy involving goods that moved in interstate commerce.

*United States v. Constante*, No. 07-41004 (5th Cir., October 6, 2008): **Federal Sentencing Guidelines; Crime of Violence:** Sentence in a felon in possession of a firearm case is vacated because a prior burglary conviction under Texas law is not a violent felony that can be used to enhance the sentence.

*United States v. Woods*, No. 07-51491 (5th Cir., October 28, 2008): **Conditions of Probation:** In a drug case, a condition of supervised release, that Woods is forbidden from residing with any person to whom she is not ceremonially married or related by blood, is VACATED as an abuse of discretion under 18 U.S.C. 3583(d).

*United States v. Hope*, No. 07-60769 (5th Cir., October 8, 2008): **Possession of Firearm by Felon:** Hope was arrested following a high speed chase when police tried to arrest him for a traffic infraction. A gun was recovered under the passenger seat. It was later identified as the same weapon used by Hope in a robbery the previous day. Hope was convicted of two counts of felon in possession of a firearm. The first count was for the day he was arrested and the second count was for possessing it during the robbery the previous day. HELD: The two convictions for the single act of continuous possession (where the government did not introduce evidence of any break in possession of the gun by Hope) violate Double Jeopardy and this was plain error (note that the circuits are unanimous on this and the panel cited cases from the First, Sixth, Seventh, Ninth, and Eleventh Circuits).

*United States v. Crist*, No. 1:07-cr-211 (M.D. Penn., October 22, 2008): **Searches and Seizures; Computers:** Crist lived in squalor and got behind on his rent. The landlord hired some guys to clean out Crist's house. The guys put most of his stuff out on the curb as trash, but one of them took Crist's computer and told his friend to come and get it which the friend did. When Crist arrived at his house and saw that his belongings were being trashed, he asked where his computer was and was told they did not know. In the meantime, the friend hooked up the computer and found child pornography on it and called the police. Police then ran a search of the hard drive using special software (EnCase) and found the child pom files. In this interesting opinion, the court held that the search using the EnCase software exceeded the scope of the private party search and thus was unreasonable under the Fourth Amendment.

*Urcinoli v. Cathel*, No. 06-4028 (3rd Cir., November 7, 2008): **Habeas Corpus; Statute of Limitations/Equitable Tolling:** Urcinoli was convicted of murder in New Jersey state courts. He sought habeas relief in federal court but presented a petition that contained both exhausted and

unexhausted claims. The district court waited for over 14 months before dismissing his petition under *Rose v. Lundy*, noting that he had the option of going back to state court to exhaust the claims (which he did). However, the district court effectively deprived Urcinoli of any meaningful review because it had waited until after the one-year statute of limitations to dismiss the petition---thus any subsequent petition filed by Urcinoli, whether exhausted or not, was time-barred. HELD: "Although the District Court's initial dismissal of Urcinoli's petition was not improper under prevailing law, we conclude that the one-year statute of limitations should have been equitably tolled to allow him to bring those claims in his second petition."

***United States v. Hamilton***, No. 06-2933-cr (2nd Cir., November 7, 2008): **Searches and Seizures; Standing**: Suppression issue remanded to the district court for an evidentiary hearing which erred in denying Hamilton's motion to suppress on the basis of lack of standing where Hamilton asserted a privacy interest. Hamilton moved orally to suppress on the day of trial and made an offer via his counsel that he had paid \$250,000 for the house, that the house was registered in the name of his common-law wife and mother of his child, he had free access to come and go as he pleased, and he did so two to three times a week for years. The panel held there was an issue of fact here even though Hamilton had no keys to the house and told police he did not live there.

***United States v. Williams, et al.***, No. 06-50599 (9th Cir., November 6, 2008): **Jury Instructions; Allen Charge**: Good case resulting in reversal when the trial court gave an *Allen* charge to the jury after a hold-out wrote a note to the court saying they jury was deadlocked and she had made up her mind to disagree with the others. The panel stated, "When a juror clearly discloses to the district court that she disagrees with the rest of the jury and that she cannot return a different verdict, as Juror No. 1 disclosed here, the district court cannot give a supplemental instruction instructing the jury to continue deliberating."

***Brinson v. Walker***, No. 06-0618-pr (2nd Cir., November 13, 2008): **Confrontation/Cross-Examination**: Grant of habeas relief is AFFIRMED based upon a violation of the Confrontation Clause where the accused was prohibited from cross-examining his accuser regarding the accuser's racial bias as a motivation for his false accusation. The lower court held that such cross-examination went toward general ill will rather than specific hostility toward the defendant.

***United States v. Nevils***, No. 06-50485 (9th Cir., November 20, 2008): **Possession of Firearm by Felon**: "Earl Nevils appeals from a jury conviction for being a felon in possession of firearms and ammunition in violation of 18 U.S.C. sec. 922(g)(1). We reverse the conviction because the evidence offered at trial was insufficient with regard to the element of knowing possession." **NOTE**: This was a 2-1 opinion involving facts that would result in reversal only in the Ninth Circuit (Nevils was asleep on a couch with two loaded guns laying on him, one on his lap and one on his leg, when he was surprised by officers and woke up, motioning toward one of the guns, with marijuana, ecstasy and cash on a nearby table). Dissenting Judge Bybee was "both amazed and disappointed" at the conclusion reached by the majority. This is an excellent opinion, but take it with a grain of salt.

***Doody v. Schriro***, No. 06-17161 (9th Cir., November 20, 2008): **Interrogations/Fifth Amendment**: Habeas case where the panel found that the statements made by a seventeen-year-old after an extended interrogation were involuntary even though *Miranda* warnings had been given.

**Thompkins v. Berghuis**, No. 06-2435 (6th Cir., November 19, 2008): **Interrogations/Fifth Amendment**: Habeas winner on a *Miranda* issue where Thompkins sat basically silent and uncommunicative for two hours and forty-five minutes while being questioned by the police before he finally talked. The panel held that these facts *did not constitute a valid waiver*.

**United States v. Morena**, No. 07-1297 (3rd Cir., November 19, 2008): **1. "Bad Acts"; 2. Curative Instructions**: Felon in Possession of a Firearm conviction reversed on the basis of prosecutorial misconduct when the government injected "into the trial...extensive evidence of uncharged drug use and transactions...was well as evidence of Morena's prior non-felony convictions[.]" **NOTE**: The panel found plain error and also that the limiting instructions were inadequate to cure the prejudice from the prosecutorial misconduct.

**Bradshaw v. State**, No. S08A1057 (Ga., November 25, 2008): **Excessive Sentence**: Bradshaw failed to provide his valid current address within 72 hours of changing his address and thus violated the provisions of the Georgia sex offender registration act. However, since this was the second violation of the act by Bradshaw, he was sentenced to mandatory life imprisonment(!) HELD: "We conclude that the imposition of a sentence of life imprisonment is so harsh in comparison to the crime for which it was imposed that it is unconstitutional.

**Harris v. Alexander**, No. 07-3920 (2nd Cir., December 4, 2008): **Jury Instructions; Defense Requested Instructions**: Harris was convicted in New York of Possession of CDS with Intent to Sell. Harris denied that he had sold or offered drugs or intended to do so, insisting that he intended only to share the drugs with his female companion, at whose request he had acquired the drugs. Thus, at trial, Harris sought a jury instruction under the "agency defense" available under New York law which posits that there a defendant has acquired drugs acting as the agent of a would-be purchaser, his delivery of those drugs to his principal is not considered a sale. The trial court refused this instruction. The federal district court granted habeas relief on the ground that the trial court refused to instruct on Harris's theory of defense and the Second Circuit AFFIRMED in this tight opinion.

**United States v. Williams**, No. 05-1684 (2nd Cir., December 3, 2008): **Confrontation/Cross-Examination**: Admission of hearsay statements by participant in a conspiracy violated the Sixth Amendment and *Crawford*, and were not harmless.

**People v. Hernandez**, No. S150038 (Cal., December 11, 2008): **Searches and Seizures; Traffic Stops**: "An officer who sees a vehicle displaying a temporary operating permit in lieu of license plates may not stop the vehicle simply because he or she believes that such permits are often forged or otherwise invalid. To support a stop the officer must have a reasonable suspicion that the particular permit is invalid."

**Charles Ray Goodner v. David Parker, Warden**, No. CIV-08-1095-R (W.D. Okla., December 18, 2008): **1. Habeas Corpus; Evidentiary Hearings; 2. Double Jeopardy/21 O.S. 11**: Interesting order in a habeas case out of Johnston County. Goodner was charged in state court with two counts of Rape in the First Degree. He denied guilt and went to jury trial. The State's evidence included the presence of a condom where at least one of the rapes allegedly occurred. At trial, when defense

counsel began questioning State witnesses about the details of how the condom was found, the assistant district attorney called time-out and went to a side-bar to admit that he had actually found the wrapper at the scene that led to the discovery of the condom. This revelation caused a heated exchange and the trial judge ultimately declared a mis-trial over objection. Subsequently, Goodner argued that he was goaded into the mis-trial the first time and that any subsequent prosecution was barred by Double Jeopardy based upon the actions of the prosecutor. In this order, Judge Russell found that the allegations were sufficient to warrant an evidentiary hearing.

***United States v. Haygood***, No. 07-1771 (6th Cir., December 15, 2008): **Allocution**: Interesting case where the panel vacated a sentence based upon failure of the trial court to allow allocution prior to sentencing. The trial court told Haygood that he did not have to answer the questions of the court and Haygood stated, "I plead the Fifth on all questions." The panel held that this was not the same thing as the trial court inviting the defendant personally to make a statement on his own behalf at sentencing and that such errors are basically presumptively prejudicial.

***United States v. Whorley***, No. 06-4288 (4th Cir., December 18, 2008): **Obscenity**: Not a winner, but noteworthy because Whorley was convicted of several counts involving receipt of Japanese anime cartoons depicting minors engaged in sexual conduct, but also text-only e-mails which he argued could not legally be considered obscene since they did not feature an image. The panel held that text-only e-mails could qualify as obscene.

***Vazquez v. Wilson***, No. 07-2162 (3rd Cir., December 19, 2008): **Confrontation/Cross-Examination**: In this habeas case, a First Degree Murder conviction is reversed where the use of non-testifying co-defendant's statement at trial was prejudicial error, even when the statement was redacted and subject to an instruction to the jury that it should not be used against the defendant. This was an unreasonable application of *Bruton* by the state courts. NOTE: The panel used the word "ironical" in footnote 1. Is that even a proper word?

***Poole v. State***, No. SC05-1770 (Fla., December 11, 2008): **Death Penalty; State Cases**: Conviction affirmed, but death sentence vacated on the basis of improper cross-examination by the prosecutor concerning unproven evidence, prior arrests, a "Thug Life" tattoo, and evidence of lack of remorse. The Court stated, "We reiterate the rule that the State cannot introduce inadmissible nonstatutory aggravation under the guise of impeachment."

***United States v. Comstock, et al.***, No. 07-7671 (4th Cir., January 8, 2009): **Sexually Dangerous Person**: According to the panel, this is the first appellate court to address whether part of the Adam Walsh Child Protection and Safety Act of 2006 is unconstitutional. The portion of the Act at issue is 18 U.S.C. sec. 4248, which allows the federal government to place in indefinite civil commitment "sexually dangerous" persons. HELD: The statute "does indeed lie beyond the scope of Congress's authority. The Constitution does not empower the federal government to confine a person solely because of asserted "sexual dangerousness" when the Government need not allege (let alone prove) that this "dangerousness" violates any federal law."

***Dolphy v. Mantello***, No. 03-2738-pr (2nd Cir., January 9, 2009): **Peremptory Challenges/Batson**: In this habeas case involving state court convictions on drug, weapons, and attempted assault

charges, dismissal of habeas petition is REVERSED because the trial court, in response to Dolphy's *Batson* claim, failed to "engage in the third, critical step of the *Batson* analysis" of whether the prosecutor had discriminatory intent in striking the only black juror on the basis of obesity.

***United States v. Berry***, No. 07-1251 (3rd Cir., January 6, 2009): **Federal Sentencing Guidelines:** As to sentencing, the District Court's speculative reliance on the defendants' bare arrest records, without more, violates the requirements of Due Process.

***United States v. Coleman***, No. 05-3182 (D.C. Cir., January 16, 2009): **Possession of Firearm by Felon:** In this Felon in Possession of a Firearm Case, "Because the district court read the unredacted indictment to the prospective juror pool, revealing appellant's prior felony convictions for crimes of violence including robbery with a deadly weapon, we reverse and remand for a new trial."

***United States v. Dodge***, No. 08-10802 (11th Cir., January 14, 2009): **Sex Offender Registration:** Dodge plead guilty to a violation of 18 U.S.C. sec. 1470, transferring obscene material to a minor. He objected to the part of the judgment that required him to register as a Tier I Sex Offender under the Sex Offender Registration and Notification Act ("SORNA"). The panel REVERSED on the basis that Dodge did not engage in conduct that constitutes a "sex offense against a minor" as the phrase is found in 42 U.S.C. sec. 16911(7)(I). "Although we do not adopt Dodge's construction of SORNA, we conclude that we are unable to distinguish Dodge's behavior from other behavior, involving distributing obscene material, that would support a conviction under 18 U.S.C. sec. 1470, but would not require Dodge to register as a sex offender. Accordingly, Dodge also cannot be required to register." NOTE: Judge Wilson dissented on the basis that a "sex offense" under SORNA should be read broadly and would thus encompass the conduct of Dodge. Thus, it appears that this case might be one to watch for possible en banc review and/or action in the Supreme Court at some time in the future.

***Gonzalez v. Duncan***, No. 06-56523 (9th Cir., December 30, 2008): **Excessive Sentence:** Gonzalez, a sex offender who must register, failed to update his annual sex offender registration within five working days of his birthday. Under the "three strikes" law in California, he received a sentence of 28 years to life. The panel held that such an extreme sentence for a technical violation of the statute violated the Eighth Amendment as an excessive sentence. NOTE: This is a habeas case where the panel found that the state courts applied unreasonable Supreme Court precedent on this issue. I suspect that this opinion is ripe for reversal by the Supreme Court in a per curiam opinion at some point in the future. Point being, you should probably use this one while you can.

***United States v. Giggey***, No. 07-2317 (1st Cir., December 22, 2008) (*en banc*): **Federal Sentencing Guidelines; Crime of Violence:** A conviction for a non-residential burglary is not *per se* a "crime of violence" under the Career Offender Sentencing Guideline 4B1.2.

***United States v. Gross***, No. 07-5971 (6th Cir., December 22, 2008): **Searches and Searches; Traffic Stops:** This is a rare suppression winner in a traffic stop case where the initial stop was unlawful. The officer's stated reason for stopping the car was "lane straddling." However, the panel held that the actions described by the officer were essentially slow lane changes and thus there was no probable cause to believe that a violation of Tennessee traffic statutes had been violated.

**United States v. Dixon**, No. 08-1438 (7th Cir., December 22, 2008): This case deals with two defendants convicted of failing to register under SORNA. One is affirmed, but another is reversed on *ex post facto* grounds. The argument was not that the registration requirement itself is an *ex post facto* law (it is regulatory rather than punitive); rather, "his argument is that all the conduct for which he was punished, not merely the sex crimes and the travel and the change of residence, occurred before the Sex Offender Registration and Notification Act was made applicable to him by the Attorney General's regulation." **NOTE:** On November 5, 2008, the Tenth Circuit decided *United States v. Husted*, which held that SORNA cannot apply to a defendant whose interstate travel is complete prior to the effective date of the Act (as a matter of statutory construction). The panel in *Dixon* **expressly disagreed with the Tenth Circuit on this point**, thus creating an intercircuit conflict.

**State v. Scott**, No. M2007-02024-SC-S09-CO (Tenn., January 23, 2009): **Sleepwalking:** Scott was charged with committing sexual acts with his stepdaughter. He defended on the basis that he could not have formed the required criminal intent because he was asleep at the time and was unaware of what he was doing. He attempted to buttress his defense with expert testimony from a physician who had diagnosed him as having sleep parasomnia involving sexual behavior. The trial court denied the use of the expert on the basis that the testimony was not sufficiently trustworthy and reliable. REVERSED. Such testimony meets the threshold for reliability and trustworthiness and would assist the trier of fact.

**Drake v. Portuondo**, No. 06-1365-pr (2nd Cir., January 23, 2009): **Prosecutorial Misconduct; Presenting False Testimony:** In this federal habeas corpus action, Drake, a high school senior at the time of the crimes, challenged his 1982 convictions of two counts of second degree murder for shooting a young couple in a parked car. The panel summarized this strange case as follows: "At Drake's trial, the prosecution called an expert witness who testified regarding a fictional syndrome of sexual dysfunction, dubbed 'picquerism,' that appeared to supply a motive for the shooting." The case was remanded one prior time for an evidentiary hearing on whether the prosecutor knew or should have known that the State's expert witness was committing perjury. The District Court held there was no such knowledge. HELD: The District Court erred in concluding (1) that the prosecution was not aware of the expert witness's false statements and (2) that the false testimony was not material to the jury's verdict. REVERSED and WRIT GRANTED.

**Reed v. Quarterman**, No. 05-70046 (5th Cir., January 12, 2009): **Peremptory Challenges/Batson:** Extraordinary capital habeas case where the Fifth Circuit granted habeas relief on a *Batson* claim to a prisoner who has been on death row for almost THIRTY YEARS. Jonathan Bruce Reed was received on death row in Texas on September 6, 1979.

**United States v. Perazza-Mercado**, No. 07-1511 (1st Cir., January 21, 2009): **Conditions of Probation:** In a case in which a Defendant was convicted of unlawful sexual contact with a minor, the District Court imposed two conditions of supervised release: 1) the Defendant is prohibited from having any access to the internet at home during the fifteen-years of supervised release; and 2) the Defendant was prohibited generally from possessing pornography. HELD: The imposition of a total ban on home internet use was an abuse of discretion under the facts of the case and there was plain error on the second condition because the District Court failed to offer any explanation for the total

ban on pornography and there was no evidence in the record regarding the use of pornography by the Defendant, its involvement in the offense, or its relationship to the likelihood of recidivism.

**Holladay v. Allen**, No. 06-16026 (11th Cir., January 30, 2009): **Death Penalty; Mental Retardation**: District Court grant of habeas relief in this capital case on the basis that Holladay had proven by a preponderance of the evidence that he was mentally retarded is AFFIRMED.

**Jones v. West**, No. 07-1313 (2nd Cir., February 4, 2009): **Peremptory Challenges/Batson**: Non-capital habeas winner on a Batson issue where the state courts concluded that Jones had failed to establish a prima facie case of discrimination. The panel held that the state courts unreasonably applied Batson and that the petition for habeas relief should be granted.

**In Re: Larry Ray Swearingen**, No. 09-20024 (5th Cir., January 26, 2009): **1. Death Penalty; Stay of Execution; 2. Habeas Corpus; Second/Successive**: Rare opinion out of the Fifth Circuit granted a stay of execution and permission to file a second/subsequent habeas petition on *Brady/Giglio* claims.

**United States v. Cruz**, No. 07-30384 (9th Cir., February 10, 2009): **Indians**: Instructive case involving construction of 18 U.S.C. sec. 1153 which governs conduct of Indians in Indian Country. Cruz was convicted of Assault Resulting in Serious Bodily Injury under 18 U.S.C. sec. 113(a)(6), which is a federal offense when committed by an Indian on an Indian reservation under 18 U.S.C. sec. 1153. The panel, in a 2-1 split (Chief Judge Kozinski, dissenting), held that the Government had failed to prove that Cruz was an Indian and thus absence of this jurisdictional element mandated granting his motion for acquittal.

**United States v. Autery**, No. 07-30424 (9th Cir., February 13, 2009): **Federal Sentencing Guidelines; Reasonableness**: Autery plead guilty to possession of child porn and entered into a plea bargain that called for a Guidelines range of 41-51 months. The District Court deviated significantly and imposed a sentence of five years probation. The Government appealed on the grounds that the sentence was substantively unreasonable. AFFIRMED under the abuse of discretion standard.

**People v. Maye**, No. 77 (N.Y. Ct. App., February 12, 2009): **Searches and Seizures; Body Cavity**: At the police station, an officer saw a "baggie" protruding from the rectum of the defendant and removed it. HELD: Since no exigent circumstances prevented the police from seeking prior judicial authorization for the search, defendant's motion to suppress should be granted.

**Price v. Cain**, No. 08-30338 (5th Cir., February 17, 2009): **Peremptory Challenges/Batson**: This non-capital habeas case presents a very instructive opinion on a *Batson* claim. At trial, the State used six of twelve peremptory challenges to strike African-Americans (three of whom it had challenged unsuccessfully for cause) which resulted in an all-white jury. The trial court held that this was not sufficient for a *prima facie* case of unlawful discrimination under *Batson*. In this short opinion, the panel disagreed, stating that the Supreme Court cases hold that Price needed to show only that the facts and circumstances of his case gave rise to an inference that the State exercised peremptory challenges on the basis of race and that Price had met this "light burden."

*United States v. Bornman*, No. 07-3447 (3rd Cir., March 6, 2009): **1. Conspiracy; 2. Statute of Limitations**: Some counts of Conspiracy are reversed based upon the statute of limitations. The court noted the general rule: For a conspiracy indictment to fall within the statute of limitations, it is "incumbent on the Government to prove that...at least one overt act in furtherance of the conspiracy was performed" within five years of the date the Indictment was returned. Good discussion of this issue.

*United States v. Long*, No. 07-31131 (5th Cir., March 5, 2009): **Insanity/Competency**: The District Court committed reversible error (an error of law) in refusing to instruct on the defense of insanity. NOTE: This was a split decision with Judge Emilio M. Garza dissenting on the basis that there was no link between the mental illness of the defendant and the criminal conduct.

*McGahee v. Alabama Department of Corrections*, No. 07-15602 (11th Cir., March 4, 2009): **Peremptory Challenges/Batson**: Capital habeas winner on a *Batson* claim where the Alabama Court of Criminal Appeals failed to follow clearly established federal law when, at the third step of the *Batson* inquiry, it failed to consider "all relevant circumstances" in its analysis of the trial court's ruling, for example, in one instance, the state court failed to consider the third reason proffered by the prosecutor which indicated that race was the key factor.

*Government of the Virgin Islands v. Davis*, No. 07-2136 (3rd Cir., March 27, 2009): **Prosecutorial Misconduct; Improper Argument**: In this drive-by shooting case, Prosecutor's references during trial to Defendant's post-arrest, post-*Miranda* silence violated his right to Due Process and was not harmless. Reversed and remanded for a new trial.

*United States v. Rivera-Maldonado*, No. 07-1426 (1st Cir., March 12, 2009): **Guilty Pleas**: Guilty plea to the crime of Possession of Child Pornography is vacated when the defendant was mis-advised of the maximum term of supervised release (he was told it was three years, but it was in fact life). NOTE: The panel allowed withdrawal of the plea even though the issue was not raised below, finding plain error.

*Wilson v. Cain*, No. 07-30728 (5th Cir., April 1, 2009): **Habeas Corpus; Statute of Limitations/Equitable Tolling**: Dismissal of Wilson's habeas petition as untimely is REVERSED because he filed a motion for rehearing in the Supreme Court of Louisiana and thereafter filed his federal habeas petition based on the denial of rehearing. Although the rules of the Supreme Court of Louisiana state that when a certiorari petition is simply granted or denied, then rehearing is not allowed. The Fifth Circuit observed that, despite this rule, the Supreme Court of Louisiana has often granted such petitions.

*United States v. McFall*, No. 07-10034 (9th Cir., March 9, 2009): **Extortion**: Convictions for extortion are reversed where decreasing a competitor's chance of winning a contract, standing alone, does not amount to obtaining a transferable asset for oneself under the Hobbs Act. NOTE: The panel applied the rule of lenity in this context.

*Awkal v. Mitchell*, No. 01-4278 (6th Cir., March 16, 2009): **1. Habeas Corpus; Capital Habeas Cases; 2. Ineffective Assistance of Counsel**: In this capital habeas case, the panel split 2-1 and

granted relief because defense counsel was ineffective for calling an expert witness who testified that Awkal was sane at the time of the murders, an opinion that directly contradicted Awkal's only defense.

*United States v. Hatcher*, No. 07-4839 (4th Cir., March 13, 2009): **Sex Offender Registration:** The panel by-passed dealing with constitutional challenges to the Sex Offender Registration and Notification Act (SORNA) by holding that, as a matter of statutory interpretation, SORNA's registration requirements did not apply to the appellants at the time they committed the acts giving rise to their indictments. Convictions for failing to register are reversed. The panel provided this caveat: "It is important to note that the decision reached today is quite narrow, for we do not hold that SORNA's registration requirements do not apply to persons who were convicted of sex offenses prior to SORNA's enactment date. Rather, we hold only that SORNA's registration requirements did not apply to pre-SORNA offenders until the Attorney General issued the interim rule on February 28, 2007. **NOTE:** This opinion was 2-1 and is in conflict with both Tenth Circuit and Eighth Circuit precedent on the issue as announced in *United States v. Hinckley*, 550 F.3d 926 (10th Cir. 2008) and *United States v. May*, 535 F.3d 912 (8th Cir. 2008). Authority from the Eleventh Circuit is in line with this Fourth Circuit opinion. See *United States v. Madera*, 528 F.3d 852 (11th Cir. 2008). Thus, there appears to be a profound circuit split on this issue and I suspect this one will eventually reach SCOTUS.

*United States v. Olhovsky*, No. 07-1642 (3rd Cir., April 16, 2009): **Federal Sentencing Guidelines; Reasonableness:** Sentence of six years for Possession of Child Pornography is vacated as unreasonable and also on the basis that the District Court refused to issue a subpoena to Olhovsky's treating psychologist so he could testify at the sentencing hearing. **NOTE:** This is a very lengthy opinion (73 pages).

*United States v. Tirado-Tirado*, No. 07-50670 (5th Cir., March 19, 2009): **Confrontation/Cross-Examination:** Unlawful entry conviction is reversed because a videotaped deposition was admitted at trial and the government failed to show that the deponent was unavailable.

*United States v. Keith*, No. 07-5202 (6th Cir., March 18, 2009): **Searches and Seizures; Warrantless:** In this 2-1 opinion, the panel reversed the denial of a motion to suppress on the basis that officers did not have reasonable and articulable suspicion of criminal activity to conduct a *Terry* stop. The officers were across the street from "Big Daddy's" liquor store at 2:00 a.m. and saw a pedestrian walk up to a car that was parked in the drive-through. That appears to be about it, other than the usual high-crime area and the fact that "Big Daddy's" sold paraphernalia.

*United States v. Polouizzi*, No. 08-1830 (2nd Cir., April 24, 2009): **Child Porn:** Interesting statutory construction case wherein the panel concluded that Polizzi was convicted of 11 counts of possession of child pornography but argued on appeal that all but one must be vacated because Double Jeopardy precluded multiple convictions for possessing a single collection of child pornography in violation of 18 U.S.C. sec. 2252(a)(4)(B) (even though police found a total of 5000 digital images and several videos of child pornography on three external hard drives in his home).

***United States v. Mitchell***, No. 08-10791 (11th Cir., April 22, 2009): **Searches and Seizures; Search Warrants; Delay**: Interesting case involving an investigation by ICE officials into a child porn ring on the internet. Mitchell used his credit card to subscribe to a site and agents went to his house for knock-and-talk. Mitchell admitted that child porn was on the hard drive and allowed the officer to take it. However, the officer who took it went on a training trip for two weeks and did not actually present a search warrant to a magistrate until 21 days later. **HELD**: This delay was unreasonable and the motion to suppress should have been granted.

***State v. Underdahl***, No. A07-2293 (Minn., April 30, 2009): **1. DUI; 2. Discovery**: These are actually two cases where trial courts in Minnesota ordered the prosecutors to provide the source code for the Minnesota version of the Intoxilyzer 5000EN. The prosecutors did not like that too much so they appealed. In this opinion, the Supreme Court of Minnesota **AFFIRMED** the orders as to one defendant (the one who attached exhibits and made a proper evidentiary showing in the trial court) and reversed the order as to the other. This is quite a watershed decision since the machines are made in Kentucky by a company that considers the source code proprietary and thus far refuses to give it to prosecutors.

***Hummel v. Rosemeyer***, No. 06-2711 (3rd Cir., April 29, 2009): **1. Ineffective Assistance of Counsel; 2. Insanity/Competency**: In this federal habeas case, the court granted relief on the basis of IAC, stating: "Edward Hummel, who is missing a portion of his brain after a self-inflicted gunshot wound, sought a writ of habeas corpus, contending that his trial counsel failed to perform up to the constitutional standard when he (1) stipulated that Hummel was competent to stand trial and (2) did not seek to have Hummel evaluated by a psychiatrist before trial. The District Court denied Hummel's request for a writ of habeas corpus. We will reverse."

***Richards v. Quarterman***, No. 08-10934 (5th Cir., April 27, 2009): **Ineffective Assistance of Counsel**: In this non-capital murder case, a District Court grant of federal habeas relief is **AFFIRMED** based on an IAC claim where trial counsel failed to investigate and to present exculpatory evidence on behalf of her client.

***United States v. Neely***, No. 08-4257 (4th Cir., April 29, 2009): **Searches and Seizures; Consent**: Neely was stopped in a "high crime" area of Charlotte-Mecklenburg for driving with no headlights on. He had a valid license and registration, no warrants, and did not act unusual. As with many of these cases, the police ended up searching the interior of his vehicle without any reason and relied upon consent. This is an excellent opinion on the scope of consent. The panel held that the search exceeded the scope of consent (Neely arguably consented to a search of the trunk only) and there were no other circumstances to justify a *Terry* search. Evidence **SUPPRESSED**.

***G.H. v. Township of Galloway***, No. A-64 (N.J., May 7, 2009): **Sex Offender Registration**: Apparently, some townships in New Jersey had enacted municipal ordinances that were more restrictive to sex offenders than the state-wide Megan's Law. In this *per curiam* opinion, the New Jersey Supreme Court affirmed a lower court opinion that invalidated the municipal ordinances as preempted by state statutes.

**United States v. Melendez-Rivas**, No. 07-1962 (1st Cir., May 15, 2009): **Judges/Bias/Recusal:** This opinion has a little bit of flair as it involved a murder apparently motivated by jealousy over a woman. Melendez-Rivas was not the actual killer, but was along for the ride and was thus convicted of conspiracy, aiding and abetting, and a firearms charge. He defended on the ground that he was forced to participate in the crime, but the panel REVERSED on the basis that the District Court questioned a defense witness *sua sponte* and elicited prejudicial testimony.

**United States v. Mannava**, No. 07-3748 (7th Cir., May 5, 2009): **Prosecutorial Misconduct; Improper Argument:** Mannava was enticed by e-mails from a police officer posing as 13-year-old "Gracie" to meet "her" at an ice cream parlor. He was subsequently convicted of sexual offenses under Indiana law. The panel (per Judge Posner) reversed on the basis of "the prosecutor's incessant harping at the trial on the theme that Mannava had been intending to 'rape' a 13-year-old." The defense, which according to the panel had support in the e-mail exchanges with the officer, was that Mannava thought "Gracie" was an adult pretending to be a young girl. The panel pointed out that this was not a ridiculous defense because "Gracie" was in fact an adult pretending to be a child, and that "maybe the pretense was discernible." Thus, the prosecutor was simply trying to inflame the jury and, since the case was sufficiently close, the panel reversed.

**People v. Weaver**, No. 53 (N.Y. Ct. App., May 12, 2009): **Searches and Seizures; GPS Tracking:** Interesting case where police surreptitiously and without a warrant placed a GPS device on Weaver's van which let them know its location. Weaver was subsequently tried for Burglary and sought to suppress the GPS evidence (which constituted the location of his van and the speed driven at any given time). The court held that this constituted an illegal search under the STATE constitution.

**Ex Parte Charles Dean Hood**, No. W296-80233-90 (Collin County, Tex., May 1, 2009): **Judges/Bias/Recusal:** This is a neat order in an old capital case out of Texas where the trial court made findings of fact and conclusions of law that habeas relief is appropriate on the basis that back in 1990 when the case was tried, the trial judge (Hon. Verla Sue Holland) was having an "intimate sexual relationship" with the District Attorney who was involved in prosecuting the case (both were married at the time).

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# INTERROGATIONS AND FALSE CONFESSIONS—WHAT ATTORNEYS SHOULD KNOW FROM THE SOCIAL SCIENCES

by

SHAWN ROBERSON, PH.D.<sup>6</sup>

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I first became interested in false confessions over a decade ago when teaching a course on the clinical and legal implications of repressed memories. A wave of sexual abuse allegations arose during the 1980s to 1990s due to improperly interviewed children and the “repressed memories” of adults which were “recovered” through psychotherapy. The fervor with which accusations were leveled against innocent parents, daycare providers, and others in some jurisdictions reached a pitch reminiscent of the Salem Witch trials. It also provided a frightening glimpse into what can go horribly wrong with both the mental health profession and law enforcement interrogations, as many of these cases involved false confessions from innocent suspects.

In 1997 Saul Kassin, Ph.D., the current president of the American Psychology and Law Society (division 41 of the American Psychological Association), suggested that the empirical foundation of research related to false confessions was probably not substantive enough to meet *Daubert* standards. However, by 2004, Dr. Kassin noted this was no longer the case.

This article will outline how social science research during the past several decades supports the conclusions that: 1) false confessions do occur; 2) confession evidence is the most damning of all forms of evidence; 3) most suspects waive *Miranda*, especially innocent suspects; 4) law enforcement investigators have been widely trained to believe in techniques of “lie detection” that are not empirically supported; 5) law enforcement investigators have been widely trained in psychological methods of interrogating suspects which raise the risk an innocent person will confess; 6) jurors are likely influenced by coerced confessions, even when they view them as coerced and they are instructed to ignore them; and 7) certain groups are at risk for interrogative suggestibility (*e.g.*, minors, persons with mental illness, intoxicated persons, *etc.*). The reader will be provided with a basic understanding of research in these areas, gain exposure to the process of criminal forensic evaluations of interrogation/confession issues, and become familiar with public policy suggestions for consideration. In addition, I will discuss a case example from Oklahoma.

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## **HOW DO WE KNOW THAT FALSE CONFESSIONS EXIST?**

There are three main ways in which false confessions have been clearly demonstrated. The first is the existence of the many high profile false confessions dating back decades. For example, in the 1930s, over 200 people confessed to kidnaping and murdering Charles Lindbergh's baby. In the 1940s, over 30 people confessed to the murder of Elizabeth Short, later to be known as the case of the "Black Dahlia" (and recently made into a movie). More recently, we witnessed the vague and bizarre false confession of a man in the case of Jon Benet Ramsey.

Second, the development of DNA evidence in the 1980s confirmed the existence of false confessions with scientific precision. With each passing year we learn of more wrongful convictions through DNA exonerations. The New York based Innocence Project has now helped free over 200 wrongfully convicted people, 25% of whom confessed, implicated themselves, or otherwise pled guilty. This includes 10 from Oklahoma, 30% of which involved false confession issues. This rate is significantly higher than the 14% documented in the Stanford Law Review by Bedau & Radelet (1987) and only slightly higher than the 25% rate found in overturned cases by Scheck, Neufeld & Dwyer (2000).

In January, 2009, we saw the single largest exoneration with the "Beatrice Six" of Nebraska. This included three men and three women wrongfully convicted of murder. All but one pled guilty or no contest and four gave detailed confessions under interrogation. Law enforcement was not alone in the blame, as apparently a psychologist who previously served as a therapist for two of them assisted police by suggesting to the defendants they might have committed the murder and repressed the memory.

Third, and perhaps most surprising, law enforcement personnel themselves have identified the existence of false confessions. Research indicates that they believe suspects give them false confessions anywhere from 1-10% of the time (Kassin, Leo, Meissner, Richman, Coldwell, Leach & LaFon, 2007; Meyer & Reppucci, 2007); although they typically believe that such false confessions are discovered before anyone is actually charged with a crime. The FBI has also cautioned investigators against this very risk in the FBI Law Enforcement Bulletin (Napier & Adams, 2002).

## **HOW DO YOU DETERMINE WHETHER A CONFESSION IS FALSE AND HOW OFTEN DO FALSE CONFESSIONS OCCUR?**

The gold standard for independent evidence that a confession was false is DNA evidence. If DNA can be used as an investigative tool to incriminate the guilty, it should also be available as a tool to exonerate the innocent. Law enforcement has long used DNA to rule out suspects. However, interestingly, even in some cases where DNA does not match a suspect who falsely confessed, prosecutors have refused to dismiss the charges, maintaining that the suspect was likely one of multiple perpetrators but did not leave his DNA behind. Obviously, other evidence precluding the suspect's involvement such as a solid alibi with a confession by another suspect may be considered but is often not given as much weight as more "scientific" evidence.

The exact rate of false confessions remains unknown and can not be calculated because people can be convicted on false confessions and never exonerated. In addition, even true confessions can be coerced and later retracted. Some studies estimate false confessions occur in as few as 1% of criminal cases (Gudjonsson, Sigurdsson, & Einarsson, 2004 as cited in Kassin & Gudjonsson, 2004); with about half of those being caused by police interrogation. As noted earlier, research with law enforcement actually suggests a higher rate ranging from 1-10%.

### **HOW LONG HAS THE STUDY OF FALSE CONFESSIONS BEEN AN ISSUE IN PSYCHOLOGY?**

As early as 1908, Munsterberg wrote about false confessions in his book *On the Witness Stand*. Throughout the 20<sup>th</sup> century, research on related topics such as compliance with authority, memory, and other factors proliferated. In 1985, Kassin and Wrightsman proposed the first theoretical model of false confessions, including three types: 1) Voluntary-when the suspect's pathological need for fame or punishment leads him to seek out police and confess to an offense which he did not commit, or when he does so to protect a third party or avoid conviction for a more serious offense; 2) Coerced-Compliant-when the suspect is coerced into a confession, but knows he did not commit the crime; and 3) Coerced-Internalized-when the suspect is coerced into a confession and comes to actually believe that he committed the crime, sometimes developing a false memory in the process. Other models have proposed slight additions or adaptations.

Since that 1980s, there have been an extensive number of legal and scientific articles and books focused specifically on false confessions. A "white paper" (*i.e.*, an article that states an organization's position about a subject) entitled *Police-Induced Confessions: Risk Factors and Recommendations* has recently been proposed for consideration within the American Psychology Law Society (see [http://www.ap-ls.org/links/Police\\_Induced\\_Confessions\\_White\\_Paper\\_Oct08.pdf](http://www.ap-ls.org/links/Police_Induced_Confessions_White_Paper_Oct08.pdf)). As noted earlier, the empirical foundation of false confessions and related research has been around for decades, and likely meets Daubert standards, although the results have been mixed in court.

### **WHAT ROLE DOES *MIRANDA* PLAY?**

The Supreme Court recognized that interrogations were naturally coercive and, therefore, established *Miranda* warnings. However, police sometimes use techniques to get suspects to waive *Miranda* by emphasizing the benefits versus potential consequences. The techniques may include establishing rapport with the suspect, feigning sympathy, or stressing that waiving *Miranda* is just a "formality." In fact, research has shown that the majority of suspects agree to speak with police (Kassin & Gudjonsson, 2004).

In an analysis of exoneration cases, Leo (1996) found that 80% of suspects waive *Miranda*, and suspects with no history of felony convictions were far more likely to do so. If recidivism is an indicator of likely guilt-then this may lead one to conclude that innocents may be far more likely to waive their *Miranda* rights. This very fact has support in the research of Kassin and Norwick (2004), who had research subjects follow a script and either commit, or not commit, a mock theft. The subjects were then interrogated by a mock detective (which was recorded) and were given

motivation to avoid being charged. Most subjects rated the offense and interrogation experience as moderately believable. The results indicated that the interrogator style (friendly, neutral or hostile) did not affect the likelihood of *Miranda* waiver.

However, actual guilt and innocence did. Only 36% of those who were guilty of the offense waived *Miranda* compared to 81% of innocent subjects. Most guilty subjects cited waiving *Miranda* for self-preservation (e.g., to look innocent), while most innocent subjects waived *Miranda* due to naïveté (e.g., I have nothing to hide and the truth will be revealed). Observers of the interrogation videos viewed those waiving *Miranda* as more likely innocent; supporting the common belief among suspects that not waiving *Miranda* makes one look guilty. Overall, the implications of this study suggested that innocent suspects who waive *Miranda* can begin a coercive interrogation process, including an investigator confirmation bias (to be described later).

### **WHAT FACTORS FACILITATE A FALSE CONFESSION?**

Federal and state courts have evidence rules about admissions of confessions that generally exclude them if they are the result of physical coercion, prolonged isolation, physical deprivation (food, drink, or sleep), outright threats of harm or punishment, or explicit promises of leniency. Like most of us, I believe that the great majority of law enforcement officials have the honest goal of catching the guilty and protecting the innocent. When it comes to false confessions, the problem most often lies not in the officers themselves, but in the methods by which they have been trained to go about the interview and interrogation process. Physical coercion has been replaced with a far more insidious, and legal, avenue for gaining confessions—methodical psychological persuasion. This may include deception, evidence fabrication, ingratiation, and coercion. The goal is to overcome a suspect’s perception of consequences so that confessing is a better alternative than not confessing.

There are numerous training manuals, with accompanying training courses, which outline psychological interrogation procedures, the most prominent of which is Inbau, Reid and Buckley’s *Criminal Interrogation and Confessions* (4th edition). You may or may not be surprised to learn that many in Oklahoma law enforcement have been trained by this very technique or one similar. Inbau *et al.* teach that investigators can learn to detect deception with accuracy rates up to 85%. They suggest that the investigator ask “neutral” questions of the suspect and gather a baseline of behavior. Then, while asking more threatening questions related to the allegations, look for behavior such as fidgeting, lack of eye contact, and other cues of anxiety which they claim are likely related to deception. Once the investigator determines who is guilty, they can then move to the Reid Technique of interrogation.

The Reid Technique is an accusatory process to facilitate confessions. Some of the key methods include: 1) isolation—to increase anxiety and the desire to escape; 2) confrontation—accusing the suspect and presenting real or invented evidence, while blocking all denials; 3) minimization—suggesting the crime is morally justified, or leading the suspect to view confession as a means to escape interrogation or more severe punishment (this may also include “themes” that psychologically excuse the crime, while at the same time feigning sympathy or understanding and urging the suspect to confess); and 4) maximization—alluding to punishment for the suspect or others the suspect cares about.

At the conclusion, the investigator is to obtain a post-admission narrative (for more information see <http://www.reid.com>). It should also be noted that Inbau, *et al.*, have suggested police use the same interrogation techniques with juveniles as they do with adults (Redlich, A. 2007). This is particularly troublesome given that interrogative suggestibility (*e.g.*, altering recollection due to misinformation or pressure) is negatively correlated with age (Redlich, A.D. & Goodman, G.S., 2003).

The problem with this and similar methods of interrogation is that the same factors can facilitate both true and false confessions. As noted earlier, both guilty and innocent suspects are likely to waive their *Miranda* rights, which can sometimes facilitate a coercive interrogation process where, if the investigator suspects guilt, he will attempt to instill hopelessness in the suspect. This can include making the situation appear inescapable with actual, exaggerated, or fabricated evidence.

In some cases, innocent suspects may feel compelled to provide explanations for the *fake* evidence, statements which can then later be used against them (*i.e.*, a co-defendant had motive). To the interrogator, all denials are rejected, even if the suspect happens to be innocent. It will be presented that there is no doubt the suspect did it. It is now just a determination of why...or if it was an accident. The interrogator might then switch to incentives for confessing, such as reducing feelings of guilt, doing the “right thing,” showing empathy for the victim, maintaining good will with the police, showing remorse to look good to the D.A., judge or jury, or avoiding a harsher penalty.

This is compounded by the problem that police sometimes do not sufficiently use post-admission narratives to evaluate for exonerating evidence. Recent research by Ask, Rebelius & Granhag (2008) indicated that in fact, police trainees give less weight to disconfirming evidence and considered it less reliable in a mock homicide investigation.

### **HOW DO WE KNOW THESE “DETECTION DECEPTION” TECHNIQUES DO NOT WORK?**

With very few exceptions, research has not supported the conclusion that law enforcement professionals are effective in detecting deception (including mental health professionals). Kassir, Meissner & Norwick (2005) assessed the ability of college students and police investigators to accurately predict true versus false confessions of inmates on videotape. The results indicated that *neither* group was effective. The hit rate for accuracy was around 50%, which is not better than chance levels.

Kassin & Fong (1999) went a step further, having subjects commit a mock crime (or not) and then sign a *Miranda* waiver and maintain their innocence during a videotaped interrogation. Next, two groups, either trained in the Reid Technique or not, viewed the tapes. The results indicated that naïve subjects actually outperformed those with Reid training (although both were around chance levels). However, the Reid training subjects were more confident and cited more reasons for their decisions. The implications being that the Reid technique training did not improve detecting deception, but *increased the belief in the subject that it did*.

Meissner & Kassin (2002) compared the ability of experienced investigators and college students in the identification of guilty versus innocent suspects during an interrogation. Participants viewed videos of 8 suspects being interrogated-4 were truly guilty of a mock crime and 4 were innocent. Investigators had a higher rate of “hits” (accurately identifying guilty suspects), but also had a higher rate of “false alarms” (identifying innocent suspects as guilty) compared to college students.

### **DOES EVIDENCE SUPPORT A CONCLUSION THAT THESE INTERROGATION TECHNIQUES ACTUALLY RAISE THE RISK OF FALSE CONFESSIONS?**

It is obviously important to know which specific interrogation techniques are effective at getting guilty people to confess, while not eliciting confessions from the innocent. This is called “diagnosticity” (increasing true confessions while decreasing false confession). Research has demonstrated that several common interrogation techniques are key factors in decreasing diagnosticity, including fabricated evidence, minimization, and maximization. Just a couple of these studies will be highlighted to demonstrate how interrogation factors raise the risk for false confessions.

Kassin & McNall (1991) conducted research with mock jurors reading an interrogation script to examine whether alluding to harm (maximization) or leniency (minimization), which is legal, was the functional equivalent to outright threats of harm or promises of leniency, which is illegal. The results indicated that jurors inferred harsher punishment when maximization is used, harsher punishment with continual denial, and leniency in sentencing for a confession when minimization is used (just as much as outright promises). In summary, maximization and minimization are the functional equivalents, and likely just as effective, as outright threats or promises of leniency, which are illegal.

In an ingenious study with real world implications, Russano, Meissner, Narchet, & Kassin (2005) induced unknowing college students to “cheat” with a confederate during an experiment. Naturally, some did and others did not. However, all subjects were then threatened by the researcher with the professor being contacted and the potential ramifications. Various groups were then exposed to specific interrogation tactics, such as minimization and/or specifically offering a “deal” for a confession. As hypothesized, diagnosticity was greatly reduced with these techniques. When the tactic of minimization was used in conjunction with a “deal,” nearly half of the innocent college students falsely confessed to having cheated.

While confessing to cheating in college may not have the same repercussions as admitting to a heinous criminal offense, there are real world consequences nonetheless. In the student’s mind, they could have certainly faced academic or career altering implications for admitting to such an act. Bottom line, the underlying principle remains the same-people often confess to obtain what they see as lesser consequences than if they do not confess, regardless of their guilt.

## **HOW DO WE KNOW THAT POLICE ACTUALLY USE THESE PSYCHOLOGICAL INTERROGATION TECHNIQUES OR RECEIVE SUCH TRAINING?**

Kassin et al. (2007) conducted a survey of hundreds of police officers who were assured it was anonymous to increase the accuracy. The survey results indicated that 82% had received some specific training on interrogation methods and 11% on the Reid technique specifically. The officers estimated that they can accurately predict deception in suspects at a 77% level-whereas research suggests chance levels as noted earlier. This further supports that police are significantly more confident about detecting deception, but not more accurate than John Q. Public.

In general, police reported using psychological techniques and not physical force which the courts have deemed coercive. The most frequent interrogation practices were isolation, identifying contradictions, establishing rapport to gain trust, confronting, appealing to the suspect's self-interest, minimization, and fabricating evidence.

## **WHAT EFFECT DO FALSE CONFESSIONS HAVE ON JURIES?**

The United States Supreme Court recognized the power of confession evidence, noting that "Triers of fact accord confessions such heavy weight in their determinations that the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained." *Colorado v. Connelly*, 479 U.S. 157 (1986). Needless to say, confessions are extremely challenging to overcome.

Research has indicated that while many people are aware that false confessions occur, they are unaware of the factors which contribute to false confessions (Henkel, Coffman, & Dailey, 2008). More troublesome, they believe they would never falsely confess. This occurs because of the long-understood social psychology principle called the "Fundamental Attribution Error." That is, when a person sees other people do something negative, he attributes it to the other person's attributes, whereas if he does something negative, he attributes it to the situation he was in. So in terms of an interrogation situation, the viewer (or juror in this case) likely attributes a confession to the suspects guilty mind rather than situational factors (the interrogation process) which led to the confession.

This is precisely the reason so many jurors may understand the phenomenon in principle, but have difficulty believing it occurred for a specific defendant in an actual trial. Kassin & Sukel (1997) found that mock jurors do not discount coerced confessions and they influence verdicts, even when the jurors view them as coerced and the judge instructs them to be ignored. Moreover, the jurors believed the confession did not influence their decision, although it clearly did.

In another study, Kassin & Neumann (1997) examined the weight given to confessions compared to other types of evidence (*e.g.*, eyewitness testimony, character witnesses). They found that mock jurors were significantly more likely to convict a defendant charged with murder, rape, or assault when there was a confession compared to eyewitness identification or character witnesses.

## **SO WHEN SHOULD AN ATTORNEY CONSIDER HIRING A PSYCHOLOGIST TO EVALUATE A DISPUTED CONFESSION?**

An attorney would probably be best served to contact a psychologist familiar with these issues to discuss the specific case prior to making a determination as to whether or not a clinical evaluation would be helpful. Psychologists may be retained as an expert on these issues either by the Court, the prosecution, or the defense. There are two opportunities to challenge a disputed confession: 1) the pre-trial evidence suppression hearing (challenging the voluntariness or reliability of a confession; known as a *Jackson v. Denno* hearing in Oklahoma)<sup>7</sup>; and 2) during a trial (so the jury can weigh the validity of the confession). The psychologist may be retained during either or both of the challenges to the confession.

## **WHAT CONSTITUTES AN EVALUATION OF INTERROGATION AND FALSE CONFESSION ISSUES?**

A psychologist can testify that suspects sometimes falsely confess to crimes, and although the rate is unknown and may be small-it is a serious problem nonetheless. Certain interrogation techniques raise the risk of false confessions. People typically confess due to a combination of factors, rather than due to one factor alone. The primary factors relate to internal pressure, external pressure, and perception of proof. Certain personal factors also raise the risk of succumbing to interrogative pressure and falsely confessing. Protective factors can be put in place to lessen the risk of false confessions. The psychologist can then describe the factors present or absent in the case of a particular defendant.

Deceit, be it malingering mental illness or dishonesty about what occurred during the interrogation, is not uncommon in evaluating criminal defendants. Obviously, any information from a defendant should be critically examined and corroborated when possible because it is self-serving. I believe it is only logical to conduct malingering testing in the beginning-prior to other testing in order to ascertain the defendant's response style.

If a dishonest approach to test-taking is indicated, it makes little sense to proceed with other measures (especially those without validity scales such as IQ tests). Although some professionals only conduct malingering testing latter in a test battery and will still opine in a defendant's favor even with affirmative malingering results, I believe that such testimony is fraught with problems and likely to fall on deaf ears. Identifying such problems in the beginning and arming the attorney with that information is a more prudent course of action.

Conducting an evaluation of confession issues is similar to evaluating a defendant for insanity. The clinician should assess what was going on in the person's life around the time of the confession and the degree to which the person was suffering from symptoms prior to, during, and following the interrogation.

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<sup>7</sup> See *Jackson v. Denno*, 378 U.S. 376-77 (1964) (holding that Due Process requires that a defendant who objects to the use of a confession must be given a hearing on the issue of voluntariness that is not influenced by the truth or falsity of the confession).

There are two main legal issues to be examined regarding the confession: 1) Voluntariness is assessed by determining the degree to which the confession was a product of an essentially free and unconstrained choice (therefore, the primary focus will be on the techniques used by police during the interrogation); and 2) Reliability pertains to whether or not the confession can be counted on as factual.

There are no reliable behavioral differences between true and false confessions when interrogating a suspect. Therefore, reliability of a confession should be established by the accuracy of information obtained in the post-confession narrative. Does the defendant have special knowledge of crime details? Does it result in the discovery of unknown evidence? Is there absence of contamination in the subject's confession from media reports? Did the interrogators avoid contaminating the interview with crime-specific information, crime scene visits, or photos? Was the suspect's confession tainted by third party information (suspect being told by the perpetrator)? Audio or videotaping of interrogations and confessions is important to rule out contamination. If the suspect provides information contradictory from what is known, the validity of the confession should be examined.

When determining the voluntariness and reliability of a confession, there are three key areas: 1) Suspect-specific factors; 2) Interrogation-specific factors; and 3) Interactive factors between the suspect and interrogation.

*Suspect-specific factors:* These may include, but are not limited to, fear, suggestibility, education level/intelligence, mental disorders affecting reality testing or memory, level of experience with the criminal justice system, age/immaturity, mental status (orientation, attention, concentration, etc.), history of substance abuse, anxiety disorder, language barriers, medical conditions, medication effects, pressure from family or others, dependent personality, and recent bereavement.

First, suspect-specific factors are examined through clinical procedures, such as a review of records (educational, mental health, medical, criminal, etc.), clinical interview for mental illness, malingering testing, intelligence testing (when relevant), achievement testing (reading or listening comprehension when relevant), memory testing, personality/psychopathology testing, *Miranda* test, and interrogative suggestibility testing (e.g., the Gudjonsson Suggestibility Scale which measures suggestibility and compliance as a personality trait).

Second, suspect-specific factors are examined through an interrogation interview. This includes a reconstruction of the entire interrogation using a timeline, assessing the defendant's case knowledge (evidence, detective's statements, etc.), examining thoughts/feelings/behaviors regarding the *Miranda* warning (using the actual local form), examining his outlook on the interrogation at the beginning, during, and the end, assessing his view about mental state at the time, examining issues of drug intoxication or withdrawal, memory of the process of recording, evidence contamination, memory for interrogator's behavior (accusations, evidence presentation, etc.) and techniques, and physical deprivation.

*Interrogation-specific factors:* These may include, but are not limited to, a review of recordings, police reports, transcripts (if any), and any information gained through legal hearings,

evidence of suspect intoxication/withdrawal, length and environment of the detention, use of interrogation techniques (*i.e.*, minimization, maximization, etc.), use of physical punishment (abuse, deprivation of sleep, food, *etc.*), lying or trickery by police, evidence contamination, and the presence of a careful, detailed, post-admission narrative.

*Suspect-Interrogation interaction:* This factor represents how a suspect's vulnerabilities and interrogation variables can come together to dramatically raise the risk for a false confession. A few examples might include a fearful defendant with low IQ being presented with fabricated evidence, substance withdrawal and extended interrogation, and the suggestible defendant with leading questions and interview contamination.

### **BASED ON WHAT IS KNOWN FROM THE RESEARCH, ARE THERE ANY POLICY RECOMMENDATIONS FOR SAFEGUARDS?**

These represent just a few key, yet important, policy recommendations from the literature:

- 1) Provide an "appropriate adult" or legal representative for at-risk groups (juveniles, mentally retarded, Mentally Ill, *etc.*).
- 2) Electronically record the entire interrogation. This prevents or decreases claims of police misconduct by defendants. It also deters coercive police conduct and provides a more complete audiovisual record for the trier of fact to evaluate the voluntariness of statements. It is important to point out that video should include both the interrogator(s) and the suspect. Taping only the suspect results in views of the interrogation being less "pressured" than when the suspect and interrogator are in the picture. In addition, "Recap" videos where the suspect simply confesses what happened (without the benefit of seeing the entire interrogation) should be avoided. They do not include what led up to the confession-thus increasing perceptions of voluntariness in some cases. In addition, after rehearsing, the suspect may appear unemotional and callous.
- 3) Obtain a detailed post-admission narrative and check to see whether the details provided by the suspect conform to the actual evidence in the case.
- 4) Institute interrogation safeguards recommended by the FBI (Napier & Adams, 2002):
  - a) Avoid over-reliance on the analysis of behavior and "gut feelings,"
  - b) Investigate all potential exonerating information,
  - c) Recognize that suspect vulnerabilities for coerced confessions exist,
  - d) Adapt questioning for vulnerabilities when required (and document those adaptations),
  - e) Avoid contaminating the interview by using open ended questions without leading or informing suspects of information,
  - f) Receive suspect answers without judgment, reaction, or interruption, responding with open-ended questions; later used pointed, closed ended questions, and
  - g) Avoid both direct statements and suggestions of threats and promises

## A CASE EXAMPLE FROM OKLAHOMA

It is important to note that I fully agree with the DeClue model (DeClue, 2005) which suggests that barring any independent and corroborating evidence of innocence, it is not within the role of a clinician to determine whether or not a particular confession is true or false-only to describe the factors which were present or absent that put it at risk for being a false confession.

I have been retained in several cases to evaluate and/or testify on interrogation and confession issues and will describe the case of one young man referred to as “Billy” (any personally identifying information has been altered). Billy was 17 when he was charged with First Degree Murder. A young adult female was abducted, robbed, and beaten to death. Billy was reportedly found to have some of her possessions and corroborating witnesses claimed that Billy had admitted to them that he had committed the crime (although they were suspects as well at one point). After hours of interrogation, Billy confessed to the murder. An earlier attempt to have Billy certified as a juvenile or youthful offender was unsuccessful.

Billy informed his attorney that one of the interrogating officers physically abused him and pointed a firearm at him, in addition to a number of threats and psychological interrogation techniques. His attorney then contacted me and arranged for an evaluation.

Some factors often associated with coerced confessions were absent in Billy’s case, including a lack of understanding *Miranda* (he was well aware it was his choice to speak with police and testing revealed he understood the concepts contained in the *Miranda* warning); fatigue or sleep deprivation; the presence of mental illness or low IQ; and naivety towards police.

There were several factors present in Billy’s case, including his youth (youth are often more impulsive, vulnerable to interrogative pressure, present time oriented, more suggestible, and poorer in judgment); disrupted family ties (he had a strained relationship with father and his sister was his legal guardian and only support); and most importantly, his suggestibility. A psychologist who previously evaluated Billy for the Court noted that he had a pattern of “backing down” to authority figures.

His attorney informed me that Billy had signed a release for an OJA evaluator, even though his attorney specifically told him not to do so. During my evaluation, Billy also signed a release for me and spoke about case details he indicated his attorney had instructed him not to. While Billy described himself as non-compliant, his scores on the Gudjonsson Suggestibility Scales (Gudjonsson, 2005) were higher than very young children (*i.e.*, under 10) and the mentally retarded.

There were also a number of very concerning interrogation factors described by Billy during the evaluation. Obviously, I questioned the validity of Billy’s claims. Complicating the situation was the fact that despite hours of interrogation, no recording ever took place until the last few minutes when detectives obtained the all-too-familiar audio “recap” of his confession. As one case detective put it during a preliminary hearing, “Towards the end of the interview, we get as near close to the truth as we can and that’s when we begin taping.”

Unfortunately, I had no way of determining the methods by which they arrived at that truth. If any number of the interrogation factors Billy described were accurate, they were concerning to say the least. No video recording was ever utilized. A detective testified that although it is often their practice to video record interrogations, their equipment happened to be on the fritz at that time. Other justifications for not recording were also offered, such as one detective stating that audio taping the entire interrogation would have been too cumbersome for their already overburdened transcription service.

Therefore, in the end, I had nothing but the detectives' testimony during hearings with which to compare Billy's claims. Not unexpectedly, their testimony countered all of Billy's claims, despite the fact that research indicates many of these interrogation techniques are frequently used and some of the detectives in this case had themselves been trained in the Reid Technique of interrogation previously described. I could only testify about the concerns raised if Billy's account were accurate.

Billy described an extensive number of issues associated with false confessions. He indicated that even prior to the interrogation, the transporting officer stated, "You'll never get out of prison." (a maximization technique). While being booked, another officer mentioned that they had found a fingerprint on the left arm of the body of the victim (fabrication of evidence). Billy described being taken to a bare room in an isolated area where he was not allowed food, drink, or access to a bathroom (physical discomfort). He claimed that he asked to see his sister multiple times, who was his legal guardian, but was informed that she was ashamed of him, did not want to see him, and wanted him to own up to what he had done. He was told that no one cared about him and he might as well confess (inducement of hopelessness). Billy stated he was told what police believed he had done, including being informed of the victim's workplace and shown pictures of the victim and crime scene (interview contamination). He stated that the police would not accept his claims of innocence, telling him that they already had the "whole puzzle" and just wanted to hear "his piece"-that he was "going down for it" no matter what he told them (blocking all denials) and that he might receive the death penalty (maximization).

Billy indicated that at some point, one of the officers called a coach from his school that happened to be related to one of the detectives, and they wanted him to speak with the coach on a cell phone-although he would not agree to do so. He indicated that one officer also told him that he should listen to the other officer who was trying to "help him" (building rapport). Billy related that they told him it was possible he could be released if he was honest, that they would tell the jury he cooperated, that they could ensure he did not serve over 10 years or so in prison, and other such statements (minimization techniques).

When Billy became verbally combative towards them, he claimed he was shoved, threatened, and had a gun pointed at him. Billy stated he finally lost all hope and confessed to what the detectives wanted him to admit. He indicated that they recorded this confession, and when it was not to their satisfaction, they stopped the recording and had him start over. He stated that they reassured him he was doing the "right thing" and would "feel better" after telling the truth. He stated he was also allowed access to the bathroom and food following his confession (positive reinforcement).

In Billy's case, there were also several key personal and interrogation factors which may have interacted to place him at risk for a false confession (if you assume his statements about the interrogation were true). First and foremost, his youth and extremely high suggestibility scores were of concern (scores similar to those of small children and the mentally retarded-and this test is masked such that the examinee has no idea they are being evaluated for "suggestibility"). When combined with his disrupted family relationships and reported belief that his sister "wanted him to confess," he may have been much easier to pressure during an interrogation. He also reported feeling hopeless, that based on the evidence presented to him and fears for his safety, he saw no other choice. Finally, there was no interrogation recording and no detailed post-confession narrative to identify inaccuracies or see if he had special knowledge of the crime.

### **THE OUTCOME**

The results were not as the defense might have hoped. While the Court ruled that I was an expert on the topic of interrogations/confessions and the testimony would be allowed for consideration in the *Jackson-Denno* hearing, the Court opined that the science related to false confessions was "too young" to meet the *Daubert* standard and the jury may supplant my testimony in place of their evaluation of the evidence (despite my detailing an extensive number of studies, some of which were listed here). Therefore, testimony in the trial regarding false confession issues was denied. Later, the Court also ruled that the *Miranda* warning was properly given and the statement by the defendant was voluntary.

In the end, I do not know the degree to which Billy was honest with me about what occurred after his arrest; however, it is clear that Billy was a minor charged with a serious offense and he was never afforded the benefit of a recorded interrogation. If he had been, the trier of fact could determine how detectives came to elicit "the truth" from him. If it had been recorded, perhaps Billy's account would have been supported, or perhaps the detectives' version would have been verified and there would not have been a need to hire me in the first place.

### **SUGGESTIONS FOR FUTURE CASES**

Any individual judge may likely be hesitant to set precedent by allowing testimony on interrogation and confession issues before a jury in Oklahoma. Such testimony has been allowed in many other states, including Texas. My colleagues have informed me that it is not without great effort. In one such New York case, it involved five experts testifying in a preliminary hearing before the judge ruled that one would be allowed to testify at trial. I am told that the most likely avenue for success is using multiple experts: 1) a national expert(s) to focus specifically on the abundance of research and case law to demonstrate how and why false confessions happen (typically an experimental psychologist, sometimes joint Ph.D./J.D.); and 2) a regional expert to focus on the clinical forensic evaluation of the defendant.

## RELEVANT WEB SITES

The Innocence Project : <http://www.innocenceproject.org/>

The American Psychology Law Society (Div. 41 of APA): <http://www.ap-ls.org/>

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# NUGGETS OF GOLD

by

MICHAEL R. WILDS<sup>8</sup>

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*The following legal nuggets were mined from the OCDLA e-mail list-serv which is a privilege of membership and one of the most valuable tools available to a practitioner of criminal defense in Oklahoma.—Ed.*

**QUERY: IS THERE A TRAFFIC VIOLATION FOR “WEAVING WITHIN THE LANE?”**

*OCDLA Active Past President Barry Derryberry noted*, in *United States v. Gregory*, 79 F.3d 973 (10th Cir. 1996), the Court examined the validity of a traffic stop that was in many ways similar to the stop in the instant case. In *Gregory* the defendant was driving a U-haul truck on Interstate 70 in Utah. The defendant crossed two feet over into the right shoulder emergency lane of the interstate, and the trooper testified that crossing into the emergency lane of a roadway was a violation of Utah law. The Tenth Circuit conducted an examination of the applicable Utah statutes and case law and determined that no violation of Utah law had occurred. The Court ruled the stop was illegal and the evidence seized had to be suppressed. The Court stated, “We do not find that an isolated incident of a vehicle crossing into the emergency lane of a roadway is a violation of Utah law.” This interpretation of Utah law has been followed by the Utah courts. See e.g., *State of Utah v. Bello*, 872 F.2d 584, 586 (Utah App. 1994) (a single instance of weaving does not constitute a violation of Utah code Annotated Sec. 41-6-61 (1)). We agree with the Utah court which noted that the statute requires only that the vehicle remain entirely in a single lane “as nearly as practical.” *Id.* ... Since the movement of the vehicle occurred towards the right shoulder, other traffic was in no danger of collision. These facts lead us to conclude that the single occurrence of moving to the right shoulder of the roadway which was observed by Officer Barney could not constitute a violation of Utah law and therefore does not warrant the invasion of Fourth Amendment protection. *Id.* at 978.

*A different OCDLA member added*, look at *State v. Gilworth*, 1975 OK CR 38, *State v. Fields*, 1970 OK CR 1, *Catron v. City of Ponca City*, 1959 OK CR 67 holding that probable cause to make a traffic stop must be based on an actual and not an illusory traffic violation.

*See also*, police observation of a suspect's car weaving three or four times within its lane is insufficient. *United States v. Lyons*, 7 F.3d 973 (10th Cir. 1993)

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<sup>8</sup> Michael R. Wilds is an Associate Professor for Criminal Justice, Legal Studies and Homeland Security for Northeastern State University, [wilds@nsuok.edu](mailto:wilds@nsuok.edu).

**QUERY: IS LORITAB (HYDROCODONE) A SCHEDULE III DRUG? DA HAS IT LISTED THAT WAY, BUT I CAN'T FIND IT IN DRUG SCHEDULES.**

*OCDLA Member Randy Evers responds*, "Dihydrocodeinone is another name for hydrocodone. It's listed in schedule III."

**QUERY: WHAT IS THE EASIEST WAY TO GET A COPY OF OAC 40:20-1-3 COLLECTION, TRANSFERS AND RETENTION OF BLOOD SAMPLES?**

*Jeff Eulberg advises* that the Secretary of State web site is [http://www.oar.state.ok.us/oar/codedoc02.nsf/frmMain?OpenFrameSet&Frame=Main&Src=\\_75tnm2shfcdnm8pb4dthj0chedppmcbq8dtmmak31ctijujrgcln50ob7ckj42tbkdt374obdcli00\\_](http://www.oar.state.ok.us/oar/codedoc02.nsf/frmMain?OpenFrameSet&Frame=Main&Src=_75tnm2shfcdnm8pb4dthj0chedppmcbq8dtmmak31ctijujrgcln50ob7ckj42tbkdt374obdcli00_)

**QUERY: DOES POSSESSION OF AN UNALTERED "BB PISTOL" QUALIFY AS AFC UNDER 12 O.S. 1283 B, FELON IN POSSESSION. 1283 DOES REFER TO AN "AIR PISTOL" BUT REQUIRES IT TO BE "ALTERED".**

*OCDLA Past President Barry Derryberry recommends reviewing Thompson v. State*, 488 P.2d 944 (Okl.Cr. 1971) (overruled on other ground by *Dolph v. State*, 520 P.2d 378). "The language 'or any other dangerous or deadly firearm' limits and restricts the word 'pistol' to only firearms, and 'imitation' or 'homemade' refers to the type or kind of firearm." *Thompson* goes on to say firearm is limited to something that can cause lethal injury. "A 'BB' or small lead pellet generally designed for use in an air compression pistol is not a firearm type bullet and may not 'reasonably be expected' to cause death." Although inclusion of air & toy pistols have been added since *Thompson*, the point is still valid that "or any other dangerous or deadly firearm" is a qualification on all the preceding modes of the offense.

**QUERY: HOW DOES ONE OBTAIN AN INTERNET PROVIDER (IP) ADDRESS?**

OCDLA member Johnny Lombardi recommends the following: Use the "show headers" function on an e-mail. After obtaining the IP address from the headers, run that number through the following website:

[www.geektools.com](http://www.geektools.com) - use the following functions:

- 1) WHOIS and then use
- 2) TRACEROUTE.

These functions will show the IP Provider, a contact person at that company and then the city from where the host computer is located.

There are also more advanced websites:

- 1) <http://www.opus1.com/www/traceroute.html>
- 2) <http://visualroute.visualware.com/> (use the FREE edition)

Also, for a tutorial on tracing IP addresses use: <http://tools.ietf.org/html/rfc1393>

**QUERY:       HOW DO I ESTABLISH AN E-MAIL SIGNATURE LINE (I.E., YOUR NAME, FIRM NAME, ADDRESS PHONE NUMBER, EMAIL ADDRESS AS A LINK, WEB LINK IF YOU HAVE A WEB SITE AND A DISCLAIMER REGARDING CONFIDENTIALITY OF THE TRANSMISSION)?**

*OCDLA Board Member Bruce Edge outlines the procedure.* The procedure takes only 1-2 minutes. From OUTLOOK, open your mail folder. From top tool bar select Tools, Options, Mail format, Signatures and New. Then, enter a name you choose for the new signature such as ABC Law Firm. Click on Next to enter your name, address, phone, email, etc. Then, Click on Finish, Ok and another Ok. You have successfully completed the e-mail signature line!

For AOL, go to the Welcome menu, select Settings from the top bar, then Signature, message boards. On the left tab, hit your Signature and add your signature with a limit of 254 characters.

You can adjust the size, fonts and color to your choice and add an e-mail and web link. Then, click on save.

For YAHOO, open your mail box. At the top far right, select option and mail options. Then, from the middle, select signature. You can select color and adjust fonts by selecting color and Graphics. Once you complete your text check Add signature to all outgoing messages,” and then Save.

With all systems you can add what looks like a handwritten signature by merely selecting such a font from the numerous fonts available in Word. I find it easier to prepare my signature as a Word document and then just cut and paste.

**QUERY:       ANYONE KNOW ANYTHING ABOUT DOC’S RESTORATION OF CREDITS POLICY?**

*OCDLA member Don Pope notes,* I previously was General Counsel at DOC and continue to work with many of the inmates in the private prisons right now. DOC’s policy for restoration of credits is governed by OP 060211. Check p. 34 of that procedure. You can find it on DOCs website which is [www.doc.state.ok.us](http://www.doc.state.ok.us).

Client has to make application for the credits, and it is at the discretion of the facility head. However, under their policy he has to be within 365 days of discharge and would only be recommended if the credits he gets would entitle him to immediate release. He is also restricted if he is on a certain offense (see the list in the policy).

**QUERY:       WHAT IS A *STEAGALD* VIOLATION?**

*OCDLA Past President Barry Derryberry advises,* under *Steagald v. US*, 451 US 204, an arrest warrant doesn't authorize entry into a home of one other than the warrant's target without exigent circumstances. In cases like *U.S. v. Reeves*, 524 F.3d 1161 (10th Cir.

2008) and *U.S. v. Flowers*, 336 F.3d 1222 (10th Cir. 2003), compelling an occupant to exit is equivalent to police entry. That sets you up to suppress what your client said.

**QUERY: HAVE A HEARING TOMORROW ON A MOTION TO SUPPRESS (TRAFFIC STOP CASE) WHERE TROOPER ADMINISTERED HGN. I WOULD APPRECIATE ANY HELPFUL QUESTIONS AND/OR ASPECTS OF HGN THAT I SHOULD COVER.**

***OCDLA Board Member John Hunsucker responded:*** Basic info is to ask the cop what clues he saw and what the clues are called. I am amazed at the number that don't know. Ask him whether your hero was standing or sitting in the patrol car. His training taught him to have the defendant standing in front of him not sitting in the front seat of the patrol car with his body twisted. Also, it is difficult to get the full pass in for nystag at max deviation when in the front seat with their being rear view mirror, radios, guns, etc. The instructions they are taught to tell the hero is to put feet together and keep hands by side. Did the officer take any steps to avoid optokinetic nystagmus like turning off the flashing lights and making sure there wasn't traffic whipping by? The basic HGN requires:

Instructions

2 passes to check for equal tracking. (manual states they must check for equal tracking but doesn't actually tell them two passes but they are trained to make two passes)

2 passes to check for lack of smooth pursuit. Start with left eye then check right eye. One clue per eye. Imagine a marble rolling across sand paper versus rolling across glass. If like sandpaper=clue. Stimulus should be moved at rate where it takes two seconds out and two seconds back per eye.

2 passes for Distinct and Sustained Nystagmus at Max deviation. The nystagmus or jerking must be "definite, distinct and sustained" to count as a clue. The cop must hold at max deviation at least 4 seconds to see if sustained. (Look at video from car if HGN on video) One clue per eye

2 passes for Onset of nystagmus Prior to 45 degree. Move stimulus at rate so it takes approx 4 seconds to reach hero's shoulder, if jerking is seen, the cop is trained to stop moving the stimulus to confirm the jerking continues. One clue per eye.

The stimulus should be approx 12-15 inches from hero's nose and slightly above eye level.

4 clues are indication that hero may be above limit.

This is very basic info for HGN. Call me if you need more info. Also, all of this info is in the SFST student and instructor manuals.

**QUERY: CAN POLICE WALK ALL AROUND A HOUSE WITHOUT A SEARCH WARRANT (I.E., WHERE IS THE OKLAHOMA CARTILAGE)?**

***OCDLA Past President Barry Derryberry notes,*** Oklahoma law is more favorable than federal cases on this issue. *See: Lumen v. State*, 1981 OK CR 70, 629 P.2d 1275, citing *Hunsucker v. State*, 475 P.2d 618, (Okl.Cr. 1970). Curtilage includes all outbuildings used in connection with residence, such as garages, sheds, barns, yards and lots connected

with an in close vicinity of residence, but an open pasture and wooded areas beyond the fenced residence property would not constitute part of the curtilage.

*Brinlee v. State*, Okl.Cr., 403 P.2d 253 (1965) "Curtilage means the ground adjacent to a dwelling house and used in connection with it" (Cops improperly view cattle which were on lot adjoining barn 100 yards from the house).

*Turknett v. State*, 36 Okla. Cr. 401, 254 P. 985 "Curtilage, in law, means a small piece of land, not necessarily enclosed, around a dwelling house, and generally includes the buildings used for domestic purposes in the conduct of family affairs. The term has no application to any building not used as a dwelling."

**QUERY: DOES ANYONE HAVE A LIST OF TREATMENT CENTERS IN OKLAHOMA?**

***OCDLA Member Glen Graham provides the following partial list:***

**Alcoholics Anonymous** 627-2224

**Alpha II** – Men - Tonkawa Phone: 580-628-2530 Male

**Avalon** (Alternative to Prison) - at Archer & Denver – (918) 593-9445

**Bill Willis CMHC** – Tahlequah 918-207-3000 Male

**Bill Willis Chemical Dependency Unit**, 1200 W. 4<sup>th</sup>, Tahlequah, OK, (918) 456-8272, 16 Bed Residential Treatment, Men Only.

**Bridgeway, Inc.**, 620 West Grand Street Ponca City, OK 74601 Phone: (580) 762-1462 Male Halfway for 28 Day Program-Contact Darrin Vanman for details.

**Broadway House**, 221 2nd Avenue NW, Ardmore, OK 73401 580-226-3252 Male Resid. & Halfway

**Cenikor North Texas Facility**, 2209 South Main Street, Ft. Worth, TX Ph: 1-800-495-5411 Website: cenikor.org In Business 35 years. 2-½ year therapeutic community program. Non-profit, No cost program, Privately funded. 165 beds in Ft. Worth

**Darp Foundation**, 14100 North 477 Road, Tahlequah, OK Phone: (918) 456-9100

**One-Year, Two-Year Programs.** Work, Financial Incentives, Christian Based.

**Drug Recovery Inc.**, Oklahoma City (405) 232-9804, Male and Female Preg. OK

**Eagle Ridge Institute.**, Guthrie (405) 282-8232 WWC – women with children

**Eagle Ridge**, 1916 E. Perkins Guthrie, OK (405) 282-8232, W & C Accepts Dual Diagn.

**First Step**, 12411 Sooner Rd., OKC, (405) 794-2834

**Gary E. Miller Canadian Co Children's Ctr.**, El Reno (405) 262-0202 M & F Adolescents

**House of Hope, Inc.**, Male, East 320 S. 625 Road, Grove, OK (918) 786-2930

**H.O.W. Foundation of Oklahoma**, 5649 South Garnett Road, Tulsa, OK Phone: (918) 252-5739

**Jordan's Crossing, Inc.**, Oklahoma City (405) 604-9644, ext. 05, women with children (WWC)

**The Lighthouse**, Woodward (580) 256-9700 Male

**The Lighthouse**, Ardmore (580) 256-9700 Female Preg. OK

**Mental Health & Substance Abuse Centers of South OK**, Ardmore (580) 226-5048 M&F(Non-Preg.)

**Monarch** , 501 Fredonia Muskogee, OK (918) 683-0124 Women only – Res. – W&C

**Norman Adolescent Center**, (NAC) (405) 573-3998 Separate Male and Female

**New Hope of Mangum**, Mangum (580) 782-3337 Separate Male and Female Preg

**Next Step Network**, Guymon (580) 338-7259 Male and Sep. Female Preg. OK

**Northeastern OK Council on Alcoholism (NOCA)**, Miami (918) 542-2845 Male

**Northwest Substance Abuse Treatment Center for Women & Children**, 500 S. Church, Waynoka, OK (580) 824-0674 Inpatient 90-120 days

**The Oaks**, McAlester (918) 423-6030 Separate Male & Female Preg OK

**Opportunities** Watonga (580) 623-2545 Sep. Male & Female Preg OK

**Native Americans** should contact the Indian Health Resource Center or their local Indian Health representative for a referral.

**Native Americans** (Out Patient) **Keetowah Cherokee Treatment Services** (Accepts both Indian & Non-Indian). 2727 E. Admiral Place, Tulsa, OK. (918) 835-3017.

**Narcotics Anonymous, Tulsa** (918) 747-0017

**New Hope**, 2 Wickersham Drive, Rt. 1 Box 91-B, Mangum, OK (580) 782-3337, 24-Hour Crisis Line 1-800-292-3337 Residential Treatment

**Northeastern Oklahoma Council on Alcoholism, INC. (NOCA)**, 130 West Steve Owens Blvd. Miami, OK (918) 542-2845 Intake (918) 542-4150

**Opportunities, Inc.**, 120 W. First, P.O. Box 569, Watonga, OK (580) 623-2545 Men

**Osage Nation Counseling Center Substance Abuse Program**, 518 Eeahy Street Pawhuska, OK Phone: (918) 287-2773/(918) 287-9002 (Intake Phone #) Grant Funded- Must have CDIB card for free services - Men

**Roadback - Miller Manor**, Lawton (580) 357-8114 Male Halfway; Female Resid.; Female Halfway

**Roadback – Helen Holliday Home**, Lawton Female Halfway (Same Ph. #)

**Roadback – Pathway – Lawton** Female Residential (580) 357-8114

**Salvation Army Adult Rehabilitation Center**, 601 N. Main Street, Tulsa, OK (918) 583-6119

**Saint John Medical Center** - Offers treatment for both alcohol & drugs & or mental illness (918) 744-2066

**The Haven** – 1647 S. Elwood, Tulsa, OK (918) 585-1389 \$50 per Week 7days/24hrs per day, Co-Ed - Both Male/Female – Treatment Centers: 12 & 12 6333 E. Skelly Dr, Tulsa, OK (918) 664-4224

**The Oaks**, Men, 628 E. Creek, P.O. Box 1404 McAlester, OK 74502 Phone: (918) 423-6030

**Tulsa Center for Behavioral Health (TCBH)**, Tulsa Male: (918) 293-2140 or Female: (918) 293-2141

**Tulsa Center for Behavioral Health (TCBH)**, Tulsa (918) 293-2141 (Female Co-Occur)

**Tulsa Women & Children's Center (TWCC)**, Tulsa (918) 430-0975 x2 Women w/ children

**12 & 12 Tulsa**, (918) 664-4224 Male; Female; Preg. OK; Male/Female Halfway

**Veterans** might consider contacting the V.A. health center for a referral for treatment.

**Valliant House**, Valliant, OK (580) 933-7031 Female – Preg. OK

**Vantage Pointe** - Ardmore, OK (580) 226-5048 28-Day Residential Treatment

**Vinita Alcohol & Drug Treatment Ctr**, (VADTC) Vinita 918-256-7841 Female - Preg  
OK

**Woodward Lighthouse** – 5050 Williams Ave., Woodward, OK 580-256-9700,  
Adult 30 day inpatient treatment program State Funded - Sliding Scale Fee.

**YWCA Reflections**, Enid, OK (580) 237-0470 Women with children Halfway In-Patient  
Treatment Centers for Women.

### **LEGAL DOCKETS ONLINE**

OCDLA member Robert Manchester posted this treasure trove of legal dockets which can be found at [www.legaldockets.com](http://www.legaldockets.com). According to Robert, this service has been around for a long time and allows you to research and obtain public records, court case dockets, filings, and more, from all 50 states.

Most of the databases contained here are free -- just click on a state and you'll find links to federal and state court case dockets, state and county property, recordings and liens, criminal records, and a lot more.

# POINTS FOR DRIVING VIOLATIONS

provided by

**OCDLA Member Jeff Sifers**

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This table is found in the Oklahoma Administrative Code, 595:10-7-2, and is one of those little legal points that layman seem to ask about all the time. Under the Code, the following points shall be assessed to the driving record of any licensed or unlicensed person for the offenses which the Department of Public Safety has received a final conviction from any court having jurisdiction of the violations as stated below:

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<b>VIOLATION</b>	<b>POINTS</b>
Reckless driving without regard for the safety of others	4
Failure to stop or to remain stopped for school bus loading or unloading	4
Speeding in excess of 25 M.P.H. above the posted speed limit	3
Inattentive driving resulting in a collision	2
Left of center or wrong way	2
Failure to yield right of way	2
Violation of driver license restrictions	2
Following too close or improperly	2
Failure to obey stop sign or traffic light	2
Careless driving	2
Speeding	2
Contest racing on public traffic way	2
Speed in excess of posted maximum	2
Speed less than posted minimum	2
Speed in school zone	2
Radar checked speed violation	2
Airplane checked speed violation	2
Vascar	2
Any violation related to a railroad crossing	2
Operating a defective vehicle	1
Operating a vehicle without being licensed	1

Leaving a vehicle unattended with engine running	1
Towing or pushing vehicle improperly	1
Failure to dim lights as required	1
Failure to stop at required stops with explosives or flammable load	1
Transporting hazardous substances without safety devices or precautions	1
Improper lane usage	1
Driving on shoulder, in ditch or on sidewalk	1
Making improper entrance to or exit from traffic way	1
Loading a vehicle so drivers view is obstructed	1
Starting improperly from parked position	1
Improper backing	1
Spinning wheels	1
Operating a vehicle with view obstructed	1
Negligent driving	1
Improper passing	1
Operating a motor vehicle at speed greater than reasonable and proper	1
Operating a motor vehicle at speed less than reasonable and proper	1
Coasting or operating with gears disengaged	1
Failure to follow instructions of police officer	1
Failure to obey traffic instructions stated on traffic sign or shown by traffic device	1
Passing through or around barrier positioned to prohibit or channel traffic	1
Failure to observe warnings or instructions on vehicle properly displaying them	1
Failure to signal intention to change vehicle direction or to reduce speed suddenly	1
Giving improper signal	1
Improper stopping on roadway	1
Improper turns	1
Operating defective vehicle after receiving a warning or summons	1
Impeding traffic (and under 40 M.P.H.)	1
Crossing center median	1

[Source: Amended at 9 Ok Reg 2563, eff 6-26-92; Amended at 10 Ok Reg 3189, eff 6-25-93;  
Amended at 22 Ok Reg 2690, eff 7-25-05]

Oklahoma Criminal Defense Lawyers Association  
P.O. Box 2272  
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**OCDLA "2009" MEMBERSHIP APPLICATION**

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Mail to **OCDLA, P. O. Box 2272, Oklahoma City, OK 73101-2272 or fax to (405) 239-2595**

- |                                                                            |                                                   |
|----------------------------------------------------------------------------|---------------------------------------------------|
| <input type="checkbox"/> \$200 Sustaining Member<br>non-lawyers)           | <input type="checkbox"/> \$100 Affiliate (allied  |
| <input type="checkbox"/> \$100 Regular Member (OBA member 3+ years)        | <input type="checkbox"/> \$ 50 Student Membership |
| <input type="checkbox"/> \$ 75 Regular Member (OBA member 3 or less years) | Law school _____                                  |
| <input type="checkbox"/> \$ 75 Public Defender / O.I.D.S. Rate             | Graduation date _____                             |
| <input type="checkbox"/> \$ 30 Grimes Criminal Law Outline                 |                                                   |

Name \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

OBA # \_\_\_\_\_ County \_\_\_\_\_

Telephone (\_\_\_\_\_) \_\_\_\_\_ Fax (\_\_\_\_\_) \_\_\_\_\_

E-mail \_\_\_\_\_

Payment method: Check \_\_\_\_\_ Visa \_\_\_\_\_ MasterCard \_\_\_\_\_ Discover \_\_\_\_\_ AMX \_\_\_\_\_

Credit Card Number \_\_\_\_\_ Exp. Date \_\_\_\_\_

**By submitting this application, I verify that I am *not* a prosecutor, a member of law enforcement, or a full-time judge.**

\_\_\_\_\_  
**Signature**