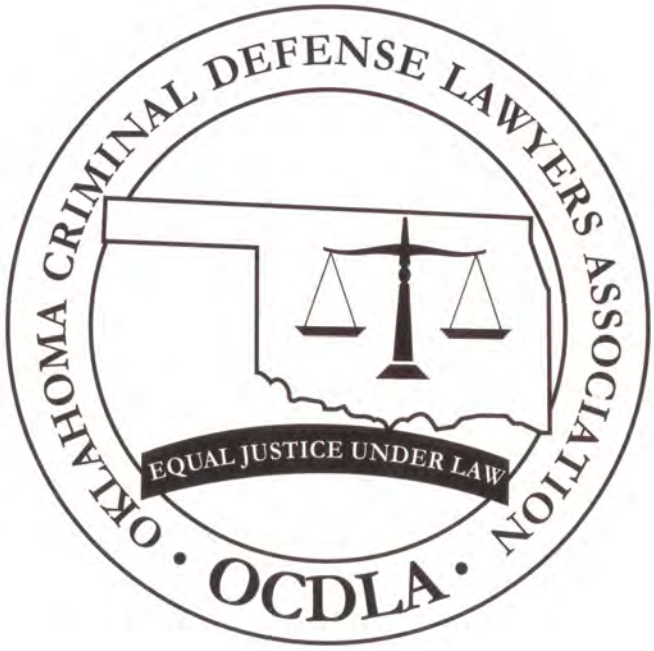
The Gauntlet

The Law Journal of the

Oklahoma Criminal Defense Lawyers Association



Fall 2011

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THE GAUNTLET

"take up the gauntlet: to accept a challenge to fight; to show one's defiance"
"run the gauntlet: to endure severe criticism or tribulation"

CRAIG M. HOEHNS
Editor-in-Chief

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The *Oklahoma Criminal Defense Lawyers Association* (OCDLA) distributes over five hundred (500) copies of *The Gauntlet* to OCDLA members, law schools, law libraries and law professors. OCDLA and its members provide over seventy (70) hours of Continuing Legal Education (CLE) each year and publish *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 **Craig M. Hoehns, Editor, at craig.hoehns@hoehnslaw.com**.

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THE PRESIDENT'S PAGE

by

Tim Laughlin
President, Oklahoma Criminal Defense Lawyers Association

Dear Members:

Welcome to the Fall 2011 edition of the *Gauntlet*.

First, on behalf of the OCDLA leadership, I thank you for your membership in Oklahoma's oldest and largest criminal defense lawyers' organization. Only through your membership and participation in the OCDLA are we capable of providing services through which we criminal defense lawyers exchange ideas, share our experiences and develop our advocacy skills.

Since the OCDLA was founded thirty-five years ago, many dedicated men and women have volunteered their time and energy to the pursuit of establishing a community of skilled and knowledgeable criminal defense lawyers. As a result of these efforts, lawyers from around the state, whether or not they regularly practice criminal defense, have come to rely on the OCDLA's 450 plus members for advice and guidance in matters related to criminal defense practice in Oklahoma.

On behalf of the OCDLA, I thank all of you who took time out of your personal lives to contribute to this edition on the *Gauntlet.* As always, I extend special thanks to our Editor, Craig Hoehns, and Mike Wilds, Mark Hoover, Ray Deneke, Shena Burgess and Jim Hankins for their editorial and content contributions.

The OCDLA counts among its membership some of the State's most experienced and insightful lawyers. Please take time to share your knowledge and experience with your colleagues and contribute an article to the *Gauntlet.*

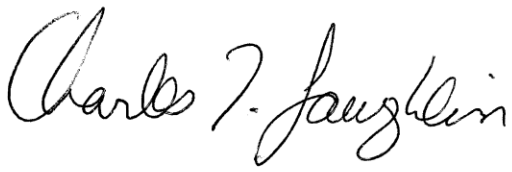
The OCDLA also needs your recommendations for Continuing Legal Education topics. We remain committed to providing high-quality continuing legal education. Earlier in the year, the OCDLA presented Criminal Law Basics 2011 in which some of Oklahoma's brightest criminal defense lawyers provided hundreds of pages of valuable material and nine hours of Oklahoma Bar Association approved CLE.

We also collaborated with the Oklahoma County Public Defender, the Tulsa County Public Defender and the Oklahoma Indigent Defense System to present the 2011 Patrick A. Williams Criminal Defense Institute. We presented an excellent slate of national and state speakers that discussed a wide range in important topics.

Please share your ideas for upcoming continuing legal education ideas. Let us know if there are speakers you would like to hear or if there are topics you would like us to cover in future CLEs.

Whether it is through the Little Green Book, the Gauntlet, Hot Sheets, the Listserv, CLE or our website, www.ocdlaoklahoma.com, we hope to provide our members with useful information and a supportive community.

Thank you for your continued support of the OCDLA.



Tim Laughlin
OCDLA President

OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION

2011 ANNUAL AWARDS

THE LORD THOMAS ERSKINE AWARD

Lord Thomas Erskine, Lord Chancellor of the United Kingdom, was a Scotsman and the third son of Henry David Erskine, the Tenth Earl of Buchan. Lord Erskine was educated at the Royal High School of Edinburgh and later at Trinity College, Cambridge. He was called to the bar in 1778, and became a strong advocate and defender of popular liberties and constitutional rights. His defense of Thomas Paine cost him his post of Attorney General to the Prince of Wales.

The Lord Thomas Erskine Award is bestowed to honor a member of the Oklahoma criminal defense bar who has, over the years, steadfastly placed the preservation of personal liberties over his or her own personal gain or reputation. The award is intended to recognize these qualities during an attorney's career or lifetime and is not limited to any particular activities in any given year. This year's recipient is:

ROBERT A. MANCHESTER, III

THE CLARENCE DARROW AWARD

Clarence Darrow was born in Ohio in 1857. After being admitted to the bar in 1878, he became a small-town lawyer for nine years. During WWI, Darrow defended anti-war activists and was critical of The Espionage Act which at that time was used to stifle anti-war activities. Darrow's magnificent and tenacious advocacy is illustrated in his famous cases such as the *Scopes Monkey Trial* and the *Leopold-Loeb Murder Trials*. A 1936 FBI memo to Clyde Tolson, *aide-de-camp* to J. Edgar Hoover, gave Mr. Hoover some quotes that Clarence Darrow had made in an article entitled *Attorney for the Defendant*. It was suggested that Mr. Hoover could use these quotes in speeches to point out how unscrupulous criminal defense lawyers foster disrespect for the law and influence crime conditions.

The Clarence Darrow Award recognizes the efforts of an individual who has, during the year, exemplified the zealous advocacy in criminal cases that befits the namesake of the award. It is in the deeds and spirit of Clarence Darrow that this award is given each year. This year's recipient is:

JACQUELYN L. FORD

THE THURGOOD MARSHALL APPELLATE ADVOCACY AWARD

Thurgood Marshall, the grandson of a slave, was born in 1908 in Maryland. In 1930, Marshall desired to attend law school in his hometown but was denied admission to the University of Maryland Law School because of the school's segregation policy. This event had a dramatic influence on his future professional life. Marshall sought admission to, and was accepted at, Howard University where he graduated from law school in 1933. In 1934, he began his association with the NAACP. In 1954, he dismantled public school segregation in the spectacular 1954 victory of *Brown vs. Board of Education of Topeka.* He later desegregated graduate schools with his victory in *McLaurin vs. Oklahoma State Regents*. As a judge on the United States Court of Appeals for the Second Circuit, he issued 112 opinions, all of which were upheld before the United States Supreme Court. As Solicitor General of the United States, he won 14 of 19 cases argued before the United States Supreme Court. In 1967, Marshall became the first African-American appointed to the United States Supreme Court. He was often the lone voice of dissent against the death penalty (although accompanied frequently by Justice Brennan) and always spoke for voiceless Americans in his opinions. He died in 1993. The Thurgood Marshall Appellate Advocacy Award for 2011 is awarded to:

WILLIAM H. LUKER

TEN CASES YOU SHOULD KNOW FOR DRUG COURT TERMINATIONS

by

Ray Denecke[1]

NOTE: The unpublished cases listed above should be used as persuasive authority only. If cited, please comply with the Oklahoma Court of Criminal Appeals Rules. For example, you may cite: "In compliance with Rule 3.5(C)(3*), Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (YEAR), Appellant/Defendant acknowledges that an unpublished decision is not binding on this Court. However, Appellant/Defendant brings this unpublished decision to the Court's attention as no published opinion would serve as well in relation to (WHATEVER). For the convenience of the Court and of opposing counsel, a copy of the decision is attached hereto as Exhibit ___."

Lewis v. State, 220 P.3d 1140 (Okl.Cr. 2009) When entering a plea into Drug Court, the district court must ensure that the defendant's plea is knowing, intelligent, and voluntary. A defendant must be advised of all constitutional rights he or she relinquishes pursuant to the plea as well as the range of punishment.

Vanmeter v. State, F-2008-963 (September 24, 2009) (unpublished) The district court abuses its discretion when it terminates a participant from Drug Court without affording the participant due process. District court denied the defendant due process when it terminated him from Drug Court without written notice to the defendant citing allegations to justify termination.

Barnett v. State, F-2008-289 (September 3, 2009) (unpublished) The Drug Court Act does not require automatic termination, when under such circumstances, all other evidence demonstrates that substance abuse treatment is working, that such treatment can ultimately succeed, and that the participant possess the capability to complete the program successfully.

[1]Ray Denecke is an assistant public defender at the Oklahoma County Public Defender's Office. He can be contacted at (405) 713-1550.

Hagar v. State, 990 P.2d 894 (Okl.Cr. 1999) To terminate participation in a drug court program, the trial court must find that the participant violated the conditions of his or her plea agreement or performance contract, and that disciplinary sanctions were insufficient to gain compliance. Furthermore, a drug court judge shall state on the record the reasons for a participants termination from Drug Court, including "the conditions violated and reasons why disciplinary sanctions [are] insufficient or [are] not appropriate."

Airehart v. State, F-2006-850 (October 19, 2007) (unpublished) Drug Court termination based on violations for which a defendant has been previously sanctioned is improper. The Oklahoma Court of Criminal Appeals reversed the district court's decision and ordered Mr. Airehart reinstated into Drug Court.

Woodward v. Morrissey, 991 P.2d 1042 (Okl.Cr. 1999) A Drug Court participant will be sentenced pursuant to his or her plea agreement when the State moves to terminate.

Alexander v. State, 48 P.3d 110 (Okl.Cr. 2002) A Drug Court judge cannot change the terms of a written plea agreement after the defendant has been admitted to the Drug Court program.

Taylor v. State, F-2008-824 (February 22, 2010) (unpublished) When the original sentence(s) imposed by the district court are ordered to run concurrently, it is error for the district court to order the original sentence(s) to run consecutively upon termination from Drug Court.

Long v. State, F-2007-636 & C-2007-743 (July 15, 2008) (unpublished) Punishment agreed to by parties at the defendant's admission into Drug Court is the only authorized punishment that the district court may execute upon termination, provided such punishment is within the range prescribed by law for the particular offense with which the State charged defendant. Upward modification of the originally imposed sentence upon termination from Drug Court is error.

Looney v. State, 49 P.3d 761 (Okl.Cr. 2002) Upon termination from Drug Court, the Notice to Terminate defendant from Drug Court, the Application to Terminate defendant from Drug Court, and the Drug Court judge's order granting the request to terminate, should all be cross-referenced and made part of the original criminal case file.

TRIAL TECHNIQUES FROM A TIRED TULSA PUBLIC DEFENDER

by

Shena E. Burgess[1]

From time to time, we have OCDLA Board Meetings where we discuss ways to help our members, all of the board members agreed to submit an article for the Gauntlet. Unfortunately our Editor-in-Chief and President Laughlin forgot to tell me that it was my turn until two days before my trial with a two hour taped confession, five eye witnesses and a testifying codefendant was to begin. Luckily they gave me an extension, so as I sit here waiting on my jury to come back with a verdict, I am pondering what knowledge can I dispense to my learned brethren.

Jury Instructions

Do proposed jury instructions! I start to prepare my jury instructions at the beginning of trial preparation. It gets you focused on what the law is and gives you focus on where the potential holes are in the State's case. It allows you to think about lesser included instructions and gives you the opportunity to talk to your client about on what law the jury will be instructed. I drop off two different copies to the Court. One for the court to sign the cover sheet (accepted in whole, accepted in part or denied in whole) and a copy for the court to use in the trial. Why does this help your client? The court looks at the evidence as it comes in through your eyes. Since starting this practice, I have received lesser included instructions in all the cases that I have requested them until this trial. (Judge didn't see fit to give me a misdemeanor reckless handling a firearm as a lesser included to robbery with a firearm). Another reason it is helpful to your case is that as you are putting together the courts packet of instructions, you create a list of OUJI numbers to make sure all of your instructions make it into the final packet. In every trial I have done, I am exhausted by the time we get to the settlement of instructions. By utilizing the list, there is no chance an instruction helpful to your case will be missed.

Object to the verdict form! Ask for the not guilty to be first on the verdict form. The presumption of innocence lasts unless the State of Oklahoma meets their burden of proof. Putting the guilty box first on the verdict form flies in the face of the presumption of innocence.

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1 Shena Burgess is the Deputy Chief Public Defender at the Tulsa County Public Defender's Office. She can be contacted at (918) 596-5530.

Motions in Limine

Make sure a motion in limine is filed on non-murder cases to prevent the State of Oklahoma from calling the complaining witness a victim. To allow the State to use the term victim assumes a crime occurred. And isn't that why you set if for trial in the first place?

File motions in limine on anything that hurts your case as more prejudicial than probative. Having a client with a gang name of "Stick up" would be a motion in limine in a robbery with firearm case. Always motion out all AKAs. File a motion in limine on prosecutorial misconduct in every case. It puts that Court and the State on notice that you will not put up with that behavior in the trial or in the State's closing.

Exhibits

I try the month before trial to meet with the prosecutor and go through each item in evidence. If you get resistance from the State's Attorney, get an order from the Judge to allow you to see it at property. I record the item on a list and photograph it so I can refer to it later in trial preparation. I have never gone through evidence and not found something to my advantage. You are entitled to this make the State show you the evidence in police property. Plus it is a burden on them to get the evidence over to their office so you can review it. (Bring gloves when handling evidence. I also bring a ruler to put next to items so when photographing them I can tell size). My current case had five hundred pieces of evidence, it took two days to go through and document all of the items but it was worth it. (Only 150 were introduced in my case).

At the beginning of trial, I make a request to have the court rule on my objections on the photographs and exhibits. I request this be done before my *voir dire*. The benefit to the court is that during the trial when the State has the property officer on the stand admitting the laundry list of evidence, you have already seen it and therefore it speeds up the entry into evidence. If you have a previous objection your record is already made; therefore you only need to object to preserve the record. I generally object and refer to the date I made my record (e.g., previous objection from 8/15/11). This also keeps your appellate counsel happy since they know when to refer in the transcript to see the complete record. The benefit to you and your client is that you get a preview of what pieces of evidence will be introduced. By seeing all of the pictures as a whole it makes your cumulative objection stronger when you can show the court that the State has five different pictures of the decedent from five different angles. Make sure to always object to autopsy photos!

I also use a check list for exhibits during trial with different columns: Exhibit number, Description of item, Identifying witness, Admitted date/time, Objection, and Ruling. When an item is admitted, it is highlighted on my sheet. At the end of trial, it is the defense lawyer's responsibility to make sure that the pieces of evidence going back to the jury are the items that have actually been admitted. Your check list allows a faster way to double check the pieces. The reason I have a column for objections is when the State moves to admit a piece of evidence, I can quickly check to see if that piece needs to be objected to again to preserve the appellate record.

Objections/Mistrials

Remember when asking for a potential juror to be removed for cause to make your record. If you are denied the cause strike, ask for an additional peremptory strike since you had to use one for the person you wanted to remove for cause. Make sure you state who you would have stricken from the pool and why. This makes a complete record on appeal.

When asking for a mistrial (usually because the State has violated a ruling on a motion in limine) make a complete record. Frankly saying "you cannot unring the bell" does not quite get the message across. This week I asked for two different mistrials, both for violations of motions in limine. The State started tip-toeing in that direction, I objected and was overruled. When the State asked its the final question/answer, the light went off for the Court that they were in violation of its ruling. I quoted a retired Tulsa District Judge in asking for my mistrial. I told the court that the State when violating his ruling had in a sense stuck a hot poker up the rear ends of the jury and that an admonition from the court would not heal that wound and the only recourse was a mistrial. If that's not an image to make a court pause I don't know what is. The Court denied my mistrial and requested that I choose whether or not he admonish the jury. I refused to make that decision, arguing that if I requested the admonition then I was conceded that ill created by the State was cured and if no admonition was requested then I was acknowledging that it was not a big deal. Within an hour, the State had asked the codefendant what my clients AKA was (refer to motion in limine to AKAs) thus violating another motion in limine when the response was "Stick up." At that point, the court bellowed for us to approach. At that point I leaned forward and stated, "I... WANT... MY ... MISTRIAL... NOW! After much thought, the court denied me ... again.

With the jury returning, I will leave you with this, Preparation is key. Have your trial completely prepped at least a week before the trial date that way if they dump two hundred more pieces of evidence on you on the tenth day before trial you are ready to jump on it. Remember you are not alone in this world of criminal defense. Do not reinvent the wheel. Ask for help from your colleagues both in your community and in your OCDLA community listserver.

OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION
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COMBATING MATERIAL WITNESS WARRANTS

by

Andrea Digilio Miller[1]

Judges commonly issue material witness warrants at the request of the State when prosecutors believe a witness is not being appropriately accommodating to the State's needs. Generally the warrant is issued without a hearing and without the issuing court questioning the prosecutor about the witness and his status as a material witness. When those witnesses are picked up on the material witness warrants they often sit in jail until they have testified satisfactorily for the State.

A recent case involving a material witness resulting in a successful writ to the Oklahoma Court of Criminal Appeals caused me to review the material witness statutes and come to realize that not only are the statutes themselves some of the clearest in the Oklahoma Code of Criminal Procedure, but that they are not always followed by the prosecutors and bench. I can think of few things more antithetical to our system of justice than arresting and detaining a witness to ensure his cooperation for trial. Because of that, I wanted to share some thoughts about the process with the membership.

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1 Andrea Digilio Miller is Chief of the Appellate Division at the Oklahoma County Public Defender's Office. She can be reached at (405) 713-1550.

The situation in our case involved the arrest of a material witness for whom a warrant had been issued several months before (according to the prosecutors) after he had failed to appear to testify at a trial causing the trial to be continued at the State's request. Two weeks prior to the beginning of the re-set trial he was served with a subpoena at his home. At that time he accepted service and assured the deputy that he would appear to testify. Despite that assurance the State decided to arrest him on the outstanding material witness warrant. The day after his arrest he was brought before the district court judge. At that time, despite his assurances that he would appear and testify, he was held without bond until after his testimony which would not occur for six days. The district court appointed the material witness a public defender and a petition for writ of habeas corpus was filed. Ultimately the writ was issued but unfortunately the Court did not rule until the day he was set to testify. After his very brief testimony, about seeing the defendant after the homicide occurred, he was released.

The statutes applicable to a material witness after the defendant has been bound over for trial are Okla. Stat. tit. 22, §§ 719 and 720. Section 719 states:

> Whenever any person shall be taken into custody by any law enforcement officer to be held as a material witness in any criminal investigation or proceeding, he shall, if not sooner released, be taken before a judge of the district court without unnecessary delay and said judge of the district court shall immediately inform him of his constitutional rights including the reason he is being held in custody, his right to the aid of counsel in every stage of the proceedings, and of his right to be released from custody upon entering into a written undertaking in the manner provided by law. A witness who is held in custody pursuant to the provisions hereof shall be kept separately and apart from any person, or persons, being held in custody because of being accused of committing a crime. A witness who desires aid of counsel and is unable to obtain aid of counsel by reason of poverty shall be by the court provided counsel at the expense of the court fund of the county. During the time a witness is in custody he shall receive the witness fee provided by law for witnesses in criminal cases.

Section 720 which sets forth the procedure by which a material witness may be taken into custody states:

> A. If a law enforcement officer has probable cause to believe that a person is a necessary and material witness to a felony and that there is probable cause to believe that the person would be unwilling to accept service of a subpoena or may otherwise refuse to appear in any criminal proceeding, the officer may detain the person as a material witness with or without an arrest warrant; provided, no person may be detained as a material witness to a crime for more than forty-eight (48) hours without being taken before a judge as required by Section 719 of Title 22 of the Oklahoma Statutes; and provided further, no person may be detained as a material witness to a crime who is a victim of such crime.
> B. At the time of the detainment, the law enforcement officer shall inform the person:
> 1. Of the identity of the officer as a law enforcement officer; and
> 2. That the person is being detained because the officer has probable cause to believe the person:
> a. is a material witness to an identified felony, and
> b. would be unwilling to accept service of a subpoena or may otherwise refuse to appear in any criminal proceeding.
> C. If a material witness is taken into custody pursuant to this section, the provisions of Section 719 of Title 22 of the Oklahoma Statutes shall apply.

A person taken into custody pursuant to a material witness warrant has a right to be taken before a judge "without unnecessary delay" so that he can be informed of his rights, told why he is being held, and given the opportunity to enter into an undertaking to secure his release. As recognized by the Court in the writ order, the district court must at least set bond, but without a showing that the witness is a risk, the court should also consider an O.R. bond or any other undertaking that allows the witness to go home. The Oklahoma Court of Criminal Appeals has only approved of the continued detention of a material witness without bond in the case of a transient where there was no way to ensure the witness would be present at court if he was released. *Shaw v. State ex. rel. Porter*, 624 P.2d 81 (Okl.Cr.1981).

An aspect of the statute often overlooked by prosecutors is that the witness is entitled to a witness fee for the time he is in custody as provided by law for witnesses in criminal cases. Okla. Stat. tit. 28, § 81 sets forth the fees that are applicable in this context. While the fee is nominal, it is something the detained witness is entitled to and might be something that figures into a judge's decision whether to hold the witness or not.

Under the language of subsection A of § 720 a person is only a material witness if that person is a "necessary and material witness to a felony." Arguably what that means is that a person is only a material witness if that person actually witnessed the commission of the crime. There are no Oklahoma cases on point on this issue but the phrase "material witness to a felony" seems clear that the witness has to have something substantial to offer as the commission of the crime itself rather than collateral information about the crime or the defendant as was the situation in our case.

The material witness statutes only become applicable upon a probable cause showing that the witness is unlikely to accept service of a subpoena or might otherwise refuse to testify. That requirement presupposes that the State has actually attempted to serve a subpoena and it has been refused or the witness has made known his refusal to testify. Where a material witness has made assurances to the court that he will appear to testify, he should be released from custody.

NUGGETS OF GOLD: MINED FROM THE LISTSERVER

by

Mark Hoover[1] and Ray Denecke[2]

Query: **Group: Have any of you researched the issue of the wrong address/description on a search warrant lately?**
FACTS: Officers to go Defendant's apartment, located at 123 XYZ Street and ask to come in and speak with him. He said no, my kids are here and stepped out of the apartment to the front porch. The police start to question him and he asked for an attorney. They then arrested him on an outstanding arrest warrant and put him in a police car in the parking lot. The officers then had his wife who had came outside take his children out of the house and all waited while they obtained a search warrant. Both the affidavit and the warrant describe Defendant's apartment as 125 XYZ Street which does exist and is an apartment next door to 123.

All of the apartments in the complex look alike. The affidavit contains several other errors to the extent that no one could find the apartment by only following the description in the affidavit. If you have any research, briefs or ideas you are willing to share…

An OCDLA member provided a number of cites, including the 4th amendment, Art. II, sec. 30 OK Const., Title 22 O.S. sec. 1223, ***Wallace v. State***, 1949 OK CR 74**,** ***Kinsey v. State***, 1979 OK CR 122, ***Miles v. State***, 1987 OK Cr 179, ***Fletcher v. State***, 1986 OK CR 163.

Query: Does anyone know of case law, or statutory provision, that requires the state to have a J&S, as opposed to a record of plea, to prove predicate? Also, does anyone know of a case that outlines what must occur, notice to defendant, court of record, proper J&S etc., for a misdemeanor to be used as a predicate to a felony?

An OCDLA member provides a number of cites, including ***Wilson v. State***, 871 P.2d 46 (Okl.Cr. 1994); ***Cooper v. State***, 810 P.2d 1303 (Okl.Cr. 1991); ***Battenfield v. State***, 826 P.2d 612 (Okl.Cr. 1991); ***Mitchell v. State***, 659 P.2d 366 (Okl.Cr. 1983) (interesting twist on how jury sentencing instructions unlawfully shifted burden to defendant to disprove he was one and the same person as the one shown on J&S); and ***Sidney Wayne Clark v. State***, F-2000-282 (Okl.Cr. January 26, 2001), an unpublished opinion you can access at the OIDS website link for unpublished opinions (a great case, authored by Judge Lumpkin, and addressing the failure of proof where J&S was from another state).

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1 Mark Hoover is defense counsel at the Oklahoma Indigent Defense System. He can be contacted at (405) 801-2601.

2 Ray Denecke is an assistant public defender at the Oklahoma County Public Defender's Office. He can be contacted at (405) 713-1550.

Query: What's the authority requiring the State to have collected new evidence before it can lawfully refile the case after having dismissed it before preliminary hearing?

An OCDLA member provides a citation for ***Jones v. State***, 481 P.2d 171.

Another OCDLA member responds, I think the consensus was that if dismissed by the State anytime prior to resting their case at Prelim, that the State did not have to have additional evidence to refile. However, if dismissed by the Court for lack of evidence, then they would have to have the additional evidence.

Finally, an OCDLA member answers, once the State opens the Preliminary Hearing, not after it rests.

Query: Is Acquiring Proceeds from Drug Activity under Okla. Stat. Title 63, § 2-503 a crime?

One OCDLA member responds, 2-503 is not a criminal statute, it provides grounds for civil forfeitures. I've never seen anybody charge it in my neck of the woods, but my prosecutors tend to keep at least a tinge of common sense.

Another OCDLA member writes, ***U.S. v. Santos*** addressed for the federal statute and held it must be profits not mere money in the flow.

And two more OCDLA members instruct to review 2-503.1.

Query: Does a valid Mexican driver's license allow a Mexican citizen to lawfully operate a motor vehicle in the State of Oklahoma? Does it matter where the vehicle is tagged? How long driver has been in the U.S.?

One OCDLA member responds, I think the answer is No, but there is such a thing as an International Driver's Permit. Did your client have one? You can call AAA (or its equivalent in your home country), show your valid driver's license, & for a fee, be issued a permit which, in conjunction w/ your license, allows you to drive legally for up to 6 months in any reciprocal country ("Valid in over 150 countries").

Another member writes, 47 O.S. § 6-102 - anyone over sixteen years of age who is properly licensed in his or her home country may operate a vehicle on Oklahoma roads.

Another member offers more specifically, see also subparagraph D of that same statute (47 O.S. § 6-102).

Query: Are 911 tapes received by a municipal police department obtainable under the FOIA? If so, does anyone have a form demand letter?

An OCDLA member responds, yes, they are obtainable under the FOIA. Goggle this site: Bristol Herald Carrier wins fees in FOIA/911 tape case. Also, review this site: http://www.rcfp.org/fogg/index.php?index.html and go to the link "FOIA Letter Generator." Or, call the municipality and ask if they have a FOIA Form. If not, just draft a simple letter citing The Freedom of Information Act at 5 U.S.C.A. § 552, as amended by Public Law No. 104-231, 110 Stat. 3048, and make a request for your tape.

Query: Does anyone have the citation for the fairly recent case that says that either the revocation or the acceleration stands even though the new crime that is the basis of the revocation or acceleration is beaten at trial?

An OCDLA member responds, not recent, but ***Brown v. State***, 740 P.2d 164 (Okl.Cr. 1987) is dead on (acquittal does not bar revo/accel).

And the member who inquired followed-up with an earlier case, ***Moore v. State***, 1982 OK CR 60, 644 P.2d 1079, which deals with a charge that later was dismissed.

Query: I have client who has been charged with indecent exposure. He is a severe alcoholic. He decided to get drunk and then strip down outside in his front yard. Just as he has finished undressing the school bus drove by and several children saw my client naked. Several outraged parents filed police reports and my client was charged with felony indecent exposure. He has a prior conviction. My client has completed inpatient rehab and aftercare. He attends AA meetings every week and seems to be committed to staying sober.

The problem with this charge is there in a mandatory registration as a sex offender for the felony charge. The ADA is willing to let him plead out to a lesser felony charge which would not require him to register. I have encouraged my client to take this matter to trial but he wants this to be over with. The ADA has also mentioned that she may be willing to allow him to plead out to several misdemeanor charges. I would like to know what charges would fit this factual basis. Any help is greatly appreciated.

Two OCDLA members suggested Outraging Public Decency as an alternate charge, a misdemeanor, not requiring registration.

One member suggested Disturbing the Peace as an alternate charge.

Three respondents advised having the State dismiss the current Information / charges and file a new Information reflecting the new charges.

Query: Can the State use misdemeanors from another State to enhance punishment on a Larceny from Retailer (21 O.S. Sec. 1731)? The Statute reads "convicted on the same offense" but if it is in another State, is it really the same offense?

Several OCDLA members responded to this message, including one respondent that is not sure on case law but would also look and see if the statute is the same from the enhancing state.

Another member offered the following, look at 47 O.S. 11-902(C)(2)... there is specific language... "...after a previous conviction of a violation of this section or a violation pursuant to the provisions of any law of another state prohibiting the offense.." Clearly, the legislature specifies when it INTENDS that predicates might INCLUDE same violations from other states... I would suggest the rule of statutory construction "expressio unius est exclusio alterius"... which is "the expression of one thing is to the exclusion of others." So... if the legislature SPECIFIES in certain instances OTHER STATE violations... then, when it does NOT... it could/should be presumed that the legislature DID NOT intend OTHER state violations. Simply an argument to be made.

One member instructs to review the published opinion in ***Dufries v. State***, 133 P.3d 887 (Okl.Cr.2006). I know that your case deals with misdemeanors, however the issue in ***Dufries*** dealt with the propriety of enhancing the defendant's punishment with two federal convictions from other jurisdictions. There might be some language in the opinion which might give you some additional ideas or direction.

Query: Does anyone have any ideas on reducing a Lewd Mol to a non-registerable felony? It appears that assault with intent causes registration now (even if it is not amended from a Lewd Mol) if it carries more than 2 years. So on 2 counts can I get 2 sentences of 18 months and still not have to register?

The member who inquired relays the following, person who hugs the kids outside their clothes. He is also strict and stops kids from necking. One girl files a complaint saying he touched her breast and he is admonished by his employer. He still hugs one kid outside her clothes and they move to fire him. He agrees to walk for neglect of duty, but not for moral turpitude. Employer's lawyer is an old colleague with ADA and one count is filed (I moved to recuse the DA for about 18 months to no avail even though the phone records showed collusion). Then great big investigation and another girl says he hugged me outside my clothes and touched my breast. I can try it, but my guy will never work in his field again and rightfully has trepidation about the risk.

I would have the original charge dismissed and expunged, but I need a new one. I cannot plausibly make it an Agg A&B, but while I am writing, I am thinking of assault with intent to commit Agg A&B. Thoughts?

One OCDLA member responds, your idea should work, but is much more specific than the generic charge ("assault with intent to commit a felony" under 21 O.S. Sec. 681) we frequently used back before the SOR was changed to eliminate the feasibility of simply reducing the charge within the original case.

OKLAHOMA LEGISLATIVE UPDATE

by

Curt Allen[1]

SB 137 *(Effective Nov. 1, 2011)*
57 O.S. 138 – Get an Associate's degree in prison? 100 days credit. Get a Bachelor's? 200 days credit.

SB 179 *(Effective Aug 25, 2011)*
Last year's "you can't sell glass tubes" law amended to allow sales of cigars in glass tubes

SB 282 *(Effective Nov. 1, 2011)*
57 O.S. 584 – people with out-of-state sex offenses must provide their local jurisdiction with certified copies of the "judgment and sentencing report" from the out-of-state case

SB 856 (*Effective Nov. 1, 2011)*
21 O.S. 1289.28

- It is illegal to try to get a gun dealer to transfer a firearm or ammunition if you know it would be illegal (unless you're law enforcement).
- It is illegal to give a gun dealer false information to deceive them about the legality of the transfer of firearm or ammunition (unless you're law enforcement).
- It is illegal to try to get a person to do any of the above illegal acts (unless you're law enforcement).

Felony, 0-5 years, $5,000 fine

HB 1249 *(Effective Nov. 1, 2011)*
21 O.S. 1835.2 – It is now trespassing if you don't get permission before retrieving your animals from another person's property

HB 1991 *(Effective Nov. 1, 2011)*
22 O.S. 1014 – removes requirement for 3-drug cocktail for death penalty – now all that is required is "a lethal quantity of drug or drugs"
22 O.S. 1015 – Director of DOC can invite however many personnel he wants to an execution; identity of all persons involved in the execution from supplier to executioner are confidential and are not subject to civil or criminal discovery.

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SB 406 *(Effective Nov. 1, 2011)*
21 O.S. 1380

- Extends 'no funeral picketing zone' from 1 hour before and after funeral to 2 hours before and after
- Extends 'no funeral picketing zone' from 500 feet to 1000 feet

HB 1672 *(Effective Nov. 1, 2011)*
22 O.S. 471.6 – when a drug court judge allows a drug court participant to drive a car while suspended or revoked by DPS, the suspension time determined by DPS continues to run (e.g., a 6 month suspension will not begin *after* one graduates from drug court)

HB 1358 *(Effective Nov. 1, 2011)*
22 O.S. 60.4 – incarceration time does not count towards a protective order's time limit
22 O.S. 60.19 – judge in a deprived action can issue P.O. against accused physical or sexual abuser, to remain in effect until the case is dismissed or the judge says so

HB 1439 *(Effective Nov. 1, 2011)*
21 O.S. 1289.25 – adds "place of business" to Oklahoma Self-defense Act

HB 1604 *(Effective Nov. 1, 2011)*
21 O.S. 1738

- Amends forfeiture law: adds "equipment" to items that can be forfeited (formerly, just vehicles)
- Adds vehicles or parts that have had identifying numbers removed, and stolen vehicle parts where the true owner cannot be identified to list of forfeitable property
- Allows the DA's cut of forfeiture to be used for 'any lawful expense' of the DAs office (formerly, money could only go to evidence fund, victim witness fund or reward fund)

HB 1736 *(Effective Nov. 1, 2011)*
56 O.S. 162.4 – DHS can investigate medicare fraud
56 O.S. 1005.1 – False or fraudulent receipt of or attempt to receive DHS benefits is a felony, 0-5 years, if the amount received is more than $5000, and misdemeanor, 0-3 months, if the amount is less than $5000. Attempting to obtain benefits by omitting information is a misdemeanor, 0-3 months.

HB 1798 *(Effective Nov. 1, 2011)*
63 O.S. 2-509 – making or attempting to manufacture any kind of hashish is a felony, punishable by 2-life, up to $50,000 fine

HB 1800 *(Effective Nov. 1, 2011)*
74 O.S. 150.5 – If authorized by the Director, OSBI can reveal confidential information to crime victims or homicide victims' family members
74 O.S. 150.37 – Switches forensic lab accreditation from American Society of Crime Laboratory Directors to American Board of Forensic Toxicology

HB 1382 *(Effective Nov. 1, 2011)*
21 O.S. 701.12 – expands aggravator from murder of prison *guard* to murder of prison *employee*.

SB 923 *(Effective Nov. 1, 2011)*
21 O.S. 856
- increases punishment for getting a minor to join or associate with a gang or gang member in order to commit any criminal act - from 0-1 years DOC and up to $3000 fine to 0-5 years and $5000 fine. Second of subsequent conviction punishment increased from 0-5 years to 5-10 years.
- Removes "transporting a weapon in, or discharging a weapon from, a boat" from the list of gang-defining crimes

21 O.S. 856.3 - committing a gang related offense (as defined in 21 OS 856) as either a member or prosepective member of a gang is punishable by an additional 5 years DOC
70 O.S. 5-146.1 – school employees shall notify the school's designated gang person if they have reason to believe a child is involved with gang activity. The designated gang person may contact law enforcement. Employees are granted civil and criminal immunity for reports made while exercising due care and acting in good faith.

HB 1347 *(Effective Aug 25, 2011)*
29 O.S. 9-111 through 9-114 - Wildlife Bail Procedure Act – brings wildlife bail more in line with 22 O.S. 1115 *et seq.* (on scene PR bond for minor traffic offenses)

SB 180 *(Effective Nov. 1, 2011)*
57 O.S. 627 – formerly, DOC could only outsource inpatient hospital services. Amendment allows DOC to outsource all health care services, equipment and products.

SB 446 *(Effective Nov. 1, 2011)*
21 O.S. 1021 – Public urination is no longer indecent exposure, is not a sex offender registerable offense, and should be punished under 21 OS 22.

HB 1549 *(Effective Nov. 1, 2011)*
21 O.S. 1040.56 – children depicted in child pornography can sue possessors, producers, promoters, of child porn for actual, special, and punitive damages plus attorney's fees. Statute of limitations is 3 years after age 18, end of criminal case, or after knowledge of existence of child porn. Does not apply to Law enforcement, forensic examiners, DAs and child advocacy employees (but not defense counsel) who possess child porn in the course of employment.

SB 347 *(Effective Aug 25, 2011)*
11 O.S. 1-110 – Municipal officers or employees (including police officers) who plead guilty or nolo or are convicted of "a felony for bribery, corruption, forgery or perjury or any other crime related to the duties of his or her office or employment" lose their retirement benefits. Deferred sentences only forfeit benefits until the sentence is completed. Does not affect employee contributions or benefits vested before effective date of the act. Act applies even if officer or employee pleads or is convicted after they leave employment.

SB 324 *(EMERGENCY LEGISLATION – effective May 10, 2011)*
63 O.S. 4210 – removes age limits for operating a motor or sail boat.
63 O.S. 4210A – drops boating DUI limit from .10 to .08.
63 O.S. 4210.9 – implied consent law for boating DUI
63 O.S. 4210.10 – blood/ urine /breath/ saliva draw rules for boating DUI
63 O.S. 4210.12 – no right of confrontation regarding autopsies or lab reports if furnished within 5 days of a hearing (boat DUI version of 22 OS 751, except it removes the "any hearing *prior to trial*" caveat)
63 O.S. 4210.13 – applies road DUI presumptions to boat DUIs

HB 2131 *(Effective Nov. 1, 2011)*
22 O.S. 988.2 – Community Sentencing open to anyone who scores other than 'low' on the LSI (was only for 'moderate' score); 85% crimes are eligible for community sentencing (with DA's consent)
22 O.S. 988.18 – only community sentencing folks with one or more prior are eligible for state funded community punishments (formerly, only those who scored in the moderate range were eligible for state funded community punishments)
57 O.S. 332.1B –establishing minimum requirements for parole board members –

- Bachelors in social science +5 years criminal justice experience
- Masters + 4 year's criminal justice experience
- J.D. + 3 year's criminal justice experience

57 O.S. 332.16 – if the Governor does not act on a parole recommendation within 30 days of receipt, the recommendation is deemed granted.
Except: all crimes in 57 O.S. 571, plus:

- Aggravated drug trafficking 63 O.S. 2-415
- Racketeering 22 O.S. 1403
- Offenses of public corruption such as bribery of public officials 21 O.S. 381 or 382
- Embezzlement of public money 21 O.S. 1451 et seq. or 19 O.S. 641
- Failure to pay and collect tax 68 O.S. 1361 or 2385.3
- Conspiracy to defraud the state 21 O.S. 424
- Child pornography 21 O.S. 1021.2 or 1021.3 or 1024.1
- Child prostitution 21 O.S. 1030
- Abuse of a vulnerable adult 43A O.S. 10-103
- Terrorism crimes, including biochemical assault 21 O.S. 1268
- Trafficking of children 21 O.S. 865 et seq.
- Trafficking of humans 21 O.S. 748 et seq.

57 O.S. 510.9 – Expands DOC's electronic monitoring program – only 90 days of initial incarceration is required for eligibility (was 180 days), and inmates with more than 11 months to go on a less than 5 year sentence who were initially placed at minimum security level are also eligible (formerly, anyone with more than 11 months to go was ineligible)

HB 1970 *(Effective Nov. 1, 2011)*
63 O.S. 1-729a – adds any "abortion-inducing drug" to RU-486 regulations, there must be an FDA approved process for an abortion drug and the procedure must be followed, doctors must first determine how far along the pregnancy is and verify that the pregnancy is in the uterus

HB 1355 *(Effective Nov. 1, 2011)*
21 O.S. 1151a – one loses the right to control the disposition of a body if you: are charged with killing them, are estranged from them, or wait more than 5 days after they are dead (or 3 days after you're told they are dead) to say anything. (Then the funeral director gets to decide)
69 O.S. 1736 – If you are in a funeral procession for a service member killed in the line of duty in a combat zone or who died of wounds sustained in the same, you can apply to have any tolls paid reimbursed

SB 919 *(Effective Nov. 1, 2011)*
59 O.S. 353.24 – possessing or distributing non-scheduled prescription dangerous drugs that have been obtained by a forged prescription is a misdemeanor, 0-1 year in jail and 0-$1,000 fine. Second offense is a felony, 0-5 years, 0-$2000 fine.
63 O.S. 2-204 – adds 128 more synthetic marijuana variants to Schedule I
63 O.S. 2-206 – adds Codeine, Hydrocodone, Morphine, Remifentanil, Sufentanil and Nabilone to Schedule II
63 O.S. 2-208 – adds Buprenorphine to Schedule III and clarifies that Hydrocodone (if combined with another active ingredient) is Schedule III
63 O.S. 2-210 – adds Estazolam, Eszopiclone, Midazolam, Modafinil, Zaleplon and Zolpidem to Schedule IV
63 O.S. 2-212 – adds any detectable amount of pregabalin to Schedule V
63 O.S. 2-415 – drops aggravated trafficking amount of cocaine from 1 pound (454 grams) to 450 grams; drops aggravated trafficking of meth from 1 pound to 450 grams. Trafficking LSD changed from 50 dosage units to 1 gram or more of a mixture or substance containing a detectable amount of LSD. Amount where LSD Trafficking fines go up changed from 1000 dosage units to 10 grams or more of a mixture or substance containing a detectable amount of LSD. Trafficking PCP drops from 1 ounce (28 grams) to 20 grams. Amount where PCP Trafficking fines go up changed from 8 ounces (227g) to 150 grams (5 ¼ oz.)
63 O.S. 2-701 – adds people who have out-of-state convictions and deferred sentences to Meth offender registration act

SB 637 *(EMERGENCY LEGISLATION – effective May 16, 2011)*
59 O.S. 5017 – you cannot be a commercial pet breeder if you've been convicted of a violent crime (57 O.S. 571) or of an Oklahoma RICO felony

HB 1234 *(Effective Nov. 1, 2011)*
20 O.S. 3005 – with a defendant or juvenile's consent, courts can hold hearings via videoconferencing between the court and DOC or an OJA facility. This includes but is not limited to sentence reviews, PCR hearings, delinquent and deprived actions, custody and adoption hearings, commitment proceedings and extradition proceedings

HB 2136 *(Effective Nov. 1, 2011)*
10A O.S. 1-2-102 – requires DHS to more thoroughly investigate reports of child abuse or neglect if the family has been the subject of a deprived action or has had three or more DHS referrals
10A O.S. 1-4-806 – before returning a child to a parent for a trial reunification, everyone in the household has to undergo a criminal background check
10A O.S. 1-4-807 – in a deprived action review hearing, the judge, DA, counsel for parents, counsel for child and GAL are to receive all service provider progress reports and critical incident reports
10A O.S. 1-6-101 – a child's social record shall *not* include service provider progress reports and critical incident reports
10A O.S. 1-6-105 – if a person responsible for a child has been charged with a crime resulting in the death or near death of the child, the circumstances of the death/near death investigation and all other investigations involving the child or any other child in the household shall be disclosed to the public (according to the procedures and restrictions already in the statute) (formerly, only information on investigations within 3 years before and one year after the death or near death could be released)

SB 285 *(Effective Nov. 1, 2011)*
21 O.S. 1835 – entering the grounds of the Governor's mansion except where entry would be expected is trespassing. The grounds are not required to be posted. $0-500 fine or 30 days to 6 months in jail.
21 O.S. 282 – it is now illegal for any person or persons to attempt to, conspire to, or to

- Enter or remain in any area of a building or grounds designated as restricted where the Governor, Governor's family, Lt Governor or other person being provided protection by DPS is or will be temporarily visiting. The governor can designate any person to receive DPS protection.
- Enter or remain in any area of a building or grounds designated as restricted in conjunction with an event designated as a special even of state or national significance
- Enter or remain in any area of a building or grounds used as above with the intent to disrupt the orderly conduct of government business or official functions or engage in disorderly or disruptive conduct in close proximity to those buildings or grounds.
- Obstruct or impede entrance or exit from a building or grounds used as above.
- Engage in any acts of physical violence against persons or property at a building or grounds used as above
- If a person uses or carries a deadly or dangerous weapon or firearm while doing so, *or* if any person receives great bodily injury (21 O.S. 646) it is a felony, 0-10 years and 0-$1,000 fine.
- In all other cases, misdemeanor, 0-1 year jail, 0-$500 fine

HB 1322 *(Effective Nov. 1, 2011)*
21 O.S. 1451 – if you are convicted of embezzling from an estate while acting in a fiduciary or administrative capacity, you lose all benefit/share/portion of the estate to which you might otherwise be entitled

HB 1079 *(Effective Nov. 1, 2011)*
17 O.S. 710.6 – detailed smart grid/smart meter utility usage information can be obtained by third parties "as required by law," pursuant to a warrant, subpoena duces tecum "or other court order," by consent, or in an emergency

HB 1271 *(Effective Nov. 1, 2011)*
43A O.S. 1-103 – RE: definition of "person requiring [mental health] treatment," modifies the definition of "risk of harm to self or others;" Removed the 'homeless aren't a risk to themselves or other just by being homeless" provisions and added that prior mental health or substance abuse history can be used to determine whether a person is a risk to themselves or others (but the history cannot be the sole reason)

HB 1507 *(Effective Nov. 1, 2011)*
47 O.S. 6-205 – adds additional violations that will get your driver's license revoked:
- "Reckless driving without regard for the safety of others"
- Failure to obey traffic light or stop sign that results in great bodily injury to another
- Failure to stop for or remain stopped for school bus that is loading or unloading children

47 O.S. 11-903 – changes minimum fine for vehicular negligent homicide from $100 to $1000. If the person has been convicted of any traffic offense in the three years before the negligent homicide, the fine is doubled. Also requires violator to take a driver improvement/defensive driving class.

HB 2184 *(Effective Nov. 1, 2011)*
56 O.S. 3051 – Directs DHS to figure out, by Jan. 1, 2012, how to "change or discontinue" its residential care facilities for persons with moderate to profound mental retardation

HB 1211 *(Effective Nov. 1, 2011)*
37 O.S. 8.2 – expands "don't let underage people drink alcohol at your place" law to include 3.2 beer, now punishes allowing underage possession of alcohol with misdemeanor and $500 fine for first offense, misdemeanor and $1000 fine for second offense, and felony, 0-5 years and/or $2500 fine for third and greater offense (formerly applied only to alcohol (not 3.2 beer) and to situations where great bodily injury or death occurred)

HB 1676 *(Effective Aug 25, 2011)*
47 O.S. 752 – If convicted, the costs for blood, breath, saliva, or urine tests to determine drug or alcohol intoxication will be added to a defendant's court costs.

HB 1652 *(Effective Nov. 1, 2011)*
21 O.S. 1277 – you can now concealed carry on Vo-Tech campuses (with the school's consent)

SB 250 *(Effective Nov. 1, 2011)*
63 O.S. 942 – spouse and relatives within one degree of consanguinity can get copies of an M.E.'s report
63 O.S. 942a – spouse and relatives within one degree of consanguinity can appeal the findings of the M.E. within two years of the report

SB 529 *(Effective Nov. 1, 2011)*
47 O.S. 6-111 – if you have an ignition interlock as the result of a DUI, you have to get a new driver's license that says "Interlock Required"
47 O.S. 6-205.1 – an ignition interlock is now required if you get a modification to your DUI license revocation
47 O.S. 6-212.3 – if your license is revoked for DUI, you must have an ignition interlock installed:

- For a first revocation, if you refused the test or blew more than .15, for 18 months after your license is reinstated.
- Second revocation, for 4 years
- Third or more, for 5 years.

SB 852 *(Effective July 1, 2012)*
57 O.S. 590.1 – knowingly allowing sex offenders to live together in an individual dwelling is punishable by:

- 1st offense: misdemeanor, 0-$500 fine
- 2nd offense: misdemeanor, 0-1 year in jail, 0-$2500 fine
- 3rd and more offense: felony, 0-5 years, $2500-$5000 fine

SB 952 *(Effective Nov. 1, 2011)*
21 O.S 13.1 – adds "Aggravated assault and battery upon any person defending another person from assault and battery" to list of 85% crimes
21 O.S. 644

- creates Domestic assault **OR** battery with a dangerous weapon, felony, 0-10 years or 0-1 year in county jail
- creates *shooting* with a deadly weapon (domestic), felony, 0-life
- 21 O.S. 51.1 now applies to Domestic A&B 2d in the presence of a child

21 O.S. 650

- punishment for aggravated A&B on law enforcement or corrections officer increased from 0-5 years to 0-life
- creates A&B on law enforcement or corrections officer that results in maiming – 5-life, 0-$5000 fine

21 O.S. 759 – punishment for maiming increased from 0-7 years to 0-life.

OKLAHOMA COURT OF CRIMINAL APPEALS UPDATE

(An update of the published cases since May 2011)

by

James L. Hankins[1]

Pryor v. State, 2011 OK CR 18 (June 23, 2011): **Prosecutorial Misconduct; Improper Argument**: Pryor was tried by jury in Tulsa on a count of First Degree Manslaughter. As the Court stated, it "is a rare case in the jurisprudence of this Court that a prosecutor's misconduct during closing argument is found to be so egregiously detrimental to a defendant's right to a fair trial as to require reversal. This is such a case." The prosecutor expressed his own anger and sarcastically ridiculed the defense team as having turned the courtroom into a "bizarre world" where "nothing makes sense" and the "rules of right and wrong" and "fairness" do not apply, and injected his own beliefs and emotions into the proceedings and invited the jurors to do likewise. Next, the prosecutor told the jurors that if they "have been drinking the Kool Aid" then they would probably walk her. A different prosecutor then argued that Pryor attempted to influence the police investigation through people she knew, although there was no evidence of this. Finally, the prosecutors continued to argue manipulation by the defendant, ridiculed the judge's evidentiary rulings to allow biographical information in, and suggested to the jury that the fix was in against the State by unnamed powerful persons. REVERSED AND REMANDED FOR A NEW TRIAL.

Nesbitt v. State, 2011 OK CR 19 (June 29, 2011): **Suspended Sentences**: In this revocation case, Nesbitt lodged an appeal attacking the additional court costs tacked on as a result of the revocation proceedings. In an odd opinion, the Court dismissed the appeal because the question of costs is not within the scope of revocation appeals; but, the Court then explained at length the reasons for the dismissal and the scope of revocation appeals. Judge Lumpkin characterized everything after the words "appeal dismissed" as dicta.

State v. Mosley, 2011 OK CR 20 (July 19, 2011): **Double Jeopardy**: In this Trafficking case out of Cleveland County, a police officer delivered a harpoon from the stand concerning his conversation with Mosley wherein the officer testified that Mosley made statements about prior arrests. The officer testified this way, even though there was a pre-trial ruling excluding such evidence. The defense objected and asked for a mistrial, which was granted without any comment or objection from the State. The issue in the case developed subsequent to the mistrial when the State sought to re-try the case. Judge Candace Blalock dismissed the matter based on double jeopardy grounds, stating that the prosecutors were negligent for not telling the officer that he could not testify in that manner. The State appealed, and in this opinion, wins the right to re-try Mosley because of the nearly insurmountable legal standard that applies in these cases. If the accused requests the mistrial, as Mosley did here, he must show intent on the part of the prosecutors to create a mistrial (*i.e.*, the accused must be "goaded", or intentionally provoked, into moving for a mistrial).

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Coddington v. State, 2011 OK CR 21 (August 23, 2011): **Death Penalty (State Cases)**: In this death penalty re-sentencing case out of Oklahoma County, the application for post-conviction relief is denied over several claims relating to IAC for failing to interview jurors (who gave inaccurate answers during *voir dire*) and failure to raise various claims. NOTE: the Court held that compliance with the ABA Guidelines is not mandatory, or that non-compliance is *per se* IAC.

State v. Davis, 2011 OK CR 22 (August 30, 2011): **Pseudoephedrine**: Davis and two other defendants were charged with misdemeanor counts of Purchasing in Excess of Nine Grams of Pseudoephedrine with a Thirty Day Period. The Hon. Michael Stano (Payne County) sustained the demurrer and the State appealed on a reserved question of law dealing with whether the statute requires that the "real-time log system" for tracking purchases be in place before citizens can be prosecuted. The Court held that the implementation of the log is not a condition precedent to enforcement of the statute.

Faulkner v. State, 2011 OK CR 23 (September 7, 2011): **Conflict of Interest**: This is one of the most bizarre cases to come along in a while. Maxey Parker Reilly was an attorney in Okfuskee County. She represented Faulkner in a guardianship case in which he sought custody of a child. Eighteen months later, Reilly was an assistant district attorney and the State charged Faulkner with Child Sexual Abuse of the child subject to the guardianship. Although Reilly "recused" herself from the case, she remained actively involved in it and appeared at the pre-trial conference and argued on behalf of the State. During the trial she was depicted in a videotape questioning the complaining witness and telling the witness that she did not represent Faulkner anymore and that now she "puts criminals in jail." She also met with the prosecutor who tried the case and conveyed confidential communications in order to help convict Faulkner. The error was so great in this case that the Court not only found plain error requiring reversal, but also referred Reilly to the Bar Association.

A.R.M. v. State, 2011 OK CR 25 (September 9, 2011): **Youthful Offender**: A.R.M. was charged as a Youthful Offender with Shooting with Intent to Kill and Possession of a Firearm. The State filed a motion for adult sentencing and the Hon. Larry Jones (Oklahoma County) granted the motion. In this opinion, the Court affirmed, holding that the requirement that the OJA relinquish custody of Youthful Offenders once they reach 18 years and five months is not contrary to the purpose of the Act, there was no unnecessary delay, and that State met its evidentiary burden. NOTE: This case was issued as an unpublished opinion originally, but the State moved to publish and this motion was granted at *A.R.M. v. State*, 2011 OK CR 24 (September 8, 2011).

Mitchell v. State, 2011 OK CR 26 (October 13, 2011): **Death Penalty (State Cases)**: Capital murder appeal out of Oklahoma County (child abuse murder) where the conviction is affirmed, but the death sentence is vacated. The issues raised included: 1) denial of his motion to suppress statements (Mitchell re-initiated contact); 2) Joinder of counts (no prejudice); 3) improper *voir dire* from the trial court and prosecutor defining reasonable doubt (no plain error); 4) a *Batson* claim involving two minority jurors (no *prima facie* case of discrimination shown); 5) instructions related to jury notes (no plain error); 6) limitations on cross-examination (it was not relevant); 7) improper admission of miscellaneous pieces of evidence; 8) sufficiency of the evidence on a count of child abuse; 9) a challenge to the jury instructions regarding "unreasonable force"; 10) failing to instruct that prior inconsistent statements of a witness could be used as substantive evidence of guilt or innocence; 11) refusal to accept the plea/sentencing agreement reached after the first stage guilty verdict. Judge Virgil Black refused to accept an agreement that called for LWOP because Mitchell refused to say that he was guilty. This was not necessary since Mitchell had already been found guilty. However, the Court seemed to find an "interests of justice" reason to vacate the death penalty here, noting that "The law should not require a defendant to defend himself at trial against a death sentence which the State no longer seeks." 12) other claims regarding IAC, prosecutorial misconduct, and responses to the jury questions about the meaning of LWOP.

Leftwich v. Alcorn, 2011 OK CR 27 (October 13, 2011): **Extraordinary Writs**: This opinion deals with the prosecution of Deborah Leftwich and whether the Speech and Debate clause of the Oklahoma Constitution precludes her criminal prosecution. This issue had been bandied about prior to trial via extraordinary writs in the OCCA and the Oklahoma Supreme Court. It made its way back to the OCCA which declined to assume jurisdiction as the issue was premature and had not been developed fully in the court below.

OKLAHOMA COURT OF CRIMINAL APPEALS UPDATE

(An update of the unpublished cases since May 2011)

by

James L. Hankins[1]

Jeffrey Eugene Rowan v. State, No. F-2009-385 (Okl.Cr., June 3, 2011) (unpublished): **Newly Discovered Evidence; Impeachment**: Rowan was tried and convicted by jury in Pittsburg County of Child Sexual Abuse. He was sentenced to 35 years. While his case was pending on direct appeal, he filed a motion for a new trial (when a case is pending appeal, these motions are filed directly in the Court of Criminal Appeals, not the district court). In this 3-2 opinion, the Court GRANTED the motion and remanded for a new trial, even though Rowan had apparently confessed(!!) The basis for the new trial was that it came to light that **STACY SCROGGINS**, a physician's assistant who testified for the State as a rebuttal witness and who examined the minor complaining witness, had her license suspended for a drug problem and was being treated at an inpatient rehab facility. The Oklahoma Board of Medical Licensure and Supervision also issued a report that Scroggins had been on probation and had forged and fraudulently wrote prescriptions for her personal use. These activities occurred during the period that she examined the minor complaining witness and testified at trial. The majority held that this newly discovered evidence was material impeachment. **NOTE**: Judges Lumpkin and Smith dissented on the basis that the newly discovered evidence was merely impeachment and not material enough to change the outcome of the trial. **NOTE**: This evidence came to light when a prosecutor in Pittsburg County informed defense counsel (who then informed appellate counsel). Although the opinion does not name the prosecutor, it is noteworthy that at least one prosecutor in Pittsburg County remembered his *Brady* duty.

Tashawn R. Wilson v. State, No. F-2010-662 (Okl.Cr., June 13, 2011): **Deferred Sentences**: Wilson violated his deferred sentences and was sentenced to consecutive life terms which, on appeal, he argued were excessive. The Court held that he failed to preserve this claim because he did not file a motion to withdraw his pleas. I include this opinion because this particular **procedural trap** happens with some regularity. In *all* guilty plea cases, if you wish to appeal the excessive nature of the sentence (or any other aspect of the case apart from the validity of the acceleration order), you must do it via the certiorari procedure, which means that you must file a motion to withdraw the plea within ten days of sentencing. If you do not, then all issues are waived except to attack the validity of the acceleration order.

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Christopher Lee Anthony v. State, No. RE-2010-512 (Okl.Cr., June 22, 2011) (unpublished): **Indigents**: This is another one of those cases where an indigent defendant bonds out (a $10,000.00 bond in this case) and the trial judge strikes the OIDS attorney and holds a revocation hearing where the defendant appears pro se. The Court reiterated the trial courts cannot deny a court-appointed attorney simply because the defendant posted bond. Posting bond simply creates a rebuttable presumption that the defendant is not indigent. The trial judge in this case was the Hon. Curtis L. DeLapp (Nowata County).

James Lyman Mahaffey v. State, No. F-2010-267 (Okl.Cr., July 19, 2011) (unpublished): **Prosecutorial Misconduct**: Mahaffey was convicted by jury in Grady County of Assault and Battery w/Deadly Weapon, Kidnapping, and Possession of a Firearm (all AFCF). One could tell that Mahaffey, who elected to proceed *pro se*, did not connect to the jury because it indicated on the verdict form that it wanted the sentences (Life, 10 years, and 6 years) to be served consecutively. Judge Richard G. Van Dyck obliged. The Court found that the prosecutor (Leah Edwards) committed misconduct by commenting on Mahaffey's failure to testify (telling the jury, "I did not hear his side of the story"), but held that this was harmless error. In addition, Mahaffey wrote some letters to the complaining witness which reference Bible verses, which were used by the prosecutor during second stage closing arguments when she quoted the verses and made other biblical references. This was improper since, although Mahaffey referenced the cite of the verses in his letters, he did not print out the actual verse; thus, the content of the Bible verse he mentioned in his letters would not have been accessible to the jury. Third, the prosecutor told the jury that "life" means 85% of 45 years, which is also error (the prisoner does not get out after serving 85% of the sentence; rather, he is only *eligible* for parole after that time). The Court held that these three instances of prosecutorial misconduct impacted the sentence (per the jury's recommendation that the sentences be served consecutively). HELD: The convictions were affirmed, but the sentences were ordered to run concurrently.

Anthony Frank Monaco v. State, No. C-2010-260 (Okl.Cr., July 20, 2011) (unpublished): **Guilty Pleas (State)**: Monaco entered blind pleas of guilty to ten counts of Child Sexual Abuse in Canadian County. The Hon. Jack D. McCurdy sentenced him to a total of 35 years. Monaco sought to withdraw his pleas based upon the fact that there was not allegation or factual basis that he was a "person responsible" for the complaining witness. This is another case where the same counsel who did the plea also represented the defendant at the hearing on the motion to withdraw the plea. In an unusually detailed and footnote-laden opinion for an unpublished case, the Court granted certiorari and remanded to the district court for appointment of new counsel to conduct the hearing on the motion to withdraw the plea.

Shawn Leroy Harger v. State, No. C-2010-1033 (Okl.Cr., July 21, 2011) (unpublished): **Guilty Pleas (State)**: Harger entered a blind plea of no contest in Garfield County to a count of Child Abuse, with the understanding that the State would stand on 20 years. Judge Ronald G. Franklin sentenced Harger accordingly. Although the reasons are a little sketchy, Harger moved to withdraw his plea and asserted that he is entitled to effective assistance at the hearing on the application to withdraw. The Court agreed with this and granted relief, apparently on the basis that trial counsel simply stood on the motion without developing any additional argument or evidence to support the allegations in the motion.

Clinton Riley Potts v. State, No. F-2010-2 (Okl.Cr., July 21, 2011) (unpublished): **Prosecutorial Misconduct (*Brady* Claims)**: Potts was convicted of First Degree Murder by jury in Muskogee County before the Hon. Thomas H. Alford, and sentenced to LWOP. In an unusual maneuver, after the initial briefing and motion for an evidentiary hearing filed by Potts alleging *Brady* and IAC claims, the State agreed that an evidentiary hearing was necessary. The Court stayed further briefing and remanded for an evidentiary hearing, at which the parties stipulated that the prosecution had in its possession "information about a key prosecution witness which it should have disclosed to the defense but failed to do so" (the fact that the State's star jailhouse snitch had received benefits in exchange for his testimony in the form of lenient treatment with regard to his own pending criminal matters). To their credit, the trial judge and the Assistant Attorneys General (E. Scott Pruitt & Donald D. Self) conceded the IAC and *Brady* errors, and the Court reversed and remanded for a new trial. The prosecutors listed were: FARLEY WARD & JEFF SHERIDAN.

Michael Lee Albright v. State, No. F-2010-798 (Okl.Cr., July 21, 2011) (unpublished): **Demurrer**: Albright was convicted at a bench trial of Possession of a Stolen Vehicle and Eluding (AFCF) in Tulsa County before the Hon. Tom C. Gillert. Albright appealed on the basis that the trial court erred in overruling his demurrer at the conclusion of the State's case. The Court affirmed, but I included this case because it illustrates an appellate quirk that might impact trial strategy. When the State rested, Albright demurred. However, when the judge overruled the demurrer, Albright presented additional evidence in the defense case. When this happens, the appellate court will ***not*** consider the State's evidence only; rather, it will consider all of the evidence presented (even the evidence presented by the accused) and treat such a claim as attacking the sufficiency of the evidence. This means that, at the conclusion of the State's case, trial lawyers must determine whether the State has made its case. If it has not, then it might be wise to forego further evidence if you want to attack the case based solely on the State's evidence.

Michael Anthony Birch v. State, No. F-2009-344 (Okl.Cr., July 29, 2011) (unpublished): ***Voir Dire*; Court/Juror Communications**: This Lewd Acts case was tried to a jury in Oklahoma County before the Hon. Jerry Bass. Although not a winner, it presents a couple of interesting issues. The first is that *voir dire* was not reported. To the appellate lawyers, this is *highly* annoying. I never understood why trial lawyers waive it. *Voir dire* is a good source of reversible error (*e.g.*, *Batson* issues, the preemptive *Allen* charge issue where Judge Elliott was reversed a few times, etc.). *Voir dire* is required to be reported unless the parties consent otherwise. If it is not reported, then the only way to reconstruct the record is through the cumbersome procedures of Rule 2.2(C) which involve affidavits or stipulations, all very poor substitutes for a stenographic record. Since Birch failed to comply with Rule 2.2(C) the Court had nothing to review. Claim denied. The second issue concerns communications between the trial judge and a juror for sentencing purposes. The Court found no error where the trial court considered a conversation with a juror, in addition to the evidence at trial, in determining the sentence (in this case, all counts consecutively).

State v. Vysean Leondre Embry, No. S-2010-872 (Okl.Cr., July 29, 2011) (unpublished): **Jury Instructions (Drug Proceeds)**: Embry was charged in Tulsa County with a single count of Acquiring Proceeds from Drug Activity under 63 O.S. § 2-503.1. The Hon. Kurt Glassco sustained the motion to quash based upon insufficient evidence. The State appealed and convinced the Court that the evidence at preliminary hearing was sufficient. The Court noted that there is no Uniform Jury Instruction on this crime. The Court presented the elements of the crime which would form the basis a jury instruction if you have one of these cases.

Douglas H. Polk, Jr., v. State, No. C-2010-765 (Okl.Cr., August 16, 2011) (unpublished): **Guilty Pleas (State); Waiver**: Polk entered blind pleas of guilty to a string of sex and violent crimes before the Hon. Tom C. Gillert in Tulsa County, who ordered consecutive life sentences. Polk was mis-advised of the sentencing range on several counts, but the Court held that the error was harmless because Polk entered the blind plea with an understanding that he was an unlikely candidate for a minimum sentence because the district court indicated that he would be going to prison for a "long stretch" and the prosecutor recommended the maximum on all counts, arguing that Polk needed to breathe "his last breath behind bars where he [could] not violate another child ever again." The defense strategy was to hope for concurrent sentences. However, the Court found merit in his double punishment claim regarding a count of Rape and a count of Lewd Molestation based upon the same conduct. The act of luring the child and the act of unlawfully looking upon her charged in one of the counts was part of the same acts of raping the child and kidnapping as charged in other counts. Unfortunately for Polk, this error only resulted in one count being reversed. NOTE: The State argued waiver of the issue because it was not raised below. But, the Court did not find a waiver, noting in footnote 2 that the Court has reviewed double jeopardy claims in many certiorari appeals in the past (and citing cases).

Sheila Ingram v. The City of Oklahoma City, No. M-2009-1125 (Okl.Cr., August 24, 2011) (unpublished): This case arises out of the Municipal Court of Oklahoma City where Ingram was cited with Harboring a Dangerous Animal. She appeared *pro se* before the Hon. M. Fred Austin who apparently elected to have a trial, upon which she was found guilty. In this opinion, the Court REVERSED because the City failed to give her notice that the hearing she attended was for the purposes of trial rather than for arraignment. This violated Due Process. The problem is that the citation form just informed her that she needed to show up for court at a certain date and time, but it did not indicate the nature of the court date.

Amanda Moncella Thompson v. State, No. F-2009-648 (Okl.Cr., August 31, 2011) (unpublished): **Deferred Sentences (Acceleration)**: Thompson pled guilty to First Degree Manslaughter in Marshall County and was given a deferred sentence. Thereafter, the State filed a motion to accelerate and she stipulated to it. The Hon. Richard A. Miller ordered a PSI and accelerated sentencing, ordering Thompson to a whopping 70 years, with all but the first 25 years suspended. On appeal, the State asserted that review was limited because Thompson did not file a certiorari appeal and seek to withdraw her plea. Thompson asserts that she was prevented from seeking a petition for writ of certiorari because the trial court failed to inform her at the time her sentence was accelerated that she had the right to withdraw her guilty plea. The Court agreed. The trial court telling the client that she has the right to appeal is not enough; the court must tell the client that she has a right to seek to withdraw her plea.

Antonio Catalino Myrie, Jr., v. State, No. F-2009-1142 (Okl.Cr., September 1, 2011) (unpublished): **Continuance; Joinder**: Myrie was convicted by jury in the courtroom of the Hon. William C. Kellough (Tulsa County) of several property crimes, including KCSP, Arson, and Burglary. REVERSED because the trial court refused to grant a continuance so that the indigent Myrie could obtain a copy of the preliminary hearing transcript in order to prepare for trial. In addition, the trial court erred in joining multiple dissimilar criminal counts which resulted in inadmissible "other crimes" evidence. NOTE: This was a 3-2 decision with Judge A. Johnson and Judge Lumpkin, dissenting (they would require a showing of prejudice).

Joe Reaner Strong v. State, No. F-2009-1181 (Okl.Cr., September 1, 2011) (unpublished): **Jury Instructions (Lesser Included)**: Strong was convicted by jury in Okmulgee County of Second Degree Felony Murder when he drove to Tulsa to pick up his wife, leaving his two-year-old grandson asleep at home. The boy awoke, found some matches, started a fire, and subsequently died from smoke inhalation. REVERSED because the trial court (the Hon. John Maley) denied his requested instruction on the lesser offense of Second Degree Manslaughter (*i.e.*, mere negligence rather than child neglect).

Darren Casey Wilkes v. State, No. C-2011-51 (Okl.Cr., September 2, 2011) (unpublished): **Guilty Pleas**: Wilkes plead no contest to a count of Rape in the Second Degree in Tulsa County and sentencing was delayed pursuant to the Delayed Sentencing Program for Young Adults, but Wilkes was not accepted into the program (because of an error in the paperwork which reflected that he pled to a crime that made him ineligible when in fact that count had been dismissed for the purpose of allowing him into the program). Wilkes filed a motion to withdraw his plea which was denied by the Hon. Kurt G. Glassco. The Court held that Wilkes is entitled to withdraw his plea since it was predicated on acceptance into the DSPYA and he was not accepted.

Thomas D. Ranes v. State, No. PC-2011-362 (Okl.Cr., September 6, 2011) (unpublished): **State Post-Conviction (Newly Discovered Evidence)**: This case deals with a denial of post-conviction relief out of Tulsa County by the Hon. William Musseman, Jr. Ranes was on probation for a drug case when he was arrested on another drug case. The State prosecuted him on the new case and sought to revoke probation on the old one. Ranes entered a plea agreement on both cases in which he pled no contest on the basis that "the weight of the testimony of the officers involved would outweigh that of my own." As it turned out, all four of the Tulsa police officers involved in his arrest were subsequently indicted on drug charges or were disciplined for falsifying evidence in other cases. Ranes then filed for post-conviction relief on the basis that this information constituted evidence of material facts, not previously presented and heard, that would require vacation of the conviction and sentence. Judge Musseman denied relief on the basis that the no contest plea should be treated as a guilty plea that in effect waived all other issues. The Court held: 1) the Post-Conviction Procedure Act does apply in cases like this one that were no contest pleas that raise an allegation of newly discovered evidence (NOTE: the Court did not reach the question whether this would be true in a guilty plea case); and 2) Ranes is entitled to a remand in order to show whether he meets the criteria under 22 O.S. § 1080(d).

Joshua Clifton Johnson v. State, No. F-2010-583 (Okl.Cr., September 9, 2011) (unpublished): **Impeachment**: Johnson was convicted by jury in Stephens County of Robbery in the First Degree. The Court affirmed the conviction and sentence, but the case is notable for the discussion concerning impeachment of a witness with *pending criminal charges* (not convictions). The Court stated the general rule that *arrests* may not be used to impeach the credibility of a witness, and that *pending charges* are not the same as convictions. HOWEVER, a witness may be cross-examined about anything to show bias or prejudice. The Court stated that questions regarding a pending charge may be admissible if it goes to show the bias of a witness.

Donald James Galbreath v. State, No. F-2010-142 (Okl.Cr., September 14, 2011) (unpublished): **Drug Court (Methods of Appeal)**: This case is not a winner, but it outlines clearly the appellate procedures available in a drug court case where the sentence is accelerated and a conviction is imposed. Appellate proceedings are sometimes confusing in these cases (and also in acceleration of deferred sentences), but this opinion sets forth the available options and appellate procedures.

Janice D. Caswell v. State, No. C-2010-1139 (Okl.Cr., September 23, 2011) (unpublished): **Guilty Pleas (State)**: Caswell entered a no contest plea to False Personation in LeFlore County, but later filed a motion to withdraw it. No hearing was held within the 30-day time frame established under Rule 4.2(B) of the Rules of the Oklahoma Court of Criminal Appeals. The trial court held that this time frame was jurisdictional and denied the motion without a hearing. The Court held that this interpretation of the rule was erroneous and remanded the matter for an evidentiary hearing on the motion.

Lonnie Sie Chance v. State, No. F-2010-1123 (Okl.Cr., September 23, 2011) (unpublished): **After Formers (Pen Packs)**: Chance was convicted of First Degree Burglary and Possession of Drug Paraphernalia (AFCF x 2) in Garfield County and sentenced to thirty years. The Court modified the sentence to twenty years because of introduction of "unmistakable improper references to the pardon and parole system" through a "pen packet" which was exacerbated by the prosecutor's argument to the jury that this information could be used to determine sentencing. In addition, the case was remanded for a proper determination of restitution.

Karen Deborah Smith v. State, No. C-2010-1059 (Okl.Cr., September 23, 2011) (unpublished): **Guilty Pleas (State)**: This is a case where trial counsel failed to inform the client of the applicability of the 85% Rule prior to entering the plea. The same lawyer also represented client at the hearing on the motion to withdraw the plea (and he told the trial court this). However, counsel made no other advocacy on her behalf. The Court granted certiorari and remanded to the trial court for a proper, adversarial hearing on the motion to withdraw the guilty plea.

Tim Alex Forbes v. State, No. F-2009-537 (Okl.Cr., September 26, 2011) (unpublished): **Speedy Trial**: This case arose out of a rape-murder of a prostitute in 1983. In 2003, the investigation was re-opened when the federal government provided grant money to the state to conduct DNA analysis. Forbes was eventually charged with the murder when his DNA was matched to the case in 2007. The central issue in the case was the 24-year delay in prosecution. The Court affirmed the conviction of Murder in the First Degree and LWOP sentence, but the discussion of pre-trial delay is instructive.

State v. Jeffrey Nigel Howard, No. S-2010-1037 (Okl.Cr., September 28, 2011) (unpublished): **Quash**: Nigel was charged with failing to comply with the sex offender registration act. The Hon. Kenneth Watson (Oklahoma County) sustained a motion to quash, even though Howard waived preliminary hearing on the issue. In addressing an issue of first impression, the Court held that a transcript of the preliminary hearing is necessary for a district court to sustain a motion to quash for insufficient evidence.

State v. Robert Lee Smallen, No. S-2011-105 (Okl.Cr., September 28, 2011) (unpublished): **Confrontation/Cross-Examination**: Although not a winner, this case is instructive on the issue of the unavailable witness. In a murder trial in Oklahoma County, a witness (Thornburg) testified for the State at trial. The case ended in a hung jury. Thornburg was subsequently charged as a participant in the murder, and he filed a Notice of Invocation of Constitutional Rights against self-incrimination. Smallen sought to prohibit the State from introducing Smallen's prior trial testimony. The trial court granted Smallen's motion *in limine*, but in the State appealed. In this opinion, the Court reversed, holding that, although Thornburg was in fact legally unavailable, Smallen had a prior opportunity and similar motive to examine him at the first trial.

State v. Shea Brandon Seals, No. S-2011-208 (Okl.Cr., September 29, 2011) (unpublished): **State Appeals; Waiver; Traffic Stops**: This is a State Appeal arising out of the grant of a motion to suppress by the Hon. Cliff Smith (Tulsa County) in a traffic stop case on the basis that the defendant's car did not cross the marked lane for any appreciable amount of time (apparently this was the basis for the traffic stop). The State appealed and the Assistant District Attorney (Rachel Dewberry) handled it herself. She did not include the videotape in the record on appeal, and she tried to raise a new issue (that the stop was legal because it was based on reasonable suspicion) that she did not raise below. The Court found no abuse of discretion and affirmed.

Tucker Roger Mendenhall v. State, No. F-2010-1100 (Okl.Cr., September 30, 2011) (unpublished): **Sex Offender Registration**: In this Indecent Exposure case, Mendenhall asserted a right to have the jury instructed on the registration issue. The Court affirmed the denial of such an instruction on the basis that the registration scheme is regulatory and not punitive in nature. NOTE: I have raised this issue before in a "pristine" case where there was an instruction offered by defense counsel, a denial by the trial court, and a jury question specifically about registration. The Court has repeatedly denied this claim and continues to do so in this case.

James Henry Taylor v. State, No. RE-2010-1013 (Okl.Cr., October 3, 2011) (unpublished): **Judicial Bias**: This case involved a revocation hearing before the Hon. Lisa Tipping Davis (Oklahoma County). The basis for the revocation was an APC. The hearing pitted the arresting officer against Taylor. When Judge Davis announced her decision revoking one year, she stated, "I'm not in the practice of questioning officers that come in front of my court." The OCCA refused to find any bias in this matter because it was not met with an objection and she had no opportunity to explain it, even though the OCCA stated, "We find Judge Davis was addressing the State's assertion Appellant lacked credibility and shouldn't be believed over the word of a police officer."

Carlos David Oliver v. State, No. C-2010-1060 (Okl.Cr., October 7, 2011) (unpublished): **Guilty Pleas (State); Double Jeopardy**: In this guilty plea case involving multiple counts, a count of Resisting Arrest is reversed for insufficient evidence (under plain error no less since this issue was not raised in the motion to withdraw his plea). The evidence showed that Oliver ran from the police and surrendered when they caught up to him. There was no resistance. Second, a count of Assault with a Dangerous Weapon is reversed on Double Jeopardy grounds because the factual basis is the same as that of a count of Assault with a Dangerous Weapon While Masked.

State ex rel. Hollis Thorp v. Jason Michael Nelson, et al., No. PR-2011-0701 (Okl.Cr., October 18, 2011) (unpublished): **Extraordinary Writs**: This is an order denying extraordinary relief to District Attorney Hollis Thorp after Judge Ray Dean Linder imposed sanctions on his office and ordered the District Attorney to pay $566.00 to OIDS for filing a frivolous motion for sanctions.

Jacquelin Clariece Alexander v. State, No. RE-2010-457 (Okl.Cr., October 21, 2011) (unpublished): **Suspended Sentences**: Revocation case where one count is reversed because the court lacked jurisdiction on the basis the application to revoke was filed after the suspended sentence had expired. This opinion re-asserts the general rule that a trial court may only revoke a suspended sentence which has already expired if the State filed an application to revoke prior to the expiration of the suspended sentence. This case is notable because the State in fact did file an application to revoke, but dismissed it. It was the second application that was filed late.

Sheila Diane Royal v. State, N. F-2010-99(Okl.Cr., October 21, 2011): **After-Formers (Bifurcation)**: Royal was charged with several drug offenses, as well as a count of possession of a firearm, all AFCF. She was convicted and eventually sentenced to LWOP and other sentences. Her trial was *trifurcated* based on the charges: all charges except the firearm possession offense were tried to guilt or innocence in stage 1; then the firearms possession offense was tried to guilt or innocence; then finally the jury considered her prior convictions for purposes of assessing punishment. Also, this is one of those cases that involve prosecution for the offense of failing to have a tax stamp on the drugs. The Court rejected a double jeopardy challenge on that ground.

State v. Jimmy Virgil Hughes, No. S-2011-100 (Okl.Cr., October 27, 2011) (unpublished): **Obtaining Money by False Pretenses; Quash**: In this case out of LeFlore County, the preliminary hearing evidence showed that in the normal course of the livestock-auction business, Hughes took possession of livestock without having to make immediate payment, and his checks later bounced. He was bound over on a charge of Obtaining Money by False Pretenses, but filed a motion to quash before the Hon. Ted A. Knight, who granted the motion on the basis that the State never established that the initial transfer of property was induced by fraud or deceit. The rule of law is that the receipt of property is not criminally fraudulent merely because the express or implied promise to pay for it goes unfulfilled. The Court held that the order granting the motion to quash and dismissing the case is AFFIRMED.

Israel Gonzalez Flores v. State, No. F-2010-1098 (Okl.Cr., October 28, 2011) (unpublished): **Peremptory Challenges**: This rape case out of Caddo County is not a winner, but is instructive on analyzing *Batson* claims. The defense lodged a *Batson* challenge to a juror and the prosecutor's explanation for the strike was that the prosecutor "got an evil look towards me. When I was talking to her she was rolling her eyes. So she just gave me the impression that she was not a Bret Burns fan." The District Court credited this explanation as race-neutral without any analysis. The Court affirmed, with Judge Lewis dissenting on this issue.

TENTH CIRCUIT UPDATE

by

James L. Hankins[1]

United States v. Shipp, No. 10-5069 (10th Cir., June 1, 2011) (Published) (Tymkovich, Brorby & Matheson): **Mandate Rule**: Interesting ACCA case where Shipp, in a prior appeal, convinced the panel that his "walk-away" conviction of escape did not count because Supreme Court authority was in his favor, and that the Supreme Court case was retroactive to his case. On remand, however, the District Court found that even without the walk-away conviction, Shipp had enough priors to qualify under the ACCA—even though the mandate on the prior appeal instructed the District Court to correct Shipp's sentence by resentencing him without the ACCA classification. Not surprisingly, the panel parsed the mandate language with a fine-toothed comb and found no error.

United States v. Sierra-Ledesma, No. 10-3006 (10th Cir., June 2, 2011) (Published) (Kelly, Baldock & Hartz): **Scienter**: Sierra-Ledesma was convicted of the odd crime of being "found" in the United States after having been deported. AFFIRMED over his claims asserting: 1) failing to instruct the jury on a scienter requirement of "knowingly" being found in the United States (the scienter requirement is the intent to enter the country); the panel held that the trial court committed error in the instruction, but it was harmless; 2) failure of the Government to prove that he was an alien (rather than a foreign national); interesting discussion of the difference between a citizen and a national (the only nationals are folks born in American Somoa and Swains Island), and since Sierra-Ledesma admitted that he was born in Mexico, the Government met its burden; 3) introduction of 404(b) evidence of a prior conviction for illegal re-entry (the panel side-steps whether this error, and seems to indicate that it was, but applies harmless error analysis and concludes that any error was harmless); and 4) prosecutorial misconduct in closing argument (harmless).

United States v. Hillman, No. 10-1166 (June 13, 2011) (Published) (O'Brien, Tymkovich & Gorsuch): **1. Jury Instructions; Deliberate Ignorance; 2. Prosecutorial Misconduct; Grand Jury**: Convictions for money laundering and false statements are affirmed over claims relating to: 1) prosecutorial misconduct before the grand jury in asking federal agent questions designed to extract an opinion of guilt (none of them improperly invaded the grand jury's deliberative processes); 2) prosecutorial misconduct/due process violation where the prosecutor improperly influenced a witness in a pre-trial interview (plain error review; the panel found no error at all); 3) testimony of an IRS agent that Hillman had lied and been deceitful; and 4) no error in a deliberate ignorance instruction (no relief on the merits, but also because Hillman failed to challenge the sufficiency of the evidence relating to his *actual knowledge*). NOTE: The standard of review regarding claims of prosecutorial misconduct before a grand jury is *de novo*, but the panel noted a circuit split on the issue.

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United States v. Galvon-Manzo, No. 10-4112 (10th Cir., June 14, 2011) (Published) (Kelly, Anderson & Lucero): **Federal Sentencing Guidelines; Safety Valve**: This case concerns application of the fifth criterion for consideration of a safety-valve sentence reduction: whether the defendant has truthfully provided information no later than the date of sentencing. The panel held, in agreement with the other circuits that have addressed the question, that the deadline for all disclosures is prior to the commencement of the sentencing hearing. Disclosures prior to the sentencing hearing are governed by the discretion of the District Court.

United States v. Martinez-Haro, No. 10-4166 (10th Cir., June 22, 2011) (Published) (Lucero, Ebel & Gorsuch): **Jurisdiction (Appellate/Interlocutory); Insanity and Competency**: In this drug case, the defendant's counsel requested a competency examination, which was ordered. The examining psychiatrist concluded that Martinez-Haro was likely not competent, but recommended further testing in Spanish, and also expressed a willingness to revise her conclusions based upon further testing. The Government moved for a second competency examination, which the District Court ordered over defense objection. The defense then took this interlocutory appeal. As an initial matter, the panel held this type of order was properly the subject of an interlocutory appeal. On the merits, the statute indicates that "a" competency examination can be ordered by the District Court (seeming to limit it to one), but the panel construed the statute as allowing multiple competency examinations (no big surprise there).

United States v. Ransom, No. 10-3162 (10th Cir., June 24, 2011) (Published) (Hartz, O'Brien & Matheson): **Sufficiency**: Ransom was convicted of falsifying his time-sheets from his government employer. AFFIRMED over his claims relating to: 1) sufficiency of the evidence (rejecting the enterprising argument that since he was a salaried employee, his time records were irrelevant); 2) jury instructions (they stated the law and did not mislead the jury); and 3) that the fraud statute is void for vagueness (not addressed on the merits since his central premise in his first argument is incorrect).

United States v. Rushin, No. 10-3025 (10th Cir., June 28, 2011) (Published) (Holmes, Baldock & Johnson, Dist. N.M., sitting by designation): **Speedy Trial**: In this 2255 action alleging IAC for defense counsel's failure to move for dismissal based upon Speedy Trial, the decision of the District Court denying the motion is AFFIRMED. NOTE: The panel appeared to rest its decision on the dubious proposition that dismissal under the Speedy Trial Act would have been without prejudice, therefore Rushin would have been re-indicted in any event.

United States v. Maestas, No. 10-2204 (10th Cir., June 28, 2011) (Published) (Briscoe, Ebel & Holmes): **Federal Sentencing Guidelines (Danger)**: Maestas stole radioactive gold from Los Alamos National Laboratory. In this appeal, he argued that the District Court erred in enhancing his sentence with the "conscious or reckless risk of death or serious bodily injury" enhancement under 2B1.1(b)(13). HELD: The District Court's finding that radioactive gold posed a danger of serious bodily injury or death was not clearly erroneous.

United States v. Keck, No. 10-8008 (10th Cir., July 1, 2011) (Published) (Murphy, Tymkovich & Gorsuch): **Sufficiency; Confrontation/Cross-Examination; and Federal Sentencing Guidelines (Drug Quantity)**: In this drug conspiracy and money laundering case, convictions and sentences are affirmed over claims relating to: 1) sufficiency of the evidence; 2) evidentiary rulings disallowing the use of defense exhibits (Guidelines tables showing that Keck's daughter would benefit from a reduced sentence by testifying against him) and allowing spreadsheets showing wire transfers (the spreadsheets were non-testimonial); and 3) sentencing issues, including application of horrendous circuit precedent under *Magallanez* which allows a District Court to find a defendant responsible for a drug amount greater than that found by the jury (the rationale being that the District Court can make such a finding under the preponderance of the evidence standard).

United States v. Thomas, No. 10-3023 (10th Cir., July 5, 2011) (Published) (Kelly, Baldock & Hartz): **Federal Sentencing Guidelines (Crime of Violence)**: As the panel stated, the sole issue in this appeal is whether the crime of Eluding under Kansas law is a "crime of violence" under the Guidelines for ACCA purposes. It is.

United States v. Soza, No. 10-2196 (10th Cir., July 7, 2011) (Published) (Lucero, Baldock, & Hartz): **Search and Seizure (Traffic Stops) (Good Faith)**: The law regarding search and seizure incident to arrest in traffic stop cases changed in *Arizona v. Gant*. But what of searches of this type prior to Gant that were lawful under existing circuit precedent? The Tenth Circuit had held that such searches were justifiable under the "good faith" exception, and the Supreme Court affirmed that holding recently in *Davis v. United States*. Thus, Soza loses.

United States v. Vasquez-Alcarez, No. 10-1325 (10th Cir., July 12, 2011) (Published) (Hartz, O'Brien & Matheson): **Standard of Review (Federal); Federal Sentencing Guidelines (Reasonableness)**: Illegal re-entry case where the sentence was enhanced 12-levels by a 1995 cocaine trafficking conviction. Vasquez-Alcarez challenged his 27-month sentence (at the low end of the Guidelines), claiming that it was substantively unreasonable because the District Court placed too much weight on the prior conviction because it was stale. However, after the appeal was filed, the Sentencing Commission proposed an amendment to the Guidelines that, had it been in effect at the time of sentencing, would have resulted in an 8-level increase (rather than the 12-level increase that he received). This, argued Vasquez-Alcarez, showed that the sentence was unreasonable. The panel was not persuaded and held that the amendment was proposed, not adopted, and even if it had been adopted it would not have been retroactive, and the sentence was reasonable.

United States v. Martinez, No. 10-2070 (10th Cir., July 12, 2011) (Published) (O'Brien, Seymour & Ebel): **Search and Seizure (Warrantless-Home)**: Warrantless search of a home is ruled unconstitutional because officers did not have an objectively reasonable basis to believe there was a person inside the home who was in need of immediate aid (there was a 911 call, but only static on the line, and no answer when the dispatcher called back).

United States v. Armijo, No. 09-1533 (10th Cir., July 12, 2011) (Published) (Briscoe, Holloway & Murphy): **Federal Sentencing Guidelines (Crime of Violence)**; In this felon in possession case, Colorado conviction for Manslaughter is ***not*** a crime of violence under the Guidelines; but a conviction for Menacing ***is***.

Curtis Edward McCarty v. Joyce A. Gilchrist, No. 09-6220 (10th Cir., July 14, 2011) (Published) (Bye, Colloton & Shepherd, all from the Eighth Circuit for some unknown reason): **Civil Rights**: This is not a criminal case, but rather a civil rights action brought by former death-row inmate McCarty against Ol' Black Magic, former OKC Police Department chemist Joyce Gilchrist. Alas, the District Court had dismissed the lawsuit based on statute of limitations and in this opinion, a panel of judges from the Eighth Circuit affirmed.

United States v. Waseta, No. 10-2097 (10th Cir., July 26, 2011) (Published) (Lucero, Gorsuch & Holmes): **Federal Sentencing Guidelines (Retroactivity)**: Waseta systematically sexually abused his stepson for years. He entered a guilty plea to a single count. In this appeal, he argued that application of the *advisory* Guidelines now in effect was an impermissible *ex post facto* violation in his case because he would have received a much more favorable sentence under the then-*mandatory* Guidelines scheme in effect at the time of the crime. Under the mandatory Guidelines the top end range was 21 months; whereas under the advisory Guidelines the District Court sentenced Waseta to 46 months, a sentence that Waseta argued was unenforceable at the time of the crime. Generally, the retroactive application of the advisory Guidelines scheme does not violate the *ex post facto* component of the Due Process Clause. All circuits are in accord on this point. However, the Tenth and First Circuits have specifically held open the question of whether the *ex post facto* rule are implicated when a post-*Booker* sentence imposed was higher than any that might realistically have been imagined at the time of the crime. Interesting argument by Waseta, but ultimately unavailing since the panel was persuaded that even under the mandatory Guidelines, the sentence that he actually received was "realistically imaginable" (since Waseta would have been subject to an upward departure).

United States v. Shavanaux, No. 10-4178 (10th Cir., July 26, 2011) (Published) (Kelly, Anderson & Lucero): **After Formers (Enhancement)**: This is a federal domestic abuse case which was enhanced by two prior misdemeanor convictions in Ute Indian tribal court. The problem was that Shavanaux was not entitled to a court-appointed attorney in that court when he was convicted (although he did hire a lay person advocate). The question was whether these convictions when he was not represented by counsel (which he wanted but could not afford) can be used to enhance a subsequent charge. The panel held initially that the Sixth Amendment does not apply to Indian tribes, thus there is no Sixth Amendment violation. The trickier question was whether Due Process prevents the Government from using the priors which did not comply with the Constitution, but did not violate it. It does not.

Rhodes v. Judiscak, No. 10-2268 (10th Cir., July 27, 2011) (Published) (Lucero, Ebel & Gorsuch): **Habeas Corpus (Moot)**: Rhodes appealed an order from the District Court dismissing his 2241 petition as moot because it attacked the length of his prison sentence, but Rhodes was no longer in prison. Affirmed.

United States v. Merriman, No. 10-1439 (10th Cir., July 27, 2011) (Published) (O'Brien, McKay & Tymkovich): **Federal Sentencing Guidelines (Aggregate Loss; Position of Trust)**: Merriman walked into the U.S. Attorney's Office one day and informed them that he had operated a Ponzi scheme that had defrauded investors of over twenty million dollars. He cooperated with authorities, and in fact handed over assets valued at several million dollars so that authorities could remit the proceeds to the victims. He subsequently pled guilty. In this appeal, he challenged his sentence on two grounds. First, he argued that the value of the assets he turned over should have counted as a credit against the aggregate loss (which would decrease his level by two). Second, he argued that he did not occupy a position of trust for a two level enhancement. The panel denied both claims.

United States v. Reyes-Alfonso, No. 10-2091 (10th Cir., July 27, 2011) (Published) (Briscoe, Ebel & Murphy): **Federal Sentencing Guidelines (Crime of Violence)**: In this illegal re-entry case, a sixteen-level enhancement is affirmed because a Colorado crime of Sexual Contact—No Consent (sexual intercourse with a 14-year-old girl) is a forcible sex offense and thus a crime of violence for enhancement purposes.

United States v. Beckstrom, No. 10-4108 (10th Cir., July 28, 2011) (Published) (Kelly, Anderson & Lucero): **Duress; Double Counting; *Apprendi* Issues**: Beckstrom was convicted of Possession of 50 Grams or More of Meth w/Intent, but because he had qualifying priors his sentence was mandatory life. AFFIRMED over claims relating to: 1) preclusion of a duress defense based on being forced to sell meth to pay a debt when another drug dealer threatened harm (generally, the ability to contact law enforcement will constitute a reasonable alternative to legal activity); 2) his qualifying priors of drug possession in state court and CCE in federal court involved the same conduct (although they did involve the same conduct, the CCE was based on additional criminal conduct and was therefore a distinct crime); and 3) enhancement with the priors did not violate the Sixth Amendment. NOTE: On the last claim, Beckstrom argued that the statute was unconstitutional because it allowed his priors to be used to enhance without a jury finding that the convictions occurred. This is allowed under *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which was a five-member majority. The kicker is that *Apprendi* was decided two years later. In *Apprendi*, Justice Thomas, who was one of the five votes in *Almendarez-Torres*, stated in a concurring opinion that his vote in *Almendarez-Torres* was an "error." Thus, it appears now that a majority of the Court would hold the view that the Constitution requires any prior conviction that increases a statutory maximum sentence to be found by a jury. The problem is that the Court has not overruled *Almendarez-Torres*, and the claim is thus "doomed" in the Tenth Circuit.

United States v. Lente, No. 10-2194 (10th Cir., July 29, 2011) (Published) (Gorsuch, Holloway & Matheson): **Federal Sentencing Guidelines (Disparity)**: Lente, then 22-years-old, killed three persons and injured another while driving drunk on an Indian reservation. She was sentenced to 216 months (18 years) which, as the panel noted, was a "significant upward variance from her proposed Guidelines range of 46 to 57 months." This sentence was vacated and remanded for resentencing by a divided panel. At the resentencing, before a different judge, she was sentenced to 192 months (16 years). In this opinion, the panel found reversible procedural error in the District Court failing to address her argument about the need to avoid unwarranted sentencing disparities. Reversed and remanded for yet another resentencing. NOTE: This opinion contains some interesting statistical data on federal manslaughter sentences and a very good discussion of "sentencing disparity" arguments and law. For example, over the past five years, an upward variance that exceeded 43% occurred in only 4% of all manslaughter cases, and an increase of over 24 months above the Guidelines occurred in only 4% of such cases. Lente's sentence was a 237% increase over the Guidelines.

United States v. Manatau, No. 10-4101 (10th Cir., August 1, 2011) (Published) (Briscoe, Tymkovich & Gorsuch): **Federal Sentencing Guidelines; Intended Loss**: What counts as "intended loss" under the Guidelines? The panel stated the holding in this way: [W]e hold that the term means exactly what it says: to be included in an advisory guidelines calculation the intended loss must have been an object of the defendant's purpose. This opinion ties intended loss to the *mens rea* of the offense, or as the panel stated the holding in a different way, "We hold that 'intended' loss means a loss the defendant *purposely* sought to inflict." It does not mean a loss that the defendant knew would result from his scheme or a loss he might have possibly and potentially contemplated. This legal ruling assisted Manatau because, as a prolific but not altogether successful identity thief, the District Court, at the urging of the Government, calculated the intended loss as basically the maximum amounts he could have stole from each victim (such as credit card checks), rather than his actual, subjected purpose.

United States v. Fraser, No. 10-8049 (10th Cir., August 2, 2011) (Published) (Gorsuch, Holloway & Matheson): **Possession of Firearm by Felon**: In this case out of Wyoming, Fraser got into a serious altercation with Brown. So serious, in fact, that Brown threatened to kill Fraser and his family. Fraser took steps to prevent this by obtaining a firearm, waiting for Brown to make good on his threat, Brown obliged, and Fraser shot and killed him. The problem for Fraser was that he was a convicted felon and could not possess a gun. At trial, he sought to introduce the fact of the killing of Brown and how it happened in order to buttress his necessity theory of defense. The panel had none of it, pondered whether such a defense was even legally cognizable in such cases, and held that in any event Fraser was not entitled to such a defense as a matter of law since he had a reasonable, legal, alternative available to him---calling the police.

United States v. Prince, No. 10-3180 (10th Cir., August 5, 2011) (Published) (Tymkovich, Seymour & Anderson): **Peremptory Challenges; Scienter (False Statements to Firearms Dealer)**: The panel stated that this case presented two questions of first impression in the Tenth Circuit. First, does the Constitution bar the Government from peremptorily striking prospective jurors because of their views on marijuana legalization? Answer: No. Second, does a conviction for making false statements to a federally licensed firearms dealer require a defendant to know that his false statement will be kept in the firearm dealer's written records (as required by law)? Answer: No (the records-keeping requirement is purely a jurisdictional element, it does not affect or create a *mens rea* requirement).

Strope v. Cummings, No. 10-3254 (10th Cir., August 9, 2011) (Published) (Tymkovich, Baldock & Brorby): **Pro Se Representation**: Strope, a Kansas state prisoner, is an active litigator who filed three appeals in the circuit, all *pro se* and *in forma pauperis*. In this opinion, the panel finally gets tired of his frivolous lawsuits and invokes the "three strikes and you're out" provisions of the Prison Litigation Reform Act and, because he had at least three lawsuits previously dismissed for failure to state a claim, requires that he pay the full filing fees.

United States v. Weeks, No. 09-4171 (10th Cir., August 9, 2011) (Published) (Tymkovich, Seymour & Holmes): **Guilty Pleas (Federal)**: Weeks pled guilty to conspiracy to commit securities fraud. He cooperated against his co-defendants and was sentenced four years later to a year and a day in prison. He did not file a direct appeal, but did file a *pro se* 2255 motion seeking vacate his conviction, alleging IAC for, among other things, refusing his request to file a direct appeal. The panel denied his direct appeal, but vacated the denial of his 2255 motion, directing the District Court to develop the record regarding his allegations of IAC.

United States v. Washington, No. 10-7013 (10th Cir., August 9, 2011) (O'Brien, Seymour & Holmes): **Indictments & Informations (Sufficiency/Duplicity); Sequestration**: A federal jury convicted Washington of one count of witness tampering for which he was sentenced him to 360 months (it involved a murder-for-hire scheme where the intended victim was a law enforcement officer who was going to testify). AFFIRMED over Washington's claims regarding: 1) the Indictment failed to charge a crime; 2) the Indictment was duplicitous; 3) insufficient evidence; and 4) abuse of discretion in excluding the testimony of a defense witness who violated the rule of sequestration.

United States v. Kitchell, No. 09-6176 (10th Cir., August 9, 2011) (Published) (Gorsuch, Ebel & Arguello, U.S. District Judge for the District of Colorado): **Search and Seizure (Traffic Stops)**: Highly detailed opinion affirming firearm possession convictions stemming from a familiar fact pattern: OHP sees minor traffic infraction of rental car, writes warning, gets inconsistent travel plans and sees nervousness, runs drug dog around the car, dog hits, subsequent search yields guns in the trunk. The defendants here chirped among themselves in the backseat while the search was being conducted, the audio recorder picking up the conversation the entire time. AFFIRMED.

Standifer v. Ledezma, No. 11-6025 (10th Cir., August 10, 2011) (Published) (O'Brien, McKay & Tymkovich): **BOP Regs (RDAP Eligibility)**: *Pro se* prisoner challenged a BOP regulation that denied him eligibility to participate in the Residential Drug Abuse Program on the basis that his last-reported date of drug use was more than three years before his arrest on federal charges. The BOP policy considers substance-abuse history for only 12 months preceding the arrest. The panel held that the eligibility requirement is a reasonable interpretation of the governing statutory provisions.

United States v. Hoskins, No. 10-4131 (10th Cir., August 12, 2011) (Published) (Briscoe, C.J., Tymkovich & Gorsuch): **Federal Sentencing Guidelines (Loss Calculations)**: Hoskins was convicted of tax evasion relating to an escort service in Salt Lake City. This appeal centers around the amount of tax loss for sentencing purposes. Hoskins offered "hypothetical tax returns" to the District Court since it was too late to submit amended returns to the IRS. The District Court rejected the tax returns and accepted the Government's tax-loss estimate, but a majority of the panel announced a rule that permits defendants in future cases to offer deductions they did not actually claim in order to establish "a more accurate determination of the tax loss." Chief Judge Briscoe dissented from this holding, noting a circuit split on the issue.

United States v. Cooper, No. 10-3105 (10th Cir., August 15, 2011) (Published) (Holmes, Baldock & Johnson, U.S. District Judge for the District of New Mexico, sitting by designation): Cooper was convicted by jury of Conspiracy to Defraud, multiple counts of Mail and Wire Fraud, and other fraud and money laundering counts. AFFIRMED over claims relating to: 1) Sufficiency of the evidence; and 2) Search warrants issued without probable cause, insufficiently particular, and denial of a hearing under *Franks*.

Rojem v. Workman, No. 10-6202 (10th Cir., August 23, 2011) (Published) (Murphy, McKay & Holmes): **Criminal Justice Act**: In this capital habeas case, defense counsel appealed the denial of his ex parte motion for de novo review of the budget and his ex parte motion for expert funds. The panel held that, since the appeal "at its core" challenges the district court's decision regarding how much compensation to award counsel, "this court dismisses for lack of jurisdiction."

United States v. Coleman, No. 10-6134 (10th Cir., August 26, 2011) (Published) (Murphy, Brorby & Tymkovich): **Federal Sentencing Guidelines (Serious Drug Offense)**: Oklahoma drug trafficking convictions that are initially adjudicated under the Youthful Offender Act qualify as "serious drug offenses" under the Armed Career Criminal Act (18 U.S.C. § 924(e)).

United States v. Acosta-Gallardo, No. 10-8075 (10th Cir., August 30, 2011) (Published) (Gorsuch, Holloway & Matheson): Convictions on drug trafficking and other counts are affirmed over claims relating to: 1) a variance between the indictment and the facts proven at trial (no variance in fact occurred); 2) a *Brady* claim (no showing that the evidence was favorable or material); 3) improper venue (extended discussion of this issue and venue in section 843(b) cases that involve allegations of using a communication facility to cause or facilitate a drug crime); and 4) failure to prove interdependence beyond a reasonable doubt.

United States v. Hong, No. 10-6294 (10th Cir., August 30, 2011) (Published) (O'Brien, McKay & Tymkovich): **Habeas Corpus (Retroactivity)**: In this 2255 case, the panel held that *Padilla v. Kentucky* (which says that it is IAC when trial counsel does not advise the client of the immigration consequences of a guilty plea) is a new rule of constitutional law, but that it does ***not*** apply retroactively to cases on collateral review.

United States v. Cordery, No. 10-4068 (10th Cir., August 30, 2011) (Published) (Lucero, Baldock & Tymkovich): **Federal Sentencing Guidelines (Drug Rehab)**: District Court erred in increasing a term of imprisonment in order to enable Cordery to qualify for a prison drug treatment program (in light of *Tapia v. United States*, 131 S.Ct. 2382 (2011)). Reversed and remanded for resentencing.

United States v. Irvin, No. 10-3106 (10th Cir., August 31, 2011) (Published) (Murphy, Ebel & Tymkovich): **Hearsay (Summaries)**: In this mortgage fraud case, the panel found error in the District Court's admission of the Government's summary which was based on hearsay documents. The District Court said that it had heard nothing from the defense that contradicts the ideas that the loan files were business records. The panel held that this was an abuse of discretion because it is not the duty of the defendants to disprove the applicability of the business records exception; rather, it is the duty of the proponent of the evidence, here the Government, to lay the proper foundation for the applicability of the rule. This error was not harmless.

United States v. Perez-Jiminez, No. 10-1322 (10th Cir., September 2, 2011) (Published) (Kelly, Seymour & Holmes): **Federal Sentencing Guidelines (Crime of Violence)**: Federal inmate pled guilty to possessing two shanks. This is a crime of violence. The opinion is interesting because the panel distinguished between analyzing whether a past crime is a crime of violence as opposed to an instant offence. Past convictions require employing the "categorical approach" while instant offenses may be analyzed using a conduct-specific inquiry that looks to the facts of the case.

United States v. Burleson, No. 10-2060 (10th Cir., September 12, 2011) (Published) (O'Brien, Seymour & Ebel): **Search and Seizure (Warrantless Arrest)**: An officer saw three people walking down the middle of the street (one of them was Burleson) and one of them was holding a dog. The officer approached, told them to get out of the street, asked for their names, and ran checks for warrants which came back a hit on Burleson. The officer found two handguns and ammunition on Burleson. The District Court granted the motion to suppress, holding that the reason for the investigatory stop concluded prior to the officer seeking the names and that there was no concern for officer safety in this case. The panel reversed, applying circuit precedent which allows warrants checks on pedestrians during investigatory stops.

United States v. Blechman, No. 10-3034 (10th Cir., September 14, 2011) (Published) (Murphy, Ebel & Hartz): **Hearsay**: In this mail fraud and identity theft case, the District Court erred in allowing the admission of PACER and AOL records linking Blechman to an e-mail address. Blechman asserted that the critical, user-identifying information in the records consisted of input by a third party over the Internet with no verification by AOL or PACER. The panel agreed with this, but found the error harmless.

In re: Michael Wayne Rains, No. 11-6210 (10th Cir., September 21, 2011) (Published): **Habeas Corpus (Second/Successive Petitions)**: Rains, proceeding *pro se*, moved for authorization to file a second or successive 28 U.S.C. § 2254 petition alleging claims that he had raised in previous petitions, but that the District Court had not addressed on the merits. In this order, the panel denied authorization because he seeks to assert claims that had already been asserted and denied as outside the statute of limitations, which the panel held was a decision on the merits.

United States v. Chavez, No. 10-2273 (10th Cir., October 18, 2011) (Gorsuch, Holloway & Matheson) (Published): **Federal Sentencing Guidelines (Attempt Crimes)**: Drug conviction and sentence affirmed over his claims relating to a search of his car after he was arrested for DWI and the car was impounded (the subsequent search was pursuant to a warrant); and also an ACCA enhancement based upon a prior conviction for *attempted* drug trafficking. These types of convictions can be used to enhance under the ACCA.

United States v. Marrufo, No. 10-2263 (10th Cir., October 18, 2011) (Gorsuch, Holloway & Matheson) (Published): **Federal Sentencing Guidelines (Facilitating)**: Marrufo was prosecuted by the feds and the state for actions arising out of the same event. He was convicted in federal court of being a felon in possession of a firearm. He was convicted in state court of tampering with evidence by hiding the same firearm. This is a problem for Marrufo because the Guidelines adds four levels when the defendant used or possessed a firearm in connection with another felony offense. Marrufo argued on appeal that the enhancement did not apply to him because his possession of the firearm did not facilitate the tampering. In this opinion rife with tortured reasoning, the panel concluded otherwise and affirmed.

UNITED STATES SUPREME COURT UPDATE

by

James L. Hankins[1]

McNeill v. United States, No. 10-5258 (U.S., June 6, 2011): **Federal Sentencing Guidelines; "Serious Drug Offense"**: This is another ACCA case, this time construing the "serious drug offense" part rather than the "violent felony" part for deciding whether prior convictions count for the enhanced penalty. The statute defines a serious drug offense as one punishable by 10 years or more. McNeill had six such prior convictions and was sentenced to 10 years on all six. The rub in his case was that state law later reduced the maximum sentences for his prior convictions to under 10 years. McNeill argued that this change also affected his federal sentence under the ACCA. The Court disagreed (unanimously), holding that the controlling time frame is the time of the defendant's conviction for the offense.

Sykes v. United States, No. 09-11311 (U.S., June 9, 2011): **Felony Sentencing Guidelines; Crime of Violence**: In this ACCA case, Sykes challenged one of his priors, felony flight by vehicle under Indiana law as counting as "violent." In an overly complicated opinion, the Court held that such a crime is "violent" under the ACCA. NOTE: The dissenters were Justices Scalia, Kagan, and Ginsburg. Justice Scalia's dissent (as is often the case) is forceful, declaring that the residual clause of the ACCA is a "drafting failure" and should be declared void for vagueness. His elegantly simple solution is to simply limit the ACCA to the named crimes and let Congress add others if it wants.

DePierre v. United States, No. 09-1533 (U.S., June 9, 2011): **Federal Sentencing Guidelines; Crack**: The question is whether the mandatory minimums for drug offenses involving "cocaine base" under 21 U.S.C. 841(b)(1) apply specifically to crack cocaine, or all forms of cocaine base. The Court held that "cocaine base" means not just crack cocaine, but cocaine in its chemically basic form.

Tapia v. United States, No. 10-5400 (U.S., June 16, 2011): **Federal Sentencing Guidelines; Drug Rehab**: A circuit split had arisen over whether a District Court could impose or lengthen a sentence of imprisonment in order to promote a defendant's rehabilitation (*i.e.*, impose a longer sentence than the court otherwise would in order for the defendant to have enough time to complete a drug program). Resolving the split, the Court held unanimously that District Courts have the power to do this.

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J.D.B. v. North Carolina, No. 09-11121 (U.S., June 16, 2011): **Interrogations; Fifth Amendment**: Police questioned a 13-year-old boy at his school regarding criminal activity, but did not give him *Miranda* warnings. Concerning the question of whether someone is in "custody" for *Miranda* purposes, that test is the hypothetical reasonable person. In this case, the lower court refused to consider the age of J.D.B. In a 5-4 opinion, fractured along ideological lines, the Court held that this was error, and that a child's age properly informs the *Miranda* custody analysis. The dissent saw no reason to go down this road.

Davis v. United States, No. 09-11328 (U.S., June 16, 2011): **Search and Seizure; Exclusionary Rule**: Davis was subject to a vehicle search incident to arrest which, under then-existing Eleventh Circuit precedent, was perfectly fine. However, while the case was pending on appeal, the Supreme Court decided *Gant* which disrupted precedent in the circuit and made the search illegal. The question is whether the *exclusionary rule* applies when police search in compliance with binding circuit precedent that is later overruled. The Court held that it does not; therefore Davis loses.

Bond v. United States, No. 09-1227 (U.S., June 16, 2011): **Standing**: Bond learned that her best friend was pregnant. Unfortunately, the father of the child was Bond's husband. This triggered a campaign of harassment by Bond which culminated in the use of caustic chemicals. Under federal law, and in order to comply with a treaty, possession of the chemicals at issue is a federal crime, at least as far as Bond is concerned. Bond moved to dismiss the indictment on the basis of the Tenth Amendment, arguing that the federal government had no power to enact the statute at issue because such things are reserved to the States. The court below held that Bond had no standing to make such a challenge. In this opinion, the unanimous Court held that she did.

Turner v. Rogers, No. 10-10 (U.S., June 20, 2011): **Right to Counsel; Jurisdiction (Appellate)**: This is a case arising out of a *civil* contempt proceeding where the defendant owed child support and was jailed for not paying it. The Court held that there is no constitutional right to counsel in such cases (where the claimant is not represented by counsel either), but added that the State must employ alternative measures that comport with Due Process. Since such procedures were not employed in this case, the judgment is reversed. The Court noted that this opinion does not address whether counsel is required when money is owed to the State, or in a case that is unusually complex. NOTE: The Court addressed a threshold matter of mootness since Turner had already served his 12-month jail sentence and there were no collateral consequences of the adjudication against him. The Court held that the case was not moot since it was one that was capable of repetition, yet evading review.

Bullcoming v. New Mexico, No. 09-10876 (U.S., June 23, 2011): **Confrontation and Cross-Examination**: In this Aggravated DWI case out of New Mexico, the State introduced a forensic report showing that Bullcoming's blood-alcohol level exceeded the threshold. The problem was that the analyst who actually conducted the testing and prepared the report did not testify at trial (he had been placed on unpaid leave for undisclosed reasons). The State sought to get around the Confrontation problem by presenting another forensic analyst to sponsor the report, one who was qualified to conduct the same testing but who did not actually conduct the testing in this case. HELD: This violated the Sixth Amendment.

Freeman v. United States, No. 09-10245 (U.S., June 23, 2011): **Federal Sentencing Guidelines (Retroactivity)**: If the Sentencing Commission makes changes to the Guidelines that are retroactive and help a prisoner, is he still eligible for relief even if he entered an agreed plea under Rule 11? In this fractured opinion, the answer is yes. There was a four-to-four vote split on this issue, but Justice Sotomayor broke the tie in favor of allowing such prisoners the benefit of the retroactive rule, but for different reasons than that of the four-Justice plurality.

Garcia v. Texas, No. 11-5001 (U.S., July 7, 2011) (*per curiam*): **Vienna Convention; Stays**: Garcia, a Mexican National who has lived in the United States since the age of two, was convicted of capital murder in Texas and sentenced to death. One of the issues in his case was a violation of the Vienna Convention which mandates that foreign nationals must be advised of their right to consular assistance. The problem has been that the Supreme Court has rejected this argument in the past because Congress has not enacted enabling legislation. In this case, Garcia and the United States asked the Court to stay his execution so that Congress could do so. The Court was not moved, holding that "the Due Process Clause does not prohibit a State from carrying out a lawful judgment in light of unenacted legislation that might someday authorize a collateral attack on that judgment." Stay denied. NOTE: This was a 5-4 decision with Justices Breyer, Ginsburg, Sotomayor, and Kagan, dissenting.

OTHER CASES OF NOTE

by

James L. Hankins[1]

United States v. Perry, No. 10-1992 (8th Cir., February 18, 2011): **Proffer Statements**: In this drug case, Perry engaged in a proffer session with the Government, during which he made self-incriminating statements. He ultimately decided to go to trial, after which he was convicted. The Government then tried to use his proffer statements against him for purposes of calculating the Guidelines range. The panel found error because the proffer agreement did not allow for the use of the information in determining the Guidelines range.

In Re: Grand Jury, No. 10-2005 (1st Cir., March 23, 2011): **Contempt**: Unusual case where a state prisoner serving a long sentence in state prison was hauled before a federal grand jury, but refused to testify, even when granted immunity. The federal District Court entered an order of civil contempt and suspended the serving of the state prison time while the prisoner was in contempt. Although panel was a little bit troubled at the interference by the federal court in state court criminal matters, it affirmed the order.

United States v. Phillips, No. 09-4201 (6th Cir., April 7, 2011): **Failure to Report**: Failure to appear to begin serving a prison sentence is a federal crime, but the statutory maximum is based upon the underlying offense. When a person fails to appear to serve a re-instated prison sentence after his supervised release was revoked, is the relevant underlying offense the supervised release violation or the original offense that led to the term of supervised release? It is the latter.

United States v. Smith, No. 09-3119 (D.C. Cir., April 15, 2011): **Confrontation/Cross-Examination; Experts (Drug Jargon)**: Drug and firearms case where the firearms conviction is reversed based on the fact that the Government introduced letters from a state court clerk to prove prior convictions, rather than a certified record or in-court testimony. Also, the panel found error in allowing an FBI agent to testify as a lay witness about the meaning of slang terms used in recorded conversations. Such testimony had to satisfy the requirements for expert testimony, but it was harmless.

United States v. Vanhook, No. 09-5778 (6th Cir., April 18, 2011): **Federal Sentencing Guidelines (Crime of Violence)**: In this ACCA case, the panel held that the crime of Facilitating the Burglary of a Building under Tennessee law is not categorically a violent felony.

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United States v. Monzel, No. 11-3008 (D.C. Cir., April 19, 2011): **Restitution**: Monzel pled guilty to possession of child porn. One of the images he possessed featured a child ("Amy") who sought over $3 million in restitution from Monzel. The District Court awarded $5,000.00 in restitution. "Amy" appealed by both mandamus and direct appeal. The Court granted mandamus because the District Court acknowledged that the award was less than the harm done to "Amy" but dismissed the direct appeal because it is not authorized by statute. NOTE: This case deals with the Crime Victims' Rights Act which grants a right to full restitution. Aggressive efforts by victims in child porn cases could result in huge restitution amounts for your clients.

Tice v. Johnson, No. 09-8245 (4th Cir., April 20, 2011): **IAC**: Habeas relief is granted on an IAC claim for failure to suppress Tice's confession (on a *Miranda* claim).

Harris v. State, No. SC08-1871 (Fla., April 21, 2011): **Drug Dogs**: The Florida Supreme Court analyzes the reliability of drug dogs and what the State must show in order to establish PC for a search based upon a drug dog alert: "We hold that the State may establish probable cause by demonstrating that the officer had a reasonable basis for believing the dog to be reliable based on the totality of the circumstances." The Court stated that evidence that the dog has been trained and certified, standing alone, is **NOT** enough (because of the lack of standards in training and certification programs). The Court concluded that the State's burden is formidable: "[W]e conclude that to met its burden of establishing that the officer had a reasonable basis for believing the dog to be reliable in order to establish probable cause, the State must present the training and certification records, an explanation of the meaning of the particular training and certification of that dog, field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as other objective evidence known to the officer about the dog's reliability in being able to detect the presence of illegal substances within the vehicle." In this case, the State failed to meet its burden and the evidence was suppressed. NOTE: There is a treasure trove of legal analysis and case law cites on drug dog searches in this case.

United States v. Curley, No. 09-3314-cr (2nd Cir., April 25, 2011): ***Burks* Notice and Bad Acts**: Federal stalking conviction by Curley against his ex-wife is reversed on the basis of erroneous introduction of 404(b) evidence that Curley's brother had physically abused the ex-wife, and also a traffic stop subsequent to the stalking in which police found in Curley's car a will, ammunition, a bullet-proof vest, a ski mask, and three black-powder rifles. The panel found that this last bit "lacks the necessary parallel to the charged acts."

Dillon v. Conway, No. 08-4030-PR (2nd Cir., April 26, 2011): **Habeas Corpus; SOL & Equitable Tolling**: Filing of habeas petition one day late is excused under equitable tolling principles when the lawyer mis-calculated the date by one day and filed it on that date, but the inmate had specifically discussed it with the lawyer who told the inmate that he would not wait until the last day.

Abu-Jamal v. Blaine, No. 01-9014 (3rd Cir., April 26, 2011): **Habeas Corpus; Capital Habeas Cases**: Capital habeas winner as to the death sentence on a *Mills* claim (where the jury instructions prevented the jury from considering mitigating factors unless they were found unanimously).

United States v. Papagno, No. 09-3002 (D.C. Cir., April 26, 2011): **Restitution**: Papagno stole 19,709 pieces of computer equipment over a ten year period from the Naval Research Laboratory where he worked. He pled guilty and was sentenced to 18 months. The case centered around a restitution order of $160,000.00 which the NRL sought to recoup the expenses of its internal investigation. The District Court agreed that such expenses were compensable under the Mandatory Victims Restitution Act found at 18 U.S.C. 3663A(b)(4). The panel disagreed, holding that the Act does not authorize restitution for the costs of an organization's internal investigation when the investigation is neither required nor requested by the criminal investigators or prosecutors.

Wood v. Ercole, No. 09-2905-pr (2nd Cir., May 4, 2011): **Interrogations/Fifth Amendment**: Instructive *Miranda* winner where a suspect's statement, "I think I should get a lawyer," was sufficient to invoke the right to counsel before questioning (*i.e.*, not ambiguous); and the error was not harmless. NOTE: This is a 2-1 split panel opinion.

United States v. Albertson, No. 09-1049 (3rd Cir., May 4, 2011): **Supervised Release**: In this Possession of Child Porn case, a condition of supervised release of a complete ban on internet usage is overbroad.

United States v. Sanchez, No. 10-10229 (9th Cir., May 5, 2011): **Possession of Firearm (Restraining Order)**: Possession of a Firearm while subject to a restraining order is a federal crime, but only if the restraining order prohibits the use or attempted use of physical force against an intimate partner or child. In this case, the restraining order (issued by a municipal court) simply stated that Sanchez must have "no contact" with his ex-girlfriend and her two family members. Since it did not contain language similar to the statute, the judgment of acquittal should have been granted.

People v. Martin, No. 15 (N.Y. App., May 10, 2011): **Public Trial**: Martin's right to a public trial was violated when the trial court *sua sponte* closed the courtroom and ejected the defendant's father during *voir dire* without considering any alternative accommodations.

United States v. Williams, No. 09-5256 (6th Cir., May 11, 2011): **Sentencing (Right to be Present); Standard of Review (Waiver of Plain Error Review)**: Williams was a disturbed person who planted a pipe-bomb in a vending machine that killed his stepfather, and he also thereafter mailed a threatening letter to the federal judge handling his habeas case (the letter purported to contain anthrax, which turned out to be sugar). When it came time for sentencing, the Marshals did not bring Williams to court because of the possibility that he would be disruptive. The District Court decided to conduct the sentencing via video, which worked fine and to which no one objected. On appeal, the panel found that this was error because Williams had a constitutional right to be personally present at his sentencing hearing. Also, even though there was no objection below, Williams asserted that he was entitled to *de novo* review, an assertion that was not contradicted by the Government. The panel actually split 2-1 on this issue, holding that since the Government had failed to request plain error review, it has forfeited any argument that the panel should apply it. The panel thus reviewed the claim *de novo*.

United States v. Meises, No. 09-2235 (1st Cir., May 13, 2011): **Overview Testimony**: This drug conspiracy case is reversed on an interesting ground: improper testimony by the Government's case agent as to the step-by-step progression of the investigation, including describing the phone calls and meetings that culminated in the arrests of the defendants. After the prosecutor established that the case agent actually viewed videotapes and listened to the audiotapes, the case agent was then asked to tell the jury what role each individual had played in the conspiracy. The panel found a violation of Rule 701 concerning lay opinion testimony since the primary inculpatory evidence was provided by an informant---not witnessed personally by the case agent. The panel characterized this as "dressing up argument as evidence." Such testimony was not admissible under Rule 701, usurped the jury's fact-finding role, and improperly endorsed the Government's theory of the case.

United States v. Friske, No. 09-14915 (11th Cir., May 18, 2011): **Obstruction of Justice**: A guy named Erickson was in jail after having been indicted on drug charges. While in jail, he called his friend Friske and they talked in code, the gist of which was that Friske would travel to Erickson's house and retrieve something under the pool. Agents went there first and discovered almost $400,000.00 in cash. Friske showed up later and tried to retrieve the cash that the agents had already taken. He was indicted for obstruction of a forfeiture proceeding. In construing his challenge on the sufficiency of the evidence, the panel held that the Government must prove that Friske knew of, or foresaw, an official proceeding, and knew that his actions were likely to affect it. REVERSED and remanded to enter a judgment of acquittal.

Hardaway v. Robinson, No. 08-1156 (6th Cir., May 19, 2011): **IAC (Appellate Counsel)**: Murder case in which the panel granted habeas relief on the basis of IAC appellate counsel, who failed to file an appellate brief and thereby deprived Hardaway of a direct appeal. The panel also held that this error was not cured by the ability to appeal from later state collateral proceedings and, under Supreme Court precedent, there is a presumption of prejudice.

United States v. Sellers, No. 09-2516 (7th Cir., May 19, 2011): **Counsel of Choice**: Solid winner in a drug and firearm case where Sellers was forced to go to trial, convicted and sentenced to 180 months, while being represented under protest by a lawyer that he did not want. The lawyer he wanted had scheduled jury trials in state court and the federal District Court refused to continue the case to accommodate the lawyer that Sellers wanted and had hired. Reversed and remanded for a new trial. NOTE: This opinion might carry some more weight on this issue because sitting on the panel by designation was retired Associate Justice of the United States Supreme Court, the Hon. Sandra Day O'Connor.

United States v. Mendez-Santana, No. 09-2073 (6th Cir., May 20, 2011): **Guilty Pleas (Federal)**: In this illegal re-entry case, Mendez-Santana entered a guilty plea, but before the District Court accepted the plea, he filed a motion to withdraw it, asserting a statute of limitations defense. The District Court denied the motion. HELD: Mendez-Santana had an absolute right to withdraw his plea since it had not been accepted by the trial court.

United States v. Spencer, No. 10-1869-cr (2nd Cir., May 20, 2011): **Supervised Release**: This case deals with a standard condition of supervised release: "Notify the probation officer at least ten days prior to any change in residence or employment." The problem here was that Spencer was fired immediately from his job without prior notice; thus, he did not have the ten days notice under the condition. The panel held that reasonable people would not believe that the condition included periods of notice less than ten days, nor was there any evidence that Spencer had at least ten days prior notice before he was fired. The District Court erred in finding a violation. Similarly, Spencer was accused of violating the condition mandating that he keep his probation officer advised of changes of residence when his girlfriend kicked him out of her apartment for a short period of time and he lived with his brother. It was error for the District Court to find a violation on this basis as well.

Williams v. Cavazos, No. 07-56127 (9th Cir., May 23, 2011): **Jurors**: During contentious jury deliberations, jurors were brought into court and talked about the problem, which was a hold-out juror who would not vote to convict. The trial court removed the juror because the juror was "biased" against the State, and when the alternate was seated a guilty verdict came back quickly. HELD: Since no state court addressed the Sixth Amendment claim here, review is *de novo*, and the panel held that the trial court erred in both removing the juror based upon the juror's views of the case, and also because there was no good cause in any event.

United States v. Booker, No. 10-2736 (8th Cir., May 25, 2011): **Entrapment**: Although not a winner, this opinion delves into the difference between "sentencing entrapment" and "sentencing manipulation." According to the panel, these are distinct defenses. Sentencing entrapment focuses on the predisposition of the defendant to commit the crime; whereas sentencing manipulation focuses on whether the Government stretched out the investigation merely to increase the defendant's sentence.

United States v. Bryant, No. 09-2500 (1st Cir., May 26, 2011): **Right to be Present**: Odd case which was remanded for a resentencing hearing at which the Government was to present additional evidence regarding some prior convictions. However, just days prior to the hearing, defense counsel realized that transportation of Bryant from prison to the hearing had not been arranged, but the District Court proceeded anyway. The panel vacated the sentence and held that Bryant had a right to be present at this particular resentencing hearing and to allocate.

People v. Hunter, No. 103 (N.Y. App., June 2, 2011): **Search and Seizure (Standing)**: A defendant seeking suppression of evidence must prove standing in order to challenge the search. But what happens if the State does not timely object to a defendant's failure to prove standing? Does the State waive the issue for appellate purposes? In New York, the answer is yes.

United States v. Buckles, No. 08-36031 (9th Cir., June 2, 2011): **Habeas Corpus (SOL & Equitable Tolling)**: Although the District Court ruled that a federal prisoner's 2255 motion was untimely, the contention of the Petitioner that the court clerk provided him with inaccurate advice regarding filing deadlines, if true, may entitle him to equitable tolling.

Narvaez v. United States, No. 09-2919 (7th Cir., June 3, 2011): **Retroactivity**: Narvaez was sentenced as a career offender because of two prior escape convictions. On collateral review, he argued that *Begay* (DUI is not a violent crime) and *Chambers* (walkaway escapes are not violent) applied retroactively to his case. The Government conceded that *Begay* and *Chambers* decided questions of substantive statutory construction and therefore did apply retroactively on collateral review. The panel agreed.

United States v. Harper, No. 10-30643 (5th Cir., June 6, 2011): **Immunity; Plea Agreements**: Harper pled guilty in a drug case and, pursuant to the plea agreement, he gave immunized statements in a debriefing to the Government. He objected to the some aspects of the PSR, and the Government used his immunized statements to support it. The panel held that such use was inconsistent with any reasonable understanding of the plea agreement, that the Government breached the agreement, and that Harper was entitled to a re-sentencing before a different judge. This opinion contains a good discussion of general principles governing immunity and plea agreements.

People v. Steward, No. 108 (N.Y. App., June 7, 2011): **Voir Dire**: In this robbery case, the trial judge gave the parties only five minutes to question each panel of prospective jurors. This was an abuse of discretion.

Ocampo v. Vail, No. 08-35586 (9th Cir., June 9, 2011): **Confrontation/Cross-Examination**: Habeas winner in a First Degree Murder case where admission of testimony by a law enforcement officer regarding statements made by a potential witness who did not testify violated Ocampo's Sixth Amendment rights.

United States v. Marshall, No. 09-3140 (D.C. Cir., June 9, 2011): **Speedy Trial; IAC**: Speedy trial winner based upon the District Court's erroneous exclusion of time following the filing of a Rule 404(b) motion by the Government. Although trial counsel filed a motion to dismiss based upon speed trial, he did not challenge the exclusion on this basis which was obvious from circuit precedent.

United States v. Portillo-Munoz, No. 11-10086 (5th Cir., June 13, 2011): **Second Amendment; Possession of Firearm by (Illegal Alien)**: The Supreme Court has breathed new life into the Second Amendment in *Heller*, which held that it guarantees an individual right to bear arms. This case presented the question of whether the Second Amendment protects an illegal alien from prosecution for possessing a firearm. The panel held that it does not. Conviction affirmed. NOTE: Judge Dennis penned a sharp dissent.

United States v. Akhigbe, No. 10-3019 (D.C. Cir., June 14, 2011): **Federal Sentencing Guidelines (Reasonableness)**: Convictions of a physician for Medicaid fraud are affirmed, but his sentence is vacated because the District Court did not provide an adequate explanation for its above-Guidelines sentence which was a procedural defect amounting to plain error.

United States v. Freeman, No. 09-4043 (7th Cir., June 17, 2011): **Prosecutorial Misconduct (False Testimony)**: Drug cases are reversed when it was learned that the Government's star witness had testified falsely, that the Government knew this testimony was false, and that the Government relied upon it to secure the convictions.

United States v. Sariles, No. 10-50577 (5th Cir., June 23, 2011): **Public Authority Defense**: This is a cautionary tale in drug cases. Sariles was stopped by a state deputy sheriff who wanted him to cooperate. Sariles was thereafter arrested transporting drugs, but asserted that he was doing so pursuant to an agreement he had with the deputy. The problem is that the deputy was a state official and had no actual authority to authorize Sariles to violate federal drug laws. The rule is this: the public authority defense requires a law enforcement officer who engages a defendant in covert activity to possess actual, rather than only apparent, authority to authorize the defendant's conduct.

United States v. Aguilar, No. 09-40658 (5th Cir., June 23, 2011): **Prosecutorial Misconduct (Improper Argument)**: In this drug conspiracy case, the convictions are reversed and remanded for a new trial because of the prosecutor's improper closing arguments in which he was outraged that the defense would call government agents liars. The prosecutor told the jury that it was a "sad deal" when agents risk their lives to protect people like "you and me" and protect "us and our kids" and what do they get for it? They get to come into the courtroom and be called a liar. NOTE: This is a good case because the panel reversed on plain error review under the facts.

United States v. Rojas, No. 10-14662 (11th Cir., June 24, 2011) (Published): **Federal Sentencing Guidelines (Retroactivity)**: The Fair Sentencing Act of 2010 applies to defendants who committed crack cocaine offenses before August 3, 2010 (the date of its enactment), but who were sentenced thereafter.

United States v. Ladson, No. 10-10151 (11th Cir., June 24, 2011): **After Formers (Enhancement—Federal)**: Enhancement of a sentence for prior drug convictions per 21 U.S.C. § 851 is vacated because of late filing by the Government and a lack of service. This is a good opinion because the panel held that the Government must comply strictly to the statutory service requirement prior to trial.

Matthews v. Parker, No. 09-5464 (6th Cir., June 27, 2011): **Habeas Corpus (Capital Habeas Cases); Prosecutorial Misconduct**: Capital case out of Kentucky where the denial of habeas relief is reversed on the basis of prosecutorial misconduct (denigrating the defense theory of the case which was an absence of extreme emotional distress) and impermissibly shifting the burden onto the Petitioner with respect to extreme emotional distress, where proof of the absence of extreme emotional distress was an element of murder under Kentucky law and the State failed to prove this element.

Browning v. Workman, No. 07-CV-16-TCK-PJC (N.D. Okla., June 30, 2011): **Confrontation/ Cross-Examination (Sealed Mental Health Records); Prosecutorial Misconduct (*Brady*)**: Outstanding habeas winner for Oklahoma death row inmate Michael Browning where Judge Terrance Kern held that mental health records of the State's key witness contained exculpatory information and should have been released to the defense for use in the case. The records were provided to the trial court and made part of the record, but filed under seal. The Oklahoma state courts reviewed them and found that the information did not help the defense. Judge Kern not only disagreed with this assessment, he had to conclude under the AEDPA that the Oklahoma state courts were unreasonable to so conclude. According to Judge Kern, the prosecution's key witness "suffered from severe mental illness which could affect her ability to recount events accurately and she was also prone to manipulate and blame others."

United States v. Evanston, No. 10-10159 (9th Cir., July 5, 2011) (For Publication): **Jury Instructions (Allen Charge); Trial Procedure (Supplemental Argument)**: As the panel stated: "In a case of first impression, we examine whether a district court may, over defense objection and after the administration of an unsuccessful *Allen* charge, inquire into the reasons for a trial jury's deadlock and then permit supplemental argument focused on those issues, where the issues in dispute are factual rather than legal. We conclude that allowing such a procedure in a criminal trial is an abuse of the discretion accorded district courts in the management of jury deliberations."

United States v. Sanabria, No. 09-2298 (1st Cir., July 11, 2011): **Confrontation/Cross-Examination; Cumulative Error**: Drug trafficking convictions reversed on the basis of *cumulative error* regarding several evidentiary errors, including 1) exclusion of Agent testimony to impeach a witness regarding the physical description of the drug dealer which did not match Sanabria; 2) restriction on cross-examination on the basis that a prior inconsistent statement was not made under oath (there is no requirement that such statements must have been made under oath) and that it was beyond the scope of direct (showing bias or motive to fabricate are properly for cross-examination even if the matter is not broached on direct); and 3) asking a witness whether she believed the statement of Sanabria regarding his arrest (that the authorities had him confused with someone else).

United States v. Kebodeaux, No. 08-51185 (5th Cir., July 12, 2011): **Sex Offender Registration**: Not a winner, but the panel addresses an interesting issue. Kebodeaux was convicted of knowingly failing to update his sex offender registration after a purely *intrastate* change of address in Texas (from El Paso to San Antonio). He attacked his conviction on the ground that the Constitution does not grant Congress the authority to regulate this purely intrastate activity. The panel held that Congress does have the authority, but this is an issue to keep an eye on in this area of the law.

Pabon v. Mahanoy, No. 08-1536 (3rd Cir., July 12, 2011): **Habeas Corpus (Equitable Tolling)**: Pabon is a Spanish-speaking prisoner who filed a *pro se* petition that was late. However, he argued equitable tolling should apply because he cannot speak, read, or write English, the prison had no Spanish-language legal materials, and he had been denied translation assistance. The panel held that Pabon was entitled to an evidentiary hearing on this issue.

State ex rel. Craig Ladd, District Attorney v. $457.02, No. 107,350 (Okla. Civ. App., Div. II, July 13, 2011) (Published): **Forfeiture**: Instructive forfeiture case out of Ardmore where the State sought to forfeit cash in a drug case. The matter was set for trial, but the claimant failed to appear (he was shot in the foot and was being treated by a physician). The State sought a default judgment, which was granted. The enterprising pro se claimant filed a petition for *coram nobis*, which the trial court treated as a motion for new trial, but it was denied. HELD: Reversed and remanded for a new trial because even if the claimant fails to appear, the statute requires the State to still present evidence showing that the monies were properly subject to forfeiture.

State v. Williams, No. 2009-0088 (Ohio, July 13, 2011): **Sex Offender Registration**: State sexual registration scheme could not apply to defendant who committed sex offenses prior to its enactment. This is prohibited by the Ohio Constitution.

United States v. Hernandez, No. 10-10695 (5th Cir., July 18, 2011): **Search and Seizure (GPS Tracking)**: Spin on the GPS tracking device cases where Hernandez challenged the warrantless placement of the device on his *brother's* truck. The panel held that Hernandez did have standing to challenge the use of the device, but not the placement. The panel held that use of the device was not a search. NOTE: Authority from the circuits agree with the panel, but there is contrary authority from the D.C. Circuit which held that extensive use of GPS tracking devices violated the Fourth Amendment, and certiorari has been granted in the D.C. Circuit case so stay tuned.

United States v. Bagdasarian, No. 09-50529 (9th Cir., July 19, 2011): **Scienter (Threats to Presidential Candidates)**: Bagdasarian was convicted under 18 U.S.C. § 879(a)(3) which makes it a felony to threaten to kill or do bodily harm to a major presidential candidate. The basis for the conviction was two statements he posted on the internet in an on-line message board: "Re: Obama fk the niggar, he will have a 50 cal in the head soon" and "shoot the nig." The panel held that these statements did not constitute an offense within the meaning of the threat statute.

Kathleen Minyard v. State of Oklahoma *ex rel*. Oklahoma Department of Corrections, No. 108,963 (Okla. App., Division IV, July 21, 2011) (Not for Official Publication): **Sex Offender Registration**: Minyard was convicted of a sex crime in California in 1986. The Oklahoma Sex Offender Registration Act was enacted in 1989. Minyard became a resident of Oklahoma in 2006. The Court held that the OSORA applied to Minyard because she resided in Oklahoma after its enactment, and by its terms it applies to those who reside here after 1999. HOWEVER, at the time she resided here the term of registration was 10 years. DOC asserted that the subsequent lifetime registration applied. The Court held that Minyard was subject to the 10 year duration. Also, the district court ruled that the retroactive application of OSORA violated the *ex post facto* clause of the Constitution. The panel held that such a holding was unnecessary since the constitutional question need not be reached since, as a matter of statutory construction, the provisions do not apply retroactively. NOTE: The trial court was then-judge, now-Justice Noma D. Gurich.

Michael Bollin v. Jones, No. 108,819 (Okla. App., Division IV, July 21, 2011) (Not for Official Publication): **Sex Offender Registration**: Bollin was convicted of a sex offense in Missouri in 1987. OSORA was enacted in 1989. He moved to Oklahoma in 2004. In 2010, DOC informed Bollin that he had to register. Bollin objected because his conviction occurred in 1987, which preceded the 1989 enactment of OSORA. The panel rejected this argument because he moved to Oklahoma in 2004, after the provision was enacted that required those who reside here to register. Bollin also raised an Equal Protection claim which the panel found unnecessary, and remanded in light of *Reimers* (which held that retroactive application of OSORA provisions are not permissible).

Joseph W. Hendricks v. Jones, No. 108,797 (Okla. App., Division IV, July 21, 2011) (Not for Official Publication): **Sex Offender Registration**: This case completes the *Bollin*, *Minyard*, *Hendricks* trifecta from the Court of Appeals on sex offender registration issues. Hendricks was convicted of a sex crime in California in 1982. OSORA was enacted in 1989. Hendricks moved to Oklahoma in 2009. As in the other cases, the panel held that OSORA applied to Hendricks since he moved here after its enactment, but it remanded in light of *Reimers* since only the version in effect at the time applies to Hendricks.

United States v. Piazza, No. 10-40675 (5th Cir., July 22, 2011): **Motion for New Trial**: Grant of a new trial is affirmed in a case where the Government presented evidence that Piazza sold two firearms to a person, but shortly after sentencing, Piazza filed a motion for a new trial based on newly discovered evidence that his brother, Jed, was the individual who had sold the firearms.

United States v. Digiovanni, No. 10-4417 (4th Cir., July 25, 2011): **Search and Seizure (Traffic Stops)**: Grant of a suppression motion is affirmed in this excellent opinion that reads as a blueprint on how to attack traffic stop searches. The facts read just like all of the cases that we see, except here the officer started in with the drug questions/investigation before calling in the license information, and he obtained consent search. The officer eventually wrote out a warning ticket, gave Digiovanni his license back, and told him that he was free to go. However, immediately after telling Digiovanni that he is free to go, the officer began questioning him some more about drugs, implied that his previous consent to search was still in force, and obtained a written consent form. The District Court found that the officer erred by not proceeding with diligence in checking the license by waiting ten minutes to undertake the inquiry. Rather than proceed to check the license and go about the business of the traffic stop for following too closely, the officer diverted from the purpose of the stop into a drug investigation. The District Court found the consent invalid even though the officer said that Digiovanni was free to go because of the coercive nature of the encounter, and also that the detention was illegal. The panel affirmed. NOTE: The traffic stop here was fifteen minutes long.

United States v. Johnson, No. 09-31106 (5th Cir., July 28, 2011): **Federal Sentencing Guidelines (Considering Arrests)**: District Court erred at sentencing in fashioning an above-Guidelines sentenced based in part on Johnson's record of prior *arrests*.

Lee v. Lampert, No. 09-35276 (9th Cir., August 2, 2011) (*en banc*): **Habeas Corpus (Statute of Limitations and Equitable Tolling)**: In this *en banc* opinion, the Court held that a credible showing of "actual innocence" excuses the statute of limitations period under the AEDPA.

United States v. Gabrion, No. 02-1386 (6th Cir., August 3, 2011): **Death Penalty (Federal)**: Federal death penalty case where the panel vacated the death penalty on the basis that: 1) the District Court prevented Gabrion from arguing that the state of Michigan (where the murder occurred) had no death penalty; and 2) that the District Court erred in failing to instruct the jury that the aggravating factors must outweigh the mitigating factors beyond a reasonable doubt ("We, therefore, hold that a jury's finding that the aggravating factors outweigh the mitigating factors is an element of the death penalty and must be found beyond a reasonable doubt, the same standard constitutionally required for all other findings of fact and mixed questions of law an fact.")

People v. Buza, No. A125542 (Cal. Ct. App., First Dist., Division II, August 4, 2011): **Search and Seizure (DNA Collection)**: State statute requiring DNA sample from all adults arrested for or charged with any felony is unconstitutional.

United States v. Wells, No. 10-2638 (8th Cir., August 8, 2011): **Search and Seizure (Curtilage)**: Police received a tip from a CI that Wells was manufacturing drugs in an outbuilding behind his house. Police surveilled the scene between 3:00 a.m. - 4:00 a.m. and noticed a door open in a shed behind the house, as well as a door open on a camper parked on the street in front of the house. Both had been closed on prior passes, and the police surmised that a burglar was possible. One police officer now became three, and at 4:00 a.m. they arrived at the house whereupon they walked across the backyard to a lighted outbuilding where they knocked on the door, Wells answered, and they detected the strong odor of burnt marijuana. Although they later secured a search warrant, the District Court granted a motion to suppress because police entered the curtilage (the backyard) along an unpaved driveway with no warrant and no exigent circumstances.

United States v. Quintero, No. 10-3280 (8th Cir., August 8, 2011): **Search and Seizure (Consent)**: Police suspected drug activity at a hotel room occupied by a couple. They conducted a knock-and-talk, which consisted of two police officers, hotel security, and an associate manager. They had to knock three times before a man finally answered when the officers identified themselves as "security." The man talked to officers in the hallway, telling them that his girlfriend was undressed inside the room. She finally came to the door and the officers asked if they could come inside to which she purportedly said, yes, but the tape recording of the incident is inaudible on this point. Motion to suppress granted because her consent was not voluntary.

United States v. Dixon, No. 10-4300 (3rd Cir., August 9, 2011): **Federal Sentencing Guidelines (Crack)**: The Fair Sentencing Act of 2010 (dealing with crack cocaine sentences) does apply retroactively in cases where the defendant committed the crime prior to the Act becoming law, but who were sentenced *after* the Act became law.

United States v. Massenburg, No. 10-4209 (4th Cir., August 15, 2011): **Search and Seizure (Pat Down & Collective Knowledge Doctrine)**: Instructive case where police responded to a shooting call in a high crime neighborhood. They contacted four persons a few blocks away and all four were cooperative and provided information. Cops asked permission to pat them down, two agreed and two did not, including Massenburg. Since Massenburg was "nervous" about being patted down, the cops patted him down anyway and found a gun and marijuana. This case is significant because it holds that the search was illegal, but also because the Government tried to save it by invoking the "collective knowledge doctrine" since one of the officers (the one who did not conduct the pat down) saw a bulge in Massenburg's pocket. The panel declined to do that in an excellent discussion of this doctrine and also Tenth Circuit authority on the issue.

Virgin Islands v. John, No. 09-4185 (3rd Cir., August 15, 2011): **Search and Seizure (Search Warrants)**: Police obtained a search warrant for child pornography, but the affidavit only alleged that the home would contain evidence of sexual assault on children at a school where John taught, it did not allege any direct evidence that John possessed child porn, and contained no evidence of the existence of any connection between the two crimes. "In general, the affidavit provided no reason to believe that a person who has committed child sexual assault would be likely to possess child pornography." Evidence suppressed.

United States v. Waller, No. 10-1321 (3rd Cir., August 16, 2011): **Jury Instructions (Intent)**: Waller was charged with firearm possession, heroin possession, and possessing a firearm in furtherance of a drug trafficking crime. In this opinion, the panel reversed based upon a faulty jury instruction on the element of intent which stated that the jury could consider "statements made or omitted by the defendant" which demonstrate the defendant's state of mind. This instruction allowed the jury to consider Waller's post-arrest and post-*Miranda* warning silence in violation of the Fifth Amendment.

United States v. Springston, No. 10-2820 (8th Cir., August 18, 2011): **Supervised Release**: In this case resulting from a conviction for failing to register as a sex offender, three conditions of supervised release are vacated and remanded for specific findings. The District Court held that the conditions were proper because Springston was a sex offender. The conditions were: 1) no unsupervised contact with minors; 2) no access to the internet without approval; and 3) mental health testing and treatment with an emphasis on sex offender treatment.

State v. Henderson, No. A-8 (062218) (New Jersey, August 24, 2011): **Eyewitness Identification; State Constitutions**: This opinion from the New Jersey Supreme Court might be the most comprehensive court document ever issued on the topic of eyewitness identification. It is 142 pages long and completely revolutionizes the way that such evidence is treated in state court. The opinion is so ambitious in scale that it is difficult to summarize, but it includes detailed analysis of how human memory works, the variables that affect it, how jurors understand it, and what the experts say about it. Based upon this exhaustive factual background, the court (using the state constitution as authority) revised the legal test for using eyewitness identification evidence (including the use of pre-trial hearings) and issued new jury instructions on the issue. This case is a must-read on this topic.

Glik v. Cunniffe, No. 10-1764 (1st Cir., August 26, 2011): **Civil Rights**: This is not a criminal case, but rather a civil rights case that deals with the phenomenon of filming public events with cell phones. In this case, Glik was in a park and saw police arresting a young man. Glik was concerned that the officers were using excessive force so he started filming the arrest on his cell phone. The officers noticed this, then advanced on Glik and asked him if his phone recorded audio (it did). Glik was then placed in handcuffs, arrested, and charged with violating state wiretap laws (Massachusetts), disturbing the peace, and aiding in the escape of a prisoner. These charges were all dismissed as baseless and Glik then proceeded to the sue the police officers after his complaints to the police department were ignored. In this opinion, the officers sought qualified immunity and the panel rejected the request in a strong opinion telling us what should be patently obvious: the First Amendment allows citizens the right to publicly record the activities of police officers on public business.

United States v. Johnson, No. 09-6461 (6th Cir., August 29, 2011): **Search and Seizure (Consent)**: This is another consent case where police received a tip and then went to a home to conduct a knock-and-talk. Several persons were at the home and let the police inside. Johnson was there visiting his children. He had permission to stay there periodically, and he objected to a search of a bedroom. The District Court held that since he had lesser possessory interests in the house than the other consenting persons, his objection was not relevant. The panel rejected this analysis, holding that his objection was valid.

United States v. Macias, No. 10-50614 (5th Cir., September 27, 2011): **Search and Seizure (Traffic Stops; Consent)**: Denial of a motion to suppress stemming from a warrantless automobile search is reversed on the basis that the trooper unconstitutionally prolonged the detention by asking irrelevant and unrelated questions without reasonable suspicion of criminal activity. In this case, the delay and the questioning by the trooper took place prior to the trooper running computer checks (a time lapse of 11 minutes from the time of the stop to the time that the trooper ran the computer checks). The panel also rejected the Government's contention that the trooper had reasonable suspicion based on nervousness and a lack of eye contact. Finally, Macias ended up giving consent to search, but this was invalid as well.

People v. Robinson, No. 159 (N.Y. Ct. App., October 13, 2011): **Right to Present a Defense**: New York has an odd law called the "automobile presumption" which says that all persons occupying a vehicle are presumed to possess a firearm found within the vehicle. Robinson was stopped for a traffic violation and walked away from the officer without complying. A subsequent search turned up a firearm under the driver's seat. At the scene, Robinson stated something about "possession is nine-tenths of the law" which was repeated by the arresting officer and used as evidence of guilt (knowledge of and possession of the gun). Robinson testified in his own defense and when defense counsel asked him to explain what he meant by the "nine-tenths statement" the State objected and the objection was sustained. In this opinion, the New York Court of Appeals held this was not only error, but it was not harmless under the facts since the car was not Robinson's, he had it only a short time to run an errand, and other family members had access to it.

United States v. Tickles, No. 10-30852 (5th Cir., October 19, 2011): **Federal Sentencing Guidelines (Crack)**: This is the most recent circuit court treatment of whether the Fair Sentencing Act (dealing with crack cocaine cases) applies retroactively in cases where the criminal conduct preceded the enactment of the FSA, but sentencing occurred after. There is a circuit split on this issue and in this opinion the Fifth Circuit cites cases and sides with those circuits holding that the FSA does not apply in such cases.

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Lex succurrit ignoranti

(The law assists the ignorant)

I GREATLY APPRECIATE THE OCDLA MEMBERSHIP FOR THEIR SUBMISSIONS TO MAKE THIS SECTION A REALITY. TO ENSURE CONTINUED PARTICIPATION IN FUTURE ISSUES, NAMES AND JURISDICTIONS HAVE BEEN REDACTED. – ED.

Attorney: -- how did you get along with your dad?

Witness: Well, first it was okay, besides the beatings and whipping, but I got along with him very well besides the beatings.

***

Judge to Client: How do you plea to the charges?

Client: Blind.

Judge: No … what is your plea to the charges?

Client: Blind! [Counsel briefly confers with Client] No contest?

*****

Preliminary Hearing Statement:
Defense Attorney to Judge: May I have a moment, your Honor?

Preliminary Hearing Transcript:
Defense Attorney to Judge: May I have a movement, your Honor?

*****

The Court: Counsel, the Court would be amiss if I didn't say that I have been around a few bull riders, and they don't have good sense. Not a solitary one of them. They get back on bulls when they ought to stay at home.

Attorney: What was your mom's advice on that point?

Defendant: I don't really remember. I remember she was – I knew that I couldn't really rely on her advice at that point, but I don't know, she might have wanted me to stay and get a lawyer or something. That probably sounds like something she would want to happen. But to me – because when it first happened, I just thought – I was like, Mom, calm down. Some black dude shot somebody over here, and they are just rounding up all the black dudes in this area. That's exactly what I told her.

***

Defendant: I'd like to ask you how you think I'm going to get a fair trial.

The Court: Sir, I don't have to answer your questions.

Defendant: (Defendant rises from chair at counsel table). Yeah, you do.

The Court: No, I don't.

Defendant: I'll tell you what, you piece of shit mother fucker.

Prison Guard: (calls defendant by name).

Defendant: You're telling me I get me a fair fucking trial. You better hope I don't ever get out of the fucking joint. I'll commit me another mother fucking stabbing and cut your fucking head off. Tell me I'm going to get me a fucking fair trial.

(At which time the Defendant was removed from the court room by the prison guard).

The Court: you know, the bad thing is and for the record, the bad thing is with this particular inmate all I can do as far as that outburst is find him in direct contempt and give him six more months on top of whatever he's serving, but I see no purpose in that.

Defense Counsel: Well, for the record, I see no purpose in the whole trial. The man is going to be in prison the rest of his life.

COURTHOUSE VICTORIES

Nothing is as exciting as hearing the words "not guilty," "demurrer sustained," or "motion to suppress granted." This section is dedicated to the hard work and effort of the criminal defense bar and gives special recognition to those who have heard those fantastic words in the courtroom or have otherwise seen victory in 2011. In addition to congratulating our members on their recent victories, we offer this section to provide assistance to our membership seeking advice from colleagues who have recently faced similar issues and cases. – Ed.

NOT GUILTY VERDICTS

Attorney(s)	*Client Charge(s)*	*County*
Drew Lagow	Shooting with Intent to Kill	Tulsa
Brian Jones	Aggravated Trafficking	Oklahoma
Robert R. Faulk	Domestic Violence	Garfield
Ryland Rivas Sr. / Meredith Brockman	Manslaughter I	Grady
Emilie Kirkpatrick / Michael Bush	Robbery I	Oklahoma
Ray Denecke / Beau Phillips	DUI	Oklahoma
Mark Kane	Sexual Battery	Washington
Juan Garcia	DUI	Custer
Kenny Goza	Threatening to Perform an Act of Violence	Grady
Kent Bridge / Tamala Bridge	Murder I	Oklahoma
Rob Henson / Jill Webb	Lewd Molestation, Forcible Sodomy, Child Endangerment	Rogers
Don Baker	Murder I	Muskogee
Elliott Crawford	Embezzlement of VA Benefits by Fiduciary	WDOK
Keith Nedwick	Domestic Abuse, Resisting Arrest, etc	Carter
James Thornley	Embezzlement	Bryan
Theresa McGehee	Embezzlement	Bryan
Whitney Kerr	Kidnapping, Financial Exploitation of Mentally Disabled	Bryan
Cindy Viol / Shelly Harrison	Lewd Molestation (x3)	Texas
Allen Malone	CDS	McCurtain
James Bowen / Jeree Elizabeth Griffith	Murder I	Pushmataha
Joi McClendon	Murder I	Wagoner
David McKenzie / Jacqui Ford	A&B upon EMSA Employee	Oklahoma
David McKenzie / Jacqui Ford	A&B upon Police Officer	Oklahoma

OTHER VICTORIES

Attorney(s)	*Client Charge(s)*	*Jurisdiction*
Brandi Peden	Obtained a dismissal on manufacturing of meth charges	Delaware County
Danny C. Williams	Won a suppression motion which survived a State appeal	Tulsa County
James H. Lockard	Convinced the OCCA to vacate a death sentence	
Larry Vickers	Obtained a dismissal on counts of Murder I, Burglary I and Shooting w/ Intent	
George McBee / Matthew McBee	Won a motion to quash	LeFlore County and the appeal to OCCA
Chris Sloan	Won a demurrer on five of six counts of shooting w/ intent	
Jill Webb	Won an appeal pertaining to the Post-conviction Procedure Act	
Josh Lee / Clint Ward / Richard Anderson	Demurrers sustained on kidnapping and possession of firearm AFCF charges	
Wayna Tyner	Won an appeal on attorney conflict of interest	
Jamie Pybus	Won a new trial for her client on appeal	
Janet Davis	Won an appeal on failure of notice to withdraw plea	
Mark Hoover	Convinced the OCCA on appeal to run sentences of his client concurrently	
Cindy Brown Danner	Secured a new hearing to withdraw plea for her client on appeal	
Clark Brewster / Darla Sedgwick / Robert Nigh, Jr.	Won a new trial on IAC and *Brady* issues	

If your name has been omitted, it is a result of my oversight, not the level of your accomplishment. Please contact me at craig.hoehns@hoehnslaw.com and we will give you recognition in the next issue of "*The Gauntlet*."

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