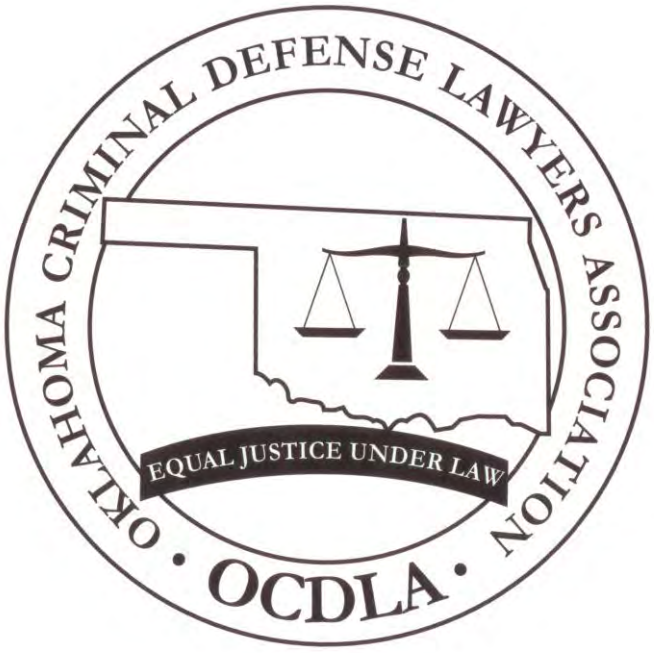
THE GAUNTLET

The Law Journal of the

OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION



SPRING 2013

OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION

PRESENTS

"Everything You Ever Wanted To Know About Doing Prison Time In Oklahoma..... But Were Afraid to Ask"

- Sentence Administration
- Programs
- Classification
- GPS Monitoring
- Parole
- Registration Acts

COMING THIS FALL
TO TULSA AND OKLAHOMA CITY

THE GAUNTLET

To confront: (1) To throw down the Gauntlet; (2) To take up the Gauntlet

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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 publishes *My Little Green Book*. *The Gauntlet* is a peer-reviewed journal. All articles are reviewed by members of the OCDLA prior to publication; however, the articles do not necessarily reflect the views of the OCDLA. Please send any comments regarding *The Gauntlet* to **Craig M. Hoehns, Editor, at craig.hoehns@hoehnslaw.com**.

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THE PRESIDENT'S PAGE

by

D. Michael Haggerty, II

President, Oklahoma Criminal Defense Lawyers Association

Fellow OCDLA Members:

I am happy to present this Spring 2013 edition of *The Gauntlet*. If you are like me, you will find it full of information useful to you in your practice not just today, but for years to come. Thanks to Craig Hoehns, Tim Laughlin and everyone else who contributed to this issue for all their hard work getting this issue out, and ensuring that *The Gauntlet* maintains the high standards that the criminal defense bar has come to expect.

The 2013 Patrick A. Williams Criminal Defense Institute is just over a month away. It will be at the Skirvin Hotel in downtown Oklahoma City. Our CLE committee has put together a tremendous program. I particularly want to recognize Catherine Hammarsten and Katrina Conrad-Legler for their tireless efforts to ensure this seminar is one of our best yet. We are tremendously proud to be able to continue working with the Oklahoma Indigent Defense System, the Oklahoma County Public Defender's Office and the Tulsa County Public Defender's Office in presenting Oklahoma's premiere criminal defense seminar. If you have not signed up for it, now's the time! Go to our website, *www.ocdlaoklahoma.com*, and register. Remember, it's not just a seminar, but an opportunity to socialize, network and swap stories with criminal defense attorneys from around the state.

After CDI, we are also planning a couple of other seminars for later this year. With the retirement of Jim Rabon from the Department of Corrections, we had to put off our planned DOC Seminar from this spring. We're hoping to get it put together with his successor either late this summer or sometime this fall. We will also be putting on our annual Cindy Foley Criminal Defense Basics seminar this fall. While the Foley seminar is aimed at new graduates, it has information useful to even the most experienced practitioners.

We continue to grow as an organization. Last year we went over 500 members for the first time in our history. We continue to work to provide first-class services to our members, such as our annual updates to *My Little Green Book* (available in both the printed version and in apps for the iPhone, Android and Blackberry), forms and other information available on our website, and our publications (*The Gauntlet*, Hot Sheets, and so forth). Our Board of Directors has done tremendous work in making sure we continue to prove to be a valuable resource to our members.

Thank you for your continued membership in this incredible organization. It was a tremendous honor to be elected OCDLA President at our annual meeting in November. I look forward to seeing each of you at the CDI in June.

D. Michael Haggerty, II
President, Oklahoma Criminal Defense Lawyers Association

The Oklahoma Criminal Defense Lawyers Association
Presents

The 21th Annual
Patrick A. Williams
CRIMINAL DEFENSE INSTITUTE

JUNE 27 & 28, 2013
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- OK - 12 Hours, includes 6 hours of Mandated Juvenile Law training* and 1 hour ethics**

Location

The Skirvin Hilton Hotel has a room rate of **$129.00** for the CDI. This rate is good until **May 28th**. For room reservations call 405-272-3040 or online. Reference Group Code: **OCDLA**

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2013 CRIMINAL DEFENSE INSTITUTE SCHEDULE

Thursday, June 27, 2012
Main Session

8:30 - 9:00 am	**Welcome** *Michael Haggerty II, OCDLA President, Bob Ravitz, Chief Public Defender OK County* *Jack Zanerhaft, Chief Public Defender Tulsa County, Joe Robertson, OIDS*
9:00 - 10:40 am	**Voir Dire: The Marriage of Colorado and Wyoming** *Cindy Viol, OIDS & David Smith, Norman*
10:50 - 11:40 am	**Ethically Addressing Issues of Prosecutorial Misconduct**** *David Autry, OKC*
11:40 - 12:30 pm	**Interviewing and Cross Examining the Child Complainant*** *William Korman, Boston, MA.*

BREAKOUT SESSIONS

Track 1

1:30 - 2:20pm	**Identifying and Litigating Brady Violations*** *David Autry, OKC*
2:30 - 3:20pm	**SORA & Convictions Triggering The Act-** *Jack Dempsey Pointer, OKC*
3:30 - 4:20pm	**Issues in Drug Dog Cases -** *Doug Parr, OKC*
4:30 - -5:20pm	**Search and Seizure***- *Larry Edwards, Tulsa*

Track 2

1:30 - 2:20pm	**Your Military Client's Records: Getting Them All & Decoding the Military Language** *Robert Don Gifford, United States Attorneys Office*
2:30 - 3:20pm	**Veterans Justice Outreach- How The Program Can Help Your Client** *Joseph Dudley, MSW, VA Hospital, OKC*
3:30 - 4:20pm	**Writing Tips for Appellate Attorneys**-Rob Ramana, OKC
4:30 - -5:20pm	**Case Update: State and Federal** *Barry Derryberry, Federal Defender, Stuart Southerland, Tulsa Public Defender*

Track 3

1:30 - 2:20pm	**DUI**: *John Hunsucker, OKC & Bruce Edge, Tulsa*
2:30 - 3:20pm	**DUI:** *John Hunsucker, OKC & Bruce Edge, Tulsa*
3:30 - 4:20pm	**DUI-Drugs/DRE**-*John Hunsucker, OKC & Bruce Edge, Tulsa*
4:30 - -5:20pm	**Designer Drugs**- *Dr. John Duncan, PhD, OUHSC*

Friday, June 28th

8:30 - 9:00am	**Welcome & Presentation of the 2013 Patrick A Williams Award**
9:00 - 9:50am	**Assessing Trauma: Integrating It Into Your Adult and Juvenile Defense Strategy*** *Cathy Olberding, LPC, OKC*
9:50 - 10:40am	**The Youthful Brain- Using the Science to Benefit Child & Young Adult Clients*** *Rick Wardroup, Lubbock, TX*
10:50 - 11:40pm	**Enforcing the Personal and Fundamental Right to a Meaningful Preliminary Hearing** *John Echols, Tulsa*
11:40 -12:30pm	**How to Represent the Sex Crimes Defendant & Still Get Invited to Cocktail Parties*** *William Korman, Boston, MA*

FOR MORE INFO: Email: *bdp@for-the-defense.com* or call the OCDLA: 405-212-5024

Or visit www.ocdlaoklahoma.com

PRACTICE TIPS:

HAVE YOU CONSIDERED CONDITIONAL EXAMINATION?

By Craig M. Hoehns[1]

A defendant's right to present evidence at preliminary hearing has been substantially hampered since the 1994 amendment of 22 O.S. §258. Since that amendment, preliminary hearings could be terminated pursuant to the "cut-off" rule if law enforcement reports had been made available to the defense five (5) working days prior to the hearing. The "cut-off" rule has hindered defense ability to not only present a defense early in proceedings but also to fully prepare for trial by examining witnesses under oath. Conditional examination allows for testimony to be taken under oath prior to trial. While not a perfect method or replacement for the preliminary hearings of old, conditionally examining witnesses pursuant to 22 O.S. §761 *et seq.* should be considered when available.

The defense can apply for conditional examination "when a material witness in any criminal case is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial," 22 O.S. §762, or when a preliminary hearing has been terminated and a witness refuses to interview with counsel, 22 O.S. §762.1. Sections 763 to 769 of Title 22 outline the application procedure and examination process. It is all too rare that the defense pursues this procedure though.

As with all pre-trial decisions, there are potential drawbacks and considerations in determining your course of action. Each case requires a careful determination whether the advantages are outweighed by the disadvantages. If conditionally examining a favorable witness, the prosecutor will have an opportunity to examine the witness prior to trial. Likewise, by conditionally examining an adverse witness, there will be sworn testimony that could be used against your client at trial if the witness later becomes unavailable.

However, conditional examination allows several benefits for the defense: (1) It allows the defense to preserve favorable testimony when witnesses may disappear due to illness or relocation; and (2) It allows the defense to lock witnesses into their stories, particularly those adverse to the defendant, and punish those witnesses who choose to deviate with sworn impeachment evidence.

Conditional examination is not for every case, but it is an important tool in the defense discovery toolbox. The defense cannot always rely on and trust the State to provide full and complete discovery pursuant to the Oklahoma Discovery Code and *Brady v. Maryland*. The defense must use its arsenal of weapons, including petitions for disclosure, subpoenas, and conditional examination, when available to provide our constitutionally mandated effective representation.

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1 Craig M. Hoehns is in private practice in Oklahoma City. He currently serves as a participating attorney on the Grady and Caddo County OIDS contracts, is a member of the Board of Directors of the *OCDLA and OCCDLA*, and acts as Editor-in-Chief of "*The Gauntlet*" for *OCDLA*. He can be contacted at craig.hoehns@hoehnslaw.com or at 405-521-1155.

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OKLAHOMA COURT OF CRIMINAL APPEALS UPDATE

(An update of the published cases)

by

James L. Hankins[1]

State v. Stice, 2012 OK CR 14 (October 24, 2012): **Supervision Fees**: In this State appeal, the district attorney in Cleveland County sought mandamus against the Hon. Steve Stice to enforce supervision fees. The case involved an Aggravated DUI case resolved by plea and a deferred sentence, but the supervision and periodic testing was not something that the D.A.'s office could provide, so Judge Stice ordered supervision by private provider and refused to order D.A. "supervision" fees in addition to this. The Court held that such decisions are discretionary under the statute, and that Judge Stice did not abuse his discretion in this case. Mandamus denied.

Kevin Duane Barnard v. State, 2012 OK CR 15 (October 30, 2012): **Double Jeopardy**: Barnard was tried by jury and convicted in Tulsa County of lewd/indecent proposals to a child, and a count of using a computer system for the purpose of committing a felony. He was sentenced to life and ten years, respectively by the Hon. Dana L. Kuehn. Barnard's chief complaint was that the jury was not instructed on the element of the crime under the statute that he had to believe the person to whom he was communicating was in fact a minor. The Court found this to be true, but harmless. The Court found error under 21 O.S. § 11 for punishment under both counts, since the computer was used to facilitate the acts as in count I. Count II is reversed.

Wolf v. State, 2012 OK CR 16 (November 28, 2012): **Guilty Pleas; Drug Registry; Due Process (Notice)**: Wolf entered guilty pleas to five counts of purchasing Pseudoephedrine. In this appeal, Wolf sought to withdraw her pleas, arguing that, in order to be constitutional, the Act which prohibits certain convicted drug offenders from purchasing Pseudoephedrine must provide notice to the persons who are subject to prosecution. HELD: "The statute does not provide such notice, and violates the Due Process Clause [of the Fourteenth Amendment]." The Court stated that when otherwise lawful conduct is criminalized, the criminal statute must provide sufficient notice for a person to know she is committing a crime.

Malone v. State, 2013 OK CR 1 (January 11, 2013): **Death Penalty**: This death penalty case out of Comanche County involved the infamous murder of OHP Trooper Nik Green. Malone was sentenced to death for the murder, but the Court vacated the death penalty. Malone was afforded a new sentencing hearing and was sentenced to death for a second time. In this appeal, the Court found no error in the death sentence over Malone's claims relating to: 1) IAC in waiving jury sentencing and in some aspects of closing argument; 2) prosecutorial misconduct in impeaching improperly defense mitigation witnesses (no objection, so plain error review); 3) the "peace officer" aggravator is duplicative; 4) the death sentence is unconstitutional because it should not apply to defendants who were mentally ill at the time of the crime (the Court refused to extend *Atkins* to this class of defendant); 5) cumulative error; and 6) the mitigating factors outweigh the aggravating factors.

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1 James L. Hankins is in private practice in Oklahoma City, Oklahoma, and produces the weekly newsletter *Oklahoma Criminal Defense Weekly* which is circulated via email. For more information or to contact James just visit www.ocdw.com or email him at jameshankins@ocdw.com.

Logan v. State, 2013 OK CR 2 (January 11, 2013): **State Post-Conviction**: Logan was convicted by jury of Robbery with a Firearm (AFCF x 1) and Robbery in the First Degree and sentenced to Life and 40 years. The Hon. Virgil C. Black ordered the counts to run consecutively. The OCCA affirmed on direct appeal. In post-conviction, Logan raised six claims of error (search and seizure, no PC for arrest, suggestive pre-trial ID, IAC of trial and appellate counsel). This opinion focuses primarily on IAC of appellate counsel for failing to raise these issues. The Court stated that post-conviction is the proper vehicle to raise IAC on appellate counsel "because it is usually a petitioner's first opportunity to allege and argue the issue." Also, the analysis involves evaluation of the merits of the issues that appellate counsel failed to raise. The Court found Judge Black's summary opinion deficient in legal analysis of the claims raised and remanded the matter back to the district court. This opinion outlines the proper analysis of IAC of appellate claims in state post-conviction proceedings and seems to direct the district courts to stop rubber stamping denials and actually analyze the merits of the claims. NOTE: This was a 3-2 opinion, with Judges Lumpkin and Lewis dissenting from the remand.

State v. Ramos, 2013 OK CR 3 (March 13, 2013): **Vienna Convention**: In this murder case out of Woodward County (the Hon. Ray Dean Linder, presiding), Judge Linder suppressed evidence based upon a violation of the Vienna Convention which requires that the consulate for foreign nationals be notified if they are arrested here in the U.S. There is no doubt that the Convention was violated, but question was whether suppression is the proper remedy. The Court—relying on Supreme Court authority that foreshadowed this result—held that it was not.

Bemo v. State, 2013 OK CR 4 (March 19, 2013): **DUI (Blood Draw)**: Bemo was convicted by jury in Tulsa County (the Hon. William J. Musseman, presiding) of First Degree Manslaughter (AFCF) and sentenced to 27 years. This case involved a fatality car wreck and the withdrawal of blood from Bemo by a paramedic. In this opinion, the Court found no error in the blood draw, holding that a formal arrest is not a prerequisite for the withdrawal of blood under 47 O.S. 10-104(B); and also that an EMT paramedic is qualified to withdraw blood in these cases. NOTE: This case deals with the interplay between two statutes that both allow blood draws: 47 O.S. 10-104 and 47 O.S. 753 & 756. The Court stated that since section 10-104 was the more specific, an actual arrest of Bemo was not required for the draw.

State v. Delso, 2013 OK CR 5 (March 27, 2013): **State Appeals; Quash**: This is a case out of Okmulgee County where Delso was charged with a drive-by, but waived preliminary hearing. At the district court arraignment before the Hon. Kenneth E. Adair, Delso filed a motion to dismiss on the basis that the information in the discovery material (police reports) showed no bullet holes in the house, but some in the detached garage which is not a dwelling under the statute. Judge Adair bought this argument and sustained the motion—which seems to be some quasi motion to quash. The problem for Delso was that there was no preliminary hearing held, thus no actual evidence before the court to sustain a motion to quash. The OCCA held that such motions must be based on evidence—not police reports—and since Delso had waived preliminary hearing, the motion could not be sustained. Reversed.

State v. Juarez, 2013 OK CR 6 (April 9, 2013): **Preliminary Hearing; Hearsay (Child Hearsay)**: Juarez was charged in Tulsa County with Lewd Molestation. At the preliminary hearing before the Hon. Deborah Ludi-Leitch, Juarez demurred, but it was overruled. However, Juarez filed a motion to quash in the district court (the Hon. William C. Kellough) and this motion was granted on the basis that the evidence was insufficient. In this State appeal, the Court affirmed, holding among other things that the reliability hearing under 12 O.S. 2803.1 is not required prior to the PH; but also that the reliability of the witness is still at issue at the preliminary hearing, and that in this case the testimony was unreliable.

State v. Bass, 2013 OK CR 7 (May 1, 2013): **Search and Seizure (Standing & Traffic Stops)**: Bass was charged in Sequoyah County with Trafficking (Marijuana), but was bound over on Possession w/Intent by the Hon. L. Elizabeth Brown (per the request of the State). The Hon. J. Jeffrey Payton granted the motion to quash based upon his review of the traffic stop video and the preliminary hearing transcript. The State appealed. The Court reversed, finding that although Bass had standing to challenge the search (even though he said he borrowed his girlfriend's rental car and he was not on the rental agreement), the extended traffic stop and dog sniff was lawful based upon Bass's "lies and shifting stories" made to the trooper; thus, the order granting the motion to quash is reversed.

OKLAHOMA COURT OF CRIMINAL APPEALS UPDATE

(An update of the unpublished cases)

by

James L. Hankins[1]

Christopher Cleveland v. State, No. F-2011-482 (Okl.Cr., September 19, 2012) (unpublished): **Waiver (Waiver of Appellate Issues)**: Cleveland proceeded *pro se* on a perjury charge in Oklahoma County and was convicted. The judge (the Hon. Kenneth Watson) allowed the attorney witnesses to testify without being sworn (like the other witnesses were) on the basis that they were officers of the court. On direct appeal, the Court denied relief by applying plain error review, holding that Cleveland did not object to this procedure until he recalled the attorney-witnesses in his case-in-chief. In this opinion, Cleveland sought rehearing on the basis that he did in fact object (and is therefore entitled to *de novo* review rather than plain error review). The issue was litigated via pre-trial motion, Judge Watson denied the motion, but at the trial Judge Watson *sua sponte* "noted" the objection and overruled it. This was reasonable because it had been litigated and Cleveland lost. In light of Judge Watson's statement noting the objection and overruling it, Cleveland did not actually say the words "I object" at trial. In this opinion, the Court characterized Judge Watson's *sua sponte* statements as a "gratuitous act of 'noting' and overruling an objection that Appellant *did not* make at the time of trial." The Court thus denied the petition for hearing on the basis that Cleveland did not object---even though Judge Watson noted the objection and overruled it. NOTE: A couple of things emerge from this. First, the lesson for trial lawyers is that even if you litigate issues by pre-trial motions which the trial judge recognizes at trial and overrules, *you still must state on the record that you object*. Second, this opinion calls into question the practice of "continuing objections" which are convenient and have heretofore been acceptable.

Exondia J. Salado v. State, No. F-2011-318 (Okl.Cr., October 16, 2012) (unpublished): **Search and Seizure (Search Warrants; Good Faith)**: Salado was convicted of murder in Oklahoma County. In this opinion, the Court affirmed, but in deciding a search and seizure issue based on search warrants, the Court explicitly applied the "good faith" exception to the exclusionary rule under *Leon*.

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1 James L. Hankins is in private practice in Oklahoma City, Oklahoma, and produces the weekly newsletter *Oklahoma Criminal Defense Weekly* which is circulated via email. For more information or to contact James just visit www.ocdw.com or email him at jameshankins@ocdw.com.

State v. James Monroe Campbell, No. S-2012-194 (Okl.Cr., October 30, 2012) (unpublished): **DUI; Search and Seizure (Traffic Stops; Weaving); Waiver (Waiver of Appellate Issues); State Appeals**: Campbell was charged with DUI in Oklahoma County (the Hon. Roma McElwee, Special Judge), and moved to dismiss the case on the basis that Trooper Rawls lacked a basis upon which to effect the traffic stop for driving within a single lane because his testimony was that Campbell's vehicle touched the inside portion of the fog line, but did not cross over it. Notably, the judge was able to see the videotape of the encounter which confirmed that no law was broken. Also, the State attempted to raise the issue of whether Campbell's driving, even if within one lane, gave rise to reasonable suspicion to stop him for DUI; however, the Court held that the State did not raise this issue at the motion hearing, and as such the Court would not consider it on appeal.

Jason Kenneth Dimaggio, Jr., v. State, No. F-2011-656 (Okl.Cr., November 1, 2012) (unpublished): **Double Jeopardy**: Dimaggio was convicted by a jury in Pottawatomie County of multiple crimes involving drugs and assault (multi-county crime spree) and sentenced by the Hon. John Gardner to time to be served consecutively. The count of possession of oxycodone was "inseparable from the completed robbery in which he demanded the drug" thus the count of possession is reversed on double jeopardy/double punishment grounds.

Gary Eugene Beaty v. State, No. F-2011-447 (Okl.Cr., November 1, 2012) (unpublished): **Jury Instructions (Lesser Included)**: Beaty was convicted by jury in Tulsa County (the Hon. Kurt Glassco presiding) of first degree malice murder and sentenced to life imprisonment. The Court affirmed, but stated that trial counsel "had a duty to consult with Beaty regarding the lesser included offense instructions, and that Appellant's waiver must be on the record." Although Beaty did not make the case that his all-or-nothing decision was made without consultation, this case is a good lesson that such decisions must be made with counsel's advice and be on the record.

State v. Blake Alan Robinson, No. S-2011-834 (Okl.Cr., November 30, 2012) (unpublished): **Search and Seizure (Exigent Circumstances)**: Robinson and a co-defendant were charged in Oklahoma County with Maintaining a Dwelling Where CDS was Kept (Marijuana). The Hon. D. Fred Doak granted a motion to suppress and dismissed the case after PH. The State appealed to the Hon. Cindy H. Truong, who affirmed. In this opinion, the OCCA reversed, holding that the suppression orders were an abuse of discretion since exigent circumstances (potential destruction of evidence) existed for the warrantless entry into the apartment. NOTE: The Court applied the recent case of *Kentucky v. King*, 131 S.Ct. 1849 (2011) (holding that there is no police-created exigency exception to the exigent circumstances doctrine, unless the police actions were threatening or violated the Fourth Amendment).

Gary Patrick Ciancio v. State, No. F-2011-568 (Okl.Cr., December 7, 2012) (unpublished): **IAC; *Burks* Notice and Bad Acts**: Ciancio was convicted by jury in Pittsburg County (the Hon. Thomas M. Bartheld presiding) of Child Abuse by Injury, and sentenced to 25 years. At trial, the State presented a plethora of evidence of other abuse (including sexual abuse) not charged, and in fact some of it developed by trial counsel. In this opinion, the OCCA found ineffective assistance of trial counsel, rejected the State's assertion of *res gestae*, and found that the error did not affect the determination of guilt, but did affect the sentence. MODIFIED to 15 years.

Bryce Andrew Davis v. State, No. F-2012-212 (Okl.Cr., December 7, 2012) (unpublished): **Restitution**: Davis entered a *nolo* plea to Aggravated Assault and Battery in Tulsa County (the Hon. Kurt G. Glassco). Davis went to RID, received a deferred sentence, but was also ordered to pay restitution in the amount of $30,528.43. Davis punched a minor in the face—twice—at a Wal-Mart which necessitated expensive surgery. In this opinion, the Court strikes down a significant portion of the restitution amount---most notably holding that the amount of medical expenses is limited to what the victims actually paid, *not* the amount billed by the hospital (and paid by insurance). The Court interpreted the statute to cover actual economic expenses. In addition, lost wages by the father was an abuse of discretion because this was not established by a preponderance of the evidence. Finally, monies for future dental care were also stricken as too indefinite and no statutory basis for insuring against potential damages. NOTE: Copying expenses for medical and court records was properly ordered. NOTE: This was a contested, 3-2 opinion, with Judges Lewis, V.P.J., and Lumpkin, dissenting.

State v. Moises Gonzales-Tello, No. S-2012-166 (Okl.Cr., January 7, 2013) (unpublished): **Search and Seizure (Traffic Stops; Exclusionary Rule); State Appeals**: Gonzales-Tello was in a heap o'trouble in Oklahoma County because he was charged with Aggravated Trafficking. However, Judge Kenneth Watson granted the defense motion to suppress. The State appealed, and in this opinion, the Court affirmed. Judge Watson found that the search was illegal because it was unreasonably protracted after a routine traffic stop. This case involved an odd circumstance where a drug dog was called out, but it did not alert. However, the officer searched anyway and found a substantial amount of heroin. The Court found no probable cause to search the car. Also, the officer relied on consent, but this was invalid since the officer never intended to let Gonzales-Tello leave, and did not return his license and documents to him. NOTE: The State also argued that "good faith" should apply here, but the Court rejected this invitation.

Dennis Lynn Miller v. State, No. F-2011-877 (Okl.Cr., January 7, 2013) (unpublished): **Assault and Battery w/Dangerous Weapon**: In this particularly disturbing child sex abuse case, Miller was convicted of, among other things, assault and battery with a dangerous weapon when he shoved the complaining witness against a dresser and she sustained a bruise. The Court held that the manner in which the dresser was used did not make the dresser a dangerous weapon likely to cause great bodily injury. That count was reversed and dismissed.

Marla Lynn Moxley v. State, No. F-2011-900 (Okl.Cr., January 8, 2013) (unpublished): **Hearsay (Business Records)**: Moxley was convicted of Second Degree Murder in Pontotoc County (the Hon. Thomas S. Landrith presiding). Moxley raised several issues, including a decent discussion on Confrontation rights as they relate to lab reports (beware that a supervisor who signs off on a report can probably testify without any Confrontation problems). The State sought to introduce a 911 tape through a police officer under the business records exception to the hearsay rule (12 O.S. § 2803(6)). The Court held that this was error (but harmless).

Michael Thomas Alcala v. State, No. F-2011-252 (Okl.Cr., January 22, 2013) (unpublished): **Polygraphs; Prosecutorial Misconduct (Comment on Inadmissible Evidence); Election**: Alcala was convicted of two counts of Sexual Abuse of a Minor Child in Tulsa County. The Court affirmed, but two issues are of interest. First, the prosecutor in the case (Erik Grayless, Tulsa County ADA) informed the jury that Alcala refused to submit to a polygraph test ("gosh darn, he didn't want to take that polygraph"). The Court found error in this "brief and fleeting" comment, but since there was no objection, there was no reversible plain error. Second, the Court discussed Alcala's claim that the State was required to elect which acts upon which it would rely for conviction on the two charged counts of child sex abuse. Requiring the State to elect acts is often confusing to counsel and the bench, but this case discusses the issue nicely, including the special rules in child sex abuse cases which make sure that all child molesters are convicted without error no matter whether election rules apply or not.

State v. Hermenegildo Vasquez Perez, No. S-2012-355 (Okl.Cr., January 29, 2013) (unpublished): **Search and Seizure (Probable Cause); State Appeals; Standards of Review (State)**: In this State appeal involving a drug case, the Hon. Darrell Shepherd (Wagoner County) granted a motion to suppress and dismissed the case. The Court affirmed Judge Shepherd over the State's claim that there was PC to arrest. The facts established that deputies saw two men exchange "bags" at a McDonald's (although one of the items might have been a suitcase), that one of the persons was a "known drug dealer," and that the deputy who saw it thought that it was a drug deal based on his training. Judge Shepherd held that the State failed to present evidence to support the conclusion that one of the persons (Miller, not Perez) was a drug dealer. The Court agreed, noting that this case did not involve an investigative stop or detention; rather, the deputy requested that Broken Arrow police stop and arrest Perez, which they did (the drug dog alerted after the arrest, and after-acquired evidence cannot support the PC determination). The opinion is noteworthy because the deputy relied upon his training to determine that a drug deal was taking place, but the Court held that this was not sufficient.

Jerry Edward Daubert v. State, No. F-2012-26 (Okl.Cr., January 31, 2013) (unpublished): **Concurrent and Consecutive Sentences**: Daubert was convicted at a bench trial of Shooting w/Intent to Kill (two counts). The trial court ordered the counts to be served concurrently at the formal sentencing, but the Judgment and Sentence filed in the case omitted any reference concerning the concurrent nature of the sentences. This happens occasionally, and this is one of the areas of the law with a firm rule: the sentence announced in open court at formal sentencing, while the judge is on the bench and the defendant is present, is the sentence that controls over subsequently filed documents. In this case, the matter was remanded for an order *nunc pro tunc* to correct the J&S.

Dean John Poolaw v. State, No. F-2011-1109 (Okl.Cr., February 8, 2013) (unpublished): **Supervised Release**: Poolaw was convicted by jury in Jackson County (the Hon. Richard Darby presiding) of First Degree Rape (Victim of Unsound Mind) and sentenced to 10 years. Oklahoma juries have to be instructed now on mandatory terms of post-imprisonment supervision (similar to supervised release in federal court). The jury here was not so instructed, and Poolaw made a good argument that he was prejudiced by the omission because the jury might have been more lenient had it known about the requirement. The Court found that the failure to instruct was plain error, but alas was harmless.

Wayne Roger Smith, Jr., v. State, No. F-2011-939 (Okl.Cr., February 8, 2013) (unpublished): **Motion *In Limine*; Jury Instructions (Preservation); Waiver (Appellate Issues)**: This is a murder case out of Oklahoma County (the Hon. Cindy H. Truong) that illustrates motions *in limine*. The State filed a motion *in limine* in this case to exclude evidence that the accused suffered from clinical depression or anxiety at or near the time of the homicide (claiming it was not relevant). The trial court sustained the motion. First, the OCCA views trial court rulings on MILs as "advisory and not conclusive." This means that if you want to preserve the issue on appeal, you have to do something at trial. In this case, where the ruling was to exclude evidence, you must make an offer of proof at trial, thus affording the trial court an opportunity to make a final ruling on the evidence (something that was not done here).

William Gene Hodgens v. State, No. F-2012-209 (Okl.Cr., February 11, 2013) (unpublished): **Bogus Checks**: This is a Bogus Check case that was tried to the Court (the Hon. Lawrence W. Parish). Hodgens was found guilty, given an 18-month deferred sentence, and ordered to pay restitution. The Court affirmed, but there is an interesting discussion of the bogus check statutes, particularly a subsection that indicates intent to defraud if the check is presented for payment within 30 days after being delivered to and accepted by the payee. Hodgens argued that this "30-day" provision rendered his checks outside the statute since they were not in fact presented within 30 days, but the Court construed the statute as merely limiting the use of refused checks as *prima facie* evidence of intent to defraud.

Darrell Ray Beauchamp v. State, No. C-2011-469 (Okl.Cr., February 13, 2013) (unpublished): **Guilty Pleas**: Beauchamp entered *Alford* pleas before the Hon. Kurt G. Glassco to two gun charges, AFCF. When Beauchamp moved to withdraw his pleas, the court appointed conflict-free counsel, held a hearing, and denied the motion. In this opinion, the Court reversed, granted certiorari, and remanded with instructions to grant Beauchamp's motion to withdraw his plea and assign his case before a different judge. At an evidentiary hearing, it appeared that Beauchamp entered his plea based upon his trial counsel's representation that counsel had spoken to the judge, and that the judge had said that he would sentence Beauchamp to a more favorable sentence than the State's offer (and also more favorable than the ultimate sentence he received).

Samuel Allen Arp v. State, No. F-2011-971 (Okl.Cr., February 20, 2013) (unpublished): **Waiver of Appellate Issues**: Arp was convicted by jury in Tulsa County (the Hon. Tom C. Gillert presiding) of A&B w/Dangerous (AFCF x 2), and Obstructing an Officer. He raised several claims, including one involving a rebuttal witness called by the State, who went on for 39-pages of transcript in a meandering rebuttal that included other uncharged crimes. This case points out a subtle procedural trap that is important on appeal. At trial, counsel objected to the *witness being called* on rebuttal, but did not object to any of her *testimony*. Thus, the Court analyzed the issue for plain error only (which is a standard of review much more favorable to the State). So, take note, and be sure to object to the actual testimony in your cases, not just the fact that the witness is called.

State v. Randall Terrill and Deborah Ann Leftwich, No. S-2011-1115 (Okl.Cr., February 20, 2013) (unpublished): **State Appeals**: In this case out of Oklahoma County, the State sought to add a count of conspiracy at the preliminary hearing. Judge Elliott eventually sustained a demurrer to the conspiracy count, and the State appealed. The OCCA affirmed, agreeing with Judge Elliott that the evidence was insufficient to support a charge of conspiracy (the Court declined to decide issues relating to Wharton's Rule and multiplicitous charges).

Santos Ramon Cruz v. State, No. F-2011-671 (Okl.Cr., February 20, 2013) (unpublished): **Credit for Time Served**: Cruz was convicted by jury in Custer County (the Hon. F. Doug Haught presiding) of A&B w/Dangerous. I included this case because of a quirky issue involving credit for time served. Cruz was sentenced to five years DOC, but no mention was made of credit for time served at the formal sentencing. However, a post-sentencing hearing of some kind was held, at which Cruz asked twice whether he was getting credit for time served, and his counsel told him yes. Neither the prosecutor nor the trial judge contradicted counsel. The Court stated that Cruz was left with the apparently official information that his sentence included credit for time served. Although the rule is that the oral pronouncement controls, the Court held that there were in effect two oral pronouncements, and gave Cruz the benefit of credit for time served.

Preston Ramon Dority v. State, No. F-2011-943 (Okl.Cr., February 20, 2013) (unpublished): **Jury Instructions (Lesser Included)**: Dority was convicted of domestic abuse by strangulation in Garfield County (the Hon. Dennis W. Hladik presiding). The Court affirmed, but a discussion of lesser included instructions is interesting. Judge Hladik denied counsel's oral request for a lesser included instruction on the basis that it was not requested in writing. The Court found this basis was error, noting that the "written request" rule was modified in *Nance v. State*, 1992 OK CR 54, 838 P.2d 513, which held that when specific instructions are timely and are unmodified uniform instructions in the OUJI-CR, an oral request by instruction number will be sufficient. Thus, Judge Hladik erred in this regard, but on the merits the Court found that Dority was not entitled to the lesser crime instruction. NOTE: Even though *Nance* does forgive the lack of a written instruction, best practice would be to always make a good written record on any requested jury instructions.

Melvin Edward Dan v. State, No. F-2011-1047 (Okl.Cr., February 25, 2013) (unpublished): **Possession of Firearm by Felon**: Dan was convicted by jury in Tulsa County (the Hon. William J. Musseman presiding) of robbery, burglary, and possession of a firearm after a previous juvenile adjudication. This third count was reversed because the State failed to present sufficient evidence to support it because the exhibit introduced at trial failed to "memorialize the nature of the offense."

Mark Alan McNamara v. State, No. F-2012-129 (Okl.Cr., February 25, 2013) (unpublished): **Double Jeopardy**: McNamara was convicted by jury in Kay County (the Hon. Phillip A. Ross presiding) of three counts of Resisting a Police Officer, and one count of Placing Bodily Fluid on a Government Employee. On appeal, he argued that he committed a single act of resisting arrest, thus the multiple convictions violated section 11/double jeopardy. The Court rejected this argument because McNamara resisted three separate police officers. The Court stated that it is "well established" that in cases of crimes against the person, acts that are part of the same transaction will constitute separate and distinct crimes where they are directed at separate and distinct persons.

Gene Freeman Price v. State, No. F-2012-112 (Okl.Cr., February 25, 2013) (unpublished): ***Pro Se* Representation**: Price was convicted by jury in Atoka County (the Hon. Richard Branam presiding) of First Degree Burglary. Price represented himself at trial, but in this opinion the Court reversed because the record did not reflect adequately a knowing and voluntary waiver of the right to counsel. NOTE: The Court is hostile to *pro se* convictions and will generally reverse unless the record is ironclad.

Steven Wayne Robertson v. State, No. RE-2011-138 (Okl.Cr., February 27, 2013) (unpublished): **Jurisdiction (General)**: Robertson was convicted of various assault and weapons charges, given suspended sentences, placed in drug court, failed, was revoked, and sentenced ultimately to 15 years. The problem as to one of the counts was that the statutory maximum was only 10 years. The Court granted relief, noting that such a revocation appeal would normally not be the place for it, but since it was a jurisdictional defect, it could be raised and considered in the context of a revocation appeal.

Darell Steven King v. State, No. F-2011-127 (Okl.Cr., February 28, 2013) (unpublished): **Search and Seizure (Search Warrants; Good Faith)**: King was convicted of First Degree Murder, Possession of a Firearm AFCF, and Conspiracy to Commit First Degree Murder, all in the district court of Tulsa County (the Hon. William C. Kellough presiding). In this lengthy opinion (37 pages), the Court found an affidavit for search warrant deficient (or, at least found no abuse of discretion when the trial court so found). The police secured the warrant to search the apartment of the girlfriend of a co-conspirator/co-defendant. The affidavit simply recited that King and co-defendant Finch were armed with handguns, were seen arguing with the decedent, and that the two of them were discovered three days later at the apartment, and that sometimes perpetrators conceal weapons at a "safe house." Although the Court stated that reasonable minds could differ on whether the affidavit was sufficient for probable cause, the Court could not say that the trial court abused its discretion. However, the Court applied the good faith exception under *Leon* and declined to apply the exclusionary rule. NOTE: Since *State v. Sittingdown*, 2010 OK CR 22, the Court has not revisited application of *Leon* in a published decision.

Wendell Richard Ayers v. State, No. F-2011-907 (Okl.Cr., March 5, 2013) (unpublished): **Interrogations (Fifth Amendment)**: Ayers was convicted at a bench trial in Atoka County (the Hon. Preston Harbuck presiding) of possession of a firearm AFCF, and also misdemeanor possession of marijuana. The Court held that Judge Harbuck erred in failing to suppress statements made by Ayers to the police. The State conceded that Ayers was detained, but not under formal arrest; and in fact the State seemed to argue that police may interrogate a suspect held for investigative detention. Although the opinion does not give much in the way of facts, it does say that the facts are remarkably similar to a Tenth Circuit case in which the suspect was taken to the ground at gunpoint and handcuffed. This was held to be the equivalent to a formal arrest. NOTE: Although the Court held that the statements should have been suppressed, it found nevertheless that the statements did not contribute to the conviction because the evidence would have "inevitably" been discovered.

State v. Williams, No. S-2012-268 (Okl.Cr., March 7, 2013) (unpublished): **Search and Seizure (Search Warrants; Good Faith)**: This is a State appeal out of Oklahoma County where the Hon. Kenneth Watson granted a motion to suppress the fruits of a search of a home, pursuant to a warrant, when the affidavit was based upon a trafficking quantity of drugs found during a traffic stop—but no other indication that drugs would be found in the home. In this opinion, the Court did not address the underlying question of whether drugs found in a car can be the basis for a search of a home (although the opinion suggests that, based upon federal court authority, it can be), choosing instead to apply the *Leon* good faith exception since police secured a search warrant.

Sherry Kay Taylor v. State, No. M-2011-870 (Okl.Cr., March 8, 2013) (unpublished): ***Pro Se* Representation**: Taylor was placed on a six-month deferred on a DUI in Bryan County, but she had the misfortune of catching another DUI a short time later. A bench trial and combined acceleration hearing were held before the Hon. Trace Sherrill, at which Taylor appeared *pro se*. However, she filled out an application for court-appointed counsel ten minutes prior to the trial and hearing. Judge Sherrill considered this a ploy to delay the proceedings, but the OCCA found that there was no waiver of the right to counsel and reversed both the trial conviction and acceleration order.

Kendrick Antonio Simpson v. State, No. PCD-2012-242 (Okl.Cr., March 8, 2013) (unpublished): **Habeas Corpus (Procedural Default)**: This is a death penalty case where the prisoner raised claims in a second post-conviction application. The Court denied relief, but reaffirmed the power of the Court to correct miscarriages of justice, notwithstanding the fact that the petitioner might have been barred from raising the claim on some procedural basis. NOTE: The procedural traps in such proceedings are formidable; however, in the published *Valdez* case from 2002, the OCCA held basically that it does not matter what procedural bars are present because the Court retained inherent power to correct miscarriages of justice, even when such claims would otherwise be barred (*e.g.*, could have been raised earlier but were not, no objection below, *etc.*) This caused some indigestion in federal habeas cases because there arose a question whether Oklahoma's application of procedural default was adequate in light of *Valdez*. The Tenth Circuit has thus far viewed Oklahoma's application of procedural default to be adequate by side-stepping *Valdez* as an outlier, but this new *Simpson* case might be some ammunition to show the Tenth Circuit that *Valdez* is still alive and well, and the central principle—that there is no claim that the OCCA cannot view for a miscarriage of justice, no matter the procedural posture—is still applied by the OCCA.

State v. Saylor, No. S-2012-573 (Okl.Cr., March 14, 2013) (unpublished): **Jurisdiction (Police)**: Saylor was charged with Possession of CDS (Meth) in Oklahoma County. The Hon. Larry A. Jones, Special Judge, sustained the demurrer. The State appealed. The Hon. Cindy H. Truong, District Judge, affirmed. The State appealed again, and this time the OCCA again affirmed, holding that a trooper exceeded his jurisdiction under *Crowley v. State*, 2009 OK CR 22, by initiating an investigation on his own at a motel.

Carmile Chong Hwan Sulvetta v. State, No. F-2011-591 (Okl.Cr., March 20, 2013) (unpublished): **Motion for New Trial**: Sulvetta was convicted by jury in Tulsa County (the Hon. William J. Musseman, presiding) of multiple counts stemming from a burglary of a home, including murder for which she received LWOP. Sulvetta filed a motion for new trial based on newly discovered evidence (statements contained in a witness affidavit). Since her appeal had already been perfected, the motion was filed directly in the OCCA per Rule 2.1(A)(3). However, the Court noted 22 O.S. 953 which provides that such a motion may be filed within three months after discovery of the evidence, but no more than one year after judgment. The affidavit made clear that Sulvetta did not file the motion within the three months. Although the statutory language is permissive ("may" be made within three months), the Court chose to punish Sulvetta and hold that such motions must be filed within three months after the discovery of the evidence. NOTE: This is a procedural trap for the unwary. It is not often that such motions are filed while direct appeal is pending, but if you have such a case, note this opinion well and be sure to file your motion in time.

Stephan Dewayne Love v. State, No. F-2012-2 (Okl.Cr., March 21, 2013) (unpublished): **Double Jeopardy (Section 11)**: Love was tried by jury in Oklahoma County (the Hon. Donald L. Deason, presiding) and convicted of Trafficking (cocaine) and Possession with Intent (marijuana). Although Love possessed both drugs at the same time, the Court found no violation of section 11 (applying plain error). Judge A. Johnson's concurring opinion clarifies this point. She stated that the issue is not whether the evidence showed that Love violated two separate and distinct criminal statutes by simultaneously possessing trafficking quantities of cocaine and marijuana with intent to distribute, but rather whether possession of these separate drugs at the same time constituted different criminal acts that may be punished separately. Her analysis includes whether an act giving rise to a criminal offenses can be subsumed by another (the marijuana quantity possessed in this case, below a Trafficking amount, cannot be merged into, or added to, the cocaine quantity to prove the cocaine Trafficking offense). This might be a better way to think of section 11 issues, which often involve vague legal standards. NOTE: Judge Smith joined the concurrence, so at least two judges prefer that mode of analysis.

Damien Hakeem Akanno v. State, No. RE-2011-1016 (Okl.Cr., April 5, 2013) (unpublished): **Mootness; Suspended Sentences**: In this revocation appeal out of Oklahoma County, Judge Donald L. Deason revoked three years of a five year sentence. However, within a week after submitting the appeal to the OCCA, Akanno was released from custody in satisfaction of the revocation. The Court dismissed his appeal as moot. NOTE: It appears that the practical effect of such a decision is that revocation orders that can be discharged prior to the resolution of the appeal are going to be *de facto* unreviewable.

State v. Justin Tyler Drumheller, No. S-2012-789 (Okl.Cr., April 5, 2013) (unpublished): **Search and Seizure (Consent & Reasonable Suspicion); State Appeals**: In this drug case out of Rogers County, the Hon. J. Dwayne Steidley granted a motion to suppress. The State appealed. In this opinion, the State loses. The police encountered Drumheller at a car wash, after having earlier viewed his car at an empty parking lot. The officer "intercepted" Drumheller as he was walking toward the vending box, and prolonged the encounter (after receiving reasonable answers to his questions) so that another officer could arrive with a drug dog. Also, a passenger was being questioned by another officer and was ordered out of the vehicle when the drug dog arrived. Held: "Under the totality of the circumstances, this Court cannot say that the trial court's findings (that the encounter was not consensual) were clearly erroneous; thus, the encounter was not voluntary. In addition, since the encounter was not consensual, the Court determined further that the police lacked reasonable suspicion of criminal activity.

Edward Lane Jackson v. State, No. F-2011-899 (Okl.Cr., April 5, 2013) (unpublished): **After Formers**: Jackson was convicted by jury in Tulsa County (the Hon. William C. Kellough, presiding) of sodomy and lewd molestation. In this appeal, Jackson attacked the sufficiency of the State's evidence regarding his prior convictions, as well as other aspects of this issue like the State using charging documents. The Court found plain error in the introduction of Louisiana charging documents in order to prove prior convictions (error, but harmless unfortunately for Jackson). NOTE: The State usually introduces judgments and sentences for this purpose, so watch out for them trying to slip in charging documents; and also make sure that none of the prior J&S contain mention of probation or suspended sentences. Those references should be redacted, but you as the advocate must ask for it.

Harold Robert Walker, Jr., v. State, No. F-2011-684 (Okl.Cr., April 5, 2013) (unpublished): **Drug Court; Jurisdiction (General); Excessive Sentence**: In this Drug Court termination appeal out of Okmulgee County, the trial court terminated and sentenced Walker to the 5 year max, but refused to give him credit for the six months that he had served prior to Drug Court. Walker argued that this was effectively a sentence of five years and six months---beyond the statutory maximum. The Court agreed.

State v. Sonya Renee Wichert, No. S-2012-244 (Okl.Cr., April 8, 2013) (unpublished): **Drug Registry; Due Process (Notice)**: This is another nice demurrer at PH winner in an unlawful purchase of pseudoephedrine case, courtesy of the Hon. Brian N. Lovell, Special Judge, and the Hon. Ray Dean Linder, District Judge. In this appeal by the State, the Court affirmed, holding that the result was controlled by Wolf v. State, 2012 OK CR 16, since Wichert had been convicted of her drug offenses prior to the effective date of the registry law.

Wayne Haudley Barclay v. State, No. F-2012-33 (Okl.Cr., April 17, 2013) (unpublished): **Interrogations; Hearsay**: Barclay was convicted of sex offenses in Cleveland County (the Hon. Lori Walkley, presiding). The sole issue raised on appeal was the trial court's admission of a videotaped interview of Barclay by police. The tape contained statements by the interviewing detective that indicated Barclay was not truthful and lying, diminished Barclay's credibility and improperly bolstered the credibility of the complaining witness, and referenced "indicators of deception" to support the detective's view that Barclay was lying (thus invading the province of the jury regarding credibility of witnesses). The jury was not instructed or admonished that the comments by the detective were not evidence, but merely "interview techniques" used by police. In this opinion, the Court affirmed, holding no error at all because the detective was cross-examined about the "interview techniques" and no juror would have been unfairly influenced. NOTE: Judge Lumpkin authored the opinion, but the result was very close. Judge Lewis dissented, holding that the failure to redact was an abuse of discretion and reversible error; Judge A. Johnson concurred in the result, finding error but deeming it harmless. Judge Smith concurred in the result, but offered no other insight into her opinion. Thus, at least two judges found error here (and possibly a third), but were not persuaded to grant relief on the facts.

Crystal Lynn Erb v. State, No. C-2012-277 (Okl.Cr., April 18, 2013) (unpublished): **Guilty Pleas**: Erb entered an *Alford* plea in front of the Hon. Timothy L. Olsen (Seminole County) to a charge of Child Neglect, and was promptly walloped with a 30 year sentence. She sought modification of her sentence, and to withdraw her plea on the basis that she was innocent. Motion denied. In this opinion, the Court remanded, as it does in almost all of these cases, for a new hearing on the motion to withdraw the plea with conflict-free counsel. NOTE: This opinion contains a good block of general legal principles with case cites regarding the right to counsel (effective and conflict-free) during pleas.

Jack Joseph Taylor v. State, No. RE-2011-562 (Okl.Cr., April 24, 2013) (unpublished): **Judicial Bias**: In this revocation case, the order of revocation is reversed where the judge (the Hon. Christopher S. Kelly) was a prosecutor from the same county and had prosecuted Taylor in the same cases underlying the basis for the revocation.

Timmy Howard Dickey v. State, No. F-2011-1019 (Okl.Cr., April 24, 2013) (unpublished): **Statutory Construction (Child Sexual Abuse)**: Dickey was convicted by jury in Caddo County (the Hon. S. Wyatt Hill, presiding) of child sexual abuse and sentenced to five years. Dickey was the uncle of the complaining witness, and the appeal centers around whether he was a "person responsible for the health, safety, or welfare" of the complaining witness per the statute (21 O.S. 843.5(E)). In this opinion, the Court held that the record was inadequate to establish that Dickey was such a person (with Judges Lewis and Lumpkin dissenting from that holding). Thus, it appears that simply being an uncle with temporary "custody" of a minor is not enough under the statute.

Kent G. Savage v. State, No. F-2011-1098 (Okl.Cr., April 24, 2013) (unpublished): **Hearsay**: Savage was convicted by jury of multiple counts of child sexual abuse in Oklahoma County (the Hon. Donald L. Deason, presiding). The Court affirmed, but did find error in the admission of hearsay within hearsay as contained in the videotape interview of one of the complaining witnesses. Had Savage raised a timely objection it should have been sustained and the evidence redacted. However, the error was harmless in this case. NOTE: The theme in the cases this week seems to be to watch all videos closely and make specific objections to all parts that you want excluded.

Paul Troy Roppolo v. State, No. F-2011-1061 (Okl.Cr., April 25, 2013) (unpublished): **After Formers (Enhancement)**: Roppolo was convicted by jury in Tulsa County (the Hon. William Kellough, presiding) of Kidnapping and A&B w/Dangerous Weapon, both AFCF. His sole claim on appeal is IAC as it related to attacking his priors, which he contended arose from a single criminal transaction and thus should not have been used to enhance. Although his priors (apparently for some sort of assault or threats) were committed on the same day, he communicated his threats to three different persons. The Court held that this was sufficient to constitute distinct offenses, and thus his legal claim on appeal was denied. NOTE: The test for whether prior convictions constitute a single crime for enhancement purposes is largely undefined, but this opinion clarifies the analysis somewhat.

Kevin Maurice Brown v. State, No. F-2011-407 (Okl.Cr., April 29, 2013) (unpublished): **Double Jeopardy; Possession of Firearm by Felon**: Brown was convicted by jury in Tulsa County (the Hon. Bill Musseman presiding) of multiple counts of Robbery w/Firearm, Possession of Firearm, Attempted Eluding, and Robbery in the First Degree. In this opinion, the Court affirmed for the most part, although it did find that Brown was convicted on two counts of possessing the same firearm which violated double jeopardy.

Donald Michael Reeser v. State, No. F-2011-696 (Okl.Cr., April 30, 2013) (unpublished): **Hearsay; Trial Procedure**: Reeser was convicted by jury in Cleveland County of Murder in the First Degree (Child Abuse). The Court affirmed, but found that it was error for the jury to take into deliberations a videotape made by a forensic interviewer.

Cody Keith Sartin v. State, No. F-2012-368 (Okl.Cr., May 2, 2013) (unpublished): **Discovery**: Sartin was convicted by jury in Tulsa County of Murder in the First Degree (Child Abuse). Affirmed, but the Court found error in the trial court (the Hon. William C. Kellough) excluding defense testimony as a discovery sanction. The Court found that the failure to disclose was a result of trial counsel's negligence and poor judgment, rather than calculated to obtain a tactical advantage. Thus, the extreme sanction of exclusion was an abuse of discretion (but, alas, the error was harmless).

Edwin Hardee Turlington, Jr., v. State, No. M-2011-909 (Okl.Cr., May 3, 2013) (unpublished): **Scienter (Threats)**: Turlington was convicted by jury in Texas County (the Hon. Ryan Reddick presiding) of a misdemeanor count of Threatening to Perform an Act of Violence. The Court affirmed over various challenges, notably finding that the statute requires only that a threat be made; it does not require proof that the party making the threat intended to act on that threat.

State v. Linda Parenti, No. S-2012-552 (Okl.Cr., May 3, 2013) (unpublished): **Accessory**: Parenti was charged in Okmulgee County with Accessory After the Fact, stemming from an allegation that she told authorities a falsehood. The Hon. H. Michael Claver granted a motion to quash. The Court affirmed, holding that accessory after the fact requires proof of some overt active assistance rendered to the felon personally, and that Parenti's actions do not amount to an overt act.

TENTH CIRCUIT UPDATE

by

James L. Hankins[1]

United States v. Turrietta, No. 11-2033 (10th Cir., August 29, 2012) (Published) (Kelly, O'Brien & Gorsuch): **Jurors; Standard of Review**: Turrietta was convicted by jury of assaulting a law enforcement officer, but the kicker was that the jury reached its verdict despite having never been sworn. The panel affirmed, however, by applying plain error review in light of the fact that defense counsel was aware of the error but lay behind the log to object until after the guilty verdict.

United States v. DeVaughn, No. 11-1225 (10th Cir., August 31, 2012) (Published) (Gorsuch, Baldock & Brorby): **Guilty Pleas**: DeVaughn mailed hoax anthrax letters to the President and other government officials, to which he pled guilty unconditionally without reserving a right to appeal. For some reason, the Government failed to argue that the guilty plea deprived the appellate court of jurisdiction to hear the case. This is a question that has prompted a circuit split. Here, the panel held that it does have jurisdiction. NOTE: The panel recited the oft-quoted rule that a voluntary and unconditional guilty plea waives all non-jurisdictional defenses. But, the panel noted that this is not technically correct because a guilty plea does not waive at least two constitutional claims: 1) a Due Process claim for vindictive prosecution; and 2) a Double Jeopardy claim that is self-evident from the face of the indictment. The panel stated it this way: "The most accurate statement of the law would be as follows: A guilty plea waives all defenses except those that go to the court's subject-matter jurisdiction and the narrow class of constitutional claims involving the right not to be haled into court."

Banks v. Workman, No. 10-5125 (10th Cir., September 5, 2012) (Published) (Murphy, O'Brien & Gorsuch): **Habeas Corpus (Capital Habeas Cases)**: Oklahoma capital case affirmed on federal habeas over claims relating to: 1) Confrontation; 2) failure of the State to disclose exculpatory evidence; 3) the right to a competent expert and the effective assistance of counsel; 4) prosecutorial misconduct; and 5) cumulative error.

United States v. Denny, No. 11-2029 (10th Cir., September 24, 2012) (Published) (Murphy, Anderson & Hartz): **Habeas Corpus (SOL and Equitable Tolling)**: This prisoner appeal arising out of 2255 deals with the statute of limitations that is triggered by the date on which the facts supporting the claim could have been discovered through due diligence. In this case, a notice of appeal was not filed in Denny's direct appeal which prompted Denny to file a 2255—but he failed to do so in a timely manner after he was informed by the clerk that no appeal had been filed. Although Denny makes an enterprising argument that his "super-diligence" should result in tolling, the panel denied relief.

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United States v. Sandoval, No. 11-1303 (10th Cir., October 9, 2012) (Published) (Kelly, Seymour & O'Brien): **Federal Sentencing Guidelines (Crime of Violence)**: Under the ACCA, a conviction of second degree assault, even though mitigated by heat of passion, is a violent crime.

United States v. Mendiola, No. 11-2209 (10th Cir., October 12, 2012) (Published) (Briscoe, C.J., McKay & Gorsuch): **Federal Sentencing Guidelines (Drug Rehab)**: The district court committed plain error in light of Supreme Court precedent when it based the length of a revocation sentence on Mendiola's need to participate in a prison-based drug rehabilitation program.

United States v. Joe, No. 11-4001 (10th Cir., October 16, 2012) (Published) (Lucero, Holloway & Tymkovich): **Federal Sentencing Guidelines (Double Counting)**: In a beating-rape case, the defendants challenged enhancements for both use of force and restraining the victim on the basis of double-counting. The panel agreed, holding that the district court erred when it enhanced for physical restraint of the victim as well as use of force.

United States v. Bagby, No. 11-5050 (10th Cir., October 17, 2012) (Published) (Briscoe, C.J., Seymour & Ebel): **Possession (Constructive)**: Life sentence in this drug case is affirmed over claims relating to: 1) sufficiency of the evidence of constructive possession of drugs in a garage; 2) the admission of a "pen pack" to prove prior convictions; and 3) severance of counts.

United States v. Duran, No. 11-1308 (10th Cir., October 18, 2012) (Published) (Murphy, Hartz & Tymkovich): **Federal Sentencing Guidelines (Crime of Violence)**: Since aggravated assault under Texas law can be committed with only a *mens rea* of recklessness, it is not categorically a crime of violence.

United States v. Rich, No. 11-6342 (10th Cir., February 11, 2013) (Published) (Briscoe, C.J., Holloway & Hartz): **Federal Sentencing Guidelines (ACCA)**: In this possession of a firearm by a felon case, a harsh sentence of 180 months is affirmed over claims that a juvenile adjudication (committed 20 years ago when he was 14-years-old) in Oklahoma that was dismissed should not have counted as an ACCA predicate, and that the ACCA violates substantive Due Process by considering these older juvenile adjudications.

Michael Lee Wilson v. Trammell, No. 11-5031 (10th Cir., February 11, 2013) (Published) (Hartz, Tymkovich & Gorsuch): **Habeas Corpus (Capital Habeas Cases)**: Oklahoma capital case where the denial of habeas relief is affirmed on a claim of penalty-phase IAC (misuse of psychological tests and testimony). NOTE: The panel had previously remanded the case to the District Court for an evidentiary hearing. Judge Gorsuch issued a concurring opinion in which he viewed such a remand as unnecessary in light of the OCCA's interpretation of its Rule 3.11 and how that standard squares with the Strickland standard. His concurring opinion is very informative on this topic, and note that he believes that the *en banc* opinion of *Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009) (*en banc*) is now dead-letter as a result of the OCCA interpretation of its rule.

United States v. Gordon, No. 10-5146 (10th Cir., March 15, 2013) (published) (Hartz, O'Brien & Holmes): **Counsel of Choice; Jurors; Speedy Trial**: Lengthy and complicated securities fraud case where the conviction, sentence, and forfeiture of assets are affirmed over claims related to: 1) denial of the Sixth Amendment right to counsel of choice when the Government encumbered or seized his assets, thus preventing him from accessing funds to pay a lawyer; 2) sufficiency of the evidence; 3) encroachment upon his Fifth Amendment right to remain silent; 4) excusal of a juror without cause; 5) speedy trial; and 6) sentencing issues on loss calculations.

Lockett v. Trammel, No. 11-6040 (10th Cir., April 1, 2013) (Published) (Kelly, Tymkovich & Matheson): **Habeas Corpus (Capital Habeas Cases; Victim Impact)**: Oklahoma capital murder conviction and sentence is upheld in federal habeas on several grounds: 1) limitation on mitigation evidence (error, but harmless); 2) victim impact testimony where the relatives of the victim ask for death (error, but harmless); 3) allowing psychiatric rebuttal evidence by State expert who examined Lockett when he considered an insanity defense; 4) sufficiency of the "great risk of death to more than person" aggravator; 5) cumulative error; and 6) IAC because counsel conceded guilt. The panel also denied Lockett's motion for an expanded COA on three other issues. NOTE: On the victim impact issue, the opinion is footnote-heavy with research, particularly footnote 10 which scoured other jurisdictions, both state and federal, on which courts allow such victim impact. Oklahoma is the *lone* state that allows it.

United States v. Benoit, No. 12-5013 (10th Cir., April 2, 2013) (Published) (Lucero, Baldock & Skavdahl, D. Wyo., sitting by designation): **Search and Seizure (State Actor); Double Jeopardy (Child Porn/Possession and Receipt; Restitution)**: Benoit was convicted of both possession of, and receipt of, child pornography. In this opinion, the panel held: 1) denial of suppression motion is affirmed because Benoit's girlfriend found the porn on his computer and called police, thus the search and seizure was private and not police sponsored or initiated; 2) both possession and receipt of child porn violate Double Jeopardy (accord with other circuits that have decided the issue; and 3) in an issue of first impression in this circuit, the panel held that the restitution statute requires proximate cause between the defendant's conduct and victims of child pornography. NOTE: On the issue whether proximate cause is required, the panel noted a circuit split. The panel sided with the majority of circuits, but note that the *en banc* Fifth Circuit is the lone outlier on this issue.

United States v. Patterson, No. 11-3258 (10th Cir., April 5, 2013) (Published) (Tymkovich, Ebel & Holmes): **Insanity & Competency**: Drug case affirmed over claims relating to: 1) denial of competency hearing (no abuse of discretion); 2) sufficiency of the evidence; 3) confrontation violation (non-testimonial since the statements were made in furtherance of a conspiracy); 4) improper statements by the trial court judge that he was going out of town and another judge would have to handle the verdict if the jury could not reach a decision before the end of the week (no plain error); 5) sentencing error based on factual findings of drug quantity; 6) sufficiency of the indictment; and 7) denial of motion to suppress wiretap information.

UNITED STATES SUPREME COURT UPDATE

by

James L. Hankins[1]

Ryan v. Gonzales, No. 10-930 (U.S., January 8, 2013): At issue here is whether federal habeas proceedings must be suspended when a habeas petitioner—such as the state death row inmate here—becomes incompetent. The Ninth Circuit held in the affirmative, and to no one's surprise, the Supreme Court disagreed. Federal law does not provide a state prisoner a right to suspension of his federal habeas proceedings when he is adjudged incompetent. NOTE: This time, it was Justice Thomas who delivered the opinion for a unanimous Court.

Smith v. United States, No. 11-8976 (U.S., January 9, 2013): **Conspiracy**: Smith was charged with a drug conspiracy and asserted the defense of withdrawal. The issue in the case was which party bears the burden of proving (or disproving) withdrawal. The Court held that the defendant bears the burden of proving a defense of withdrawal (by a preponderance of the evidence in this case). NOTE: Justice Scalia delivered the opinion for a unanimous Court.

Florida v. Harris, No. 11-817 (U.S., February 19, 2013): **Search and Seizure (Drug Dogs)**: In 2011, the Florida Supreme Court issued an impressive opinion regarding drug dogs, and the specific records that the State must introduce in order to show that the search based on the dog's alert was reasonable. The opinion included a checklist that mandated the field record of the dog (in this case, Aldo, who alerted falsely twice on the vehicle driven by Harris). In this opinion, the Supreme Court reversed the Florida Supreme Court, holding that a specific set of records is not required; rather, the catch-all "totality of the circumstances" test under *Illinois v. Gates*, 462 U.S. 213 (1983), is all that the Fourth Amendment requires, and in this instance, the evidence of Aldo's training was enough to support the trial court's finding of probable cause. NOTE: This was a unanimous opinion authored by Justice Kagan.

Bailey v. United States, No. 11-770 (February 19, 2013): **Search and Seizure (Search Warrants—Detention of Occupants)**: While police were preparing to execute a search warrant at an apartment, an officer saw two men (including Bailey) leave the apartment and stopped them about a mile away, acquiring a statement from Bailey and a key to the apartment. Bailey moved to suppress, but the lower courts held that the rule of *Michigan v. Summers*, 452 U.S. 692 (1981)—which allows detention of occupants incident to the execution of a search warrant—allowed the detention of Bailey. In this opinion, the Court disagreed, holding that the scope of *Summers* is limited to the immediate vicinity of the premises to be searched.

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Chaidez v. United States, No. 11-820 (U.S., February 20, 2013): **Retroactivity**: In *Padilla v. Kentucky*, the Supreme Court issued a sensible and just decision that the Sixth Amendment requires counsel in a criminal case to inform the accused about possible deportation consequences of a guilty plea. In this case, the Court held that *Padilla* is not retroactive to cases already final; thus, even though *Padilla* would have helped Chaidez, she does not get the benefit of it because it does not apply retroactively to her case.

Evans v. Michigan, No. 11-1327 (U.S., February 20, 2013): **Double Jeopardy**: In a Michigan criminal trial (for arson), the trial court granted a directed verdict of acquittal after the State had rested. It turned out that the trial court made a mistake in thinking that the State had to prove that the burned building was not a dwelling, but Evans argued that this mistake did not matter, and that any re-trial was barred by Double Jeopardy. In this opinion, the Court agreed with Evans that he was acquitted for Double Jeopardy purposes. NOTE: This was an 8-1 opinion, with Justice Alito dissenting.

Johnson v. Williams, No. 11-465 (U.S., February 20, 2013): **Habeas Corpus (Supreme Court Cases & Deference)**: In the land of federal habeas, the nuances of the AEDPA dictate that deference is due a state court decision if it adjudicates on the merits claims raised by a petitioner. This is an easy enough standard to conceptualize, but the state courts have not done their part by identifying with specificity the claims that they decide. In this case, a California state appellate court decided a claim that dealt with questioning and dismissal of a juror during deliberations; and, although the state appellate court cited a Supreme Court case along the way, it never stated specifically that it was adjudicating a claim raised under the Sixth Amendment. The question arose in federal habeas proceedings, does this decision by the state appellate court—which never mentioned the Sixth Amendment--constitute an adjudication on the merits of a Sixth Amendment claim? The Ninth Circuit penned a sensible decision concluding that it did not. However, the Supreme Court reversed, holding that when a state court rules against a defendant but does not expressly address a federal claim, a federal habeas court must presume, subject to rebuttal, that the federal claim was adjudicated on the merits. NOTE: This is not a surprising holding, and was pretty much dictated by *Harrington v. Richer* from 2011. The ruling was 9-0, with Justice Scalia concurring in the judgment only on the basis that the rule is simple and should not involve any presumptions: if the state court denied the claims raised, then it denied them on the merits.

Henderson v. United States, No. 11-9307 (U.S., February 20, 2013): **Standard of Review**: A defendant in federal court ordinarily must object to an error in the trial court in order for a circuit court of appeals to correct it. However, Rule 52(b) allows review for "plain error." What if a case is on appeal and the Supreme Court decides an issue in the defendant's favor, but the defendant did not object below? The Fifth Circuit held that not even plain error review is available because Rule 52 applied only to errors that were "plain" at the time of trial. Note even SCOTUS agreed with this, reversing the Fifth Circuit and holding that regardless of whether a legal question was settled or unsettled at the time of trial, an error is "plain" under Rule 52 so long as the error was plain at the time of appellate review.

Florida v. Jardines, No. 11-564 (U.S., March 26, 2013**): Search and Seizure (Drug Dogs)**: This is a new twist on using drug dogs. In the usual case, we see cops using dogs to search cars. In this case, the cops used a drug dog to sniff right on the front porch of a house. The dog alerted and the officers obtained a search warrant. In this opinion, the Court found that this use of the dog violated the Fourth Amendment because the police were not invited onto the porch, and the use of the dog constituted a search.

Marshall v. Rodgers, No. 12-382 (U.S., April 1, 2013) (*per curiam*): **Habeas Corpus (AEDPA Deference)**: This is an increasingly standard rebuke of the Ninth Circuit on a habeas grant where the state courts denied the Petitioner' request for counsel in drafting a motion for a new trial. The Court took no stance on the merits, holding only that the Ninth Circuit's duty was to determine if the state courts applied unreasonably clearly established federal law as manifested in decisions of the Supreme Court—not circuit precedent.

Missouri v. McNeely, No. 11-1425 (U.S., April 17, 2013): **DUI (Blood Draw); Search and Seizure (Warrantless-Blood)**: This case arose out of a routine DUI traffic stop (no accident or injury) in Missouri where McNeely refused to give a breath sample. The officer then transported him to a hospital for a blood test—which McNeely also refused—whereupon the officer ordered the blood to be drawn. The State requested a *per se* rule in DUI cases that, because BAC dissipates over time, exigent circumstances exist in all DUI cases to allow officers to obtain blood samples without a warrant. In this opinion, a fractured Court rejected the State's invitation to craft a *per se* rule, holding instead that dissipation of BAC alone does not create an exigency sufficient to obviate the warrant requirement; and that these cases must still be decided on a case-by-case basis (and also that the dissipation aspect is a consideration, just not controlling).

OTHER CASES OF NOTE

by

James L. Hankins[1]

United States v. Rivera, No. 10-50426 (9th Cir., June 22, 2012): **Public Trial**: A district court in California prohibited the wife and young son of a defendant from being present at a sentencing hearing, "expressing displeasure at what it perceived as the manipulative use of Rivera's young son as a sentencing 'prop'." The panel vacated the sentence and remanded, finding that Rivera's Sixth Amendment right to a public trial was violated by the district court's exclusion of his family members from the sentencing hearing.

Winston v. Pearson, No. 11-4 (4th Cir., June 25, 2012): **Habeas Corpus (Capital Habeas Cases; AEDPA Deference); IAC**: Nice winner where a grant of habeas relief in a capital case is affirmed when trial counsel failed to raise a mental retardation claim under *Atkins*. The panel held that the lower courts did not adjudicate the claim on the merits, and thus de novo review was applicable.

Rivas v. Fischer, No. 10-1300 (2nd Cir., July 9, 2012): **Habeas Corpus (Statute of Limitations/Equitable Tolling; Actual Innocence)**: In this case of first impression, the Circuit panel held that a credible and compelling showing of actual innocence under *Schlup* and *House* warrants an equitable exception to AEDPA's limitation period. Here, forensic evidence discovered after trial showed that the victim died at a time when Rivas had an iron-clad alibi, and not earlier as the prosecutor had argued at trial.

United States v. Jarman, No. 11-31217 (5th Cir., July 9, 2012): **Child Porn**: This brief opinion discusses the mandate that child porn must remain in Government custody unless the Government fails to provide the accused with reasonable access. Here, the district court held that the Government failed to do so (the defense expert testified that she could not properly conduct an analysis of the hard drive at the Government facility), and the panel affirmed. NOTE: This opinion does not give a good account of the facts, but does link to the district court opinion in the case which probably has a good recitation of the facts if an of you have a similar case where the Government is impeding your expert from a full analysis of the evidence.

United States v. Zaleski, No. 11-660-cr (2nd Cir., July 13, 2012): **Possession of Firearm by Felon**: Intriguing case where Zaleski, having been convicted of felony crimes, owned guns and wanted them transferred to a third party. The guns and ammunition were seized, but acquired by Zaleski prior to his conviction. Zaleski sought to by-pass this problem by having the guns and ammo transferred to a third party who could lawfully possess them. The District Court refused to do this, but the panel reversed, holding that such an arrangement is categorically prohibited. This was an issue of first impression in the Second Circuit.

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United States v. Worley, No. 11-4348 (4th Cir., July 13, 2012): **Supervised Release**: The District Court imposed conditions that prohibited Worley from having any unsupervised contact with any child, residing in or visiting any residence where minor children live without prior permission from his probation officer, and forming any romantic interest or sexual relationship with a person who has physical custody of any child under the age of eighteen. The panel found that the District Court plainly erred in imposing these restrictions—specifically as they affect Worley's relationship with his family—in the absence of any explanation.

United States v. Francis, No. 12-1205 (4th Cir., July 16, 2012): **Sexually Dangerous Person**: Nice opinion where the district court, after an evidentiary hearing, refused to find Francis a sexually dangerous person for purposes of civil commitment. The panel affirmed, holding that the Government failed to prove by clear and convincing evidence that Francis would have serious difficulty refraining from sexually violent conduct if released.

United States v. Ortiz, No. 11-20220 (5th Cir., July 16, 2012): **Speedy Trial**: The STA requires the Government to file an indictment or information within 30 days from the date of arrest. Here, the Government failed to do so, claiming that the delay was attributable to the absence of "an essential witness" (a co-conspirator). The panel was not impressed, and it agreed with Ortiz that the Government failed to show that the witness was essential for the purposes of obtaining a grand jury indictment. Conviction REVERSED. NOTE: In these cases based on the STA (not the constitutional provision), the convictions are reversed and remanded for the district court to determine whether dismissal should be with or without prejudice.

United States v. Teuschler, No. 11-50362 (5th Cir., July 24, 2012): **Federal Sentencing Guidelines (Relevant Conduct); Child Porn**: Instructive case involving hundreds of images of child porn on a computer, and whether images in addition to the charged images amount to relevant conduct under the Guidelines. In this case, the additional images were not relevant conduct because the Government did not prove that Teuschler's possession of the additional images occurred in preparation for, during, or in an attempt to avoid detection of an offense. Also, the additional images were not part of a "common scheme or plan."

United States v. Akinsade, No. 09-7554 (4th Cir., July 25, 2012): **Coram Nobis**: This is a rare winner on a writ of error coram nobis alleging IAC when counsel told Akinsade that pleading guilty would not result in deportation (which it did). NOTE: Split decision 2-1.

United States v. Escalante-Reyes, No. 11-40632 (5th Cir., July 25, 2012) (*en banc*)**: Standard of Review (Plain Error)**: The *en banc* Fifth Circuit addressed this question of exceptional importance: whether, when the law at the time of trial or plea is unsettled, but becomes clear while the case is pending appeal, review for the second prong of the 'plain error' test properly considers the law as it stood during the district court proceedings ("time of trial") or at the time of the appellate court's decision ("time of appeal")." The Circuit joined the majority of circuits in holding that the answer is "time of appeal."

United States v. Mahaffy, No. 09-5349-cr (2nd Circuit, August 2, 2012): **Prosecutorial Misconduct (*Brady* Issues)**: In this conspiracy to commit honest services and property fraud case, the Government waited until after sentencing to disclose transcripts of depositions taken by the SEC. "We hold that the transcripts contained material that was required to be disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963)[.]"

United States v. Burwell, No. 06-3070 (D.C. Cir., August 3, 2012) (*en banc*): **Scienter**: The *en banc* Court characterized the legal question here as: whether 18 U.S.C. § 924(c)(1)(B)(ii), which imposes a mandatory thirty-year sentence for any person who carries a machinegun while committing a crime of violence, requires the government to prove that the defendant knew the weapon he was carrying was capable of firing automatically." The AK-47 at issue here could function in both semi-automatic and fully automatic modes via a selector switch, but there was no clear marking on the switch to designate the mode. In this voluminous set of opinions, the Court followed circuit precedent in holding that there is no specific *mens rea* element on this point, but the dissents are strong and there is evidence of a circuit split on this question.

United States v. Galaviz, No. 11-2396 (8th Cir., August 6, 2012): **Federal Sentencing Guidelines (Obstruction of Justice)**: Galaviz pled guilty to drug and firearm charges. While in prison, after having pled guilty, Galaviz conspired to murder a confidential government informant in retaliation for the informant's cooperation with the Government. The District Court found that this constituted obstruction of justice under U.S.S.G. § 3C1.1. In this split opinion, the panel reversed, finding that the obstruction of justice enhancement did not apply because there was no evidence that Galaviz had reason to think that the informant would be a witness against him at *sentencing*.

Jackson v. Nevada, No. 09-17239 (9th Cir., August 6, 2012): **Right to Present a Defense**: Jackson was convicted in state court of sexually assaulting his girlfriend. He attempted to defend against the charges by presenting testimony from police witnesses that the girlfriend had made false claims against him in the past alleging physical or sexual assault. Since the trial court would not allow this evidence, the panel granted habeas relief.

United States v. Galaviz, No. 11-2396 (8th Cir., August 6, 2012): **Federal Sentencing Guidelines (Obstruction of Justice)**: After pleading guilty and being sent to prison for distributing meth and possession of a firearm, Galaviz conspired to murder one of the witnesses against him because the witness had cooperated with the Government. The Government used these facts to enhance the sentence for obstruction of justice. It makes sense that planning the murder of a witness might be a strong candidate for obstruction of justice, but in this opinion the panel vacated the enhancement because the record did not support that Galaviz could have intended to obstruct justice "with respect to the instant offense" because he had already pleaded guilty. The Government tried to save its position by arguing that the witness was going to testify against Galaviz at sentencing, but the panel rejected this argument because there was no evidence that Galaviz had reason to think that the witness would be a witness at sentencing.

United States v. Steffen, No. 12-1098 (8th Cir., August 9, 2012): **Indictments and Informations (Sufficiency)**: Steffen was indicted on several counts of bank, wire and mail fraud. He filed a motion to dismiss for failure to state an offense. The district court granted the motion, finding that a false representation is required, and that the indictment failed to allege any express misrepresentation by Steffen (mere silence or non-disclosure is insufficient). Affirmed.

United States v. Steffen, No. 12-1098 (8th Cir., August 9, 2012): **Indictments and Informations (Failure to State an Offense)**: Steffen was indicted on counts of mail, wire, and bank fraud. He filed a motion to dismiss the indictment for failure to state an offense. The trial court found that false representation is a required element of a federal fraud offense, and since the indictment failed to allege any express misrepresentation by Steffen (mere silence or nondisclosure is not enough) the court dismissed. The Government appealed and the panel affirmed.

United States v. LaPointe, No. 11-5194 (6th Cir., August 13, 2012): **Jury Instructions (Lesser Included)**: LaPointe was accused of two drug counts, including conspiring to distribute oxycodone. This count was reversed because the trial court refused his requested instruction on the lesser-included misdemeanor crime of conspiracy to possess oxycodone.

United States v. Gaskins, No. 08-3011 (D.C. Cir., August 14, 2012): **Sufficiency**: This is one of those 20-person drug conspiracies where the Government turned eight witnesses and offered intercepted phone calls/video. However, as to Gaskins, the alleged "business manager" of the conspiracy, the panel held that the Government's evidence was such that no rational jury could have convicted him. This opinion is fact-intensive, but still, a winner on sufficiency grounds in a drug conspiracy case is notable.

United States v. Mathurin, No. 11-13211 (11th Cir., August 15, 2012): **Speedy Trial**: Mathurin was accused of a five-month long crime spree which resulted in a plethora of robbery and weapons charges. The issue on appeal is the "narrow question of whether the time during which plea negotiations are conducted is automatically excludable from the Speedy Trial Act's thirty-day window for filing an information or indictment." The panel held that the time during which plea negotiations are conducted is not automatically excludable. REVERSED.

United States v. Mathurin, No. 11-13211 (11th Cir., August 15, 2012): **Speedy Trial**: As the panel stated: "This case requires us to decide the narrow question of whether the time during which plea negotiations are conducted is automatically excludable from the Speedy Trial Act's thirty-day window for filing an information or indictment. For the reasons that follow, we have concluded that the time during which plea negotiations are conducted is not automatically excludable. Convictions vacated.

Wolfe v. Clarke, No. 11-6 (4th Cir., August 16, 2012): **Prosecutorial Misconduct (*Brady*)**: Habeas relief affirmed on a Brady claim where the Commonwealth of Virginia withheld a police report indicating that a key witness might receive favorable treatment in exchange for testimony.

United States v. Duenas, No. 09-10492 (9th Cir., August 16, 2012): **Hearsay (Former Testimony)**: Officer testified at a suppression hearing, but died before trial. The Government introduced his testimony at the suppression hearing under Rule 804(b)(1) on the basis that the defense had a meaningful opportunity to cross-examine. The panel found error, holding that the defense did not have similar motive to cross at the hearing as it did at trial.

United States v. Sklena, No. 11-2589 (7th Cir., August 23, 2012): **Hearsay**: Sklena and a co-defendant, Sarvey, were charged with wire and commodity fraud. Sarvey gave a deposition before the U.S. Commodity Futures Trading Commission prior to trial, but Sarvey died before the start of trial. Sklena sought to use the deposition as evidence of his innocence, but the trial court refused to allow it. In this opinion, the panel found that this was reversible error.

In re Bacigalupo, No. S079656 (Cal., August 27, 2012): **Prosecutorial Misconduct (Brady)**: Death penalty vacated because the State failed to disclose evidence that would have supported a case in mitigation that the murders were committed because of death threats by Colombian drug cartels.

Ayala v. Wong, No. 09-99005 (9th Cir., August 29, 2012): **Habeas Corpus (Capital Habeas Cases); Peremptory Challenges**: Habeas relief granted on a *Batson* claim where the trial court concluded that a *prima facie* case was made, but permitted the prosecutor to give its justifications for the challenges *in camera* and *ex parte*. NOTE: Since this case involves the Ninth Circuit granting habeas relief in a death penalty case on a *Batson* claim, be sure to check to see if the Supreme Court has overruled it before you cite it!

United States v. White, No.11-772-cr (2nd Cir., August 30, 2012): **Right to Present a Defense**: This is an excellent case where a conviction for felon-in-possession was reversed where the trial court excluded defense evidence needed to present a defense. White was traveling in a minivan with four women on the day of arrest. During a stop and frisk, police allegedly recovered a gun from his pocket, and other guns were found in a purse of one of the women. White defended that the first gun was found in the vehicle, not on White. White sought to introduce two strands of evidence: 1) the charging decision of the prosecutor who initially charged the four women in the vehicle with possession of the gun allegedly found on White; and 2) a prior judicial finding that discredited the testimony of a Government witness. The panel held that exclusion *per se* of this evidence was reversible error.

Gutierrez v. Smith, No. 10-4478-pr (2nd Cir., August 31, 2012): **Habeas Corpus (Procedural Default)**: Gutierrez stabbed a man in a bar brawl. He raised a sufficiency of the evidence claim in federal habeas, but the claim was procedurally barred. The panel held that the claim was barred, but that there was sufficient "cause" because of a fundamental shift in New York law on the issue between the time of trial in 2001, and the time his conviction became final in 2005. Thus, the legal basis for the challenge was not reasonably available to counsel at the time of trial (thus establishing cause for the failure to object).

State of Oklahoma ex rel. Oklahoma Bar Association v. Robert Bradley Miller, No. SCBD #5732 (Prof. Resp. Tribunal, September 28, 2012): **Prosecutorial Misconduct**: This is the lengthy report (68 pages) of the tribunal reviewing the actions of former Oklahoma County prosecutor Brad Miller and his actions in two death penalty cases. Essentially, the State's witness was totally unreliable and Miller offered to assist in exchange for testimony, but did not divulge his assistance and denied it (resulting in reversal of the convictions by the federal district court and the Tenth Circuit after that). The tribunal found that Miller violated the rules and the two attorney members recommended a one year suspension, while the non-lawyer member recommended suspension of two years and one day. The panel found no Oklahoma decisions imposing discipline in situations similar to this one. Notable is the discussion beginning at page 59 regarding "open file policies" of prosecutors and how these policies do not discharge *Brady* duties.

Question Submitted by: Executive Director Terry Jenks, Oklahoma Pardon and Parole Board, 2012 OK AG 17 (October 10, 2012): This AG opinion addresses the power of the Pardon and Parole Board to issue commutations to prisoners serving 85% sentences, even when such prisoners have not yet served 85%. The AG concluded that the Board does have such power.

United States v. Cervantes, No. 11-41385 (5th Cir., January 30, 2013): **Federal Sentencing Guidelines (Double Counting)**: Dangerous weapon enhancement is vacated on the basis of double counting where defendant convicted and sentenced for drug crime and also possessing a firearm in furtherance thereof. The enhancement punished Cervantes twice for the same conduct.

Smith v. Cain, No. 10-30665 (5th Cir., February 11, 2013): **Habeas Corpus (Evidentiary Hearings)**: Smith was convicted of armed robbery in a Louisiana state court. In federal habeas proceedings, he raised a *Batson* claim and the federal district court held an evidentiary hearing. In light of *Pinholster*, this was a problem. However, the panel found no error, stating: "We hold that *Pinholster*'s restriction does not bar the federal evidentiary hearing conducted in this case because the district court first concluded, solely on the basis of the state court record, that the state courts committed legal error, as required under 28 U.S.C. § 2254(d)(1), through the state courts' 'unreasonable application of, clearly established Federal law.' Thus, the evidentiary hearing was committed to the district court's discretion, subject to section 2254(e)(2). Because the district court did not abuse its discretion in conducting the hearing, we will review Smith's substantive *Batson* claim in the light of the federal evidentiary record." After reviewing the record, the panel denied relief.

Daniel Bosh v. Cherokee County Building Authority, 2013 OK 9 (February 12, 2013): **Civil Rights; State Constitutions**: This case began as a civil rights case in federal court (E.D. Okla.) where Bosh, who was an inmate at the Cherokee County Detention Center, alleged that jailers used excessive force on him (and video appears to support his claim). The case migrated to the Oklahoma Supreme Court via the Revised Uniform Certification of Questions of Law Act, on several questions of state law, chief among them whether the Oklahoma Constitution, art. II, § 30, provides a private cause of action for excessive force, notwithstanding the limitations of the Oklahoma Governmental Tort Claims Act. The Court answered "yes" which seems to be a major legal shift in state civil rights cases. NOTE: Check out footnote 41 on page 19, which reaffirms the analysis of *Turner v. City of Lawton*, 1986 OK 51, 733 P.2d 375, that the Oklahoma Constitution provides an independent source of rights for Oklahoma citizens that can be interpreted to provide greater rights than the federal Constitution.

United States v. Yengel, No. 12-4317 (4th Cir., February 15, 2013): **Search and Seizure (Exigent Circumstances)**: Police responding to a domestic dispute arrived at a house, calmed everyone down, and carted out Yengel. However, one officer questioned his wife and found out that Yengel kept guns and a "grenade" in the house. The "grenade" was allegedly in a locked closet which the officer pried open (with the consent of the wife since she did not know the combination of the lock). Although there was a child asleep in the house, the panel found that there was no urgency sufficient to justify the intrusion without a warrant.

Luong v. State, No. CR-08-1219 (Ala., February 15, 2013): **Publicity; Death Penalty (Investigation)**: This case involved a horrific capital murder crime where Luong was convicted of killing his four children by throwing them off a bridge. The Alabama Court of Criminal Appeals reversed on the basis of failure to grant a change of venue based on pre-trial publicity. The Court also found error in the trial court denying counsel funds to travel to Vietnam to investigate Luong's childhood.

United States v. Black, No. 11-5084 (4th Cir., February 25, 2013): **Search and Seizure (Reasonable Suspicion/Pat Down)**: This case involved the everyday occurrence of overzealous cops shaking down a group of black men for no legitimate reason and finding firearms on one of them who is a felon. The panel enforced a motion to suppress on the basis that the cops had no reasonable suspicion under *Terry* to search and seize the men (one of whom was strapping a handgun in open view—which is perfectly legal in North Carolina) stating: "The facts of this case give us cause to pause and ponder the slow systematic erosion of Fourth Amendment protections for a certain demographic." NOTE: The panel makes a good distinction in footnote 3 concerning when a person is seized for Fourth Amendment purposes (physical force vs. passive acquiescence).

Gongora v. Thaler, No. 07-70031 (5th Cir., February 27, 2013): **Prosecutorial Misconduct (Improper Argument); Habeas Corpus (Capital Habeas Cases)**: Capital habeas case where relief is granted on a claim of prosecutorial misconduct where the prosecutor commented on Gongora's failure to testify at trial. NOTE: This was a 2-1 split decision. Still, a win on this particular issue under AEDPA standards in a federal habeas case is highly unusual.

People v. Wilkins, No. S190713 (Cal., March 7, 2013): **Felony Murder**: Wilkins burgled a house under construction, taking among other things appliances which he loaded onto the back of a truck. Later, when he was driving on the freeway, one of the appliances fell off, causing an accident which resulted in death. Charged with felony murder, he requested a jury instruction that the felony continues only until the perpetrator has reached a place of temporary safety. HELD: "We conclude that it was error to refuse the instruction on the escape rule and that the error requires reversal of defendant's conviction."

Grant v. Lockett, No. 10-3804 (3rd Cir., March 7, 2013): **IAC**: This is a murder case where the victim was shot outside of a bar. The State had only one key witness, whom defense counsel failed to investigate. Counsel would have found that the witness had a criminal history and was on parole the night of the shooting; and counsel should have called two other witnesses that would have undermined the State's case. IAC found, writ granted.

United States v. Cotterman, No. 09-10139 (9th Cir., March 8, 2013) (*en banc*): **Search and Seizure (Border)**: This is a lengthy decision from the *en banc* Ninth Circuit regarding a search in Arizona near the border with Mexico. Cotterman and his wife went through the checkpoint, but agents ran their information and discovered that Cotterman was a sex offender and that he was potentially involved in child sex tourism. Based upon this, agents let Cotterman and his wife leave, but they seized two laptops and three digital cameras, and sent them off to a facility over 170 miles away (an agent literally drove the items to an ICE office to have them examined by a government computer expert). The Ninth Circuit held that the *Terry* standard of reasonable suspicion applied here, and that it had been met; thus, the search of the computers was lawful.

In Re James J. Bulger, No. 12-2488 (1st Cir., March 14, 2013): **Judicial Bias**: This case involves a mob-related RICO prosecution spanning decades, complete with an allegation that Bulger committed 19 murders. The case arrived before the panel on Bulger's petition for a writ of mandamus to recuse the trial judge, who had worked as a supervisor in the U.S. Attorney's Office during a significant time as alleged in the indictment. This was held to create a situation where the judge's impartiality could reasonably be questioned. NOTE: Retired Supreme Court Justice David H. Souter, sat on the panel by designation and authored this opinion.

Milke v. Ryan, No. 07-99001 (9th Cir., March 14, 2013) (For Publication): **Prosecutorial Misconduct (*Brady* Issues); Habeas Corpus (Capital Habeas Cases)**: Milke was convicted in 1990 of murdering her four-year-old son. She was sentenced to death. Since the evidence involved "essentially, a swearing contest between Milke" and police detective as to whether she confessed, and the State wrongfully failed to divulge *Brady/Giglio* material in the detective's personnel file related to his history of "lying under oath and other misconduct" the writ of habeas corpus is issued, and the petitioner freed unless the State notifies the court within 30 days that it intends to retry Milke, and actually commences Milke's retrial within 90 days. NOTE: Debra Jean Milke has been on death row in Arizona for 22 years. This opinion actually has a chart that outlines the detective's history of lying. The panel was so outraged at the conduct of the State that it also sent copies to the U.S. Attorney "for possible investigation into whether Det. Saldate's conduct, and that of his supervisors and other state and local officials, amounts to a pattern of violating the federally protected rights of Arizona residents."

United States v. Rodriguez, No. 11-20881 (5th Cir., March 15, 2013) (*en banc*): **Federal Sentencing Guidelines (Crime of Violence)**: Rodriguez pled guilty to illegal re-entry after deportation. In this *en banc* opinion, he challenged his sentence based upon a "crime of violence" enhancement that involved a Texas conviction for sexual assault of a child (when Rodriguez was 19 and the victim 16). The Court affirmed, clarifying the analysis of what constitutes a "minor" (a person under the age of 18) and "statutory rape" (the age of consent is the age as defined by statute in the jurisdiction where the prior conviction was obtained).

Kevin Hedrick v. The Commissioner of the Department of Public Safety, No. 110,199 (Okla. Civ. App., Div. I, March 15, 2013) (not for official publication): **DUI (DPS)**: Hedrick had his license revoked for DUI. Counsel filed a Petition in district court to set aside the revocation. The Petition was not verified and had a photocopy of the DPS administrative order of revocation attached to it. The Hon. Gary Barger (McClain County), dismissed the appeal on the basis that Hedrick had the burden of proving jurisdiction, and the uncertified copy of the DPS order was insufficient for that purpose. At issue is 47 O.S. 6-211(F) which outlines the statutory prerequisites for an appeal: 1) a timely written request for a hearing; 2) the person appeared at the hearing; and 3) DPS entered an order sustaining the revocation. The panel affirmed the dismissal on the basis that the uncertified photocopy of the DPS order was insufficient to prove that DPS entered the order of revocation. NOTE: This is a procedural trap, so note well what is required in these appeals.

People v. Diaz, No. 52 (N.Y. Ct. App., March 26, 2013): **Right to Present a Defense; Witnesses (Impeachment)**: Child sex abuse case is reversed when the trial court refused to allow the defense to call a witness regarding prior false accusations by the complaining witness. The court explained, "Evidence of a complainant's prior false allegations of sexual abuse is not inadmissible as a matter of law. Rather, it may be permitted if the prior allegations 'suggest a pattern casting substantial doubt on the validity of the charges.' Here, [the] proposed testimony went to a material issue of defendant's defense, namely, whether the complainant had a history of making false allegations of sexual abuse by family members."

People v. Handy, No. 35 (N.Y. Ct. App., March 28, 2013): **Jury Instructions (Adverse Inference); Destruction of Evidence**: "We hold that when a defendant in a criminal case, acting with due diligence, demands evidence that is reasonably likely to be of material importance, and that evidence has been destroyed by the State, the defendant is entitled to an adverse inference charge." NOTE: This case involved a jail inmate charged with assaulting jailers. The jail destroyed the videotape of the cell block. Also, the court specifically did not decide a constitutional question. Under *Youngblood*, the Supreme Court held that dismissal is not required. In *Handy*, the defendant did not seek dismissal, just an adverse inference instruction.

People v. Adams, No. 47 (N.Y. Ct. App., March 28, 2013): **Prosecutorial Misconduct (Disqualification)**: District Attorney's office, which refused to negotiate a plea deal involving a sitting judge victim of offensive texts from an ex-lover, should be disqualified because of an appearance of impropriety.

United States v. Fisher, No. 11-6781 (4th Cir., April 1, 2013): **Guilty Pleas (Federal)**: In this case, a DEA Agent sought a search warrant which yielded evidence against Fisher, prompting Fisher to plead guilty. After the plea, the DEA Agent pled guilty to various fraud counts, including lying in the affidavit that supported the search of Fisher's house. The panel held that this illegal action informed Fisher's decision to plead guilty, tinged the entire proceeding, and rendered his plea involuntary in violation of Due Process. NOTE: This was a 2-1 decision.

People v. Monroe, No. 41 (N.Y. Ct. App., April 2, 2013): **Guilty Pleas (State)**: Defendant, who was assured by the trial court that his sentence would result in a minimum incarceration term of a year and half only, is allowed to withdraw his plea when resentencing extended this term.

In Re: The Honorable Leon A. Kendall, No. 11-4471 (3rd Cir., April 3, 2013): **Contempt**: This case arose out of the Virgin Islands where a rogue prosecutor got into it with a judge over a plea in a case. It was clear that the prosecutor was acting unethically, and the judge refused to budge. The matter eventually ended up in the Supreme Court of the Virgin Islands on a writ, which directed the judge (Kendall) to vacate the plea. Judge Kendall did so, but penned a published order that was scathingly critical of the Supreme Court. The Supreme Court then held Judge Kendall in *criminal* contempt. In this opinion, the Third Circuit panel reversed, holding that Judge Kendall's opinion was protected by the First Amendment (with one judge holding that Judge Kendall was protected by absolute judicial immunity).

United States v. Baird, No. 12-1565 (1st Cir., April 5, 2013): **Jury Instructions (Defense Theory/Innocent Possession)**: A conviction on one count of Possession of a Stolen Firearm, when Baird bought a stolen gun but returned it two days later, is reversed because the trial court refused give Baird's requested jury instruction on "innocent possession" of the stolen weapon.

Ross v. Varano, No. 12-2083 (3rd Cir., April 5, 2013): **Habeas Corpus (SOL/Equitable Tolling)**: Equitable tolling allowed when Ross was deprived of a direct appeal through attorney missing deadlines. The panel remanded to the district court with instructions to order the Commonwealth to release Ross within 90 days unless it reinstates his right to appeal.

Brockman v. State of Oklahoma ex rel. DPS, No. 111,190 (Okla. Civ. App. Div. III, April 8, 2013) (Released for Publication): **DUI (DPS & APC); Arrest (PC)**: Very instructive revocation appeal where the panel split 2-1 on the issue of whether the arresting officer had probable cause to arrest Brockman for APC where Brockman was found sitting in the passenger seat of his vehicle, with the keys in the ignition and the motor running. Police had been called to the scene because of an altercation, and Brockman testified that his wife had driven to the apartment to pick up her sister, who planned to drive Brockman and his wife home because they had been drinking. The arresting officer made no inquiry as to these facts, but simply arrested Brockman. The panel held that there was no PC to arrest.

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 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*
Mary Bruehl	Murder (NGRI)	Bryan
Shannon McMurray	Assault & Battery	Pittsburgh
Johnny Albert	Shooting with Intent to Kill	Oklahoma
Sharon Holmes	Rape	Tulsa
Emilie Kirkpatrick/Raven Sealy	Domestic Abuse	Oklahoma
Joe Robertson/Gretchen Mosley	Assault & Battery w/ Deadly Weapon	Kay
Michael Branch	Pointing a Firearm	Oklahoma
William Campbell	Murder	Oklahoma
Paul Faulk	Felon in Possession of Ammunition	WDOK
Gregg Graves	Murder	Tulsa
Nicole Herron/Brian Young	Shooting with Intent to Kill	Oklahoma
Heidi Baier	Lewd Molestation / Rape	Kay
Chris Eulberg	Possession Firearm	WDOK
Eric Jones	Lewd Molestation	Wagoner
Winston Connor	Child Sexual Abuse	Nowata
Gary Huggins/Grant Huskey	Robbery, Assault, Burglary	Wagoner
Roger Hilfiger	Murder I	Muskogee

NOT GUILTY VERDICTS

Jarrod Stevenson/Scott Loftis	Larceny / Concealing Stolen Property	Kay
Shannon McMurray	Assault upon a Mental Patient	Washington
Jill Webb	Manslaughter	Tulsa
Tommy Adler	Rape / Sodomy	Pontotoc
Winston Connor	Manslaughter	Delaware
Marna Franklin	Possession CDS w/ Intent	Oklahoma
Patrick Adams	Murder I	Tulsa
Beau Phillips/John Cannon	Murder I	Oklahoma
Winston Connor	Shooting with Intent to Kill	Tulsa
Misty Fields	Domestic Abuse	Tulsa
David Dunlap	DUI	Oklahoma
Kevin Adams	Lewd Acts	Washington
Craig Corgan/Perry Hudson	Lewd Molestation	Kingfisher
Stephen Lee/Mark Cagle	Murder II	Tulsa
William Campbell	Murder I	Oklahoma
Brian Rayl	Kidnapping / Assault with a Dangerous	Tulsa
Perry Hudson	Forcible Oral Sodomy	Oklahoma
Craig Keys	Lewd Molestation	Payne
Jeff Clark	Failure to Register as Sex Offender	Bryan
Katherine Greubel/Pete Silva	Protective Order Violation	Tulsa
Charles Robert Cox	Domestic Abuse	Tulsa
Mark McCormick/Amanda Holden	Embezzlement	Oklahoma
Mark Myles	Aggravated Assault and Battery	Caddo
Daniel Giraldi	Robbery	Craig
Jason Lowe	Rape I	Oklahoma

OTHER VICTORIES

Mark Wilson ..... Obtained a dismissal on his Motion to Quash for a client charged with Murder I
Stephen S. Barnes ..... Obtained a dismissal for his client charged with lewd acts
John Hunsucker/Deann Taylor..... Won a motion to suppress at the trial court that was upheld on the State's appeal
Stephen Fabian ..... Won a motion to suppress and dismiss in a DUI accident case
Joan Lopez..... Won a motion to suppress at the trial court that was upheld on the State's appeal
Joseph Howard ..... Won a motion to suppress at the trial court that was upheld on the State's appeal
Billy Coyle..... Won a motion to suppress at the trial court that was upheld on the State's appeal
Kristi Christopher/Ray Denecke..... Obtained a new trial and acceleration hearing for their client
Larry Vickers ..... Obtained a dismissal for his client charged with lewd acts
Jason Edge ..... Obtained a dismissal for his client charged with Murder I
Patrick Abitbo ..... Won a motion to suppress at the trial court that was upheld on the State's appeal
John Constantikes ..... Obtained a dismissal for his client charged with manufacturing
M.J. Denman/John Dunn ..... Convinced OCCA to uphold a motion to quash based on witness reliability
David Henneke ..... Obtained a dismissal for his client charged with a violation of the meth registry
Robert Nigh, Jr..... Obtained a dismissal from the trial court that was upheld on the State's appeal
Amanda Everett ..... Obtained a dismissal for her client charged with A&B w/ a Deadly Weapon
Dustin Phillips/Adam Banner ..... Secured a new trial on appeal for their client
Eric Edwards ..... Won a motion to quash, suppress and dismiss for his client charged with DUI
Gretchen Mosely..... Secured a term of years on a reduced charge in a capital murder case
Josh Lee/Clint Ward ..... Obtained a dismissal at preliminary hearing for their client
Eric Edwards ..... Received a dismissal from the court at a revocation hearing
Christina Burns ..... Obtained a fine only verdict for her client at jury trial
Jack Fisher ..... Won habeas relief for his client on death row
Bill Lunn..... Obtained a reversal on the trial court's denial of suppression on appeal
Kimberly Heinze..... Obtained a new revocation hearing for her client on appeal

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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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2013 CRIMINAL DEFENSE INSTITUTE SCHEDULE

Thursday, June 27, 2012
Main Session

8:30 - 9:00 am	**Welcome** *Michael Haggerty II, OCDLA President, Bob Ravitz, Chief Public Defender OK County* *Jack Zanerhaft, Chief Public Defender Tulsa County, Joe Robertson, OIDS*
9:00 - 10:40 am	**Voir Dire: The Marriage of Colorado and Wyoming** *Cindy Viol, OIDS & David Smith, Norman*
10:50 - 11:40 am	**Ethically Addressing Issues of Prosecutorial Misconduct**** *David Autry, OKC*
11:40 - 12:30 pm	**Interviewing and Cross Examining the Child Complainant*** *William Korman, Boston, MA.*

BREAKOUT SESSIONS

Track 1

1:30 - 2:20pm	**Identifying and Litigating Brady Violations*** *David Autry, OKC*
2:30 - 3:20pm	**SORA & Convictions Triggering The Act-** *Jack Dempsey Pointer, OKC*
3:30 - 4:20pm	**Issues in Drug Dog Cases -** *Doug Parr, OKC*
4:30 - -5:20pm	**Search and Seizure***- *Larry Edwards, Tulsa*

Track 2

1:30 - 2:20pm	**Your Military Client's Records: Getting Them All & Decoding the Military Language** *Robert Don Gifford, United States Attorneys Office*
2:30 - 3:20pm	**Veterans Justice Outreach- How The Program Can Help Your Client** *Joseph Dudley, MSW, VA Hospital, OKC*
3:30 - 4:20pm	**Writing Tips for Appellate Attorneys**-Rob Ramana, OKC
4:30 - -5:20pm	**Case Update: State and Federal** *Barry Derryberry, Federal Defender, Stuart Southerland, Tulsa Public Defender*

Track 3

1:30 - 2:20pm	**DUI**: *John Hunsucker, OKC & Bruce Edge, Tulsa*
2:30 - 3:20pm	**DUI:** *John Hunsucker, OKC & Bruce Edge, Tulsa*
3:30 - 4:20pm	**DUI-Drugs/DRE**-*John Hunsucker, OKC & Bruce Edge, Tulsa*
4:30 - -5:20pm	**Designer Drugs**- *Dr. John Duncan, PhD, OUHSC*

Friday, June 28th

8:30 - 9:00am	**Welcome & Presentation of the 2013 Patrick A Williams Award**
9:00 - 9:50am	**Assessing Trauma: Integrating It Into Your Adult and Juvenile Defense Strategy*** *Cathy Olberding, LPC, OKC*
9:50 - 10:40am	**The Youthful Brain- Using the Science to Benefit Child & Young Adult Clients*** *Rick Wardroup, Lubbock, TX*
10:50 - 11:40pm	**Enforcing the Personal and Fundamental Right to a Meaningful Preliminary Hearing** *John Echols, Tulsa*
11:40 -12:30pm	**How to Represent the Sex Crimes Defendant & Still Get Invited to Cocktail Parties*** *William Korman, Boston, MA*

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Permit No. 104

OCDLA 2013 MEMBERSHIP APPLICATION

Mail to OCDLA, P.O. Box 2272, Oklahoma City, OK 73101-2272 or fax to (405) 212-5024

[ ] $250 Sustaining Member
[ ] $125 Regular Member (*OBA Member 3+ years*)
[ ] $100 Regular Member (*OBA Member 3 or less years*)
[ ] $100 Public Defender / OIDS Rate
[ ] $125 Affiliate (allied non-lawyers)
[ ] $75 Student Membership
Law school _____
Graduate date _____

Name _____

Address _____

City _____ State _____ Zip _____

OBA # _____ County _____

Telephone _____ Fax _____

Email _____

Payment method: Check ___ Visa _____ MasterCard _____ Discover ___ AMX _____

Credit Card Number _____ Exp. Date _____

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

Signature

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