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

I am happy to present this Spring 2014 edition of *The Gauntlet*. Thanks to Craig Hoehns, our Director of Publications, our contributing writers and editors 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 2014 Patrick A. Williams Criminal Defense Institute is just around the corner in June. We’re going back to the Hard Rock Hotel & Casino outside Tulsa. I hope you’re all looking forward to it as much as I am. Our CLE committee - especially Catherine Hammarsten, Katrina Conrad-Legler, and Tim Laughlin - has worked tirelessly to ensure that this remains Oklahoma’s premiere criminal defense seminar. We continue to enjoy working with the Oklahoma Indigent Defense System, the Oklahoma County Public Defender’s Office and the Tulsa County Public Defender’s Office. Keep your eyes open for signup - it’ll be here before you know it.

If you weren’t there, you missed a great DOC Seminar in January. 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. Our membership is expected to exceed 500 members for the third year in a row this year. Our Board of Directors has worked very hard 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 and Android), forms and other information available on our website, and our publications (*The Gauntlet*, Hot Sheets, and so forth).

Thank you for your continued support of this incredible organization. I look forward to my second year as your President.

D. Michael Haggerty, II
President
Oklahoma Criminal Defense Lawyers Association
If you are receiving this edition of *The Gauntlet* in digital format you should notice that our publication is now more tech-friendly. In this issue of *The Gauntlet*, hyperlinks are embedded for the opinions summarized in the case updates for the Oklahoma Court of Criminal Appeals published decisions, Oklahoma Supreme Court and Oklahoma Court of Civil Appeals published decisions, Tenth Circuit decisions, and U.S. Supreme Court decisions. We are currently working on adding a database of unpublished OCCA decisions and other cases of note to our website, www.ocdlaoklahoma.com, for future editions of *The Gauntlet*.

Because of the lengthy nature of this edition, I write to highlight a few important things should you not meticulously review this issue in detail.

If you are not already up to date on the legislative changes from 2013, I encourage you to review the legislative update. Of note, you are no longer subject to up to a $50 fine for reckless horse racing along a public square thanks to HB 1522.

Of importance in case law: (1) In the decision of *State v. Salathiel*, the Court of Criminal Appeals found the 2011 amendment allowing deferred sentences to be used for enhancement purposes in DUI cases to not apply retroactively to DUI deferred sentences prior to the amendment (see *Salathiel* on p.21); (2) Simple possession of marijuana can only be enhanced to a felony with another possession charge and not a prior for possession of marijuana with intent to distribute (see *Haley* on p.37); (3) Sex Offender Registration may not be applied retroactively (see *Starkey* on p.44, and *Hendricks* and *Bollin* on p.46); (4) Juvenile adjudications can be used as a predicate offense under the ACCA (see *Washington* on p.50 and *Orona* on p.54); and (5) The consent to search by one occupant of a dwelling is sufficient even when another occupant who is not physically present objects to the search (see *Fernandez* on p.63).

I thank the associate editors of *The Gauntlet* and our contributors for their work in this issue. I further wish to give a special thanks to Jim Hankins for his continued effort in providing top-notch content to this publication and this organization.
**GIDEON V. WAINWRIGHT: A LEGACY OF INDIGENT DEFENSE**

by

Katrina Conrad-Legler

“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the dangers of conviction because he does not know how to establish his innocence.”

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1 Katrina Conrad-Legler serves as Appellate Defense Counsel with the Oklahoma Indigent Defense System and serves on the Board of Directors of the Oklahoma Criminal Defense Lawyers Association.

Last year marked the 50th anniversary of *Gideon v. Wainwright* wherein the United States Supreme Court made one of its most important civil liberty decisions establishing that criminal defendants are entitled to legal representation even if they are too poor to afford lawyers. "Any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."

**THE HISTORY OF GIDEON**

Early one morning of June of 1961, a breaking and entering took place in the Bay Harbor Pool Room a few miles east of downtown Panama City, Florida. Clarence Earl Gideon, who was living across the street in a rooming house, was later arrested and charged with the felony of breaking and entering the pool room with intent to commit petit larceny. Mr. Gideon appeared in the circuit court for Bay County, where he pled not guilty and asked for the assistance of a lawyer.

However, in 1942, the United States Supreme Court held in *Betts v. Brady*, that the Fourteenth Amendment did not require the appointment of counsel in every criminal case. Instead, the appointment of counsel should be reserved for an indigent defendant only when a special circumstance was present that would make it difficult for that person to receive a fair trial without the assistance of counsel. Such examples would include cases where the defendant was young, inexperienced, illiterate, uneducated, or had mental health problems. Mr. Gideon did not fit any of those circumstances.

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6 *The Florida Bar Journal*, “50 Years Later: Memories of Gideon v. Wainwright”, Bruce R. Jacob, March 2013,
Mr. Gideon was told by the circuit court judge that he would be denied counsel, and he was forced to defend himself at trial. He was convicted and sentenced to serve five years in the state prison. Mr. Gideon filed a habeas petition in the Florida Supreme Court on the grounds that he was denied a Constitutional right to counsel. This decision was ultimately appealed to the United States Supreme Court.

The decision in *Gideon* was announced on March 18, 1963. *Betts v. Brady* was overruled, and the Sixth Amendment right to counsel, which had previously only been applied in federal courts was now made applicable to the State courts. The majority held that *Betts* had been wrongly decided. “We concluded that certain fundamental rights safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.”

**PROGENY OF GIDEON**

While *Gideon* is the seminal case in providing indigent defense and by far the most celebrated case, it really is just the first of a series of United States Supreme Court cases that have come to define the right to an attorney for indigent defendants in criminal proceedings.

**I. State Direct Appeals**

On March 18, 1963, *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9L.Ed. 811 (1963), was also decided by the United States Supreme Court. *Douglas* may easily be overlooked in the legal world, but it is arguably just as important in criminal proceedings as *Gideon*. The question

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8. *Id.* at 343.
presented before the Court was whether petitioners were denied the assistance of counsel on their State direct appeals. Mr. Meyes and Mr. Douglas had been tried and convicted on an Information charging them with 13 felonies in a California court. A single public defender had been appointed to represent them at trial. Both appealed as a matter of right to the California District Court of Appeal, which affirmed their convictions. The California Supreme Court also denied their petitions without a hearing.⁹

The *Douglas* Court addressed only one issue: whether the petitioners were denied the assistance of counsel on appeal. The Court held that an indigent person could not be denied the right to counsel on the first appeal granted as a matter of right to rich and poor alike.¹⁰ In deciding this issue, the Court found that a “State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty.”¹¹ Just as there is a right to a free transcript on appeal, the indigent shall not be denied counsel for his appeal. “For, there can be no equal justice where the kind of appeal a man enjoys depends on the amount of money he has.”¹²

**II. Pretrial Proceedings – Critical Stages**

The United States Supreme Court began to look at pretrial proceedings next. The Court began to expand upon the right to counsel for indigent defendants and to find that it was not limited to the presence of counsel at trial. In order to expand upon this right, the Court looked to its previous case law. Already in 1932 in *Powell v. Alabama*, the United States Supreme Court had held that a person accused of a crime requires the guiding hand of counsel at every step in the proceedings

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¹⁰ *Id.* at 356.
¹¹ *Id.* at 355.
¹² *Id.*
against him.\textsuperscript{13} Applying the \textit{Powell} test, the Court held that critical stages include the pretrial type of arraignment where certain rights may be sacrificed or lost.\textsuperscript{14} The Court ultimately found that a preliminary hearing is a critical stage of the State’s criminal process at which the accused is entitled to the aid of counsel.\textsuperscript{15}

\textbf{III. Guilty Pleas}

In \textit{McMann v. Richardson}, the Court expanded the right to counsel to guilty pleas as well. “Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases. On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases.”\textsuperscript{16}

\textbf{IV. Revocation Proceedings}

The United States Supreme Court also reviewed the right to an attorney at revocation proceedings. The Court held that revocation proceedings are a critical stage of the criminal system,

\begin{flushleft}
\textsuperscript{13} Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932).
\textsuperscript{15} \textit{Id.} at 10.
\end{flushleft}
and due process demands the assistance of an attorney to ensure that an indigent defendant is not
denied liberty unfairly. “There will remain certain cases in which fundamental fairness - the
touchstone of due process - will require that the State provide as its expense counsel for indigent
probationers.”\footnote{17}

\textbf{V. Curtailing of the Right to Counsel}

Throughout the remainder of the 1960's and into the 1970's, the United States Supreme Court
continued to define the right of the counsel for indigent defendants. However, the Court of the
1980's began to curb that right by ruling that some of that authority lies with the States after all. The
Supreme Court concluded the equal protection guarantee of the Fourteenth Amendment does not
require the appointment of an attorney for an indigent appellant just because an affluent defendant
may retain counsel in every instance. In \textit{Pennsylvania v. Finley}, the Court held it is the State’s duty
to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of
the appellate process.\footnote{18}

The Court held it is the States and not the federal courts that have substantial discretion to
develop and implement programs to aid prisoners seeking to secure State post-conviction review.\footnote{19}
The States are given the power under the federal Constitution to determine how indigent defendants
will or will not be appointed counsel for post-conviction appeals. Today, this has broader
implications as issues like DNA and innocence projects become more prevalent in criminal cases and
rely upon post-conviction proceedings to move forward in the criminal justice system. Therefore,
while an attorney is to be appointed at every critical stage of a criminal proceeding, including

preliminary hearings, trials, and direct appeals, the definition of a critical stage does not invariably extend to post-conviction appeals.

While it is clear that each indigent defendant must be given appointed counsel if he requests it, the question of administration of that appointment is left to each State. In Oklahoma, the determination of indigency is within the discretion of the trial court. A person’s status as indigent can change as the case progresses, and this is always subject to review by the court. Implicit in the possibility of this change of status is that an accused’s financial status will change. Some of the factors to be considered include the availability and convertibility of personal or real property owned; outstanding debts and liabilities; the accused’s past and present history; earning capacity and living expenses; the accused’s credit standing in the community; family and dependents; and, any other circumstances that may impair or enhance the ability to advance or secure such attorney’s fees as would ordinarily be required to retain competent counsel. It is important to note that a defendant’s indigency status is not dependent on that of his family or friends. A family’s ability or willingness to contribute to a defendant’s defense is not a factor in the initial determination of indigency and has no bearing on the trial court’s findings of indigency.

Ultimately, the Oklahoma Court of Criminal Appeals has ruled that the poorest and most unpopular person in the State can still depend on the fact that justice is not for sale in Oklahoma. In a criminal trial, a State can no more discriminate on account of poverty than on account of religion,

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21 Id.
race, or color.\textsuperscript{25} Furthermore, the ability to pay costs in advance bears no rational relationship to a defendant’s guilt or innocence and cannot be used to deprive a defendant in a criminal proceeding of a fair trial.\textsuperscript{26}

**CONCLUSION**

There can be no equal justice when the kind of trial a defendant gets depends on his or her ability to pay for counsel. When a State brings its judicial power to bear upon an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense, and justice cannot be equal where a defendant is denied the opportunity to present a meaningful defense simply because of his poverty.\textsuperscript{27} The risk of an erroneous deprivation of liberty created by refusing to appoint counsel for an indigent defendant is high, because the courts have long recognized the importance of a lawyer in protecting the right to liberty.\textsuperscript{28} The United States Supreme Court has made it clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.\textsuperscript{29} The *Gideon* decision marked a major turning point in our understanding of what is meant by due process in criminal cases. Federal case law interpreting the Fourth, Fifth, Sixth, and Eighth Amendments is now binding on the States. The “federalization” of criminal procedure has now become the national model. Not only our criminal justice system but our entire legal system is a better one due to that fateful decision over fifty years ago.

\textsuperscript{25} *McMillion v. State*, 742 P.2d 1158, 1160 (Okl.Cr. 1987) (citing to *Griffin v. People of the State of Illinois*, 351 U.S. 12, 17, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956)).

\textsuperscript{26} *Id*.

\textsuperscript{27} Id. (citing to *Ake v. Oklahoma*, 470 U.S. 68, 76, 105 S.Ct. 1087, 1093, 84 L.Ed.2d 53 (1985)).

\textsuperscript{28} *Walker v. McLain*, 768 F.2d 1181, 1184 (10th Cir. 1985).

\textsuperscript{29} *Roberts v. LaVallee*, 389 U.S. 40, 42, 88 S.Ct. 194, 196, 19 L.Ed.2d 41 (1967).
Every now and again, we as criminal defense practitioners must seek appellate relief of trial court decisions. Compliance with the Rules of the Court of Criminal Appeals is imperative. Failure to comply with the Rules could mean loss of jurisdiction or no decision being rendered on the merits. The following outline (courtesy of the General Appeals Division of the Oklahoma Indigent Defense System) is provided as assistance to avoid such an undesirable outcome. As always, read and reread the Rules for yourself. — CRAIG M. HOEHN, Editor-in-Chief
**Steps for Initiating an Appeal in the Court of Criminal Appeals**

1. Notice of Intent to Appeal & Designation of Record must be filed within 10 days from appealable order in order to invoke appellate court’s jurisdiction.

   **Appealable orders include:**
   
   - Imposition of judgment and sentence from bench or jury trial
   - Denial of application to withdraw plea of guilty or no contest
   - Order revoking suspended sentence
   - Order accelerating deferred judgment and sentence
   - Order terminating drug court participation
   - Order adjudicating juvenile as delinquent (NOT disposition)
   - Order certifying defendant as youthful offender or adult
   - Order bridging youthful offender to Department of Corrections
   - Order extending custody with Office of Juvenile Affairs

2. 10 days run from the pronouncement of order in open court, not the subsequent filing of written order. *OCCA Rules 1.4, 2.1(B).*


4. If a filing deadline falls on a weekend or holiday, or day courthouse is closed for any other reason, the filing may be done on the next business day. *OCCA Rule 1.5.*

5. Use *Court of Criminal Appeals Form 13.4* for Notice of Intent to Appeal.

6. Designate everything. Include hearing dates & court reporters in both Notice of Intent and Designation of Record.


8. Within 10 days of filing NOI-DOR in District Court, send certified copy to Court of Criminal Appeals. *OCCA Rules 2.1(B), 2.5.*

9. If OIDS is appointed, send courtesy copy to OIDS, P.O. Box 926, Norman, OK, 73070.

10. If court reporter or judge is unavailable for signature on NOI, file within 10 days anyway, then file an amended NOI with appropriate signatures later.
CRIMINAL APPEALS - ONCE INITIATED, WHAT’S NEXT?

1. **Monitor Record Completion** – *OCCA Rule 2.4(B)*
   - Appellate counsel required to ensure timely completion of the record.
   - Communicate with court clerk and court reporters to make them aware of upcoming deadlines.
   - Docket record completion for 90 days from the date of appealable order, and look for Notice of Completion or Incompletion.
   - Be prepared to respond to inquiry from Court of Criminal Appeals if Notice of Completion is not forthcoming within a week or two from expected.

2. **File Petition in Error (or Petition for Writ of Certiorari)**
   - File Original plus seven (7) copies (*OCCA Rule 1.9*) within 90 days of appealable order. (See *OCCA Rules Section 7* for accelerated deadlines in juvenile cases, or *Section 9* for special rules in capital cases).
   - Be sure to attach appealable order to the Petition in Error. *OCCA Rule 3.1*.
   - Timely filing is a jurisdictional requirement.
   - There is no penalty for early filing.
   - Not necessary to enumerate legal errors.

3. **Request to Transmit Record**
   - Expect OCCA to immediately issue order when Notice of Completion is filed. *OCCA Rule 2.3*.
   - The date of this order triggers briefing deadlines. *OCCA Rule 3.4(B)*.
   - Most appeals allow 60 days for briefing from date record is requested.
   - Exceptions include guilty plea cases (30 days); juvenile appeals (20 days) and capital appeals (120 days). *OCCA Rules 4.3(D), 7.3, 9.3*.

4. **Review the Record when received to ensure it is actually complete**
   - It’s no fun having to ask for more time at the last minute because something obvious is missing.
   - Sometimes it’s unavoidable when information pops up in the midst of a hearing that leads to the need for additional records.

5. **Appellate Briefs**
   - Limited to 50 pages (100 pages in capital cases).
   - Check font and margin requirements. *OCCA Rule 3.5(D)&(E)*.
   - Juvenile appeals and certain state appeals are automatically assigned to the accelerated docket, and which require use of *OCCA Form 13.14*.
   - Must include a cover page, table of contents, table of authorities, statement of the case (procedural history & disposition in the trial court), statement of the facts(with citations to original record and transcripts), arguments or propositions of error, conclusion stating specific relief sought, and counsel’s information (address, telephone and OBA number), and certificate of service (usually Attorney General, but in guilty plea cases and juvenile cases, district attorney must also be served).
   - File Original plus seven (7) copies. *OCCA Rule 1.9*. 
GUilty Plea Appeal Checklist

Written Motion to Withdraw Plea – OCCA Rule 4.2
- Must be filed in District Court within 10 days from J&S, Jurisdictional.
- Must set forth grounds for withdrawing plea & request evidentiary hearing.

Hearing & Ruling on Motion to Withdraw
- To be held within 30 days of motion.
- If grounds for withdrawal challenge conduct of attorney who advised the plea, new counsel must be provided. Carey v. State, 1995 OK CR 55.
- Critical stage of the proceedings, requiring defendant’s presence.

Notice of Intent to Appeal & Designation of Record
- Must be filed in District Court within 10 days from denial of Motion; Jurisdictional.
- Use OCCA Form 13.4 for Notice of Intent.
- Designate all pleadings.
- Transcripts to include the court’s acceptance of plea, the pronouncement of judgment and sentence, and hearing on application to withdraw plea. OCCA Rule 4.3(B). (Also important - competency proceedings, preliminary hearing, any waiver of trial or counsel proceedings).

Petition for Writ of Certiorari
- Must be filed in Court of Criminal Appeals within 90 days of the ruling on Motion to Withdraw; Jurisdictional.
- Required information detailed in Rule 4.3(C).
- Must state reasons for Motion to Withdraw Plea.
- Serve on District Attorney and Attorney General.

Brief of Petitioner
- Due 30 days from OCCA’s order for record to be transmitted.
- Serve on DA and AG.
- Response by State required only when ordered by the Court.
REVOCATION - ACCELERATION - DRUG COURT
APPEAL CHECKLIST

Revocation Appeals Follow Rules for Direct Appeals
- **OCCA Rule 1.2(D)(4).**
- NOI-DOR must be filed 10 days from oral pronouncement of revocation.

Scope of Appeal is Limited
- Revocation appeal limited to validity of revocation order.
- Unpublished cases with relief granted available at www.oids.ok.state

Deferred Judgment & Sentence
- **OCCA Rule 1.2(D)(5)(a).**
- Can appeal the terms of deferred judgment & sentence when it is imposed (if after guilty plea, must also do certiorari appeal to challenge the plea at this time or certiorari plea is waived).

Acceleration of Deferred Judgment and Sentence
- **OCCA Rule 1.2(D)(5)(b)&(c).**
- Appeal taken from imposition of judgment and sentence for violating terms and conditions of deferral.
- After acceleration, also can move to withdraw original guilty or no contest plea and seek certiorari appeal if denied (unless an appeal was taken at outset of deferred judgment and sentence).
- Appeal from validity of acceleration order follows Rules for regular direct appeals for timelines & briefing.

Drug Court Termination
- **OCCA Rule 1.2(D)(6).**
- Same procedure as appealing from Acceleration of Deferred Judgment and Sentence.
OTHER APPEALS

Juvenile Cases
- *OCCA Rule 7.1(A)* lists types of juvenile appeals.
- In delinquency cases, time runs from adjudication, not disposition.
- Certification to stand trial as adult, or denial of motion to be certified as a youthful offender or juvenile appealed at time of order, not after trial.
- Brief & Petition in Error due 60 days after ruling; record due 40 days after ruling. Extensions are not favored.
- Court issues Scheduling order at outset of case.
- Accelerated Docket Brief (*OCCA Form 13.14*) must be used.
- Oral Arguments Scheduled.
- Use juvenile’s initials on pleadings to Court of Criminal Appeals (even if they have been certified as adult in trial court).

Extraordinary Writs
- *OCCA Rule 10.1* et.seq.
- Writ of Prohibition, requirements at *OCCA Rule 10.6(A)*.
- Writ of Mandamus, requirements at *OCCA Rule 10.6(B)*.
- Writ of Habeas Corpus, requirements at *OCCA Rule 10.6(B)*.

Appeals Out of Time
- *OCCA Rule 2.1(B)*.
- First, file Application for Post-Conviction Relief requesting an appeal out of time in District Court, showing that defendant always intended to timely appeal, but was denied through no fault of his own.
- District Court can only recommend that appeal out of time be granted or denied.
- Within 30 days of trial court’s ruling, file Request for Appeal out of Time with Court of Criminal Appeal, attaching certified copy of the application and the trial court’s recommendation.
- Sample pleadings and instructions available.
EXTRAORDINARY WRITS

Writ of Prohibition – *OCCA Rule 10.6(A)*
1. a court, officer or person has or is about to exercise judicial or quasi-judicial power;
2. the exercise of said power is unauthorized by law; and
3. the exercise of power will result in injury for which there is no other adequate remedy

Writ of Mandamus – *OCCA Rule 10.6(B)*
1. clear legal right to relief sought;
2. the respondent’s refusal to perform a plain legal duty, not involving discretion; and
3. adequacy of mandamus and inadequacy of other relief.

Procedural Requirements – *OCCA Rules 10.1-10.5*
1. Must have ruling from district court denying relief sought
2. Writ must be initiated within 30 days of district court order by filing with the Court of Criminal Appeals the following:
   a) Petition (original +7) including case number, subject matter of district court proceedings, stating nature of relief sought. Style moving party as “Petitioner,” and responding party as “Respondent.” Certified copy of order from which relief is sought must be attached;
   b) Brief in Support (original +7), setting forth arguments and authorities;
   c) certified copy of original record applicable to the writ (with copy of the order from which extraordinary relief is sought);
   d) certified copy of any supporting evidence; and
   e) original transcript of proceedings on the petition, if applicable.
3. Must be filed 10 days prior to date cause is set for hearing or trial, unless 3 members of Court agree to suspend this rule for exigent circumstances.
4. Must serve adverse party.
5. If seeking to stay district court proceedings while writ is pending, must request the stay within 10 days of the adverse order. *OCCA Rule 10.2.*
Day v. State, 2013 OK CR 8 (June 18, 2013): **Shaken Baby Syndrome; Experts; Peremptory Challenges:** Day was convicted by jury in Oklahoma County (the Hon. Kenneth C. Watson presiding) of Murder in the First Degree, and sentenced to Life imprisonment. Affirmed over Day’s claims relating to: 1) refusal to hold a *Daubert* hearing on Shaken Baby Syndrome (*Daubert* applies only to expert testimony on “novel” scientific evidence, and SBS is not novel); 2) admission of expert testimony regarding SBS; 3) sufficiency of the evidence; 4) failure to *sua sponte* define reasonable doubt; 5) denial of *Batson* challenges; and 6) cumulative error. NOTE: This is another case where Shaken Baby Syndrome was asserted by the State where there were no other indications of trauma to cause it. The Court characterized the state of the medical literature as being in disagreement or criticizing SBS, but I think it is much more than that. The entire diagnosis has been called into questions in cases where there is no other trauma indicated, which would in my estimation make such a diagnosis the proper subject of a *Daubert* challenge.


Tilden v. State, 2013 OK CR 10 (July 12, 2013): **Suspended Sentences:** Tilden was convicted of Petit Larceny (AFCF) and was sentenced to five years suspended. Tilden was revoked in full because he failed to report to his probation officer—although it appears that Tilden was in jail for most of the time that he was supposed to be reporting. The Court affirmed in this opinion, rejecting Tilden’s claims that the original J&S was outside the statutory limit (these claims must be raised via certiorari petition), that the State failed to show that his failure to report and pay fees was willful (the State simply must show a violation; the accused must then show it was not willful), excessive sentence, IAC, and cumulative error.

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Miller v. State, 2013 OK CR 11 (September 6, 2013): **Death Penalty; Double Jeopardy; Voir Dire; Prosecutorial Misconduct (Improper Argument); Victim Impact; Great Risk of Death Aggravator; Cumulative Error:** Miller had two trials on two counts of first degree murder in the courtroom of the Hon. Dana L. Kuehn (Tulsa County). The first trial resulted in convictions, with a recommendation of LWOP on one count, and death on the other. When the case was reversed, the State again sought death on both counts—even though the jury rejected the death penalty on one count. Oddly, neither counsel nor the trial court ever contested the State’s ability to seek death on both counts, but in this massive opinion the Court found that double jeopardy prevented the State from seeking death on that count. The Court also found error when the trial court refused to allow defense counsel to question jurors who gave equivocal or inconsistent answers regarding the imposition of the death penalty. This error seemed to be particularly troubling because Judge Kuehn, on at least three occasions, allowed the State to question the prospective juror, but did not allow the defense to ask clarifying questions. A third error occurred when the State was allowed to present testimony from a medical examiner who did not actually perform the autopsy or prepare the report (confrontation error, but harmless). A fourth error was prosecutorial misconduct when the prosecutor stated that the presumption of innocence had been “diminished” (rather than rebutted), but this error was harmless. A fifth error occurred at the capital sentencing phase where the Court found that the “great risk of death to another” aggravating circumstance did not apply in this case (no evidence that the shots that killed one victim put anyone else in danger). A sixth error occurred when a stepmother was allowed to give victim impact evidence since stepparents are not listed in the statute, and this error was not harmless. The Court held that these errors were reversible on a cumulative error basis with regard to the sentence. Thus, of the two death sentences imposed in this case, one is modified to LWOP (per the first jury), and the second is vacated and the case remanded for resentencing. **NOTE:** This case was 3-2, with Judge Smith authoring the lead opinion, and Judges Lewis and Lumpkin dissenting from the relief granted. Judge Smith does a good job of extensively footnoting and supporting her position (this opinion is a primer on voir dire in capital cases; and it contains over 200 footnotes!), and also of addressing head-on the criticisms of the dissent.

Johnson v. State, 2013 OK CR 12 (August 1, 2013): **Search and Seizure (Traffic Stops):** Johnson was convicted of Trafficking in Beckham County (the Hon. F. Pat Versteeg, presiding), and sentenced to eight years. The legal issues surround an Elk City policeman who was searching local motel parking lots for truck involved in a vandalism incident. In one of these parking lots, he observed Johnson standing beside a Chrysler 300 car. The officer later stopped the Chrysler for failure to use a turn signal. Johnson was issued a warning, and then the officer did the usual “consensual encounter” routine by telling Johnson that he was free to go, but then started asking whether Johnson would answer some questions. This resulted in a drug dog at the scene, and a subsequent alert. The issue on appeal was whether the traffic stop was valid. The Court held that it was, construing local and state turn signal regulations to mean a reasonable possibility that other traffic may be affected. Since the officer testified that there were other cars on the road at the time Johnson failed to signal, the State does not need to prove any actual effect on other traffic. In addition, the stop was legal because it was not extended in scope or duration beyond the time necessary to effectuate the stop’s purpose.
In Re: Adoption of the 2013 Revisions to the Oklahoma Uniform Jury Instructions—Criminal (Second Edition), 2013 OK CR 13 (August 16, 2013): The Court implemented some changes in the jury instructions. Most appear to be stylistic, but there also appear to be some substantive changes in some of the instructions, particularly concerning Kidnapping and Lewd Molestation. Be sure to check these changes if you have any upcoming trials.

Smith v. State, 2013 OK CR 14 (August 7, 2013): **Death Penalty (State Cases); Competency:** Smith was convicted by jury in Oklahoma County of five counts of murder and originally sentenced to death. After a string of appellate hurdles, Smith was eventually re-sentenced, receiving LWOP on three counts and death again on two. Affirmed over claims relating to: 1) competency to stand trial and to re-litigate the mental retardation issue (the Court applied the law of the case doctrine to this issue); 2) issues relating to jury selection at the re-sentencing hearing (denial of questionnaires and individual *voir dire* and juror views on the death penalty; and 3) issues regarding aggravating circumstances (avoid arrest, HAC).

Day v. State, 2013 OK CR 15 (September 11, 2013): Day was convicted by jury in Oklahoma County (the Hon. Kenneth C. Watson, presiding) of First Degree Murder and sentenced to life imprisonment. The Court affirmed on direct appeal, and Day sought rehearing on the basis that 12 O.S. 2702 was invalidated by the Oklahoma Supreme Court (which is true; the Court found that the legislature violated the “one-subject” rule in enacting that provision). However, the Court, while granting rehearing, denied any relief on the basis that there was no plain error since the previous version was in effect at the time of the crime, and also because Day only asked for a *Daubert* hearing, he did not challenge the admissibility of evidence under 2702.

State v. Salathiel, 2013 OK CR 16 (September 30, 2013): **DUI; Retroactivity:** Salathiel pled guilty to APC in 2009, pursuant to a plea agreement, and received a two-year deferred which he completed. On February 22, 2012, he was arrested for DUI. The State sought to enhance to a felony using the prior APC. The Hon. Larry Jones (Special Judge-Oklahoma County) granted Salathiel’s demurrer and motion to dismiss on the basis that the 2011 amendments to the DUI statute (which allow enhancement for deferred sentences) cannot be applied retroactively to Salathiel. The State appealed to the Hon. Glenn M. Jones, who affirmed. In this opinion, the State appealed yet again to the OCCA, which again affirmed, not on the basis of constitutional *ex post facto* concerns, but upon application of statutory construction, holding that the statute does not expressly provide for retroactivity, and there is no intent that the legislature intended it to be so.

Lozano v. State, 2013 OK CR 17 (October 23, 2013): **Discovery; Double Jeopardy:** Lozano was convicted of Trafficking (Cocaine). The jury recommended imprisonment of 25 years. Affirmed over Lozano’s claims related to double jeopardy (manifest necessity for mistrial was warranted since the defense violated discovery code and pre-trial orders by springing a surprise witness); and a discovery sanction of precluding testimony to the extent that it was not disclosed to the State.
Tate v. State, 2013 OK CR 18 (October 28, 2013): Mental Health Court: Tate was terminated from Mental Health Court (on a charge of Possession of CDS (meth)), sentenced to prison, and sought to withdraw her plea via certiorari appeal. In this opinion, the Court ultimately denied relief, but did address the proper mechanism for appealing termination from Mental Health Court (similar to Drug Court). NOTE: The Court held that “relapses and restarts” are not part of the statute (like Drug Court), thus a court is not required to consider them (although the court may). NOTE: This last bit troubled Judges Lewis and Johnson, who concurred in part/dissented in part, reasoning that the mental health statute should be read in conjunction with the drug court statute.

Levering v. State, 2013 OK CR 19 (November 21, 2013): After-Formers (Enhancement): Levering was convicted by jury in Oklahoma County of Assault w/Intent to Commit a Felony, Kidnapping, and Second Degree Rape by Instrumentation, all AFCF x 2. Prior convictions consisting of three convictions for assaults committed on the same day against the same victim were introduced at trial both as propensity evidence and as enhancement of the sentence under section 51. In this case, the Court remanded for re-sentencing because such priors constitute one transactional unit for enhancement purposes and the jury was not so instructed in a proper fashion.

Diaz v. State, 2013 OK CR 20 (December 4, 2013): Deferred Sentences; Guilty Pleas; Jurisdiction (General): Diaz entered guilty pleas to two counts of Concealing Stolen Property, Possession of an Offensive Weapon While Committing a Felony, and Possessing a Fictitious Identification Card. He received a deferred sentence per a plea agreement. Thereafter, Diaz sought to withdraw his plea. The district judge denied relief citing a lack of jurisdiction. In this opinion, the Court disagreed, holding that the language in the post-conviction application contained language sufficient to treat it as a request for an order recommending an appeal out-of-time.

State v. Marcum, 2014 OK CR 1 (January 28, 2014): Search and Seizure (Cell Phone; Search Warrant (Good Faith)): The State secured a search warrant (directed toward the service provider, U.S. Cellular) for text messages on a cell phone belonging to Miller. Marcum sought to suppress the texts because they involved texts made by her, to and from Miller. The trial court suppressed them, but in this opinion, the Court reversed, holding that Marcum did not have a reasonable expectation of privacy in Miller’s phone text records held by U.S. Cellular. NOTE: The Court resolved any ambiguity regarding application of the “good faith” exception to the exclusionary rule—it is here to stay in Oklahoma.

Soto v. State, 2014 OK CR 2 (March 27, 2014): Statutory Construction (Vehicle Weight): Soto was convicted in Beaver County at a bench trial of the misdemeanor count of Operating an Overweight Vehicle. Soto was the driver of a “refuse collection” vehicle, and he was cited by an apparently extremely bored OHP trooper. The appeal centered around construction of the statute dealing with weight limitations and whether garbage trucks are exempt if no permit is purchased. As it turns out, one must purchase the special overload permit in order to be exempt. Conviction affirmed.
Lockett v. State, 2014 OK CR 3 (April 18, 2014): Death Penalty (Stays): This opinion is the rejoinder by the OCCA to the Supreme Court’s opinion holding that the OCCA has jurisdiction to entertain a stay request in a case that is civil in nature and pending in the district court of Oklahoma County. Here, the OCCA disagreed with the Supreme Court, holding that since there is no underlying litigation filed in the OCCA, it does not have jurisdiction to entertain a stay request. Stay denied.

State v. Farthing, 2014 OK CR 4 (April 28, 2014): Possession of Firearm by Felon: In this Felon in Possession of a Firearm case, Farthing was accused of possessing an unmodified rifle (i.e., not sawed-off or with obliterated serial number, etc.) Under an old OCCA case, Marr v. State, 1973 OK CR 342, 513 P.2d 324, this was legal, and Farthing convinced the district court to grant his demurrer. In this State appeal, the Court reversed, holding that the statute has been amended since Marr to cover the conduct of Farthing.

Arganbright v. State, 2014 OK CR 5 (May 20, 2014): First Amendment; Texting: Arganbright was a 44-year-old, married OHP Trooper who seduced a 16-year-old girl who went to school with his son. He was charged with Lewd Acts and Soliciting Sexual Conduct with a Minor by Use of Technology. He elected to have a bench trial to attack the constitutionality of the technology conviction on First Amendment grounds. The Court rejected the claim, 4-1. NOTE 1: The issue is interesting because of Oklahoma’s “age of consent” which is 16. There seems to be a dichotomy in that actual sexual intercourse with a 16-year-old is perfectly legal; but if it is discussed via text or e-mail, the discussion of the legal sex all of a sudden becomes a felony crime. NOTE 2: Judge C. Johnson was the lone dissenter, who argued that the Legislature should simply raise the age of consent to 18 rather than criminalize a discussion about lawful and consensual (although not necessarily moral) sex acts. NOTE 3: The Texas Court of Criminal Appeals ruled a similar statute unconstitutional in Ex Parte John Christopher Lo, No. PD-1560-12 (Tex. Ct. Crim. App., October 30, 2013).
Mark J. Lawler v. State, No. F-2012-437 (Okl.Cr., May 6, 2013) (unpublished): Pro Se Representation: Lawler was convicted by jury in Hughes County of rape in the first degree. Lawler made a request represent himself five days prior to trial, which was apparently refused by the trial court. The Court reversed and remanded for a new trial. NOTE: The Court cited prior cases that reviewed such decisions for an abuse of discretion, but noted that the Supreme Court in Faretta held that the trial court has no discretion to deny a valid request for self-representation.

Richard Allen House, II, v. State, No. M-2011-1006 (Okl.Cr., May 15, 2013) (unpublished): Evidence (Diagrams): House was convicted by jury in Garfield County of the misdemeanor offense of negligent homicide (he drove a FedEx truck, apparently fell asleep, and struck and killed a bicyclist). House raised a single claim—that the admission of two diagrams prepared by a police officer and the OSBI toxicology report constituted hearsay. The Court found no error in the admission of the toxicology report, but did find error in the admission of the diagrams as hearsay because they were simply investigative reports (but, the error was harmless).

State v. Amberli Dawn Kuna, No. S-2012-768 (Okl.Cr., May 17, 2013) (unpublished): Preliminary Hearing: Kuna was charged in Oklahoma County with Aggravated A&B and First Degree Burglary. At the preliminary hearing, the State attempted to amend and add additional charges. The Hon. Larry A. Jones refused to do so, despite the fact that the charges were supported by the evidence, on the basis that the State knew about the evidence prior to the PH and undercharged, and only sought the additional crimes to “punish” Kuna for having a PH. The Hon. Jerry D. Bass affirmed. The State appealed. In this opinion, the Court reversed, finding no basis for the district court’s assertions, and in applying the statutes held that the only basis to deny the State’s request was if the defendant suffered material prejudice and none was found in this case. NOTE: Reading between the lines here, it was clear that Judges Jones and Bass, who are most familiar with the inner-workings of the courthouse, knew that the State in fact sought to punish Kuna for asserting her rights to a preliminary hearing, but the OCCA let this slide because there was “no evidence” of it—despite the fact that the State had all the information in the police reports and only sought more severe penalties because there was a PH. Notably, there was not discussion in the opinion on the standard of review. It appeared that the Court applied de novo review, but abuse of discretion is probably more appropriate—and would have resulted in a win.

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Jermaine Richard Newton v. State, No. RE-2011-710 (OkI.Cr., June 3, 2013) (unpublished): Excessive Sentence: Newton’s legal woes began with convictions for Assault with a Dangerous Weapon, which netted him ten-year suspended sentences in Tulsa County. Newton then caught a misdemeanor charge of Violation of Protective Order, which prompted the District Judge to revoke in full. In this opinion, the Court affirmed the revocation order, but found an abuse of discretion in revoking in full based upon the fact that Newton had no priors, was only 18-years-old at the time of his convictions and probation violation, this was his first prison experience, and there were no other probation violations, nor any other aggravating circumstances surrounding his misdemeanor conviction—which consisted of wholly innocent activity but for the existing protective order. MODIFIED to time served.

State v. Frank Lee Armstrong, No. S-2012-553 (OkI.Cr., June 12, 2013) (unpublished): Search and Seizure (Delay; Standard of Review): Armstrong and a co-defendant were the subjects of drug investigation. Police obtained a warrant to search a house and appurtenances on June 11, 2010, at 4:30 p.m. However, police did not serve the warrant until June 21, 2010. The Hon. George W. Butner (Seminole County) granted the motions to suppress on the basis that police failed to execute the search warrant “immediately” pursuant to 22 O.S. 1226 (the statutory language for warrants). The State appealed and, in this opinion, the Court affirmed, finding no abuse of discretion. NOTE: 22 O.S. 1231 provides a 10-day time period for police to execute the warrant or else it is void; but the warrant here was executed within 10 days as agreed to by the parties. The problem here was that police were commanded to “immediately” execute it, and the trial court found the 10 day wait too long. Also, on a procedural note, there was no record made of the suppression hearing, thus no facts upon which the Court could find to save the warrant or excuse the police.

State v. Robert Brooke, No. S-2012-719 (OkI.Cr., June 14, 2013) (unpublished): DUI: Brooke was convicted of felony DUI and entered a guilty plea in Cleveland County. The plea was negotiated, and Brooke received a deferred sentence, which all parties agreed to except for whether 47 O.S. 11-902(C)(2) applied which would force Brooke to spend either 5 days in the county jail or a minimum of 5 days in an in-patient treatment facility. The District Judge ruled that 11-902(C)(2) was unenforceable, and refused to require a 5-day treatment or jail time, finding instead that 11-902(G) applied, and ordered completion of the programs recommended in the alcohol and substance abuse evaluation. In the alternative, Judge Lucas held that 11-902(C)(2) was unconstitutional because it violated the district court’s sentencing discretion. The State appealed. In this opinion, the Court held that 11-902(C)(2) does not apply because the sentence was deferred, and the 5-day options only apply “upon conviction.” Thus, 11-902(G) applies. NOTE: As to the constitutional question, the Court held that 11-902(C)(2) is constitutional on its face, and whether it is unconstitutional as applied here is moot because it is not applicable to this case.

Juan Gabriel Choxmis v. State, No. C-2012-664 (OkI.Cr., June 14, 2013) (unpublished): Guilty Pleas (State): Choxmis entered a blind Alford plea in a rape case in Tulsa and was sentenced to life (at 85%). Choxmis tried to withdraw his plea, but the trial court did not provide conflict-free counsel at the hearing on the motion to withdraw the plea, thus certiorari is granted and the case remanded.
Samuel David Mirich v. State, RE-2012-259 (Okl.Cr., June 14, 2013) (unpublished): Suspended Sentences: Mirich entered guilty pleas in Garfield County to drug charges in two cases. He was sentenced to five years suspended in both cases, to run concurrently with each other, but consecutively to a sentenced imposed in Cleveland County. Mirich violated probation because of the crime he committed in Cleveland County, and the District Judge revoked in full, finding that Mirich had committed the new offense of Accessory to Murder in the First Degree. However, the State simply introduced the J&S from Cleveland County without any proof that the conviction was final. Reversed.

Daniel Erik Peters v. State, No. F-2012-374 (Okl.Cr., June 14, 2013) (unpublished): Confrontation/Cross-Examination: Peters was convicted by jury in Tulsa County of Robbery with a Firearm, and sentenced to 12 years. The principal witness against him was a co-defendant. The trial court limited the cross-examination of the co-defendant on the issues of his bias since the co-defendant had received benefit from the State in exchange for his PH testimony and trial testimony. The Court found error in this regard, holding that the evidence was relevant, admissible, and not outweighed by the danger of unfair prejudice, but that it was harmless.

Jerome Jay Ersland v. State, No. F-2011-638 (Okl.Cr., June 20, 2013) (unpublished): Discovery; IAC: This is the pharmacy shooting case that received so much media attention. Not much in the way of helpful legal analysis here, but it is an interesting (and lengthy) read. Ersland’s conviction for Murder is affirmed over his claims relating to: 1) sufficiency of the evidence; 2) threat of sanctions for discovery violations (defense wanted to call two experts, but did not provide reports); 3) judicial bias; 4) denial of a Daubert hearing re computer reconstruction (it was simply an illustrative aid); 5) and IAC (Frye and Lafler do not extend to informal plea discussions).

Emanuel D. Mitchell v. State, No. 2011-866 (Okl.Cr., June 20, 2013) (unpublished): Pro Se Representation: Mitchell was convicted by jury in Oklahoma County of Murder, Conspiracy and Unauthorized Use of a Motor Vehicle (AFCF). REVERSED because the trial court refused to allow Mitchell to represent himself. NOTE: This was a 3-2 decision, with judges Lewis and Lumpkin dissenting. Mitchell is one of the defendants in the Ersland/Pharmacy shooting case.

Anthony Morrison v. State, No. F-2011-624 (Okl.Cr., June 20, 2013) (unpublished): Felony Murder: Morrison rounds out the trio of opinions dealing with the Ersland/Pharmacy shooting case. Morrison and Mitchell recruited the teenagers to actually do the robbery. Morrison contests the right of the State to proceed with a felony murder prosecution on the basis of the intervening actions of Ersland who was convicted of premeditated murder. The Court rejected this claim, holding that when a victim of a crime kills a perpetrator during the commission of a felony, that action is foreseeable, and Oklahoma’s felony murder law covers this situation, and has no exception for independent intervening acts.
Scott Allen Phillips v. State, No. F-2011-1062 (Okl.Cr., June 20, 2013) (unpublished): Judicial Bias: Phillips was convicted by jury of Lewd Molestation in Tulsa County. This is one of those common situations where the accused is punished at sentencing by the trial court by electing to have a jury trial, in this case the judge refusing to consider suspending any of the 25 year sentence. Sentence is vacated and remanded.

Joseph Randal Arndt v. State, No. F-2011-473 (Okl.Cr., June 25, 2013) (unpublished): Confrontation and Cross-Examination: Arndt was tried by jury in Tulsa County and convicted of Robbery with a Firearm. Reversed and remanded for new trial because he was denied his right to cross-examine his co-defendant.

Joseph DeWayne Conner v. State, No. C-2012-686 (Okl.Cr., June 28, 2013) (unpublished): Guilty Pleas: Conner pled guilty to Robbery and Burglary in Tulsa County. In this opinion, he is allowed to withdraw his plea to Burglary because he was told that he faced a life sentence, rather than the 20 years that the offense carried.

Franklin Savoy Combs v. State, No. M-2011-1083 (Okl.Cr., July 1, 2013) (unpublished): Waiver (Right to Counsel): Combs was convicted by jury in Hughes County of a misdemeanor count of Resisting an Officer. Reversed because Combs was not warned adequately on the dangers of self-representation.

Ralph T. Smith, Jr., v. State, No. F-2012-08 (Okl.Cr., July 2, 2013) (unpublished): Extradition; Retroactivity: Smith was convicted by jury in Tulsa County of Kidnapping, Robbery, Attempted Rape, Rape, and Unlawful Possession of CDS (receiving LWOP on the Rape count). The Court affirmed, but included a detailed discussion on the Interstate Agreement on Detainers Act, as well as the exceptions and exclusions to the 180 day trial clock once a written request for final disposition is made. Also, Smith’s sentence is modified because the maximum at the time he committed the crime of Kidnapping was 10 years, but the jury was instructed that it carried up to 20.

Bradley Stevens v. State, No. F-2011-857 (Okl.Cr., July 2, 2013) (unpublished): Impeachment: Stevens was convicted by jury in Kay County (the Hon. Philip A. Ross presiding) of Rape by Instrumentation and Lewd Molestation. The Court affirmed, but the discussion on some impeachment evidence is instructive. Stevens sought to introduce evidence that one of the complainants had once accused another man of “some unspecified form of sexual assault, and later allegedly withdrawn that accusation.” The offer of proof consisted of a police officer “who claimed that at some time in the past, one of the complainants in this case accused another adult male of some sort of assault, but later (it appears) retracted that claim.” The Court held that this evidence was too vague and incomplete to be deemed a “false” allegation which could affect materially the credibility of the complaining witness. NOTE: If you have such evidence in your case and wish to use it, the evidence code (12 O.S. 2412) states that you must give notice to the State at least 15 days in advance of trial (this was another problem that Stevens had). Also, as it relates to the quantum of specificity required for such evidence to be admissible, check out footnote 2 where the Court lists the deficiencies of the offer of proof in this case.
Fount Patrick Doxey v. Hon. Kenneth Watson, No. PR-2012-859 (Okl.Cr., July 9, 2013) (unpublished): **Sex Offender Registration:** In the wake of the *Starkey* case out of the Oklahoma Supreme Court, the OCCA granted a writ of prohibition in a case out of Oklahoma County, prohibiting the district court from enforcing its order that Doxey register as a sex offender because to do so would apply retroactively the registration scheme.

State v. Jeffrey Ariel Porras, No. S-2012-834 (Okl.Cr., July 26, 2013) (unpublished): **Joinder:** Dr. Porras stands accused of using his station as a physician to perpetrate sexual assaults on patients in Oklahoma County and Cleveland County. The State charged him with counts relating to both counties in a single case filed in Cleveland County. The Hon. Lori M. Walkley (Cleveland County) granted a motion to dismiss the counts alleging crimes in Oklahoma County because she concluded that they were not part of a common scheme or plan. The State appealed this ruling, and the Court affirmed.

Andrew Lee Harris v. State, No. F-2012-916 (Okl.Cr., July 29, 2013) (unpublished): **After Formers:** Harris was convicted by jury in McCurtain County of Possession of CDS (Cocaine) AFCF and sentenced to 30 years. During the second stage, the State introduced testimony of a former probation and parole officer who testified that she had supervised Harris 2-3 years as a result of the prior convictions. This plain error, coupled with prosecutorial closing argument and a jury note about parole, resulted in a modification of the sentence to 20 years.

Darrell Odell Golden v. State, No. C-2012-714 (Okl.Cr., July 31, 2013) (unpublished): **Guilty Pleas; Resisting Arrest:** Golden entered guilty pleas in Tulsa County to Shoplifting and Resisting (AFCF). The Court rejected his attempt to withdraw his plea as to the Shoplifting charge on the basis that he was confused about the range of punishment, but allowed Golden to withdraw his plea as to the Resisting charge, reasoning that since Golden simply ran away from the store upon being confronted, he did not resist with force or violence.

Mark Tracey Vernon v. State, No. F-2011-661 (Okl.Cr., August 8, 2013) (unpublished): **IAC:** Vernon was convicted in a non-jury trial (the Hon. Paul K. Woodward) in Kingfisher County of five counts of rape and one count of forcible oral sodomy, and sentenced life sentences running consecutively. Vernon raised an IAC claim against trial counsel for failing to investigate and interview witnesses, and to present strong evidence of an alternate perpetrator and motive for the complaining witnesses to accuse Vernon. The OCCA remanded for an evidentiary hearing on the matter, at the conclusion of which Judge Woodward issued findings of fact and conclusions of law agreeing with Vernon. The OCCA agreed as well, reversing and remanding for a new trial.

Shandale Maurice Cooper v. State, No. F-2012-54 (Okl.Cr., August 13, 2013) (unpublished): **Right to Present a Defense:** Cooper was convicted by jury in Washington County of Rape, Forcible Sodomy, and First Degree Burglary. Although the Court affirmed his conviction and sentences, Cooper asserted error when the District Court excluded the audio tape recording of Cooper’s police interrogation. Since Cooper testified at trial, the Court found that this was error, but it was harmless.
Todd Aaron Henderson v. State, No. RE-2012-590 (Okl.Cr., August 14, 2013) (unpublished): **Suspended Sentences**: Henderson completed Drug Court on a felony DUI in Tulsa, at the conclusion of which he was sentenced to a one year suspended sentence on a misdemeanor, on January 27, 2011. One year later, on January 27, 2012, the State filed an application to revoke. Henderson moved to dismiss because the application was filed late, thus the trial court had no jurisdiction. The State confessed error and the Court agreed. This is so because the day of sentencing is counted as the first day on a suspended sentence; thus, January 26, 2012, was when the suspended sentence expired.

Larry David Reilly v. State, No. C-2012-565 (Okl.Cr., August 16, 2013) (unpublished): **Deferred Sentences**: Reilly was on a deferred sentence, committed new crimes, and was accelerated. This situation has given rise to a procedural trap wherein certain claims (such as excessive sentence) are not cognizable if the client appeals only the acceleration order without also filing a motion to withdraw his original plea, and then pursuing a certiorari appeal. This case is an example of how it is done correctly, which resulted in a consolidated proceeding in which Reilly challenged his acceleration order by direct appeal, and also his sentence by filing a certiorari appeal (although Reilly ultimately lost his claims on the merits, the point of the opinion is to instruct us on how to make sure the Court hears the claims on the merits, rather than procedurally defaulting them).

C.C. Johnson v. State, No. F-2012-557 (Okl.Cr., August 16, 2013) (unpublished): **Jury Instructions (Flight)**: Johnson was convicted by jury in Tulsa County of First Degree Murder and Shooting w/Intent to Kill. Since Johnson offered no explanation for his alleged departure from the scene, it was error to give the flight instruction (however, it was a harmless error).

Joshua G. Larkpor v. State, No. F-2012-655 (Okl.Cr., August 20, 2013) (unpublished): **Confrontation (Adoptive Admissions)**: Larkpor was convicted by jury in Tulsa County of Robbery w/Firearm (AFCF) and sentenced to 18 years. The Court affirmed, but I included this opinion because of its treatment of the admission of an audio recording of a phone call from the jail between Larkpor and his girlfriend. Larkpor raised an objection to statements made by the girlfriend on Confrontation Clause grounds, but the Court treated the statements as adoptive admissions by Larkpor. If your client is foolish enough to make any sort of statement on a jail or prison phone system, it is going to be extremely difficult to keep it out, and this case illustrates some of the theories that the Court will employ to make sure that the jury hears it—especially Judge A. Johnson’s concurring opinion. NOTE: Footnote 2 is also instructive on appellate procedure, and the specificity that is required to raise an issue on appeal.

Jimmy Wayne Holstine v. State, No. C-2012-699 (Okl.Cr., August 21, 2013) (unpublished): **Guilty Pleas**: This case out of Atoka County is another in a string of cases where the accused wishes to withdraw his plea, but the trial court does not appoint conflict-free counsel to advocate his position. The Court remanded for a proper hearing on the motion to withdraw the plea.
Mark Anthony Clayborne v. State, No. F-2011-509 (Okl.Cr., September 10, 2013) (unpublished): **Jury Instructions (Production of False Exhibit); Prosecutorial Misconduct (Misstating Testimony); Audio Tapes of Trial:** Clayborne was tried by jury in Oklahoma County and convicted of Perjury by Subornation and Allowing the Production of a False Exhibit. The Court affirmed the Perjury conviction, but reversed the Production conviction on the basis of prosecutorial misconduct (misstating testimony and arguing facts not based on evidence) and instructional error regarding the omission of the “knowledge that the exhibit is false” element of the crime. NOTE: On another issue, Clayborne sought the audio tapes of the jury trial at which he presented the false exhibit. The Court held that the district court erred in denying this request on the basis of OCCA rules defining what constitutes the record, but correctly denied it on the basis of relevance.

State v. Isaac Paul Bell, No. S-2013-127 (Okl.Cr., September 18, 2013) (unpublished): **State Appeals; Search and Seizure (Reasonable Suspicion):** Bell was charged with Possession of a Weapon on School Property when a security guard saw two sheathed hunting knives in Bell’s truck as Bell got out of it (the guard had approached Bell to inquire about a student parking permit). Bell moved to quash and dismiss on the basis that he committed no crime (state allows transportation of knives in cars on school property), and the Hon. Kurt G. Glassco agreed. In this opinion, the Court also agreed and affirmed.

Jeremiah William Creekmore v. State, No. RE-2012-0711 (Okl.Cr., September 20, 2013) (unpublished): **Suspended Sentences:** Creekmore was on a suspended sentence and committed new crimes. At the revocation hearing, the State introduced Judgments and Sentences of the new crimes, but failed to establish that the convictions were final. Revocation order reversed and remanded for a new revocation hearing.

Mario Lenard Phenix v. State, No. F-2012-567 (Okl.Cr., September 23, 2013) (unpublished): **After Formers (Bifurcation):** This is a case where Phenix was charged with multiple offenses—including first degree murder—and the State enhanced with a prior felony conviction. However, based upon published authority from 2010, the punishment for first degree murder cannot be enhanced; it is either life or LWOP. Here, the District Judge allowed the State to try the murder charge to guilt-innocence, and then allowed the jury to consider punishment in light of the prior conviction. There was no objection, but the Court found plain error in this procedure and modified to life with the possibility of parole.
State v. Uriel Alejandro Lopez, No. S-2013-103 (OkI.Cr., October 2, 2013) (unpublished): **Search and Seizure (Traffic Stops):** This is a Trafficking case out of McIntosh County. A motion to suppress and quash was granted by the Hon. James R. Pratt and the State appealed. The basis for the traffic stop in this case was, per the testimony of Trooper Koch, following too closely and failing to move into the inside lane when passing an emergency vehicle. Concerning the following too closely, the Trooper relied on the “two-second rule” which refers to a vehicle following less than two seconds behind another vehicle. The trooper acknowledged that this rule is not in the statute, but he asserted that it was a commonly accepted rule of thumb. The district court concluded that the application of the two-second rule was non-statutory and made it impossible for a reasonable person to understand the prohibited conduct. HELD: No abuse of discretion. Affirmed. NOTE: Concerning the allegation of failing to move to the inside lane, the trooper took no action based upon this alleged conduct (no warning or ticket), he mentioned it as an aside, it was not developed in the court below or relied upon by the State as a basis for the stop, and the district court did not abuse its discretion in ignoring it.

State v. Barry Lee Brown, No. S-2012-1012 (OkI.Cr., October 3, 2013) (unpublished): **State Appeals; Search and Seizure (Suppression):** This is a State appeal from a ruling by the Hon. Sarah Day Smith, Special Judge in Tulsa County, wherein she granted a motion to suppress and dismissed the charges in a misdemeanor DUI case. One officer initiated a traffic stop, while another officer responded to the scene and administered the sobriety tests. At the suppression hearing, the first officer had difficulty remembering details of the stop and sought to rely upon the report of the second officer, who had no personal knowledge of the predicate for the stop. In this opinion, the OCCA affirmed Judge Smith, offering several good legal nuggets. First, Judge Smith acted as fact-finder, and she found that the first officer lacked sufficient memory or knowledge of the traffic stop to sustain the State’s burden of showing that the stop was unlawful. Second, Judge Smith actually ruled in the State’s favor initially, then reversed herself *sua sponte*. The Court held that the State cited no legal authority saying that Judge Smith could not do this, and refused to consider the claim. Finally, when the first officer read the report of the second officer, he accepted the report as true—it did not refresh his own recollection of the events.

Tina Louise Haigh v. State, No. PC-2013-477 (OkI.Cr., October 15, 2013) (unpublished): **Habeas Corpus (State Habeas and PC):** Haigh pled blind to Permitting Sexual Abuse of a Child in Oklahoma County (the Hon. Kenneth C. Watson, presiding), and was sentenced to 19 years. The central issue was whether Haigh was entitled to an evidentiary hearing on her claim of IAC appellate counsel. In this 3-2 opinion, the Court held that she is. Thus, Judge Watson must consider this case for a third time. The opinion contains a good discussion of the legal standards in these cases.

DeWayne Edward Kemp v. State, No. F-2012-622 (OkI.Cr., October 15, 2013) (unpublished): **Double Jeopardy:** Kemp was convicted by jury of First Degree Felony Murder and First Degree Burglary. Kemp and two accomplices burgled a dwelling, during which the homeowner shot and killed one of them. HELD: Because the elements of the burglary count are entirely subsumed by the felony murder count, the conviction for burglary is vacated. NOTE: The State argued that the error was harmless because the sentences were run concurrently, but the Court rejected this contention.
**After Former; Venue:** O’Neal was tried by jury in Canadian County and convicted, AFCF, of multiple counts arising out of a burglary and police chase. The Court found plain error and prejudice “by the admission of information regarding the suspension, revocation and acceleration of his prior sentences as well as pardon and parole.” This error resulted in a 5-year sentence reduction/modification by the Court. NOTE: O’Neal raised an issue of venue, and objected to venue being submitted to the jury via instructions at trial. The Court held this was error because venue is a matter of law to be decided by the trial court.

**Restitution:** Coulter was convicted by jury in Wagoner County of Robbery w/Dangerous Weapon. He was sentenced to 30 years and ordered to pay restitution in the amount of $2,300.00. The Court affirmed in all respects, except for the restitution amount which was not proved with “reasonable certainty” under the statute. Good discussion of the procedures the State must employ to determine a restitution amount.

**Motion to Reconsider; Search and Seizure (Reasonable Suspicion; Traffic Stops):** This is a State appeal in a misdemeanor case from the Hon. William Hiddle who heard a motion to reconsider and sustained Ridge’s motion to quash seizure and suppress evidence that had been denied by a prior magistrate. The Hon. Sarah Day Smith had denied the motion, prior to trial, but the misdemeanor docket was transferred to Judge Hiddle, before whom Ridge re-urged his motion to suppress during trial. The Court found nothing wrong with this, stating that it was nothing more than a pre-trial ruling on the admissibility of evidence that was subject to re-examination during the proceedings. Also, the Court upheld the suppression order itself on the basis that the police officer lacked reasonable suspicion to detain Ridge when the officer pulled his vehicle behind Ridge and blocked him in.

**Election:** Langley was convicted by jury of Lewd Molestation, AFCF x 1. Reversed on the basis that the trial court refused to make the State elect which of the two acts of molestation it would rely upon to prove its case (Langley was charged with one count, but it alleged two separate and unrelated incidents of lewd molestation). The jury was instructed that it could find him guilty if they found either of the acts occurred.
Charles Allen Dyer v. State, No. F-2012-506 (Okl.Cr., October 30, 2013) (unpublished): **Waiver (Appellate Issues):** Dyer was convicted by jury of Child Sexual Abuse in Stephens County and sentenced to 30 years. Dyer went through two mistrials before being convicted on a third trial. At the first trial, he sought to present testimony by Dr. Ray Hand regarding the manner in which the forensic interview of the complaining witness was conducted. The trial court ruled that Dyer could not present testimony from Dr. Hand. Prior to the second and third trials, the trial court stated that its prior rulings on motions would stand. This should preserve the issue for appeal, right? Wrong. The Court held that since Dyer did not file a witness list naming Dr. Hand as a witness, nor made an offer of proof, the issue was waived since there “is nothing for this Court to review.” NOTE: I included this case because of the procedural trap lurking in the Court’s language. A good practice pointer is that you cannot rely on prior rulings of the trial court when you are trying the case again, or at least you must be very specific on what the prior rulings cover and must object at trial just like you did at the first one.

Bobby Ray Laney v. State, C-2012-276 (Okl.Cr., November 1, 2013) (unpublished): **Guilty Pleas (State):** Laney was charged in Seminole County with First Degree Rape. He entered an Alford plea and was sentenced to 10 years, with all but the first 8 suspended. The Court granted certiorari and allowed Laney to withdraw his plea based upon IAC in failing to present evidence to the trial court regarding Laney’s mental competency.

Richard Lee Wells, Jr., vs. State, No. RE-2012-739 (Okl.Cr., November 13, 2013) (unpublished): **Suspended Sentences:** The nine-year suspended sentence in this case was revoked on the basis of an allegation of new crimes. One of the new crimes was out of Custer County where Wells was sentenced on January 28, 2008. Wells objected on the basis that the State had failed to proceed diligently on this allegation, citing Cheadle v. State, 1988 OK CR 226, 762 P.2d 995. The Court disagreed, distinguishing Cheadle, a case where the State filed an application to revoke, but waited five years to conduct a revocation hearing. In the case of Wells, the State filed the application and the hearing was held timely, although it included an old conviction.

Bradley Joe Raymond v. State, No. F-2012-914 (Okl.Cr., November 15, 2013) (unpublished): **After Formers (Enhancement):** Bradley was tried by jury and convicted of A&B w/Dangerous Weapon (AFCF x2), Domestic Abuse in Presence of a Minor, and Domestic Abuse by Strangulation, for which he was sentenced to life on each count. The Court affirmed for the most part, but vacated and modified the sentence on count two because it was not subject to enhancement under 21 O.S. 51.1.

Gina Diane Eslick v. State, No. C-2013-254 (Okl.Cr., November 18, 2013) (unpublished): **Guilty Pleas:** Eslick entered negotiated pleas to several drug charges and entered Drug Court. This is another in a strong string of cases where the defendant was denied conflict-free counsel at the hearing on the motion to withdraw the plea. The Court remanded “for a proper hearing on Petitioner’s Application to Withdraw Plea of Guilty with conflict free representation.”
State v. Mark Anthony Herfurth, No. S-2013-413 (Okl.Cr., November 20, 2013) (unpublished): Sex Offender Registration: This State Appeal arises out of the order quashing charges alleging that Herfurth failed to register, lived within 2,000 feet of a school, and provided false/misleading information regarding registration, all on the basis that the amendments to the registration scheme did not apply to Herfurth because they were enacted after his convictions. The Court affirmed on the basis that legislation has prospective effect unless there is legislative intent to the contrary.

State v. Thomas Bradley Porton, No. S-2013-483 (Okl.Cr., December 3, 2013) (unpublished): Burks Notice and Bad Acts Evidence; State Appeals: Porton was charged with multiple sex offenses. The district judge ruled that certain evidence of other bad acts was not admissible, and the State appealed. In this opinion, the Court affirmed, finding no abuse of discretion. The evidence excluded was 12,000 photographs seized from Porton’s computer.

Christopher Lee Haak v. State, No. F-2012-1028 (Okl.Cr., December 5, 2013) (unpublished): Waiver (Appellate Issues): Haak was convicted by jury of Burglary in the First Degree and KCSP (AFCF x 2). He raised several issues, but most were reviewed for plain error only because there was no objection by trial counsel. One claim centered around prosecutorial misconduct which was raised as plain error, and also in the form of an IAC claim for trial counsel’s failure to object. In this opinion, the Court affirmed, finding no abuse of discretion. The evidence excluded was 12,000 photographs seized from Porton’s computer.

Jonathan Bear Robe Nahwooksy v. State, No. F-2012-236 (Okl.Cr., December 5, 2013) (unpublished): Prosecutorial Misconduct (Improper Argument and Questions): Nahwooksy was convicted by jury of First Degree Rape and Second Degree Rape by Instrumentation. In this opinion, the Court modified his sentence based upon prosecutorial misconduct. The misconduct was improper questions to the investigating officer about her work with “victims” and evoking sympathy for the complaining witness. The prosecutor also made closing arguments invoking sympathy and “portraying herself and the investigating detective as champions of the victim and of justice.”

Charles D. North v. State, No. C-2012-1154 (Okl.Cr., December 11, 2013) (unpublished): Guilty Pleas: This is a guilty plea case where North filed a pro se motion to withdraw his plea but was not given conflict-free counsel at the hearing on his motion. As the Court does with almost all of these cases, the matter was remanded for a hearing with conflict-free counsel.
**Escape; Waiver (Appellate Issues):** Parker was tried and convicted by jury of Escape from Arrest or Detention. Parker argued that the jury should not have been allowed to consider copies of the outstanding arrest warrants to which he was subject. The argument was that whether Parker was “lawfully” arrested or detained was a legal question for the judge. The Court disagreed, noting a distinction between the meaning of “lawful” arrest or detention for the purposes of the crime of escape, from that which may form the basis for a legal attack upon the arrest or detention. **NOTE:** Parker objected to the introduction of the arrest warrants at trial, but attacked them on a different ground on appeal; thus, resulting in waiver of the issue and plain error review only.

**Double Jeopardy:** McLaren was convicted at a bench trial of Robbery with a Firearm. In another case McLaren was convicted of multiple violent felonies. No relief for McLaren, other than vacatur of count 9 (Kidnapping) which was not separate and distinct from the Robbery w/Firearm in count 3. **NOTE:** The opinion contains a decent discussion of the analysis governing whether multiple counts violate 21 O.S. 11.

Jimmy Dale Stone v. State, No. F-2012-545 (Okl.Cr., January 8, 2014) (unpublished): **Jury Instructions (Elements):** Stone was tried by jury and convicted of Lewd Molestation. Reversed because, inexplicably, the trial court failed to instruct the jury on all of the elements of the crime—omitting two of the elements in the jury instructions.

Jimmy Dale Stewart, Jr., v. State, No. F-2012-1038 (Okl.Cr., January 8, 2014) (unpublished): **Entrapment:** Stewart was convicted of drug counts. No relief for Stewart in this opinion, but the only issue he raised was entrapment, and the Court penned a decent discussion of this defense under Oklahoma law.

Jennifer Michelle Stumpe v. State, No. C-2013-150 (Okl.Cr., January 14, 2014) (unpublished): **Guilty Pleas (State):** Guilty Plea/Drug Court case in which the trial court imposed a sentence of five years for a crime that carried up to two years (Possession of CDS-Misd. Marijuana-in the Presence of a Minor under Twelve). The Court found the sentence void and modified the sentence to two years.

Larry Eugene Lawton v. State, No. F-2012-880 (Okl.Cr., January 15, 2014) (unpublished): **Search and Seizure (Search Warrants; Good Faith):** The Trafficking conviction in this case is affirmed over a few claims, including a search and seizure issue where the Court again applies the “good faith” exception of **Leon.** The Court has applied **Leon** in a string of unpublished opinions, this one being the latest.
State v. Christopher Alan Ullrich, No. S-2013-139 (Okl.Cr., January 15, 2014) (unpublished): **Child Porn; Preliminary Hearing**: In this Possession of Child Porn case, the district judge sustained a motion to quash after preliminary hearing and dismissed the case based upon what appeared to be an argument by the defense that the State failed to prove that the images were real children as opposed to virtual images. The Court reversed, chiefly on the basis that the testimony of investigators that the images “depicted an infant and underage girls being molested” was sufficient to meet the burden at preliminary hearing.

Earnest Toby Bearshead v. State, No. F-2012-1039 (Okl.Cr., January 23, 2014) (unpublished): **False Personation; Sufficiency**: This is an instructive case on the crime of False Personation where Bearshead gave a false name to the police when he was arrested and questioned. The Court reversed his conviction, holding that under the statute no person benefitted from or suffered from his use of the false name. NOTE: This opinion is an instructive treatment of the elements of a crime, and there are no other cases on point.


George Edward Feugate v. State, No. RE-2012-619 (Okl.Cr., January 28, 2014) (unpublished): **Suspended Sentences**: Feugate was on a suspended sentence in a drug case when he caught a new case of Child Sexual Abuse. At the revocation hearing, the State relied upon the preliminary hearing transcript to show the violation. The district judge allowed this and sustained the revocation. In this opinion, the Court affirmed, holding that it was allowable to rely upon the preliminary transcript at revocation hearings - even when they contain child hearsay as in this case.

Francisco De La Cruz v. State, No. M-2013-188 (Okl.Cr., January 29, 2014) (unpublished): **Domestic Abuse/Presence of Minor**: De La Cruz was convicted of misdemeanor Domestic Abuse in the Presence of a Minor Child. On this point, he argued on appeal that the assault did not occur in the presence of a minor child. The Court rejected his claim, stating that he knew a child was present in the apartment and that was enough.

Danyale Lamont McCollough v. State, No. RE-2012-601 (Okl.Cr., February 4, 2014) (unpublished): **Suspended Sentences; Judicial Notice**: In this case, the district judge took judicial notice of a trial and conviction of McCollough of new crimes, and revoked his suspended sentences. This was reversible error. Also, the new conviction was not shown to be a final judgment and sentence.

Richard Allen House, II, v. State, No. M-2012-416 (Okl.Cr., February 11, 2014) (unpublished): **Waiver (Right to Counsel)**: House was charged with a misdemeanor count of Possession of Paraphernalia. His OIDS lawyer moved to withdraw based upon the fact that House had hired private counsel in another matter and made bail. Judge Grey granted the motion, but made no other findings or record regarding House’s waiver of his right to counsel, and House was essentially forced to trial pro se without counsel or a valid waiver. Reversed.
David Lynn Fleming v. State, No. F-2012-1014 (Okl.Cr., February 11, 2014) (unpublished): After Formers: Fleming was convicted by jury of several drug counts, AFCF x 2. During the second stage of the trial, the prosecutor entered five Judgments and Sentences as proof of Fleming’s priors, three of which reflected that Fleming had been given partially suspended sentences. Although there was no objection, and defense counsel in fact stipulated to them, the Court found plain error and modified the principal sentence from 50 years to 30 years. NOTE: This case involved misdemeanor charges which are not subject to enhancement, but the trial court sent the issue of punishment on the misdemeanors to the jury during the second stage. This was error, but harmless under the facts.

Gabriel Brian Solis v. State, No. C-2012-1165 (Okl.Cr., February 11, 2014) (unpublished): Guilty Pleas: Solis entered a blind Alford plea to Child Abuse and was sentenced to 80 years. The Court remanded the case for a hearing on his motion to withdraw his plea where he has conflict-free counsel.

Darnell Lamar Wright v. State, No. F-2012-170 (Okl.Cr., February 14, 2014) (unpublished): Double Jeopardy: Wright was convicted by jury of Robbery w/Firearm, False Personation, and Assault While Masked. Affirmed, but the Court did find that the convictions for Robbery and Assault While Masked violated 22 O.S. 11 because they were part of the same act.

Earnest Cheparney Harjo v. State, No. RE-2013-261 (Okl.Cr., February 19, 2014) (unpublished): Suspended Sentences: This case involves revocation of suspended sentences (for Bogus Checks). The procedural history is a little confusing because it involves an initial revocation, followed by re-suspension of the sentences after a stint in jail, followed by a revocation in full. In this opinion, the Court reversed, holding that Harjo had already been punished by the first revocation. The State must alleged new violations for a second revocation.

State v. Stephen Joseph Haley, No. S-2013-140 (Okl.Cr., February 20, 2014) (unpublished): Possession (Marijuana); Statutory Construction: Haley was charged with Possession of CDS (Marijuana) Subsequent Offense—but the subsequent offense was Unlawful Possession of CDS with Intent to Distribute. The Hon. Dennis W. Hladik granted Haley’s motion to quash and dismiss on the basis that the predicate was not a possession charge, but possession with intent to distribute which did not arise “under this section” as the statute required. The Court agreed.

Amon Walden Pershall v. State, No. RE-2013-279 (Okl.Cr., February 21, 2014) (unpublished): Suspended Sentences: Pershall pled guilty to DUI and received a 10-year suspended sentence. The judge revoked in full, but he did this 35 days after Pershall entered his plea of not guilty, and there was no record of a waiver. This ran afoul of the 20-day rule, so the revocation was reversed.

State v. David Johns, No. S-2013-315 (Okl.Cr., February 21, 2014) (unpublished): Deferred Sentences: Johns entered a guilty plea to Larceny and given a five year deferred. Less than a year later, Johns moved to amend the order (shorten the deferment time) and this motion was granted (over the State’s objection) by the trial court, and the case dismissed. The State appealed on a reserved question of law. The Court held that the trial court cannot shorten the deferment period in this manner.
James Crenshaw v. State, No. M-2012-430 (Okl.Cr., February 21, 2014) (unpublished): **Sufficiency:** Crenshaw was tried by the court and found guilty of Malicious Threat or Intimidation pursuant to 21 O.S. § 850 (he threatened to shoot his brother-in-law, a Native American, if he attended the funeral of Crenshaw’s mother). Crenshaw was confined to a wheelchair and had “limited mobility” caused by multiple sclerosis; yet, the judge found him guilty of this. The Court affirmed on the basis that whether the threat met the statutory elements was a question of fact.


Jacob Keith Meyer v. State, No. RE-2012-1032 (Okl.Cr., February 25, 2014) (unpublished): **After Formers (Enhancement):** Meyer committed several crimes and was revoked, but one of the crimes was Larceny of Merchandise from a Retailer, for which Meyer was revoked for 8 years (the sentence was enhanced). The Court found that this was error because 8 years exceeded the maximum punishment allowed. This is so because of an anomaly in the statute. The Legislature has declared that Larceny of Merchandise from a Retailer more than $500, but less than $1,000 is a “felony” but set punishment at misdemeanor levels (no more than one year in jail or weekends). The Court had held previously that the State may not enhance this crime given the statutory language. Thus, the revocation of 8 years on this count is reversed.

Henry James, Jr., v. State, No. F-2012-559 (Okl.Cr., February 26, 2014) (unpublished): **Notice; Indictments and Informations:** James was charged with drug offenses, including Count I of Possession of CDS (Cocaine and Marijuana), AFCF. The district court separated Count I into two charges in the jury instructions based upon the fact there were two different drugs—one a felony count for the cocaine and another for a misdemeanor county on the marijuana. This was done without objection by defense counsel. The jury found James guilty of both counts. The Court reversed the misdemeanor marijuana count because the State failed to provide notice to James in the Information that it intended to charge two counts. **N.B.** The Court stated that if the State wished to charge two counts in the Information, this would not be error; it was only error (plain error in this case) because the Information charged one count.

Omar Sharrod Pollard v. State, No. F-2012-732 (Okl.Cr., February 26, 2014) (unpublished): **After Formers:** Pollard was convicted by jury of Unlawful Distribution of CDS (Crack Cocaine), AFCF x 2, and sentenced to 40 years. The Court affirmed the conviction, but modified the sentence based upon two plain errors related to sentencing. The two priors alleged were for Second Degree Burglary and one prior conviction “consisting of nine counts of various sex offenses that arose out of a single transaction.” All nine of these priors were read to the jury by the prosecutor. The Court found error in admitting the prior with nine counts arising out of a single transaction and including that information in opening statement and closing argument. In addition, the jury also saw documents showing that both priors involved suspended time. Sentence modified to 25 years.
Tommy James Millsap v. State, No. F-2012-1107 (Okl.Cr., February 26, 2014) (unpublished): **Joinder:** Millsap was charged with several crimes, including unrelated counts of Possession of CDS and Manslaughter in the First Degree. Millsap failed to preserve a claim of improper joinder, but the Court noted that these counts were in fact joined improperly, even though they occurred in the same location and within a relatively short period of time. The error was harmless. **NOTE:** Although the Court afforded no relief to Millsap, the opinion contains a primer on the law of joinder of offenses, and how to preserve this issue for appellate review.

Jonas Alan Thornton v. State, No. F-2011-962 (Okl.Cr., February 27, 2014) (unpublished): **Judicial Bias:** Thornton was convicted in a non-jury trial of Assault w/Dangerous Weapon in Okmulgee County by the Hon. Kenneth E. Adair. However, at the time that Thornton was arrested and released on bail, he had actually consulted with Kenneth Adair, who at the time was an attorney in private practice. Thornton ended up hiring different counsel, but sometime after his consultation with Adair, Adair was elected district judge, and ultimately presided over Thornton’s bench trial. The Court reversed on the basis of judicial bias.

Clayton Lockett and Charles Warner v. State, Nos. D-2000-1330 & D-2003-829 (Okl.Cr., March 18, 2014) (unpublished): **Death Penalty (Stays):** This order deals with stays of executions filed by two death row inmates based upon the lack of available quantities of the execution drugs. The Oklahoma Supreme Court ruled ultimately that the OCCA had jurisdiction to enter a stay of execution, but the victory appears Pyrrhic because, in light of the concession by the AG that acquisition of the drugs was questionable, the OCCA vacated the execution dates, but re-set them for Tuesday, April 22, 2014 (Lockett), and Tuesday, April 29, 2014 (Warner).

Clayton Lockett & Charles Warner v. State, Nos. D-2000-1330 & D-2003-829 (Okl.Cr., April 9, 2014) (unpublished): **Stays:** Two death row inmates sought stays of execution based upon issues regarding the execution protocol. In this Order, the Court denied the stays on the basis that there is no action pending in the Court that challenges their convictions or death sentences.

Frederick Bruce Knutson v. City of Oklahoma City, No. M-2013-73 (Okl.Cr., April 10, 2014) (unpublished): **Zoning; Sufficiency:** Knutson was issued citations by the City for maintaining non-commercial expressive signs that did not conform to code, and was thereafter convicted of a zoning violation. Reversed and remanded with instructions to dismiss because the evidence was insufficient to prove that Knutson’s property was residential.

Keianne Denise Shelton v. State, No. F-2012-1066 (Okl.Cr., April 11, 2014) (unpublished): **Causation:** Shelton was tried by jury in Tulsa County and convicted of First Degree Manslaughter (DUI). Shelton ran a red light going 90 mph and collided with another vehicle driven by a Catholic priest and another passenger, both of whom died at the scene. Shelton claimed that she was fleeing persons who were shooting at her and following her. The Court affirmed, but the bulk of the opinion centers around an interesting discussion of causation (direct and proximate cause).

Carrie Denise Stumpff v. State, No. RE-2013-0511 (Okl.Cr., April 18, 2014) (unpublished): **Waiver (Right to Counsel):** Revocation order by the district court is reversed because the record was not adequate to support a knowing waiver of the right to counsel.
Stacy Gene Bellis v. State, No. RE-2012-1076 (Okl.Cr., April 18, 2014) (unpublished): **Suspended Sentences:** This opinion reverses a revocation order by the district court judge, who took judicial notice of trial proceedings on a new charge that formed the basis for the revocation proceeding. This was improper since the defendant did not stipulate to it.

Wilburn Shawn Crowell v. State, No. RE-2013-0672 (Okl.Cr., April 18, 2014) (unpublished): **Suspended Sentences:** Interesting revocation case where Crowell was sentenced to two years suspended in Hughes County. In the first revocation hearing, six months later, Crowell was “re-sentenced” to two years suspended under community sentencing. Later applications to revoke were filed, but the State confessed error where these applications were filed after the original two years had expired. The court cannot lengthen the original term of the sentence.

State v. David Vaughan, No. S-2013-687 (Okl.Cr., April 22, 2014) (unpublished): **Causation:** Vaughan was charged with Manslaughter in the First Degree (DUI). However, the facts were highly unusual in that, while Vaughan was driving drunk (BAC .14), an argument with his wife ensued inside the truck and she ended up jumping out of the moving truck and died. The trooper who testified at the preliminary hearing stated that she jumped of her own volition, and that Vaughan driving drunk had nothing to do with her death. Special Judge Alicia Littlefield sustained the demurrer, and District Judge Gary Maxey affirmed. In this opinion, the OCCA affirmed as well, holding that there was no abuse of discretion on the question of proximate causation.

Darrell Williams v. State, No. F-2012-951 (Okl.Cr., April 22, 2014) (unpublished): **Jurors:** Sex offense convictions out of Payne County are reversed because jurors made unauthorized visits to the crimes scene and discussed their observations and opinions about it during deliberations.

Lockett v. Patton, No. 0-2014-370 (Okl.Cr., April 25, 2014): **Death Penalty (Stay):** Order denying stay of execution to death row inmates challenging, in a civil proceeding, the constitutionality of the secrecy provisions of state statutes regarding acquisition of lethal injection chemicals.

Dre Edward Barham v. State, No. F-2012-633 (Okl.Cr., April 25, 2014) (unpublished): **Double Jeopardy:** Barham was convicted by jury of Lewd Molestation and Forcible Sodomy. The State’s theory was that Barham “looked upon” the body of the complaining witness with lust prior to the Forcible Sodomy, thus he committed Lewd Molestation as well. Not even the OCCA bought this argument, and the Court reversed the Lewd Molestation conviction (even in light of the fact that trial counsel did not preserve the issue at trial).

Michelle Renea Runco v. State, No. RE-2013-523 (Okl.Cr., April 30, 2014) (unpublished): **Waiver (Right to Counsel):** Revocation of suspended sentence out of Garfield County is reversed because there was no record of a valid waiver of the right to counsel.
Kenneth Jordan Mitchell v. State, No. F-2013-205 (Okl.Cr., May 1, 2014) (unpublished): **Waiver (Appellate Issues):** Appellate counsel raised a claim in this case regarding the refusal of the trial court to fund an expert witness on eyewitness identifications. However, in framing the issue in the appellate brief, appellate counsel simply incorporated trial counsel’s brief on the issue, rather than writing out the argument anew in the appellate brief. In this case, the Court stated that the issue was waived. You must make all of your arguments within the body of the brief that you file.

Martez Terrail Powell v. State, No. C-2013-763 (Okl.Cr., May 7, 2014) (unpublished): **Guilty Pleas; Prosecutorial Misconduct (Breach Plea Agreement):** Blind plea to lewd acts is affirmed in this certiorari appeal, but I included it because of the actions of the prosecutor, Christy Miller, which the Court described in this opinion as “deceptive and reprehensible.” Basically, she agreed to offer a plea deal of 40 years but with the first 20 suspended. However, at sentencing, Miller requested some counts to run consecutively which would effectively be a 90 years sentence with all but the first 75 years suspended. The Court held this deceptive and reprehensible conduct to be error enough for Powell to withdraw his pleas, and the district court in fact allowed him the opportunity to do so (but he refused and persisted with a blind plea).

Charles Frederick Warner v. State, No. D-2003-829 (Okl.Cr., May 8, 2014) (unpublished): **Death Penalty (Stays):** In light of the debacle that occurred during the execution of Clayton Lockett, Warner requested a stay of his execution, and the State agreed, so the Court granted a six months stay in this unpublished opinion—even though the Court held last month, in a published opinion, that it had no jurisdiction to issue a stay.

Richard Shane Kuehn v. State, No. RE-2013-250 (Okl.Cr., May 9, 2014) (unpublished): **Judicial Bias:** This is a revocation case where the judge revoked seven years—even though the original Information in the case was signed and prosecuted by the judge, then-assistant district attorney. Kuehn actually moved for the judge to recuse, and he refused to do so. The Court had little difficulty reversing (the State confessed error), but did so on the basis of 20 O.S. § 1401(A) (no judge shall sit in any cause in which he has been counsel for either side), rather than any constitutional basis.

Phillip Wade Barton v. State, RE-2012-1043 (Okl.Cr., May 12, 2014) (unpublished): **Suspended Sentences:** This case out of Tulsa deals with a revocation based upon a conviction for a new crime. Here, the State simply introduced the certified docket sheet in the new case. The Court found error (confessed by the State) because the State neither proved that the conviction became final (appeal time has expired, or the appeal has been adjudicated), nor proved the elements of the new offense per Sams v. State, 1988 OK CR 137, ¶ 6, 758 P.2d 834, 835.

Raymond Eugene Johnson v. State, No. PCD-2014-123 (Okl.Cr., May 21, 2014) (unpublished): **Habeas Corpus (Procedural Default):** This is an unpublished order denying a second application for post-conviction relief in a death penalty case out of Tulsa County. I included it for federal habeas practitioners who are facing procedural default problems because the Court again recognized that it may address any error in post-conviction and grant relief if failing to do so would create a miscarriage of justice.
State v. Terrence Tutson & Kindra Heartfield, No. S-2013-718 (Okl.Cr., May 22, 2014) (unpublished): **Search and Seizure (Exclusionary Rule & Consent):** In this drug case out of Oklahoma County, the Hon. Jerry D. Bass granted a motion to suppress based upon a finding that consent to search was not voluntary. The State appealed. The OCCA affirmed, finding that the burden was on the State to show voluntary consent by clear and convincing evidence, and that Judge Bass’s findings were sufficient. NOTE: The facts are not spelled out in the opinion, but I included it because of footnote 3, which discusses the State’s assertion that a warrantless search is not subject to the exclusionary rule when the police officers had reasonable suspicion of criminal activity (in essence, the State argued that the exclusionary rule should not apply where there was no police misconduct). The Court rejected this idea.

Jason Kenyatta Hayes v. State, No. F-2013-314 (Okl.Cr., May 27, 2014) (unpublished): **Jury Instructions (Punishment Range—Attempted Rape):** Hayes was convicted of Attempted Rape in the First Degree and sentenced to 45 years. The legal issue here concerns the punishment range for this crime, since attempts carry one-half of the maximum penalty for the underlying crime, but the maximum for Rape is Life (or LWOP). Here, the jury was instructed that the punishment range was not less than 5 years. The Court found this instruction proper since there is no maximum term of years.

Richard Eugene Glossip v. State, No. D-2005-310 (Okl.Cr., May 28, 2014) (unpublished): **Death Penalty (Lethal Injection):** This is an order setting an execution date for Glossip. In the usual case, the Court would set an execution date 60 days out, but in light of the botched execution of Clayton Lockett, the Court set the execution date in this case for November 20, 2014.

Andre James Orr v. State, No. RE-2013-593 (Okl.Cr., May 30, 2014) (unpublished): **Suspended Sentences; Search and Seizure (Exclusionary Rule):** Does the exclusionary rule apply in revocation proceedings? Generally, no. But, the Court has fashioned a rule that allows for it in “egregious” situations where police conduct must be deterred. The standard was not met in this case, but I included it because it outlines the law on this topic, most notable the published case of Richardson v. State, 1992 OK CR 76, 841 P.2d 603.

Waylon Dean Sniyder v. State, No. RE-2013-555 (Okl.Cr., June 2, 2014) (unpublished): **Drug Court:** Termination from Drug Court is reversed with instructions to dismiss because of a lack of notice of the allegations.

Vincent Blaine Sixkiller v. State, No. F-2013-63 (Okl.Cr., June 3, 2014) (unpublished): **Confrontation/Cross-Examination:** Sixkiller was convicted by jury of First Degree Manslaughter and DUI w/Great Bodily Injury. The Court affirmed, but did find error in the trial court not allowing defense counsel to question the victim about whether she had filed a civil lawsuit against him as a result of the accident. The Court found that such questioning went to her possible bias, credibility and motivation for testifying, and it was error to restrict questioning about it (but it was harmless).
Stephen Emanuel McCoy v. State, No. F-2013-238 (Okl.Cr., June 4, 2014) (unpublished): **Robbery:** In this case out of Oklahoma County, the Court affirmed the conviction of Robbery w/Dangerous Weapon where the “weapon” used was a stun gun. The Court stated that the stun gun was a dangerous weapon in the manner it was used in the case.

Gina Diane Eslick v. State, No. F-2013-402 (Okl.Cr., June 10, 2014) (unpublished): **Drug Court:** Eslick entered guilty pleas to Maintaining a Place Resorted to by Users of CDS, Manufacturing within 2,000 feet of a School (Meth), Child Endangerment, and Possession w/Intent (Meth). She was admitted to Drug Court, violated, and ended up with some steep sentences (25 years). One claim that she raised on direct appeals was excessive sentence. The Court held that such a claim falls outside the scope of the appeal, because such claims must be brought in the manner of acceleration appeals (certiorari).

James Marvin Carty v. State, No. F-2013-619 (Okl.Cr., June 11, 2014) (unpublished): **Restitution:** Carty was tried by jury and convicted of a single count of Robbery with a Dangerous Weapon. In this appeal, Carty challenges only the restitution order of $625.00. The amount was ordered based upon statements of the prosecutor without any actual evidence. The Court found this insufficient to establish a restitution amount with “reasonable certainty.”

Bryden Gunnar Hill v. State, No. RE-2013-50 (Okl.Cr., June 11, 2014) (unpublished): **Suspended Sentences:** In this revocation case out of Tulsa County, Hill challenged, in part, on the basis that the revocation order changed the original sentences regarding insofar as they would be served concurrently or consecutively. The Court held that this attack was not the proper subject of revocation appeal. NOTE: This is a procedural trap that is counter-intuitive. The Court held that the matter had to first be presented to the district court via a request for extraordinary relief.

Heather Ann Jones v. State, No. F-2012-703 (Okl.Cr., June 12, 2014) (unpublished): **Double Jeopardy:** Jones was convicted by jury of Second Degree Felony Murder, Robbery (Conjointly), Conspiracy to Commit Robbery, and Child Neglect. The Court affirmed for the most part, but did find error under 21 O.S. 11 (double punishment) for convictions of both the Second Degree Felony Murder count (w/larceny from house being the underlying felony) and Conjoint Robbery because the same criminal conduct supported both.
Mark M. Muratore v. State ex rel. Department of Public Safety, No. 111,586 (Okla. Civ. App., Div. I, May 10, 2013) (Released for Publication): **DUI (DPS):** In this driver’s license appeal, the trial court denied admission of a copy of a certification from the manufacturer of the Intoxilyzer 8000, certified by the Board of Tests as a true and correct copy, that the subject device had been calibrated, tested, and complied with national standards. The trial court also denied admission of a copy of a “certificate of analysis” from the provider of the test gas canisters. In this complicated and lengthy opinion, the Court held that the certificates from the manufacturer of the Intoxilyzer 8000, as kept by the Board of Tests, constitute non-testimonial evidence, and were thus admissible. Reversed.

Ward & Lee, P.L.C. v. City of Claremore, 2014 OK CIV APP 1 (Okla. Civ., Div. I, May 31, 2013): **Discovery:** An attorney requested audio and video evidence from the Claremore Police Department in a criminal case (DUI arrest) under the Open Records Act. The P.D. responded with a “policy” statement in the form of a memo from the police Chief that all such requests must be handled by the DA’s office. The trial court granted relief to the P.D., holding that the dash-cam video is not a public record subject to disclosure under the Act. In this opinion, the panel reversed, holding that dash-cams of municipal police departments are discoverable under the Act. NOTE: Judge Joplin, C.J., dissented, thus this 2-1 decision may end up on the Supreme Court’s docket. Also, note that dash-cam videos by OHP (DPS) are specifically excluded under the Act, but municipalities are not.

Starkey v. Oklahoma Department of Corrections, 2013 OK 43 (June 25, 2013): **Sex Offender Registration:** SORA may not be applied retroactively because it is punitive. The specific issue was the constitutionality of retroactively extending SORA registration, which the Court found to be unconstitutional. NOTE: The holding here appears to be bullet proof because the Court based its conclusions on the interpretation of the Oklahoma Constitution; thus, I do not see that the federal courts can overrule this interpretation of state law. Also, in light of the holding that SORA is punitive, it might be wise to continue pressing jury instructions to the effect that registration is required in appropriate cases.

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State ex rel. Oklahoma Bar Association v. Miller, 2013 OK 49 (June 25, 2013): **Prosecutorial Misconduct (General):** This is the opinion regarding disciplinary proceedings against former prosecutor Robert Bradley Miller for his misconduct associated with a capital case out of Oklahoma County. The Court suspended Miller for 6 months and imposed costs.

Courtney v. State, 2013 OK 64 (July 2, 2013): **Jurisdiction (Appellate); Habanas Corpus (State Post-Conviction); Civil Rights:** Courtney, who claimed to be convicted falsely and actually innocent, sought to sue the State under the Governmental Tort Claims Act based upon a DNA exoneration. He filed a post-conviction application seeking to vacate his conviction (for robbery), and also for the district court to determine his actual innocence under the GTCA. The district court vacated the conviction, but denied the actual innocence finding. In this opinion, the Court held: 1) the Supreme Court has jurisdiction to hear appeals regarding these claims under the GTCA; 2) the actual innocence determination must be made by the district court that vacated, dismissed, or reversed the conviction; 3) the district court acts as a gatekeeper to make a threshold determination whether a claim of actual innocence has been met; and 4) in making this determination, the court should view the evidence in a light most favorable to the petitioner, bearing in mind that actual innocence will be again examined in the claims process and may ultimately be determined by a jury.

Bush v. State ex rel. Department of Public Safety, No. 111,608 (Okla. Civ. App., Div. IV, July 11, 2013) (Not for Official Publication): **DUI (DPS):** In this driver’s license case out of Latimer County, the order of modification (requiring an ignition interlock device to and from work) is reversed because the statute does not permit modification where the licensee (as here) has multiple prior convictions for DUI or possession of CDS. NOTE: Bush failed to file any responsive brief in the case, so the case was submitted on the basis of the brief filed by DPS, although I am not sure if Bush had a winning legal argument to make. Just be aware that if your client has priors, he/she may not be eligible for even a hardship modification.

Deborah S. Judge v. State ex rel. Department of Public Safety, No. 111,513 (Okla. Civ. App., Div. IV, July 11, 2013) (Not for Official Publication): **DUI (DPS):** Judge was arrested for DUI. The breath test resulted in a reading of 0.0. Police suspected a non-alcohol substance and sought a blood draw. Judge refused a blood draw on the basis that she has small blood veins and the procedure would be painful and difficult for her. The officer did not offer an alternative test (of urine or saliva), and simply noted her refusal. She argued that failure to utilize alternative methods violated Due Process. The panel rejected this argument, citing the statute and the fact that the law enforcement agency had opted for blood draws instead of saliva or urine.
Andrews v. State ex rel. Department of Public Safety, 2014 OK CIV APP 19 (Okla. Civ. App., Div. II, September 6, 2013): **DUI (DPS):** This case involved a single-car accident (struck a tree). A trooper testified that Andrews smelled of alcoholic beverage and admitted to drinking a six-pack of beer. Since Andrews was injured, an ambulance was summoned, and an EMT paramedic performed the blood draw. The issue in the case was whether the EMT paramedic was authorized to perform the blood draw under Oklahoma law. The trial court found that he was not so authorized because the statute lists authorized persons, and EMT paramedics are not on the list. The Court agreed. NOTE: This is a significant opinion for a couple of reasons. First, the Court disagreed with a conflicting published opinion from the Oklahoma Court of Criminal Appeals on this issue (**Bemo v. State**, 2013 OK CR 4, 298 P.3d 1190). Second, the Board of Tests sought to correct this situation, and to allow EMT paramedics to perform blood draws, by enacting an “Action” or statement of the Board. The Court of Appeals noted that these “Actions” are not rules found in the Oklahoma Administrative Code.

Hendricks v. Jones, 2013 OK 71 (September 17, 2013): **Sex Offender Registration:** Hendricks came to Oklahoma in 2009, at a time when out-of-state convictions (like his) would result in registration, but Oklahoma convictions would not. Hendricks thought this was unfair and the Court agreed: “We hold applying SORA’s requirements to sex offenders now residing in Oklahoma who were convicted in another jurisdiction prior to SORA’s enactment but not applying the same requirements to a person convicted in Oklahoma of a similar offense prior to SORA’s enactment, violates a person’s equal protection guarantees.”

Bollin v. Jones, 2013 OK 72 (September 17, 2013): **Sex Offender Registration:** Bollin entered Oklahoma in June, 2004, at a time when the law did not require a pre-SORA conviction in another jurisdiction to register. The Court held that Bollin “should be held to the law in effect at the time he entered Oklahoma and became subject to SORA, thus no registration.

Corey Lynn Silver v. State, No. 111,277 (Okla. Civ. App., Div. II, September 17, 2013) (Not for Official Publication): **DUI (DPS):** A Logan County deputy arrived at the scene of an accident and observed Silver inside a vehicle as firemen were getting her out. He did not see the accident happen, did not observe other occupants of the vehicle, did not see Silver in actual physical control of the vehicle, and did not perform any SFSTs because Silver was taken to the hospital. The deputy admitted that based upon his observations, he did not have probable cause to make an arrest. Silver was interviewed by another deputy at the hospital, where she showed the usual red, watery eyes and slurred speech. She also refused a blood test. The panel held that there was no probable cause to arrest. NOTE: There are more facts that I did not include here, but the opinion is very strong on the probable cause requirement.

Christian A. Paul v. State ex rel. Department of Public Safety, 2013 OK CIV APP 95 (Okla. Civ. App., Div. IV, September 26, 2013): **DUI (APC):** This is a DPS appeal where Paul lost his license when Madill police found him drunk behind the wheel of his running vehicle. Paul acknowledged that he had been bar-hopping and was drunk, but he defended the DL revocation by arguing that he only intended to sleep in the vehicle until he was sober and that the police had no probable cause to arrest him. As you might suspect, the Court had no trouble rejecting these arguments, but the opinion does have an excellent discussion of the law of APC.
Courtney Roulston v. State ex rel. Department of Public Safety, 2014 OK CIV APP 46 (Okla. Civ. App., Div. III, October 9, 2013): **DUI (DPS)**: This opinion was one of six decided by the Court on the same day dealing with the same issue: the sufficiency of the implied consent affidavit from the Intoxilyzer 8000 because it does not contain a sworn report as required by 47 O.S. 753 in a refusal, or 47 O.S. 754 in a blood or breath case. The Court sided with the driver and held that the affidavit was deficient. The other cases decided on the same issue were: Tucker v. State, Harris v. State, Kraus v. State, Lincoln v. State, and Whitworth v. State.

Alem v. State ex rel. Department of Public Safety, 2013 OK CIV APP 105 (Okla. Civ. App., Div. II, October 15, 2013): **DUI (DPS)**: The issue here is whether the Petition filed in district court was timely (to challenge a refusal revocation). The general rule is that the Petition must be filed within 30 days of notice of the revocation order, but there is a question whether a 10-day window applies when DPS mails an order revocation. Alem filed his Petition on the 40th day, and the district court dismissed for lack of jurisdiction. Here, the Court reversed, holding that the 10-day window provided by statute applies when DPS cannot show the exact date it was received (DPS simply mailed it out in this case; the date it was mailed was not in issue, but the date it was received was never established).

David Irlando v. State ex rel. Department of Public Safety, No. 111,419 (Okla. Civ. App., Div. IV, November 15, 2013) (not for publication): **DUI (DPS); Speedy Trial (Civil Cases)**: In this driver’s license case, DPS canceled the scheduled hearing without giving a reason (according to the trial court), but it happened that the arresting officer was deployed to a military assignment, so DPS re-scheduled the hearing. The trial court held that the hearing was not held within a reasonable time and vacated the revocation order. In this opinion, the panel held that the right to a speedy trial applies to civil cases (as well as criminal cases), and that the tests are very similar and involve balancing several factors. In this case, the trial court did not conduct a proper balancing test, so the panel remanded for further proceedings. **NOTE**: In addition to Irlando, this panel remanded two other cases for the same reason: Deitra Macey v. State of Oklahoma, ex rel., Department of Public Safety, No. 111,420 (Okla. Civ. App., Div. IV, November 15, 2013) (not for publication); and Phillip Ryan Pierce v. State of Oklahoma, ex rel. Department of Public Safety, No. 111,419 (Okla. Civ. App., Div. IV, November 15, 2013) (Released for Publication). **N.B.**: Pierce was released for publication by the Court of Appeals, and it was a 2-1 opinion, with Judge Rapp dissenting. Pierce involved a 20-month delay in having a hearing, but no other factors weighed in his favor.

Christopher Luster v. State ex rel. Department of Corrections, 2013 OK 97 (November 19, 2013): **Sex Offender Registration**: This litigation involves multiple litigants in various postures regarding registration. In this order, the Court remanded to the district court in light of Starkey and Cerniglia v. Oklahoma Department of Corrections, 2013 OK 81 (date of conviction controls registration), to sort out who must actually register and for how long.
**Hedrick v. Commissioner of Department of Public Safety**, 2013 OK 98 (November 26, 2013): **DUI**; **DPS**: This opinion reversed the Hon. Gary Barger who allowed DPS to deny certified copies of revocation orders, but then demand that drivers provide certified copies in order to appeal in the district court. The Court of Civil Appeals had held previously that this was acceptable, and the Supreme Court reemphasized by holding: 1) 47 O.S. 2-111 expressly deems photocopies of DPS records to be considered originals for all purposes and to be admissible as evidence in all courts; and 2) 12 O.S. 3004(3) is construed to mean that a certified copy of the DPS order is not required. NOTE: Justice Edmondson (joined by Justice Gurich) penned a strong opinion concurring in the result, taking DPS to task and advocating a sensible approach to DPS appeals where DPS should simply be required to file the administrative record in district court appeals.

**Ransdell v. State ex rel. Oklahoma Department of Corrections**, 2013 OK 106 (Okla., December 13, 2013): **Sex Offender Registration**: This is a short, summary order reversing the district court in light of *Starkey*.

**In Re Official Publication of Decisions**, 2013 OK 109 (December 16, 2013): This is a brief Order revoking the “Certificate” designating West Publishing Company as the official reporter of Oklahoma decisions. Beginning January 1, 2014, the Court will be the publisher of its own decisions via the Oklahoma State Courts Network.

**Butler v. Jones ex rel., State of Oklahoma**, 2013 OK 105 (December 17, 2013): **Sex Offender Registration**: Butler pled guilty to two counts of Sexual Abuse of a Minor and received consecutive five-year deferred sentences, and a later expungement. The district court granted an injunction regarding registration, but in this opinion the Court reversed, holding that the law that characterized his offenses as “aggravated” was in effect at the time of the plea.

**Muratore v. State ex rel. Department of Public Safety**, 2014 OK 3 (January 28, 2014): **DUI (DPS)**: Judge James B. Croy suppressed results from an Intoxilyzer 8000 because the Board of Tests had no rules in place governing maintenance procedures, and also that the documents from the manufacturer were inadmissible hearsay. The Court of Civil Appeals reversed, but in this opinion, the Supreme Court reversed again, holding that Judge Croy did not abuse his discretion in refusing to admit the certificate of calibration and the supplier’s certificate of analysis.

**State ex rel. Oklahoma Bar Association v. Layton**, 2014 OK 21 (March 25, 2014): **Prosecutorial Misconduct**: This is a Bar disciplinary matter involving a former assistant district attorney, Jennifer Adina Layton (Kay County). She was cited by the Bar for her conduct in a rape trial back in 2012, where she allegedly was not candid to the court and counsel about a meeting she had with a witness. The Court found problems with the evidence, particularly the way the trial court failed to make records, and held that her conduct did not warrant discipline.

**Lockett v. Evans**, 2014 OK 28 (April 17, 2014): **Death Penalty (Stays)**: This is a definitive opinion from the Supreme Court on the thorny issue of which Court has the authority to entertain the merits of a stay application filed on behalf of two death row inmates who had challenged the secrecy provisions of state law regarding the State’s acquisition of lethal injection drugs. In a civil action, Judge Patricia Parrish held the secrecy provisions unconstitutional. However, as to the question of whether a stay of execution can be entered, she ruled that the OCCA must do that. In this opinion, the Supreme Court agreed.
Jose D. Escobedo v. State of Oklahoma, ex rel., Department of Public Safety, No. 112,141 (Okla. Civ. App., Div. III, April 18, 2014) (Not for Official Publication): **DUI (DPS):** Escobedo scheduled a DPS hearing on his drivers license after being arrested by Del City police officers for DUI. At the DPS hearing, the officer failed to appear. Escobedo was told by the hearing officer that the ruling would be in his favor since the arresting officer failed to appear. Thereafter, DPS vacated this favorable decision and re-set the hearing, at which counsel for Escobedo objected. However, DPS revoked the license. Judge Roma M. McElwee reversed, holding that DPS acted arbitrarily and capriciously and thus violated the Due Process rights of the licensee, and the panel agreed.

Lockett v. Evans, 2014 OK 33 (April 21, 2014): **Death Penalty (Stay):** Extraordinary opinion granting a stay of execution while the Court considers the merits of a constitutional challenge to statutory secrecy provisions regarding the acquisition of lethal injection drugs.

Lockett v. Evans, 2014 OK 34 (April 23, 2014): **Death Penalty (Secrecy):** Lower court ruling holding that secrecy provisions of 22 O.S. 1015(B) were unconstitutional is reversed, and the stay previously entered in the case is dissolved.

Pierce v. State ex rel. Department of Public Safety, 2014 OK 37 (May 6, 2014): **DUI (DPS):** Solid opinion where DPS delayed a hearing on a drivers license revocation proceeding for 20 months. The Court found that this delay denied the licensee the right to a speedy hearing under the Oklahoma Constitution.

Calvin J. Hobson v. Commissioner of the Department of Public Safety, No. 112,326 (Okla. Civ. App., Div. II, June 4, 2014) (Not for Official Publication): **DUI (DPS):** This is an unpublished opinion affirming the Hon. Steve Stice (Cleveland County) in vacating a revocation order based on a faulty officer’s affidavit pursuant to 47 O.S. 754(C). NOTE: Division III of the Court of Civil Appeals had previously ruled the same way in a published opinion (cited in Hobson). In Hobson, Division II followed suit.

Mark Andrew Olandese v. State, No. 111, 968 (Okla. Civ. App., Div. IV, June 4, 2014) (Not for Official Publication): **Expungement:** Interesting opinion on the legal question of whether a 2004 conviction for disorderly conduct in Edmond Municipal Court is a “misdemeanor” under the expungement statute. The trial court held that it was not, and that Olandese was entitled to the expungement, and the panel agreed.

Tommy Daniel Ritchie, Jr., v. State of Oklahoma ex rel. Department of Public Safety, No. 112,111 (Okla. Civ. App., Div. IV, June 13, 2014) (Not for Official Publication): **DUI (DPS):** In a recent case from the Oklahoma Supreme Court (Pierce v. State, 2014 OK 37), the Court found a delay of 20 months from the time of arrest until DPS held a hearing was too long. In this case, which involved a delay of 10 months, the panel applied Pierce and found no error. NOTE: The delay argument under Pierce is fact intensive, and I included this case as an example of an application of Pierce. It appears to hold that a ten month delay is a baseline of reasonableness, absent some intentional delay by DPS.
**Tenth Circuit Update**

by

*James L. Hankins*

United States v. Washington, No. 11-6339 (10th Cir., December 28, 2012) (Published) (Hartz, McKay & Tymkovich): Federal Sentencing Guidelines (ACCA; Juvenile Convictions): Prior conviction as a juvenile is allowed to be used as a predicate offense under the ACCA.

United States v. Holyfield, No. 12-1004 (10th Cir., January 8, 2013) (Published) (O’Brien, Murphy & Tymkovich): Federal Sentencing Guidelines (Final Judgment): 2255 petition is denied over a claim that a predicate conviction was not final when Holyfield committed the instant drug offense (which triggered a mandatory minimum life sentence).

United States v. De La Cruz, No. 11-5114 (10th Cir., January 9, 2013) (Published) (Briscoe, C.J., Seymour & Ebel): Search and Seizure (Reasonable Suspicion): Denial of motion to suppress is reversed where ICE agents, looking for a suspect at a closed car wash, block in a car and detain the driver, who turned out to be a different person. The Court held that the district court erred both in finding reasonable suspicion of criminal activity, and in concluding that suppression of identification is never possible.

Lott v. Trammell, No. 11-6096 (10th Cir., January 14, 2013) (Published) (Briscoe, C.J., Gorsuch & Holmes): Habeas Corpus (Capital Habeas Cases): Oklahoma death row inmate Ronald Lott loses his habeas appeal in this opinion dealing with issues relating to: 1) speedy trial; 2) aiding and abetting instructions; 3) admission of other crimes evidence; 4) prosecutorial misconduct by injecting hearsay; 5) IAC (failure to investigate/present mitigation; 6) victim impact evidence; 7) sufficiency regarding “avoid arrest” aggravator; 8) cumulative error.

United States v. Rutland, No. 11-8049 (10th Cir., January 22, 2013) (Published) (O’Brien, Ebel & Tymkovich): Commerce Clause: In this drug case, Rutland made the enterprising argument that a drug business operated out of a home does not implicate interstate commerce. The Court rejected this argument.

United States v. Ruby, No. 11-1441 (10th Cir., January 29, 2013) (Published) (Kelly, Seymour & Tymkovich): Supervised Release: No error in the district court considering hearsay testimony at sentencing from three witnesses in a revocation of supervised release hearing.

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**United States v. Lor**, No. 12-8024 (10th Cir., February 5, 2013) (Published) (Hartz, Baldock & Murphy): **Search and Seizure (Stone v. Powell):** Lor was stopped for speeding in Wyoming, gave consent, and drugs were found. His appeal on the suppression issue was denied. Thereafter, he learned that one of the officers—the infamous Trooper Peech—had been fired for manufacturing a story to dispatch in order to make a traffic stop. Upon hearing this, Lor filed a 2255 alleging that this constituted new evidence material to the credibility of Trooper Peech. The panel was not impressed, and simply applied the Stone doctrine which says that the exclusionary rule does not apply in collateral proceedings if a litigant was provided a full and fair opportunity to litigate the issue.

**United States v. Addison**, No. 11-8105 (10th Cir., February 26, 2013) (Published) (O’Brien, Murphy & Tymkovich): **Public Trial:** Addison and a co-defendant named St. Clair were on trial for embezzlement. A mistrial was declared as to St. Clair on the third day, and the trial court excluded her from the courtroom for the remainder of Addison’s trial. On appeal, Addison argued that exclusion of St. Clair violated Addison’s rights under the Sixth Amendment, but the panel disagreed.

**In re: Grand Jury Subpoena**, No. 12-1330 (10th Cir., March 1, 2013) (Published) (Hartz, Anderson & Gorsuch): **Grand Jury; Subpoenas:** Witness was sole shareholder of an LLC, which was hit with a subpoena to produce records in a grand jury investigation of the taxes of the business. Witness objected and moved for a stay to appeal, but the district court denied both, so Witness complied. In this opinion, the panel held that it lacked jurisdiction because Witness had complied. The procedure here is that the person has to be held in contempt before they can appeal. NOTE: The panel also noted that it was in the minority on how it views these cases, but did not change its legal stance.

**United States v. Barajas**, No. 12-3003 (10th Cir., March 4, 2013) (Published) (Kelly, Holloway & Matheson): **Search and Seizure (Wire Taps & Cell Phones):** Drug convictions are affirmed over claims relating to a denial of a motion to suppress evidence obtained from wiretap surveillance and GPS pinging of cell phones.

**In re: Leo D. Graham**, No. 13-3082 (10th Cir., April 23, 2013) (Published) (Hartz, O’Brien & Holmes): **Habeas Corpus (Second or Successive):** Authorization to file a successive habeas petition is denied because Frye and Lafler (recognizing IAC claims in the plea bargaining process) are not new rules of constitutional law.

**Browning v. Trammell**, No. 11-5102 (10th Cir., May 6, 2013) (Lucero, Tymkovich & Holmes) (Published): **Habeas Corpus (Capital Habeas Cases); Prosecutorial Misconduct (Brady cases):** This is a rare habeas winner (new trial, not just penalty phase relief) out of the circuit on a Brady claim in an Oklahoma capital murder case in Tulsa. The sole witness to the murders had psychiatric problems, and the records were in the State’s possession, but not turned over to the defense. These records showed that the State’s key witness blurred reality and fantasy, suffered from memory deficits, tended to project blame onto others, and had an assaultive, combative, and even potentially homicidal disposition. The OCCA, according to the panel, was unreasonable in concluding that this evidence did not meet the Brady standard.
In re: Keith V. Weathersby, No. 13-3077 (10th Cir., May 14, 2013) (Hartz, Tymkovich & O’Brien) (Published): **Habeas Corpus (Second/Successive):** Weathersby sought authorization to file a second or successive petition under 2255. He thought he needed to do so since he had already filed such a petition and it had been dismissed as untimely. However, in the second 2255, he alleged that his state court convictions had been successfully attacked and expunged, therefore they could not be used to enhance. The panel held that since this occurred after his first 2255 petition had concluded, his second 2255 petition is not successive because the claim was not ripe at the time the first one was pending. The motion is dismissed as unnecessary.

United States v. Shengyang Zhou, No. 11-1261 (10th Cir., June 10, 2013) (Published) (Kelly, Seymour & Tymkovich): **Federal Sentencing Guidelines (Risk of Death; Leader/Organizer):** Zhou pled guilty to Trafficking and Attempted Trafficking of Counterfeit Goods (a weight-loss drug), and sentenced to 87 months. Sentence is affirmed over claims relating to using a not-yet-completed order of 10,000 bottles of the counterfeit drug, an organizer or leader enhancement, sufficiency of the evidence regarding an enhancement for risk of death or serious bodily injury, and the assessment of $385,217 to pharmaceutical company Glaxo Smith Kline for “public relations” expenses (GSK manufactured the real drug that Zhou counterfeited).

United States v. Angilau, No. 12-4025 (10th Cir., June 14, 2013) (Published): **Double Jeopardy:** Angilau was charged with several firearms counts which were dismissed with prejudice. He was re-indicted on several other charges that were related to the charges that were dismissed. He brought this appeal prior to trial, alleging double jeopardy and collateral estoppel arguments. The panel rejected these claims. NOTE: Angilau also raised some Due Process claims based upon prosecutorial harassment in charging him and dismissing the charges, but the panel found that it had no jurisdiction over those claims since the case was pre-trial.

Magnan v. Trammell, No. 11-7072 (10th Cir., June 14, 2013) (Published) (Briscoe, C.J., Kelly & Hartz): **Jurisdiction (General/Indian Country):** Petition for habeas corpus relief is granted in this Oklahoma capital case on the basis that the state trial court lacked jurisdiction because the murders occurred in “Indian country” (rural Seminole County). NOTE: This case contains a good discussion of the jurisdiction issue, but might be a Pyrrhic victory for Magnan since he admitted guilt, and the federal government has jurisdiction over the case.

United States v. Clark, No. 10-5152 (10th Cir., June 18, 2013) (Published) (Hartz, O’Brien & Holmes): **Encumbered Property (Caveats); Severance; Speedy Trial:** Convictions on multiple counts in a “pump and dump” securities fraud scheme are affirmed over claims relating to: 1) a pre-indictment “caveat” on his home which encumbered it and did not allow him to obtain funds for counsel of choice (denied because Clark did not seek a hearing prior to trial on this issue); 2) sufficiency of the evidence; 3) denial of motion to appoint counsel with expertise in securities law (no abuse of discretion); 4) denial of severance; and 5) denial of speedy trial.

United States v. Parker, No. 12-6196 (10th Cir., June 25, 2013) (Published) (Lucero, O’Brien & Matheson): **Habeas Corpus (COA):** Request for a Certificate of Appealability to appeal the denial of a 2255 motion is denied.
United States v. Berry, No. 11-2186 (10th Cir., June 26, 2013) (Published) (Holmes, O’Brien & Matheson): **Jury Instructions (Sciente); Federal Sentencing Guidelines (Special Skills):** Drug conviction affirmed over claims relating to: 1) use of a “permissive inference” instruction regarding Berry’s possession of the truck where the drugs were found; 2) sufficiency of the evidence that the marijuana weighed more than 100 kgs.; and 3) sentence enhancement based on his use of a special skill (commercial truck driving).

United States v. Figueroa-Labrada, No. 12-6090 (10th Cir., June 28, 2013) (Published) (Holmes, Murphy & Matheson): **Federal Sentencing Guidelines (Particularized Findings):** Sentence in this drug case is vacated and remanded for failure of the district court to make particularized findings regarding the amount of meth attributable to the defendant.

United States v. Renteria, No. 12-8009 (10th Cir., June 28, 2013) (Published) (Kelly, Gorsuch & Holmes): **Prosecutorial Misconduct (Brady); Evidence (Summaries):** Drug conspiracy convictions affirmed over claims relating to: 1) Giglio violation of undisclosed promises to a Government witness (waived because there was no factual record below to support the claim); 2) the admission of summary charts showing money transactions (no abuse of discretion); 3) sufficiency of the evidence; and 4) evidence of gang affiliation (not preserved).

United States v. Neilson, No. 12-4041 10th Cir., July 2, 2013) (Published) (Kelly, McKay & O’Brien): **Taxes:** Neilson was a tax protester in Utah who ended up receiving 30 months for interfering with the administration of the internal revenue laws. The Guidelines calculation for his acts could be controlled by the Tax Evasion section, or the Obstruction of Justice section. The District Court applied the Tax Evasion section and the panel affirmed.

United States v. Briggs, No. 12-5140 (10th Cir., July 2, 2013) (Published) (Hartz, McKay & Matheson): **Search and Seizure (Reasonable Suspicion):** Briggs was found with a gun after having been convicted of a felony when Tulsa Police officers saw him and another man walking down the street in a “high crime” area. Briggs and the other man started walking fast away from the cops, and Briggs grabbed or touched at his waistband, which one of the cops stated that, according to his experience, was indication that the person had a gun. Based upon this fact situation, the panel found reasonable suspicion for the pat down of Briggs. NOTE: This opinion illustrates how the panel waters down the Constitution again, this time allowing police to stop and frisk anyone who seems suspicious. The District Court judge was the Hon. Gregory K. Frizzell, C.J., out of Tulsa. Although judge Frizzell deemed the case a “close call” one wonders just how far the police have to go in order for him to find a violation. The Courts already allow the police to essentially make up any pretext to search us in our cars. Now it appears that the judiciary is allowing similar police encroachment of citizens in foot traffic.

United States v. Hatch, No. 12-2040 (10th Cir., July 3, 2013) (Published) (Murphy, O’Brien & Tymkovich): **Hate Crimes:** Hatch and two others were convicted of a “hate crime” when they kidnapped a disabled Navajo man and branded a swastika into his arm. Hatch contested the constitutionality of the statute because it criminalized local conduct. The Government argued that the Thirteenth Amendment supported the authority of Congress to enact these types of statutes to combat the vestiges of slavery, and the Court agreed.
Wood v. Milyard, No. 09-1348 (10th Cir., July 8, 2013) (Published) (Hartz, Baldock & Gorsuch): **Double Jeopardy**: This is a very old, convoluted state court murder conviction out of Colorado that arrived at the Court via a writ of habeas corpus. The panel found merit to the argument that Wood could not be convicted of both first degree murder and second degree murder for the killing of one person in a store robbery. Writ granted conditionally to allow the state courts to vacate one of the convictions.

United States v. Nicholson, No. 11-2169 (10th Cir., July 12, 2013) (Published): **Search and Seizure (Mistake by Officer)**: An officer stopped Nicholson for making an illegal turn. As it turned out, the turn Nicholson made was not unlawful at all. In this 2-1 opinion, the panel held that this mistake of law made the stop and subsequent search illegal.

United States v. Tanner, No. 13-4022 (10th Cir., July 12, 2013) (Published) (Tymkovich, O’Brien & Gorsuch): **Guilty Pleas (Federal)**: Seeking to avoid the effects of an appellate waiver, Tanner argued that his plea was not knowing and voluntary because there was no specific discussion of it during the Rule 11 plea colloquy. The panel held that the absence of such a discussion does not invalidate the plea.

United States v. Boyd, No. 12-2123 (10th Cir., July 15, 2013) (Published) (Hartz, Baldock & Holmes): **Federal Sentencing Guidelines (Retroactivity)**: This case deals with the situation where the U.S. Sentencing Commission revises a guideline to reduce the offense level for certain conduct, and then makes the change retroactive. In these situations, the offender is entitled to resentencing. What happens when a district court grants a downward departure? Does the new sentencing calculus include the downward departure, or is it disregarded? HELD: It is disregarded.

United States v. Chavez, No. 11-1419 (10th Cir., July 23, 2013) (Published) (Tymkovich, Murphy & O’Brien): **Concurrent/Consecutive Sentences**: Chavez entered guilty pleas to drug smuggling in both state and federal court, and at sentencing he asked the district court to allow him to serve his federal sentences concurrently to his still-to-be-imposed state sentence. The Government concurred with this request, but the district court refused, instead ordering that the federal sentence run consecutive to the state sentence. The panel affirmed, finding no abuse of discretion.

United States v. Orona, No. 12-2129 (10th Cir., July 31, 2013) (Published) (Briscoe, C.J., Seymour & Lucero): **Federal Sentencing Guidelines (ACCA)**: Use of juvenile adjudication as a predicate offense for ACCA purposes does not violate the Eighth Amendment.

United States v. Hodge, No. 13-6042 (10th Cir., August 1, 2013) (Published) (Kelly, Holmes & Matheson): **Federal Sentencing Guidelines (Crack)**: Hodge is not eligible for a sentence reduction under the Fair Sentencing Act because he was convicted as a Career Offender rather than under the crack cocaine guidelines.
United States v. Esquivel-Rios, No. 12-3141 (10th Cir., August 2, 2013) (Published) (Hartz, Baldock & Gorsuch): Search and Seizure (Traffic Stops): In this opinion, the panel confronts a routine traffic stop in Kansas where a trooper saw a vehicle that had a temporary tag from Colorado. The trooper called in the tag and was told that there was no record of it, but also that there commonly is no record of Colorado temporary tags. The panel seems to indicate this might vitiate reasonable suspicion, but remanded for more fact-finding by the district court concerning the nature of the database and whether it is reliable.

United States v. Sanchez, No. 12-2084 (10th Cir., August 5, 2013) (Published) (Hartz, Baldock & Holmes): Search and Seizure (Search Warrants; Franks): Drug conviction affirmed over claims relating to a search warrant where police had the “mistaken belief” that the residence was that of the daughter of Sanchez who was a member of the drug conspiracy. Notably, there were untruths in the affidavit as admitted by the DEA agent.

United States v. Naramor, No. 12-7053 (10th Cir., August 12, 2013) (Published) (Hartz, McKay & Matheson): Federal Sentencing Guidelines (Acceptance of Responsibility): Naramor pled guilty to mailing a threatening communication to a state judge and received a 60 month sentence—the statutory maximum. AFFIRMED over his claims relating to: 1) use of a prior state conviction to calculate criminal history (Naramor had not proved that he had been denied the right counsel on the prior); 2) withdrawal by the Government of a motion to reduce for acceptance of responsibility; 3) sentence based upon rehab needs; and 4) the sentence was substantively unreasonable.

Grant v. Trammell, No. 11-5001 (10th Cir., August 15, 2013) (Published) (Briscoe, C.J., Gorsuch & Holmes): Habeas Corpus (Capital Habeas Cases): Oklahoma capital murder case affirmed in federal habeas on grounds relating to: 1) denial of lesser offense instructions under Beck (Grant did not request any lesser offense instructions at trial, and loses on the merits in any event); 2) confrontation error when the trial court refused to allow cross-examination on a hearsay statement (error, but harmless; 3) victim impact statements that requested the death penalty (error, but harmless); 4) IAC in investigating the penalty phase (harmless); and 5) cumulative error (the panel found the issue waived because of inadequate briefing). NOTE: Chief Judge Briscoe concurred regarding the denial of relief on guilt phase claims, but would grant sentencing relief based upon the IAC claim.

United States v. Brooks, No. 11-3346 (10th Cir., August 16, 2013) (Published) (Tymkovich, Ebel & Matheson): Prosecutorial Misconduct (Overview Testimony): In these consolidated appeals involving a drug distribution operation, the convictions and sentences are affirmed over claims relating to: 1) improper overview testimony by the lead investigator (plain error review, but good discussion of this issue); 2) vouching for the truthfulness of the cooperating witness by the lead investigator; 3) admission of other crimes evidence; 4) insufficient evidence of conspiracy; and 5) procedural/substantive unreasonableness of the sentences.
United States v. Anaya, No. 12-3010 (10th Cir., August 16, 2013) (Published) (Tymkovich, Ebel & Matheson): Conspiracy; Standard of Review (Federal for Prosecutorial Misconduct Claims); Prosecutorial Misconduct (General); Jury Instructions (Willful Blindness); Cumulative Error: Drug convictions and intimidation of a witness convictions are affirmed over claims related to: 1) sufficiency of the evidence of conspiracy; 2) prosecutorial misconduct (no plain error); 3) erroneous willful blindness instruction; and 4) cumulative error.

United States v. McKye, No. 12-6108 (10th Cir., August 20, 2013) (Published) (Briscoe, C.J., Brorby & Murphy): Jury Instructions: McKye was charged with securities fraud and money laundering. At trial, he tendered an instruction that would have permitted the jury to decide whether the investment notes at issue were securities under the federal securities laws. The district court refused this instruction, choosing instead to instruct the jury that the term “security” includes a note. The panel found reversible error.

United States v. Avila, No. 12-3047 (10th Cir., August 21, 2013) (Published) (Tymkovich, Ebel & Holmes): Guilty Pleas: Avila entered an unconditional plea in a drug case, but sought to appeal a suppression issue. The interesting aspect of the case is that at the plea hearing, the district court made the comment that he would “still have a right to an appeal” if the court accepted the plea. Avila contended that this comment by the trial court rendered his plea not knowing and voluntary. The panel agreed, stating: “We hold that when a court chooses to instruct a defendant that he has a right to appeal following the entry of an unconditional guilty plea, the court materially misinforms the defendant regarding the consequences of his plea when it fails further to advise him that the plea may limit that right.” Conviction and sentenced vacated, and case remanded to allow Avila to withdraw his guilty plea.

Williams v. Trammell, No. 11-5048 (10th Cir., August 26, 2013) (unpublished): Habeas Corpus (Capital Habeas Cases); Jury Instructions (Lesser Included): Habeas relief is granted in this Oklahoma capital case on the basis that the jury was not instructed on the lesser offense of second-degree depraved-mind murder.

United States v. Brooks, No. 11-3317 (10th Cir., August 29, 2013) (Published) (Tymkovich, Ebel & Holmes): Chain of Custody: Bank robbery conviction is affirmed over claims relating to: 1) sufficiency of the evidence; 2) admission of DNA evidence (chain of custody); 3) refusal to strike the testimony of a Government expert; 4) evidence that Brooks possessed large amounts of cash after the robbery; and 5) denial of a motion for new trial based on alleged juror misconduct.

United States v. Mabry, No. 12-3036 (10th Cir., September 4, 2013) (Published) (Tymkovich, Ebel & Holmes): Search and Seizure (Probation and Parole): Search of parolee’s home without a warrant is upheld when there was reasonable suspicion to believe that Mabry had violated his parole.

Hooper v. Jones, No. 13-6048 (10th Cir., September 4, 2013) (unpublished) (Tymkovich, Anderson & Matheson): Criminal Justice Act: In this unpublished order and judgment, the panel held that a lawyer is entitled to compensation under the CJA for work performed in civil rights litigation used to attack the execution protocol in capital cases.
Heard v. Addison, No. 12-5060 (10th Cir., September 4, 2013) (Published) (Lucero, Ebel & Holmes): Guilty Pleas; IAC: Heard pled guilty in an Oklahoma state court to “looking upon” a child under 16 in a lewd and lascivious manner, a charge that was filed when he was caught at a Wal-Mart in Tulsa positioning himself to look at the undergarments of kids. Heard received concurrent 25-year prison terms. After he was sentenced, Heard discovered an unpublished opinion from the OCCA that indicated that his conviction was not lawful under state law. Heard eventually filed a habeas action in the N.D. of Oklahoma, which denied his claim. In this appeal, the panel reversed, holding that Heard was entitled to withdraw his pleas. NOTE: This case is instructive because the panel holds trial counsel responsible for knowing about unpublished cases from the OCCA that might affect the decision of a client to enter a plea of guilty.

Howell v. Trammell, No. 12-6014 (10th Cir., September 5, 2013) (Published) (Lucero, Tymkovich & Gorsuch): Habeas Corpus (Capital Habeas Cases): Oklahoma death row inmate is denied relief based on his claims relating to: 1) juror misconduct; 2) admission of preliminary hearing testimony at the joint trial violated the right to confrontation; 3) failure of a juror to divulge prior employment history; 4) admission of testimony of co-defendant’s lawyers; 5) IAC at resentencing for telling the jury that Howell was already on death row.

Dodd v. Trammell, No. 11-6225 (10th Cir., September 16, 2013) (Published) (Briscoe, C.J., Kelly & Hartz): Habeas Corpus (Capital Habeas Cases): Oklahoma capital habeas case where the panel grants the writ as to the death penalty based upon the victim impact testimony where the family members recommended death.

In re: James Edward Payne, No. 13-5103 (10th Cir., September 17, 2013) (Published) (Tymkovich, Ebel & O’Brien): Habeas Corpus (Second or Successive): In this drug case, Payne sought authorization to file a successive habeas petition to attack his sentence based on Alleyne v. United States (any fact that increases the mandatory minimum is an element that must be found by a jury). The panel held that Alleyne was a new rule of constitutional law, but since the Supreme Court has not made it retroactive, Payne cannot benefit from it.

United States v. Tolliver, No. 12-5077 (10th Cir., September 17, 2013) (Published) (Hartz, McKay & Matheson): Consecutive/Concurrent Sentences: Tolliver was convicted by a jury of using fire to commit a felony and two counts of arson, and sentenced to 430 months. In this opinion, the panel affirmed over claims relating to: 1) sufficiency of the evidence; 2) lack of jurisdiction based upon expiration of the statute of limitations on the predicate felony of mail fraud (SOL is an affirmative defense, not a jurisdictional requirement); 3) prosecutorial misconduct in asking improper questions; 4) newly discovered evidence; 5) consecutive sentences (this is an interesting issue whether sentences in the same proceeding must run consecutively; the panel held that they must, and Supreme Court authority seems to say so as well; 6) consecutive other sentences; 7) a 430 month sentence violates the 8th Amendment; and 8) objection to criminal forfeiture.
United States v. Haggerty, No. 13-1093 (10th Cir., September 24, 2013) (Published) (Porfilio, Anderson & Brorby): Federal Sentencing Guidelines (Acceptance of Responsibility): Haggerty pled guilty to a drug count and a firearm count, and appealed his 72-month sentence on the basis that he was denied a one-level reduction for acceptance of responsibility. The district court refused to reduce by one level, rejecting as a basis that Haggerty saved the Government time and resources, rather than Haggerty showing true contrition. Both the Government and Haggerty agree on this point, as did the panel, holding that the district abused its discretion.

United States v. Rufai, No. 12-6034 (10th Cir., October 15, 2013) (Published) (Matheson, Ebel & O’Brien): Sufficiency: In this fact-laden opinion, the panel found that the evidence was insufficient to show that Rufai knowingly and willfully participated in a Medicare fraud scheme.

Lebere v. Abbott, No. 11-1090 (10th Cir., October 18, 2013) (Published) (Kelly, O’Brien & Matheson): Habeas Corpus (Procedural Default): The district court held that a Brady claim was procedurally barred by an aspect of Colorado law that does not allow issues on post-conviction when they were adjudicated on direct appeal. The panel disagreed and reversed, holding that the procedural default question was controlled by Cone v. Bell, 556 U.S. 449 (2009).

United States v. Schulte, No. 12-1239 (10th Cir., January 21, 2014) (Published) (Kelly, McKay & O’Brien): False Statements: Conviction affirmed for making false statements (five of them) to federal agents during execution of a search warrant.

United States v. Porter, No. 12-2048 (10th Cir., March 6, 2014) (Published) (Holmes, Holloway & Murphy): Identity Theft: Convictions of wire fraud, mail fraud, and identity theft are affirmed over claims relating to jury instructions of aggravated identity theft and sufficiency of the evidence.

Milton v. Miller, No. 12-6187 (10th Cir., March 7, 2014) (Published) (Briscoe, C.J., Ebel & Kelly): IAC: An Oklahoma prisoner serving LWOP for Trafficking gets some relief here in federal habeas on a claim of IAC appellate counsel for failing to raise IAC trial counsel who allegedly failed to inform Milton of a favorable pre-trial plea offer. The panel remanded for an evidentiary hearing.

United States v. Fonseca, No. 12-3325 (10th Cir., March 10, 2014) (Published): (Lucero, McKay & Matheson): Search and Seizure (Reasonable Suspicion); Standard of Review: Fonseca was convicted of possessing stolen firearms. Affirmed over his claims of suppression of evidence relating to a Terry stop, and the introduction of other crimes evidence (that Fonseca had sold several of the stolen guns before the night of the Terry stop). NOTE: Fonseca made a motion in limine regarding introduction of the prior gun sales which the district court granted. However, he failed to object when the Government introduced the evidence. The panel reasoned that this situation is different from cases where the district court denied a motion in limine (which may not require contemporaneous objection).
United States v. Wyss, No. 13-4005 (10th Cir., March 12, 2014) (Published) (Tymkovich, Baldock & Phillips): Restitution: The legal question in this case was whether 18 U.S.C. 3563(c) which authorizes modification of the conditions of probation, also authorizes modification of an order of restitution made pursuant to the Mandatory Victim Restitution Act over three years after the judgment became final. The panel held that it does not.

United States v. Williamson, No. 13-2023 (10th Cir., March 17, 2014) (Published) (Kelly, Hartz & Matheson): Jury Instructions (Defense Requested Instructions): Williamson was a virulent tax protester who went to trial even though it was clear that the evidence against him was overwhelming. He sought a jury instruction, supported by a forensic psychologist, that he had a “genuine belief” that he was innocent of the charges. The trial court rejected the instruction, and so did the panel.

Calhoun v. Attorney General of the State of Colorado, No. 13-1047 (10th Cir., March 18, 2014) (Published) (Kelly, Anderson & Matheson): Habeas Corpus (Custody Requirement): Calhoun, proceeding pro se, sought habeas relief under 2254 to attack his state court sex offense convictions. The district court dismissed for lack of jurisdiction because Calhoun was no longer in custody. Calhoun asserted that compelled registration as a sex offender met the custody requirement, but the panel disagreed.

United States v. Reese, No. 13-2037 (10th Cir., March 19, 2014) (Published) (Kelly, Ebel & Phillips): Prosecutorial Misconduct (Brady Claims); Standard of Review: Grant of a motion for new trial based on Brady is reversed (the Government did not disclose that a witness was being investigated by the FBI). NOTE: The panel also clarified the standard of review in these cases based upon conflicting panel opinions. The correct standard is de novo. The panel also stated that when panels issue conflicting opinions, the one decided earlier controls.

United States v. Bergman, No. 12-1373 (10th Cir., March 28, 2014) (Published) (Kelly, Tymkovich & Gorsuch): Double Jeopardy; Government Appeals: This is an oddball case where Bergman hired a hit man (undercover officer) to kill her ex-husband, but was represented at trial by a conman who was not really a lawyer. The District Court found a Sixth Amendment error, but refused to set the case for another trial. The Government appealed, and the panel found that it had jurisdiction over the order, and reversed the bar to re-trial.

United States v. Muhammad, No. 13-5040 (10th Cir., April 9, 2014) (Published) (Hartz, O’Brien & Holmes): Guilty Pleas: Denial of motion to withdraw guilty plea in this mail fraud case is affirmed because the accused is not entitled to be informed of all collateral consequences of the plea, such as no-contest is the same as guilty, felony conviction, difficulty to obtain credit, employment, federal benefits, etc.

United States v. Smalls, No. 12-2145 (10th Cir., April 28, 2014) (Published) (Tymkovich, Baldock & Phillips): Prosecutorial Misconduct (Vouching); Sufficiency: Prison-murder conviction affirmed over claims relating to: 1) admission of “signature” evidence from ex-wife who Smalls threatened in the same manner as the cause of the death of the victim; 2) prosecutorial misconduct for vouching and introducing co-conspirator testimony; 3) rejection of defense jury instructions; 4) sufficiency of the evidence; and 5) cumulative error.
United States v. Hill, No. 12-5154 (10th Cir., April 28, 2014) (Published) (Lucero, Murphy & Matheson): **Experts; Standard of Review (Plain Error Found):** This is an amazing opinion where the Government presented an FBI Agent as an expert on whether the accused, during an interrogation, was deceptive and untruthful. The agent claimed to know whether a suspect was being truthful based upon classes he had taken where he was taught “special tactics” designed to reveal when someone was lying. Hill argued on appeal that an expert testifying pursuant to Rule 702 may not give an opinion as to the credibility of another person. The panel agreed and reversed. NOTE: There was no objection to this testimony at trial, and thus the panel granted relief on plain error review, which is a very rare occurrence.

United States v. Sharp, No. 13-1114 (10th Cir., April 28, 2014) (Published) (Briscoe, C.J., Holloway & Phillips): **Jury Instructions (Allen Charge):** Complicated mail fraud convictions are affirmed over claims relating to sufficiency and instructional issues.

United States v. Thomas, No. 13-3046 (10th Cir., April 29, 2014) (Published) (Hartz, Baldock & Bacharach): **Speedy Trial; Chain of Custody:** Drug convictions affirmed over claims relating to: 1) speedy trial; 2) admission of uncorroborated testimony; 3) admissibility of drug evidence based on chain of custody; 4) faulty jury instructions; 5) sufficiency of the evidence; 6) cumulative error; but the sentence was vacated based upon prior convictions that the Government alleged in the PSR, but not proven.

United States v. Lucero, No. 13-2084 (10th Cir., May 2, 2014) (Published) (Lucero, Gorsuch & Matheson): **Federal Sentencing Guidelines (Pattern of Criminal Activity):** In this possession of child porn case, Lucero pled guilty, but his sentence was enhance under the “pattern of criminal activity” Guideline when he admitted to molesting his nieces 35-40 years ago. On appeal, he argued that this enhancement contains a temporal limitation, and that his past activities were too remote in time. This was an issue of first impression in the Tenth Circuit, although the other nine circuits that had addressed the issue held that there is no such restriction. The panel here agreed and affirmed the sentence.

United States v. Davis, No. 13-3037 (10th Cir., May 7, 2014) (Published) (Kelly, Baldock & Hartz): **Search and Seizure (Standing); Aiding and Abetting:** Robbery and firearms convictions are affirmed over several claims relating to search and seizure (no standing for passenger to contest search of car even if initial GPS search was unconstitutional); and a defective aiding and abetting jury instruction after *Rosemond* (but no plain error).
United States Supreme Court Update

by

James L. Hankins

Metrish v. Lancaster, No. 12-547 (May 20, 2013): Habeas Corpus (Deference): Lancaster shot and killed his girlfriend. At trial, he asserted a diminished capacity defense (that did not rise to the level of insanity). He was convicted, but it was later reversed. By the time of the re-trial, the Michigan Supreme Court had rejected the diminished capacity defense that he had asserted previously, and the trial court refused to allow him to present such a defense. He was convicted again. The Sixth Circuit eventually granted habeas relief on the ground that retroactive application of the Michigan Supreme Court ruling violated Due Process. In this opinion, the Supreme Court reversed, holding that there was no unreasonable application of clearly established federal law.

Trevino v. Thaler, No. 11-10189 (U.S., May 28, 2013): Habeas Corpus (Procedural Default): In Martinez v. Ryan, 566 U.S. 1 (2012), the Court held that IAC could count as “cause” to excuse a procedural default in state post-conviction proceedings (this is significant since there is no constitutional right to counsel in post-conviction). In Trevino, the Court considered whether IAC can be cause in Texas, which technically allows IAC claims to be raised on direct appeal, but in actual operation makes it nearly impossible for them to succeed. The Court held that it does.

McQuiggin v. Perkins, No. 12-126 (U.S., May 28, 2013): Habeas Corpus (SOL & Equitable Tolling): Actual innocence, if proved, may serve as a gateway through which a habeas petitioner may pursue his claims, even if the one-year statute of limitations has expired.

Nevada v. Jackson, No. 12-694 (U.S., June 3, 2013) (per curiam): Habeas Corpus (Deference): Jackson argued that he was entitled to habeas relief because he was denied his right to present a defense during his rape trial when the trial court excluded evidence that the complaining witness previously reported that he had assaulted her, but that the police had been unable to substantiate those allegations. The Ninth Circuit granted habeas relief, but in this per curiam opinion, the Court reversed, holding that the decision of the Nevada Supreme Court’s determination that the evidence was not admissible was not unreasonable; and that there was no decision of the Supreme Court that clearly established the constitutional violation found by the Ninth Circuit.

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Maryland v. King, No. 12-207 (U.S., June 3, 2013): Search and Seizure (DNA Collection): An arrest, supported by probable cause to hold the arrestee for a serious offense, allows police to take a DNA swab as a legitimate police booking procedure.

Peugh v. United States, No. 12-62 (U.S., June 10, 2013): Federal Sentencing Guidelines (Retroactivity): Peugh argued that the 1998 version of the Guidelines (the ones in effect at the time he committed his crimes of bank fraud) should apply to him, rather than the 2009 version which was in effect at the time of his sentencing. The Court agreed with Peugh by 5-4 vote.

United States v. Davila, No. 12-167 (U.S., June 13, 2013): Guilty Pleas (Federal): This case deals with Rule 11, and what happens with the district court becomes involved in plea negotiations. Davila had become sideways with his lawyer and wanted another one. A federal magistrate held an in camera, ex parte hearing with Davila and his counsel, at which the magistrate told Davila he was not going to get another lawyer and that he should plead guilty. The Eleventh Circuit vacated his plea on the basis of an automatic reversal rule for Rule 11 violations. The Supreme Court reversed, holding that vacatur of the plea is not required if the record shows no prejudice to the decision to enter the plea.

Salinas v. Texas, No. 12-246 (U.S., June 17, 2013): Interrogations (Fifth Amendment): Salinas was not placed in custody or read Miranda when he answered some questions by the police about a murder, but he fell silent when asked whether ballistics testing would match shotgun shell casings found at the scene. The prosecution used his failure to answer as evidence of guilt. In this fractured series of opinions, the Court upheld this tactic and ruled that it did not violate the right against self-incrimination. Justices Breyer, Ginsburg, Sotomayor, and Kagan dissented.

Alleyne v. United States, No. 11-9335 (U.S., June 17, 2013): Federal Sentencing Guidelines: In Harris v. United States, 536 U.S. 545 (2002), the Court held that judicial fact-finding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. In Alleyne, the Court overruled Harris on the basis of Apprendi.

Descamps v. United States, No. 11-9540 (U.S., June 20, 2013): Federal Sentencing Guidelines (Crime of Violence): In this technical opinion, the Court re-tools the analysis for determining whether a crime is a “violent felony” under the ACCA when a state statute contains a single, indivisible set of elements. In some cases, where the statute has alternative means of committing a crime, courts have been allowed to consult the court documents to make the determination (the modified categorical approach). Here, the Court held that this approach is not allowed in cases where the statute contains a single, indivisible set of elements.

United States v. Kebodeaux, No. 12-418 (U.S., June 24, 2013): Sex Offender Registration: This is an oddball case concerning a court-martial conviction of a federal sex offense, and whether subsequent registration requirements as applied to Kebodeaux were within the scope of the authority of Congress under the Necessary and Prober Clause. They were.
Ryan v. Schad, No. 12-1084 (U.S., June 24, 2013) (per curiam): **Mandate:** This is a capital case out of the Ninth Circuit that has gone on for years. The Ninth Circuit *sua sponte* construed a motion to stay the mandate filed by Schad as a motion to reconsider a motion that it had denied six months earlier. In this opinion, the Court held that the Ninth Circuit failed to demonstrate exceptional circumstances to justify withholding the mandate, and thus abused its discretion.

Sekhar v. United States, No. 12-357 (U.S., June 26, 2013): **Extortion:** Under the Hobbs Act (anti-extortion), attempting to compel a person to recommend that his employer approve an investment does not constitute “the obtaining of property from another” and is thus not illegal under the Act.

Burt v. Titlow, No. 12-414 (U.S., November 5, 2013): **Habeas Corpus (AEDPA Deferece); IAC:** This habeas case arose out of state criminal prosecution where trial counsel advised Titlow to withdraw her negotiated plea, and she ended up being convicted of second-degree murder. Titlow alleged IAC for advising her to withdraw the plea deal, and the Sixth Circuit eventually agreed. In this opinion, the Court reversed on the basis that the state court opinions were not unreasonable under the AEDPA. NOTE: This was a factually intensive case that seemed to not break any new legal ground.

Kansas v. Cheever, No. 12-609 (U.S., December 11, 2013): **Insanity and Competency:** In a federal criminal prosecution for capital murder, Cheever sought to raise a defense of lack of specific intent because of methamphetamine intoxication. The district court thus ordered a psychiatric exam. The federal case was dismissed, but the State of Kansas picked up the case. Cheever objected to the results of his exam, but they were allowed in as rebuttal evidence. The unanimous Court found no error, extending the rationale of *Buchanan v. Kentucky*, 483 U.S. 402 (1987), to this situation.

Burrage v. United States, No. 12-7515 (U.S., January 27, 2014): **Causation:** A heroin dealer’s sentence was enhanced when one of his customers died “resulting from” heroin use. Experts at trial testified that the customer might have died even if he had not taken heroin. In this opinion, the Court sides with the dealer, holding that “but for” causation is the rule, not whether the heroin was a contributing cause.

Hinton v. Alabama, No. 13-6440 (U.S., February 24, 2014) (per curiam): **IAC; Death Penalty (SCOTUS):** The Court found IAC when trial counsel failed to secure a toolmark and firearms examiner to rebut the State’s expert. Post-conviction proceedings produced three eminent experts for the defense who destroyed the conclusions of the State’s expert, and when contacted by these experts to explain his results, the State’s expert refused to cooperate. The Court held that deficient performance was shown, but remanded for a determination of prejudice.

Fernandez v. California, No. 12-7822 (U.S., February 25, 2014): **Search and Seizure (Consent; Common Authority):** The rule of *Georgia v. Randolph*, 547 U.S. 103 (2006) is that the consent of one occupant is insufficient when another occupant is present and objects to the search. This case involves a case of spousal abuse where the husband was removed, but objected to a search, and the wife consents. In this opinion, the Court refused to extend *Randolph* to this situation; thus, the rule is that the objecting occupant must be physically present.
Kaley et al. v. United States, No. 12-464 (U.S., February 25, 2014): **Forfeiture**: When the Kaleys (husband and wife) were indicted by a federal grand jury, the Government secured a pre-trial restraining order against their assets, precluding disposition pending a forfeiture action. The Kaleys attacked this order and sought to sell assets for legal defense. The Court held that when litigants like the Kaleys challenge pre-trial asset seizure, “a criminal defendant who has been indicted is not constitutionally entitled to contest a grand jury’s determination of probable cause to believe the defendant committed the crimes charged.” In other words, litigants cannot use forfeiture proceedings to second-guess or attack the grand jury finding.

United States v. Apel, No. 12-1038 (U.S., February 26, 2014): **Military**: Vandenberg Air Force Base is a closed base, but there are designated places where public highways cross the base and a designated spot for peaceful protests. Apel utilized the protest area, but was barred. He was thereafter arrested and convicted of trespassing when he went into the protest area again. The Ninth Circuit reversed, holding that “military installation” did not apply because the easement through Vandenberg deprived the Government of exclusive possession. The unanimous Court had no problem reversing this decision, holding that “military installation” under the statute includes area encompassing the commanding officer’s area of responsibility, including highways and protest areas.

Rosemond v. United States, No. 12-895 (U.S., March 5, 2014): **Aiding and Abetting**: The Court delivers a primer in this case on the law of aiding and abetting in the federal system. Rosemond took part in a drug deal in which someone used a gun—either him or a confederate. Under Tenth Circuit precedent, it was enough that Rosemond facilitated the underlying drug crime to find him an aider and abettor. Rosemond argued that the Government must show more—that he facilitated the use of the gun. The Circuits were split on the issue. The Court resolved the split by ending up in the middle with this rule: “The Government establishes that a defendant aided and abetted a § 924(c) violation by proving that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime’s commission.”

United States v. Castleman, No. 12-1371 (U.S., March 26, 2014): **Possession (Firearm by Felon); Federal Sentencing Guidelines (Crime of Violence)**: Castleman’s previous conviction of “intentionally or knowingly causing bodily injury” to the mother of his child qualifies as a “misdemeanor crime of domestic violence.”

Prado Navarette v. California, No. 12-9490 (U.S., April 22, 2014): **Search and Seizure (Anonymous Informants)**: The Court upheld a traffic stop based upon an anonymous 911 call where police stopped a pickup truck because it matched the description of a vehicle that the caller reported as having run her off the road. The Court held that this stop complied with the Fourth Amendment because the officer had reasonable suspicion that the truck’s driver was intoxicated (note that the police followed the truck for five minutes without noticing any erratic driving). NOTE: Justice Scalia, joined by all three female members of the Court, dissented with his usual flair, stating that the Court majority “serves up a freedom-destroying cocktail consisting of two parts patent falsity.”
Paroline v. United States, No. 12-8561 (U.S., April 23, 2014): **Restitution:** This case involved restitution in child porn cases. One of the victims of child porn, “Amy,” has demanded restitution. The issue, which has divided the circuit courts, is whether there is a proximate cause requirement in determining the amount of restitution to which “Amy” is entitled. All circuits except the en banc Fifth Circuit had held that there must be a proximate cause component between the conduct of the defendant and the loss of the victim. The Fifth Circuit held that there was no such requirement, which meant every defendant who possessed images of “Amy” were liable for her entire losses from the trade in her images. In this case, the Court (5-4) reversed the Fifth Circuit, holding that there is a proximate cause component to the restitution calculation which must be based upon the conduct of the accused.

White v. Woodall, No. 12-794 (U.S., April 23, 2014): **Habeas Corpus (Capital Habeas Cases):** In a Kentucky capital case, defense counsel requested an instruction for the jury to not draw any adverse inferences from the fact that Woodall did not testify at the penalty phase. Such “adverse inference” instructions are common during guilt-phase proceedings in criminal trials. The Sixth Circuit granted the writ, holding that it was error for the trial court to refuse such an instruction, but here the Court reversed, holding that the Kentucky Supreme Court’s rejection of the claim was not unreasonable. NOTE: The Court did not decide the issue of whether an “adverse inference” instruction is required; rather, it decided only that based upon existing precedent, the decision of the state court was not unreasonable.

Martinez v. Illinois, No. 13-5967 (U.S., May 27, 2014) (per curiam): **Double Jeopardy; Sufficiency:** Martinez showed up ready for trial, the jury was sworn, but the State was not ready and moved for a continuance. The trial court denied that motion, the State presented no evidence, and the motion by Martinez for a directed verdict of acquittal was granted. The Illinois Supreme Court held that jeopardy never attached because Martinez was never at risk of conviction. In this opinion, the Court held that this was manifest error, that Martinez was placed in jeopardy, and because the evidence was insufficient re-trial is barred.

Hall v. Florida, No. 12-10882 (U.S., May 27, 2014): **Death Penalty (MR):** Florida law compels a death row inmate to show an IQ score of 70 or below before he can present other evidence of intellectual disability (this is apparently the term that is now preferred over mental retardation). The Court held that this rule is unconstitutional.
OTHER CASES OF NOTE

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United States v. Williams, No. 11-30118 (9th Cir., September 7, 2012): Federal Sentencing Guidelines (Grouping; Firearm Enhancement; Leader/Organizer; and Obstruction of Justice): Sentence for multiple counts of conviction are reversed based upon improper “grouping” of counts, and erroneous enhancements related to use of a firearm, leader/organizer, and obstruction of justice.

Munchinski v. Wilson, No. 11-3416 (3rd Cir., September 11, 2012): Habeas Corpus (SOL/Equitable Tolling; Procedural Default): In this habeas case where the Brady violations were “staggering” the district court’s grant of relief is affirmed over the claims of the Commonwealth of Pennsylvania that the district court erred in applying equitable tolling and excusing procedural default.

United States v. Navedo, No. 11-3413 (3rd Cir., September 12, 2012): Search and Seizure (Warrantless; Flight): Police discovered weapons in the home of Navedo after a warrantless arrest. His motion to suppress was denied, but the panel reversed because his unprovoked flight from officers did not constitute reasonable suspicion. NOTE: This was a split 2-1 opinion, but the majority distinguishes nicely Supreme Court authority that strongly suggests that flight does constitute reasonable suspicion under Terry.

United States v. Burke, No. 11-30140 (9th Cir., September 13, 2012): Escape: Dismissal of an indictment for escape from custody is affirmed because Burke was not “in custody” within the meaning of the statute when he left a residential re-entry center where he was residing as a condition of his supervised release.

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OTHER CASES OF NOTE

United States v. Sasso, No. 11-1094 (1st Cir., September 17, 2012): **Jury Instructions (Federal; Aircraft Interference); Sciente**: Sasso pointed a laser pointer at a helicopter one night. Unfortunately for him, the helicopter was operated by law enforcement who tracked him down for prosecution. In this opinion, the panel reversed on instructional error where the instructions did not distinguish adequately between negligently (but innocently) pointing a laser at objects in the sky without any intent to interfere with the operation of an aircraft, and willfully interfering.

United States v. Cunningham, No. 10-4021 (3rd Cir., September 18, 2012): **Child Porn**: District Court committed reversible error when the Government sought to show child porn films to the jury by 1) not watching the films first; and 2) allowing the jury to see them because they were unfairly prejudicial. NOTE: Cunningham stipulated that the films were child porn.

United States v. Budziak, No. 11-10223 (9th Cir., October 5, 2012): **Child Porn; Discovery**: Child porn convictions are vacated because the District Court erred in denying Budziak’s discovery requests concerning the software used by the FBI in its investigation into his online file-sharing activities.

Young v. Conway, No. 11-830-pr (2nd Cir., October 16, 2012): **Habeas Corpus (Stone Rule); Waiver (Waiver of Appellate Issues by State); Eyewitness ID**: Grant of habeas relief is affirmed on a rare Fourth Amendment claim where the State waived the *Stone v. Powell* rule by not raising it. The claim involved a tainted line-up.

People v. Harris, No. 174 (N.Y. Ct. App., October 18, 2012): **Voir Dire**: Murder conviction is reversed where potential juror admitted to following case in the media and that she had an opinion on the guilt of the accused. The trial court failed to follow up determine if the juror could in fact be fair and impartial.

United States v. Child, No. 11-30241 (9th Cir., October 23, 2012): **Supervised Release**: In this attempted sexual abuse case, conditions of supervised release prohibiting Child from residing with or being in the company of anyone under 18, including his own children, and from socializing or dating anyone who has children under 18, including his fiancée, are substantively unreasonable and overbroad.

United States v. Cameron, No. 11-1275 (1st Cir., November 14, 2012): **Child Porn; Confrontation and Cross-Examination**: Instructive opinion where the panel held that certain documents from Yahoo! and Google were testimonial, and thus Cameron had a right to confront the authors of the documents.

Ellington v. State, No. S12P0870 (Ga., November 19, 2012): **Death Penalty (State Cases)**: Capital murder case where the convictions are affirmed, but the death sentences are vacated where the trial court abused its discretion in prohibiting Ellington from asking prospective jurors during *voir dire* whether they would consider all three sentencing options.
OTHER CASES OF NOTE

United States v. Wiggan, No. 10-50114 (9th Cir., November 20, 2012): Perjury: Wiggan was convicted of perjury and for making a false statement. Part of the perjury was her testimony before a grand jury. As part of the Government’s proof, it presented testimony from the grand jury foreman, who testified that her answers were material to the grand jury, and also as to the physical arrangement of the grand jury room. This testimony was acceptable. However, the foreman also testified that Wiggan was belligerent, quick to respond to questions, inattentive to documents shown to her, repeatedly adamant, and did not appear to be intimidated, confused or forgetful; and that in his opinion, and in the opinions of other grand jurors, Wiggan was not credible. This last bit was reversible error.

United States v. Pavulak, No. 11-3863 (3rd Cir., November 21, 2012): Search and Seizure (Search Warrants; Sufficiency): In this child porn case, an affidavit in support of a search warrant relayed that Pavulak had two prior convictions for child molestation, that two others had seen Pavulak “viewing child pornography” of females between twelve and eighteen years old (with no other details of what the images depicted), and that officers were able to corroborate Pavulak’s ownership of a Yahoo! e-mail account, his trip to the Philippines, and his presence at the place to be searched. The panel held that this was insufficient to establish probable cause to believe that the images contained child pornography. Alas, suppression was not to be had because of the “good faith” exception under Leon.

United States v. Munguia, No. 10-50253 (9th Cir., November 27, 2012): Jury Instructions (Federal; Defense Requested): Conviction for conspiring to possess, and possessing, pseudoephedrine, knowing or having reasonable cause to believe that it would be used to manufacture meth, is reversed because the district court erred as a matter of law in refusing a requested defense jury instruction specifying that “reasonable cause to believe” must be evaluated from the perspective of the accused, based on her knowledge and sophistication (not the hypothetical reasonable person.

People v. Gavazzi, No. 195 (N.Y. Ct. App., November 27, 2012): Search and Seizure (Search Warrants; Sufficiency): A police officer made an error on an application for a search warrant by naming the wrong court, and the village Justice signed the warrant without correcting the mistake. The Court held that the subsequent search of a home was illegal because the warrant failed to comply with state statutes that mandate the name of the issuing court must be named in the warrant.

United States v. I.E.V., a Juvenile Male, No. 11-10337 (9th Cir., November 28, 2012): Search and Seizure (Pat Down): A stop and frisk of a passenger during a vehicle stop was a prohibited fishing expedition for evidence, not supported by any suspicion that the person was armed; further, the searching officer exceeded the lawful scope of the frisk by lifting the defendant’s shirt to retrieve an object, because there is no evidence that the officer recognized immediately the object was a weapon or an unlawful item.

Moore v. Berghuis, No. 09-2011 (6th Cir., November 30, 2012): Interrogations (Fifth Amendment): Habeas relief is granted in this murder case on the basis that the state trial court admitted a statement made by Moore while he was in police custody and after he had requested counsel.
OTHER CASES OF NOTE

United States v. Murphy, No. 11-2978-cr (2nd Cir., December 4, 2012): Search and Seizure (Traffic Stops; Road Blocks & Checkpoints): This is a nifty opinion where a rogue Kansas trooper set up ruse drug checkpoint signs along the interstate, then sat at a turn-around to see which cars avoided the dummy checkpoint. In this opinion, the trooper gets caught lying about why he stopped Murphy’s car. The trooper testified that Murphy failed to signal, but the district court found this testimony incredible in light of the video evidence. Significantly, the panel held that the when the driver consented to the search of the car after the illegal stop, the consent was sufficiently tainted by the illegal stop. Finally, the district court also suppressed the post-arrest statements on the basis that waiver of Miranda rights was not knowing.

United States v. Caporale, No. 12-6832 (4th Cir., December 6, 2012): Sexually Dangerous Person: Caporale was in prison for child molestation, and the Government sought to keep him incarcerated by designating him as a sexually dangerous person. After a hearing, the district court held that the Government had not proved that Caporale suffers from a serious mental illness, abnormality, or disorder; and in the alternative that the Government had failed to show that Caporale will experience serious difficulty in refraining from sexually violent conduct or child molestation if released. In this opinion, the panel concluded that Caporale did suffer from a serious mental illness, but affirmed on the alternative ground.

Ortiz v. Yates, No. 11-56383 (9th Cir., December 6, 2012): Confrontation and Cross-Examination: In this domestic abuse case, denial of habeas relief is reversed on the basis that the defendant was denied his right to confront witnesses against him when the trial court precluded him from cross-examining his wife as to whether she was afraid to deviate from her initial incriminating statement because of threats allegedly made against her by the prosecutor.

United States v. $999,830.00, No. 11-15528 (9th Cir., December 10, 2012): Forfeiture: Appeal of an order striking a claim to the cash in a forfeiture proceeding based on standing. The panel reversed, holding that the district court erred by applying the standard of proof for a claimant asserting a possessory rather than an ownership interest. At the motion to dismiss stage, a claimant’s unequivocal assertion of an ownership interest in the property is sufficient by itself to establish standing.

United States v. Hilton, No. 11-4273 (4th Cir., December 13, 2012): Identity Theft; Statutory Construction: Identity theft statutes regarding theft of a corporate identity are fatally ambiguous, thus convictions are reversed.

United States v. Rouillard, No. 11-3039 (8th Cir., December 13, 2012): Sciencyter: In this case involving sex with an incapacitated person, it was reversible error for the trial court to refuse the instruction requested by the defense that Rouillard had to know that the person was incapacitated.

United States v. Burgos, No. 11-1877 (1st Cir., December 14, 2012): Sufficiency; Conspiracy: Burgos was a uniformed police officer who was charged with a drug conspiracy. HELD: No rational jury could have concluded beyond a reasonable doubt that Burgos had knowledge of, or was willfully blind to, a marijuana distribution ring.
OTHER CASES OF NOTE

United States v. Phillips, No. 11-30195 (9th Cir., December 26, 2012): Sufficiency (Mail Fraud): Mail fraud conviction is reversed because the success of the fraudulent scheme did not depend in any way on the use of the mails.

Henderson v. Johnson, No. 11-55249 (9th Cir., January 3, 2013): Habeas Corpus (Exhaustion): In a case where the petitioner filed a mixed-petition (some exhausted claims, and some not), the district court erred in dismissing the petition without allowing the petitioner to amend.

United States v. Castro, No. 11-3893 (3rd Cir., January 8, 2013): Waiver (Appeals Waiver): In this extortion case, Castro manages to defeat a waiver of the right to appeal on a sufficiency of the evidence issue, on the basis that application of the appellate waiver would result in a miscarriage of justice.

United States v. McMurtrey, No. 11-3352 (7th Cir., January 10, 2013): Search and Seizure (Search Warrants; Franks v. Delaware): Interesting case where the panel holds that a district court may hold a pre-Franks hearing in order to allow the accused to supplement or elaborate upon the original motion. In this case, the accused offered two conflicting affidavits regarding the house to be searched, but the district court simply accepted the government’s explanation without allowing the defense to contest or cross-examine. This was error because a full Franks hearing was warranted.

Johnson v. Folino, No. 11-3250 (3rd Cir., January 16, 2013): Prosecutorial Misconduct (Brady); Habeas Corpus (AEDPA Deference): In this murder case, Johnson was convicted and sentenced to life without any physical evidence or eyewitness testimony linking him to the crime. The State’s case rested on a witness who claimed that Johnson confessed. However, the prosecutor represented to the trial court that the Commonwealth had no information or police reports naming the witness as a suspect in a crime. This was clearly false, since the witness, although never charged or convicted of a crime, assisted police about other crimes when he was being investigated for an assault. In this federal habeas case, the panel found this violated Brady. NOTE: The panel noted that the case was unusual because the evidence of the Brady violation came to light at the federal district court; thus, there was no occasion to review the opinions of the state courts below (thus, no deference, and no reason to confine the analysis to the evidence presented to the state courts).

United States v. Deen, No. 11-2271 (6th Cir., February 7, 2013): Supervised Release; Federal Sentencing Guidelines (Drug Rehab): The Supreme Court has held that, at an initial sentencing, a district court may not lengthen a sentence to enable the offender to complete a treatment program. But, can a court do it in a revocation of supervised release case? No.

People v. Baker, No. 16 (N.Y. Ct. App., February 7, 2013): Search and Seizure (Warrantless—Disorderly Conduct): Two cops were parked on a residential street and noticed a woman (Baker’s girlfriend) videotaping them, so they ran the plates to the car in the driveway. Baker noticed this and walked up to the cops, still sitting in the car, and cussed them out for harassing him. He was arrested for disorderly conduct and cocaine was found incident to the arrest. HELD: Disorderly conduct requires an element of “public harm” which was missing here; thus, no PC to arrest. Drugs suppressed.
OTHER CASES OF NOTE

Cannedy v. Adams, No. 09-56902 (9th Cir., February 7, 2013): IAC: In this lewd acts case, habeas relief is granted on the basis that trial counsel failed to call witnesses who would have testified that the complaining witness made statements supporting the defense theory of the case and had motive to fabricate the allegations.

United States v. Uribe, No. 11-3590 (7th Cir., February 13, 2013): Search and Seizure (Traffic Stops): Uribe drove a blue car and made no obvious traffic violations, but an officer ran the registration and found that the registration number checked out to a white car. The panel held that this alone does not constitute reasonable suspicion to stop the car since there is nothing illegal under state law regarding the color discrepancy.

United States v. Shaw, No. 11-6433 (6th Cir., February 21, 2013): Search and Seizure (Search/Arrest Warrants; Particularity): Officers had an arrest warrant for 3171 Hendricks Avenue; however, the address on the houses was apparently confusing and they ended up entering 3170 Hendricks Avenue and seeing cocaine. The panel held that the entry was unlawful and the motion to suppress should have been granted.

United States v. Hunter, No. 12-1751 (7th Cir., February 28, 2013): Interrogations (Fifth Amendment): District Court’s order granting suppression of Hunter’s statements during custodial interrogation is affirmed because Hunter invoked his right to counsel prior to the interrogation.


United States v. Reynolds, No. 08-4747 (3rd Cir., March 14, 2013): Sex Offender Registration: This opinion is a remand from the Supreme Court on the issue of whether the sex offender registration rules regarding retroactive application of SORNA were promulgated in compliance with the Administrative Procedure Act. The panel noted circuit splits on the standard of review and other aspects of this issue, but held that under any standard the assertion of “good cause” by the Attorney General in waiving the APA notice requirements cannot stand, and the lack of good cause was prejudicial to Reynolds. Reversed.

United States v. Carillo-Ayala, No. 11-14473 (11th Cir., March 22, 2013): Federal Sentencing Guidelines (Safety Valve): Part of the “safety valve” criteria (which allows a court to bypass mandatory minimum sentences) is that the accused has not possessed a firearm in connection with the offense. Here, Carillo-Ayala was a drug dealer who also sold firearms to drug customers. Did he possess firearms “in connection with” the charged drug offense? The panel answered “not necessarily” in this accused-friendly opinion.

United States v. Johnson, No. 12-2438 (8th Cir., March 25, 2013): Supervised Release: In a revocation of supervised release hearing, the district court violated Johnson’s right to confront witnesses by accepting a police report into evidence.
**OTHER CASES OF NOTE**

**Eley v. Erickson**, No. 10-4725 (3rd Cir., April 9, 2013): **Confrontation and Cross-Examination**: Second-degree murder conviction is reversed in this habeas case where a non-testifying co-defendant’s confession was admitted against Eley in violation of *Bruton*.

**United States v. Barnes**, No. 11-30107 (9th Cir., April 18, 2013): Denial of motion to suppress statements is reversed because police conducted an impermissible two-step interrogation in violation of *Missouri v. Seibert*, 542 U.S. 600 (2004), by deliberately delaying *Miranda* warnings to induce cooperation.

**United States v. Sivilla**, No. 11-50484 (9th Cir., May 7, 2013): **Spoliation**: In this case, drugs were found inside the manifold of a Jeep. The defense sought to preserve the Jeep for inspection, filed a motion to that effect, and the motion was granted. However, the Department of Homeland Security auctioned off the Jeep. In this opinion, the panel held that although Supreme Court precedent precludes dismissal of the charges absent a showing of bad faith by the Government, such a showing is not required in order for the defense to benefit from a remedial jury instruction. Reversed because such an instruction was denied.

**United States v. Blewett**, No. 12-5226 (6th Cir., May 17, 2013) (Published): **Federal Sentencing Guidelines (Crack)**: In this spirited 2-1 opinion, the split panel held that the Fair Sentencing Act regarding crack cocaine sentences applies retroactively to all prisoners, even those sentenced prior to its passage.

**United States v. Wurie**, No. 11-1792 (1st Cir., May 17, 2013): **Search and Seizure (Cell Phones)**: The panel phrased the issue: “This case requires us to decide whether the police, after seizing a cell phone from an individual’s person as part of his lawful arrest, can search the phone’s data without a warrant. We conclude that such a search exceeds the boundaries of the Fourth Amendment search-incident-to-arrest exception. Denial of Wurie’s motion to suppress is reversed.

**United States v. Bloch**, No. 12-2784 (7th Cir., May 20, 2013): **Possession of Firearm by Felon; Merger**: Bloch was convicted of felon in possession of two guns, and was convicted of two separate counts. The panel found that Bloch engaged in a single incident of firearm possession which “can yield only one conviction under § 922(g), no matter how many disqualified classes the defendant belongs to or how many firearms he possessed.” Thus, the convictions merged into a single count of conviction.

**United States v. Zabawa**, No. 11-1519 (6th Cir., June 3, 2013): **Statutory Construction**: Zabawa was in federal custody and assaulted a federal law enforcement officer, who responded by headbutting Zabawa. This headbutt caused a cut over the eye of the officer. The Government charged Zabawa with “inflicting” injury upon the officer. In this opinion, the panel reversed, holding that “inflict” is narrower than “cause” and that the Government was required to prove that the injury was inflicted upon the officer, rather than simply proximately caused by the defendant.
United States v. Elonis, No. 12-3798 (3rd Cir., June 14, 2013): First Amendment: This is an interesting case where Elonis was convicted of making threats against his estranged wife on Facebook. He asserted that the First Amendment required that the Government prove that he had the subjective belief that the statements be understood as threats. This was against circuit precedent, but Elonis argued that intervening Supreme Court authority vitiated circuit precedent. The panel disagreed, upholding is convictions. NOTE: This opinion contains an excellent discussion of the topic, and especially the extant authority from the circuit courts of appeals that have considered the issue. The Ninth Circuit is the outlier here, so there is a circuit split on this question of law.

United States v. Valerio, No. 12-12235 (11th Cir., June 20, 2013): Search and Seizure (Warrantless): “The central issue presented in this appeal is whether Terry v. Ohio, 392 U.S. 1 (1968), authorized law enforcement officers to effectuate an investigative seizure of Mr. Valerio nearly one week after last observing him do anything suspicious. Because the constitutional authority to make a Terry stop is dependent upon the exigencies associated with ‘on-the-spot observations of the officer on the beat,’ we concluded that the officers’ seizure here was not authorized by the Fourth Amendment.”

United States v. Tavera, No. 11-6175 (6th Cir., June 20, 2013): Prosecutorial Misconduct (Brady Cases): Drug conspiracy case where two men were arrested and charged after meth was found in a truck. During plea negotiations with one of the men, the prosecutor learned that this man stated that Tavera had no knowledge of the drug conspiracy—the single material fact at issue in the case. The panel held that the Brady violation was not even close.

United States v. Hampton, No. 10-3074 (D.C. Cir., June 25, 2013): Experts (Drug Jargon): This is another drug conspiracy case where the Government uses a case agent (experienced FBI agent) to “interpret” drug lingo on intercepted phone calls. The agent was not proffered as an expert under Rule 702, but rather as a lay witness under 701. This was reversible error.

United States v. Cotton, No. 12-40563 (5th Cir., July 2, 2013) (Published): Search and Seizure (Consent): In this traffic stop case, denial of a motion to suppress is reversed because Cotton’s limited consent to search his luggage only did not give police authority for the more prolonged and extensive search of the entire vehicle.

Taylor v. Grounds, No. 12-2632 (7th Cir., July 3, 2013): IAC (Conflict): Habeas relief is granted in this state court murder case where trial counsel represented two brothers in the same case which was a conflict.

United States v. Lanning, No. 12-4547 (4th Cir., July 19, 2013): Disorderly Conduct; Sufficiency of the Evidence: Police conducted a sting operation targeting gay men. One undercover officer approached a subject and initiated sexually suggestive conversation, including an agreement for sex. In response, the subject backed up to the officer and very briefly touched the officer’s fully clothed crotch. This conduct does NOT rise to the level of action to support a conviction for disorderly conduct.
Sampson v. United States, No. 12-1643 (1st Cir., July 25, 2013): Jurors: Sampson received the federal death penalty for carjacking. The panel held that juror dishonesty during voir dire necessitated a new penalty phase. NOTE: This is not a case where the juror was equivocal about the death penalty; rather, she was simply caught in a bunch of lies on her questionnaire about things unrelated to the case because she thought that her personal life had nothing to do with the case.

Aguilar v. Woodford, No. 09-55575 (9th Cir., July 29, 2013) (For Publication): Prosecutorial Misconduct (Brady Cases): In this murder case, the only question at trial was the identity of the shooter. The State introduced evidence that a police dog had alerted to a “scent pad” indicating that Aguilar’s scent was present on the front passenger seat of the car from which the shooter appeared. However, the State failed to turn over to the defense the fact that the police dog had a history of making mistaken scent identifications. The panel held this was a Brady violation and granted habeas relief.

United States v. Robinson, No. 12-3874 (7th Cir., July 31, 2013): Possession (Firearm by Felon); Jury Instructions (Limiting Instruction): Police executed a search warrant at the house of Robinson’s grandmother, where they found not much drugs, but a handgun, which was a problem for Robinson because of his status as a felon. The only question was whether Robinson possessed it. Cops said he admitted it was his, Robinson denied it. The panel held that Robinson was entitled to a new trial because the district court failed to give a proper limiting instruction on how the jury was to assess the stipulation of his prior conviction, i.e., it should be used only to establish the fact of his prior conviction, not as evidence of guilt concerning whether he possessed the gun.

United States v. Lee, No. 12-1718 (7th Cir., August 1, 2013): Burks Notice and Bad Acts: Lee was convicted of conspiring to distribute and possessing with intent to distribute 50 or more grams of cocaine base. Reversed because the district court admitted into evidence at trial proof that he had previously been convicted of possession of cocaine base.

United States v. Lunsford, No. 12-3616 (8th Cir., August 5, 2013): Sex Offender Registration: Lunsford was not required to update his registration information when he moved to the Philippines because the registration requirements do not encompass this situation.

United States v. Smith, No. 12-1516 (3rd Cir., August 6, 2013): Burks Notice and Bad Acts: In this trial for threatening federal officers with a gun, the introduction of evidence that two years earlier Smith had been observed dealing drugs at the same location was improper “other crimes” evidence under 404(b).

United States v. Underwood, No. 11-50213 (9th Cir., August 6, 2013): Search and Seizure (Search Warrants; Sufficiency): Suppression order is affirmed where a state court search warrant affidavit failed to provide a sufficient basis for probable cause where it included only two facts, foundationless expert opinion, and conclusory allegations.
OTHER CASES OF NOTE

United States v. Nelson, No. 12-5477 (6th Cir., August 7, 2013): **Hearsay**: The Government introduced police testimony from an anonymous 911 call giving a description of a man fitting Nelson’s characteristics. The district court let the Government do this under the guise of “background” information, but the panel found it reversible error.

United States v. Thomas, No. 11-10451 (9th Cir., August 8, 2013): **Discovery; Search and Seizure (Drug Dogs)**: Drug case reversed where the Government failed to turn over “a full complement of dog-history discovery” (the Government provided redacted records).

United States v. Davis, No. 12-1486 (3rd Cir., August 9, 2013): **Burks Notice and Bad Acts**: Two prior convictions for possession of cocaine were not admissible to prove knowledge or intent in a trial for possession with intent to distribute cocaine.

Newman v. Harrington, No. 12-3725 (7th Cir., August 9, 2013): **Insanity & Competency; IAC**: Murder conviction is vacated in federal habeas based upon trial counsel’s failure to investigate and present argument regarding Newman’s fitness to stand trial.

United States v. Ashurov, No. 12-2711 (August 12, 2013): **Statutory Construction (Lenity)**: Judgment of acquittal for presenting materially false statement in an immigration form is affirmed where the rule of lenity applied to an ambiguous statute (whether the statement had to be under oath was unclear).

United States v. Gifford, No. 12-2186 (1st Cir., August 13, 2013): **Search and Seizure (Search Warrants; Franks)**: In this case involving a marijuana growing operation, the search warrant was predicated primarily upon excess energy usage. However, the affidavit omitted the fact that the house used for comparison of energy usage was 1/3 the size of the target house. In addition, there were insufficient indicia of reliability supporting the informant’s tip. The district court found these omissions violated Franks, and the panel agreed. Evidence suppressed.

United States v. Stokes, No. 12-2843-cr (2nd Cir., August 20, 2013): **Search and Seizure (Inevitable Discovery)**: Warrantless entry into a motel room resulted in suppression, but the district court applied the “inevitable discovery” doctrine. Reversed because the district court erred in application of the doctrine.

Miller v. United States, No. 13-6254 (4th Cir., August 21, 2013): **Retroactivity**: In this 2255 motion, Miller challenged his felon in possession of a firearm conviction by arguing that he should get the benefit of an en banc circuit opinion the holding of which would act to vacate on his predicates. The panel agreed that the circuit decision was retroactive.

United States v. Okatan, No. 12-1563-cr (2nd Cir., August 26, 2013): **Interrogations (Fifth Amendment)**: Okatan argued that the Government’s use of evidence that he asked to speak to a lawyer when a border patrol agent initiated an interview prior to his arrest violated his rights under the Fifth Amendment—and the panel agreed.
OTHER CASES OF NOTE

United States v. Ermoian, No. 11-10124 (9th Cir., August 28, 2013): **Obstruction of Justice**: Under the federal statute criminalizing obstruction of justice, does an FBI investigation count as an “official proceeding”? The panel held that it does not. NOTE: Since the evidence was insufficient to convict, re-trial is barred by Double Jeopardy.


United States v. Haynes, No. 12-626-cr (2nd Cir., September 5, 2013): **Cumulative Error**: In this drug case, the panel reversed based upon the cumulative effect of various errors relating to improper shackling, failure to investigate juror misconduct, improper *Allen* charge, and other evidentiary errors.

Dow v. Virga, No. 11-17678 (9th Cir., September 5, 2013): **Prosecutorial Misconduct (False Testimony)**: This is a non-capital habeas case (robbery) involving “textbook prosecutorial misconduct” where the prosecutor elicited false testimony and then failed to correct it. At a line-up, Dow’s attorney—not Dow—asked that the participants place a bandage under their eyes (where Dow had a small scar). The police officer testified that it was Dow who requested this, and then the prosecutor argued to the jury that this showed Dow’s consciousness of guilt because he tried to hide his scar. Writ granted.

Sossa v. Diaz, No. 10-56104 (9th Cir., September 10, 2013): **Habeas Corpus (SOL & Equitable Tolling)**: Sossa is entitled to equitable tolling on the ground that he relied on the assigned magistrate judge’s order extending the filing deadline beyond the statutory limitation.

United States v. Lopez-Cruz, No. 11-50551 (9th Cir., September 12, 2013): **Search and Seizure (Cell Phones; Consent)**: When border patrol agents detained Lopez-Cruz, they obtained his consent to search his cell phones—but when one of them rang, the officer answered it and passed himself off as Lopez-Cruz, which turned into a conversation leading to arrest and conviction. The panel upheld a suppression order because actually answering the phone was beyond the scope of consent.

Ayala v. Wong, No. 09-99005 (9th Cir., September 13, 2013): **Habeas Corpus (Capital Habeas Cases); Peremptory Challenges**: Habeas winner in a capital case on a *Batson* issue.

United States v. Bahr, No. 12-30218 (9th Cir., September 16, 2013): **Interrogation (Fifth Amendment)**: Bahr had participated in a prior post-prison supervision program which included polygraph tests. When he was convicted again of possessing child porn, the district court used statements made by Bahr during this prior session. The panel held this was error because the compulsory treatment disclosures violated Bahr’s Fifth Amendment rights.

Larsen v. Soto, No. 10-56118 (9th Cir., September 16, 2013): **Habeas Corpus (SOL & Equitable Tolling)**: Otherwise untimely petition shall be heard on the merits in light of the showing of actual innocence made by Larsen.
United States v. Melvin, No. 12-1332 (1st Cir., September 17, 2013): **Proffer Statements:** Reversible error when an officer identified Melvin’s voice at trial by using Melvin’s statements during a previous proffer session.

United States v. Grandberry, No. 11-50498 (9th Cir., September 17, 2013): **Search and Seizure (Probation and Parole):** Warrantless search of an apartment where a parolee had entered several times during the days preceding the search is illegal, since the observations of the officer were insufficient to establish that the parolee lived in the apartment. The panel held that a parole condition that permits searches of “your residence and any property under your control” is triggered only when the officers have probable cause that the parolee lives at the residence.

United States v. Reingold, No. 11-2826-cr (2nd Cir., September 26, 2013): **Eighth Amendment (Proportionality):** In this distribution of child porn case, the district court issued a 401 page opinion, accompanied by 55 pages of appendices, holding that the mandatory minimum of five years constituted cruel and unusual punishment in this case when applied to the immature, 19-year-old defendant. In light of the precedent from the Supreme Court, there could be little doubt that the district court was incorrect as a matter of law—and the panel reversed—but the opinion is a treatise on this topic if anyone wants to do research (and I suspect that the district court’s opinion is even more detailed).

United States v. Liu, No. 10-10613 (9th Cir., October 1, 2013): **Copyright; Scienter:** Rare prosecution of criminal copyright violations is reversed when the panel held that “willfully” requires the government to prove that a defendant knew he was acting illegally rather than simply that he knew he was making copies; and to “knowingly” traffic in counterfeit labels requires knowledge that the labels were counterfeit.

In Re: Pendleton, No. 12-3617 (3rd Cir., October 3, 2013): **Habeas Corpus (Second/Successive):** In *Miller v. Alabama*, 132 S.Ct. 2455, the Supreme Court held that LWOP for persons under 18 violates the Eighth Amendment. In this appeal, the panel authorized a second habeas petition upon a showing that Miller was retroactive.

United States v. Chandler, No. 12-30410 (5th Cir., October 4, 2013): **Federal Sentencing Guidelines (Reasonableness):** Chandler, a police officer, was convicted of engaging in a child exploitation enterprise. The district court departed upward by 127 months over the Guidelines range, imposing a sentence of 420 months. HELD: The district court erred by increasing Chandler’s sentence based on the fact that he was a police officer.

James J. Fitzgerald v. Trammel, No. 03-CV-531-GKF-TLW (N.D. Okla., October 7, 2013): **Habeas Corpus (Capital Habeas Cases):** Penalty phase relief is granted in this capital habeas case on the ground of IAC of trial and appellate counsel in failing to develop and present mitigating evidence at the penalty phase.

United States v. Cortes, No. 12-50137 (9th Cir., October 9, 2013): **Entrapment:** Drug conspiracy conviction reversed on faulty entrapment instructions, and the panel also explained aspects of sentencing entrapment and under what circumstances such a defense may be raised.
United States v. Ward, No. 12-1511 (3rd Cir., October 15, 2013): **Allocution**: This case was a prosecution of a professor emeritus at The Wharton School of Business for child porn. The district court made Ward be placed under oath before sentencing allocution, and Ward objected. The panel addressed the issue of a matter of first impression of federal law, and concluded that under Rule 32 there is no right to unsworn allocution, and that whether a defendant is sworn is left to the discretion of the trial court.

United States v. Katzin, No. 12-2548 (3rd Cir., October 22, 2013): **Search and Seizure (GPS Tracking)**: Warrantless GPS tracking device was unlawful and good faith does not apply.

United States v. Hashime, No. 12-5039 (4th Cir., October 29, 2013): **Interrogations (Fifth Amendment)**: In this Possession of Child Pornography case, Hashime made self-incriminating statements to police while being interrogated during a search of his home. The panel stated, “Because the agents did not read Hashime his *Miranda* rights until well into what was plainly an extended custodial interrogation, we reverse Hashime’s conviction and remand for further proceedings[.]”

Amado v. Gonzalez, No. 11-56420 (9th Cir., October 30, 2013): **Prosecutorial Misconduct (Brady)**: “Randall Amado was convicted in 1998 by a Los Angeles jury of aiding and abetting a senseless murder in a public bus. The prosecutor neglected, however, to discharge his obligation to disclose material information that would have enabled defense counsel to impeach the credibility of a critical witness against Amado.” The material was a probation report indicating that the State’s witness had pled guilty to robbery, was on probation, and was a member of the Piru Bloods.

United States v. Freeman, No. 12-2233-CR (2nd Cir., November 7, 2013): **Search and Seizure (Reasonable Suspicion)**: Police stopped Freeman based upon a pair of 911 calls from an anonymous caller that a man matching a certain description had a gun. The panel held that this did not constitute reasonable suspicion to stop Freeman. Reversed.

Swafford v. State, No. SC10-1772 (Fla., November 7, 2013): **Death Penalty (State Cases; Other)**: Capital case where relief is granted in post-conviction proceedings based upon new evidence of innocence (subsequent tests showed no seminal fluid in the victim).

Gassaway v. Commissioner, No. 13-60289 (5th Cir., November 8, 2013) (unpublished): Irrepressible former Oklahoma attorney Mike Gassaway is fighting the IRS over $392,355 in cash he received from a client back in 2006. The IRS considered the money taxable income, while Gassaway asserted that it was a loan. The federal courts sided with the IRS, but the opinion is relevant to tax issues regarding fees.

United States v. Arreguin, No. 12-50484 (9th Cir., November 22, 2013): **Search and Seizure (Apparent and Common Authority)**: In this case, DEA agents conducted a “knock-and-talk” at a residence which turned into a search based upon consent of a houseguest. In this opinion, the second time that the panel had considered the issue (the first time resulted in a remand), the panel again reversed with instructions to grant the motion to suppress.
United States v. Murray, No. 11-0341-cr (2nd Cir., November 27, 2013): **Rebuttal Evidence; Right to Present a Defense**: In this prosecution for the cultivation of marijuana plants, Murray appealed on the basis that the district court denied him the right to present a meaningful defense by rejecting his proffer of surrebuttal evidence to counter evidence introduced by the Government on rebuttal. The panel agreed, and reversed. NOTE: The Government’s rebuttal was cell phone records where it tried to pin down location; Murray sought to call a witness on surrebuttal to testify about Murray’s presence in the area of a cell phone tower for reasons other than to visit the drug house.

United States v. Olsen, No. 10-36063 (9th Cir., December 10, 2013) (order dissenting from denial of rehearing en banc): **Prosecutorial Misconduct (Brady Cases)**: Orders dissenting from the denial of rehearing en banc are generally not noteworthy, but in this one, Chief Judge Alex Kozinski delivers a spirited diatribe on the duty of prosecutors to divulge exculpatory evidence. It starts out, “There is an epidemic of Brady violations abroad in the land” and only gets better from there.
Set forth below is a synopsis of Oklahoma criminal law legislation passed by the Legislature and signed by the Governor in 2013:

**Murder**

**SB 1036**  
*Separate sentencing - first degree murder.* Amends 21 O.S. § 701.10; new law codified at 21 O.S. § 701.10-1; eff. Nov. 1, 2013.

- applies to first degree murder conviction in which death is not sought by state, but state has alleged the defendant has prior convictions
- court shall conduct separate sentencing proceeding to determine life or LWOP
- state shall be given opportunity to prove any prior felony convictions beyond a reasonable doubt
- proceeding conducted by trial judge before same trial jury as soon as practicable without presentence investigation

**Sentencing, Probation and Parole**

**HB 1340**  
*List of ineligible persons for Delayed Sentencing Program for Young Adults expanded.* Amends 22 O.S. § 996.1; eff. Nov. 1, 2013.

- adds to list of ineligible defendants those discharging any firearm or other deadly weapon at or into any dwelling, unlawful manufacturing, attempting to unlawfully manufacture or aggravated manufacturing of any CDS, or any violation of the Trafficking in Illegal Drugs Act

**HB 1722**  
*Consecutive sentences.* Amends 57 O.S. § 332.7; eff. Nov. 1, 2013.

- inmates sentenced to consecutive sentences shall not be eligible for parole consideration on any consecutive sentence until 1/3 of the sentence has been served, or where parole is otherwise limited by law, until the minimum term of incarceration has been served as required by law
- unless otherwise ordered by the sentencing court, any credit for jail time served shall be credited to only one offense

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- imposes new requirements on Pardon and Parole Board
- consideration of commutation shall be made only after application is made to the board pursuant to specified procedures
  - copy of application forwarded to DA, victim or representative and AG with 10 business days of receipt
  - also sent to “trial officials,” who have 20 business days to provide a written recommendation or protest
    - trial officials includes the current elected judge and DA where the conviction occurred, and the chief or head administrative officer of the arresting law enforcement agency
- recommendation or protest of persons holding office at time of conviction may be considered
- recommendation for commutation may include statement the penalty is excessive, the recommendation of a definite term now considered as just and proper, statement of reasons for recommendation based on facts not available to court/jury, or based upon a statutory change in the penalty
- board shall schedule the application on commutation docket, giving victim/representative at least 20 days to offer recommendation or protest
- consideration for pardon made only after application provided to DA, victim/representative and AG within 20 days of receipt
  - DA and victim have 20 business days to provide recommendation or protest
  - board shall schedule application on pardon docket
- board shall communicate to legislature a summary of specified activities of board
  - include such factors as approval/recommendation rates of board, rates for each board member, and percentage of public comments to and personal appearances before the board
  - summary made available to public
- board shall consider the prior criminal record of the inmate under consideration for parole
- if board grants parole for a nonviolent offender who has previously been convicted of an offense enumerated in 21 O.S. § 13.1 or 57 O.S. § 571, the offender shall be subject to 9 months post-imprisonment supervision upon release
- if offense is not designated as a violent offense, or if medical parole is being considered, the vote and names of concurring board members shall be set forth in written minutes of the meeting
- deletes provision that “nothing herein contained shall be construed to prevent a hearing by the Pardon and Parole Board before the minimum term has been served.”
- repeals provision (Section 332.17) which permits a person appearing out of the normal processing procedure to be considered for parole upon a vote of at least 3 members
Postconviction DNA Testing


- provides for postconviction DNA testing of a person convicted of a violent felony crime or who has received a sentence of 25 years or more and asserts s/he didn’t commit the crime
- may file motion in sentencing court requesting test of any biological material secured in the investigation or prosecution of challenged conviction
- eligible persons include those currently incarcerated, civilly committed, on probation or parole, or subject to sex offender registration; convicted on plea of not guilty, guilty or nolo contendere; deemed to have provided a confession or admission related to the crime; and persons who have discharged their sentence
- requires that material was not previously subject to DNA testing, or if so, would be subjected to newer testing techniques that provide a reasonable likelihood of results that are more accurate than previous test
- motion for testing to be accompanied by affidavit of individual, and said motion shall be provided by the sentencing court to the prosecutor with a response filed within 60 days of receipt
- sentencing court may refer pro se requests for testing to qualified parties willing to accept the referral
  • may include indigent defense organizations or clinical legal education programs
- sentencing court shall hold hearing to determine whether testing will be ordered
- shall order testing only if court finds 1) reasonable probability that petitioner would not have been convicted if favorable results had been obtained through testing at time of original prosecution, 2) the request is made to demonstrate the innocence of the person and not to unreasonably delay the execution of the sentence; 3) one or more items of evidence still exists; 4) the evidence was secured and either not tested or additional testing will provide a reasonable likelihood of more probative results; and 5) chain of custody meets certain standards
- if court orders testing, it shall require prosecutor to effect transfer of items to the designated lab with other related documents within 30 days of the order
- if testing is favorable to petitioner, the court shall schedule a hearing to determine the appropriate relief, such as 1) setting aside or vacating the conviction; 2) ordering a new trial or fact-finding hearing; 3) ordering a new commitment or dispositional hearing; 4) discharging the petitioner from custody; 5) specifying the disposition of any evidence remaining; 6) granting the petitioner additional discovery on matters relating to test results; or 7) directing the state to place any unidentified DNA profile into an Oklahoma or federal database
- if testing results are unfavorable, the court may dismiss the motion, or make further orders including requiring the DNA test results be provided to pardon and parole or a DOC or CODIS database
- filing of motion unnecessary if both sides agree to testing
- appeal the same as any other appeal
Sex Offenses


- enhancement provision for lewd or indecent proposals to children contained in 21 O.S. § 1123 to defer to habitual offender provision under 21 O.S. § 51.1a, providing for LWOP for second offense of 1st degree rape, forcible sodomy, lewd molestation or sexual abuse of a child after previous conviction of same

SB 679 Sexting. New law codified at 10A O.S. § 2-8-221; eff. Nov. 1, 2013

- when DA has reasonable cause to believe an individual, with knowledge of content, is engaged in sending or cause the sending of a transmission to originate within the state containing obscene material or child porn, the DA may institute an action in district court for adjudication of the obscenity or child pornographic content of the transmission
- individual may be charged in any district where the transmission is sent or is received by the person to whom transmitted
- prosecution shall be deemed to be within jurisdiction of state by fact of accessing any computer, cellular phone, or other computer-related or satellite-operated device regardless of actual jurisdiction where violator resides
- where offender is under 18 years of age and the original or relayed transmission is of another minor over 13 years of age and is made with consent of the pictured individual and transmitted to 5 or fewer individual destinations, offender is guilty of a misdemeanor punishable by a fine not exceeding $500 for the 1st offense, $1,000 for 2nd and subsequent offenses and up to 40 hours of community service or referral to a juvenile bureau
  - if without consent of pictured individual, or is sent to 6 or more individual destinations, a misdemeanor punishable by fine of $700 for the 1st offense, $1,400 for 2nd or subsequent offenses and up to 60 hours of community service and referral to a juvenile bureau
  - if with or without consent and transmitted to any number of destinations, a misdemeanor punishable by fine of $900 for the 1st offense, $1,800 for 2nd or subsequent offenses, up to 80 hours of community service and referral

SB 889 Tolling of sex offender registration period. Amends 57 O.S. § 583; eff. Nov. 1, 2013.

- registration period for level one and two offenders shall not conclude until the offender has been in compliance for the total amount of time required by act
  - DOC shall maintain records necessary to determine whether offender has been registered for total period of time required
Mental Health

HB 1109  Mental health or alcohol/substance abuse assessment after initial appearance. Amends 43A O.S. §§ 3-704 and 3-326; eff. Nov. 1, 2013.

- after initial appearance, person accused of felony offense may submit to an approved mental health and substance abuse assessment and evaluation administered and scored by assessment personnel certified by DMHSAS
- court, DA, individual and counsel shall have access to the results of the assessment
- results not admissible as evidence in the criminal case unless specifically waived by the defendant or for purposes of determining sentencing options where defendant has pled guilty

Child Abuse


- felony for person with prolonged knowledge of ongoing child abuse or neglect to knowingly and willfully fail to promptly report such knowledge
- “prolonged knowledge” means knowledge of at least 6 months of abuse or neglect
- DHS shall electronically record each referral received by child abuse hotline, and retaining recordings for 90 days
- recordings shall be confidential and subject to disclosure only where criminal charges related to referral have been filed

RICO


- now includes:
  - prohibition of kickback by state contractor under 74 O.S. § 3404
  - unlawful practices under Oklahoma Consumer Protection Act identified in 15 O.S. § 753
  - violation by professional fund raisers under 18 O.S. § 552.14a
  - exploitation of elderly persons or disabled adults pursuant to 21 O.S. § 843.4
  - computer crimes under 21 O.S. §§ 1953 and 1958
  - unlawful proceeds pursuant to 21 O.S. § 2001
  - insurance fraud pursuant to 36 O.S. § 311.1
  - workers’ comp fraud pursuant to 21 O.S. § 1663
Alcohol and Drugs

HB 2217  **New substances added to list.** Amends 63 O.S. §§ 2-204, 2-206, 2-210, 2-212, 2-309D, eff. Nov. 1, 2013.

- new substances added to schedules I, II, V
- expanded definition of synthetic compounds that are cannabinoid receptors to include materials, compounds, mixtures or preparation, and salts, isomers and salts of isomers, unless specifically excepted

HB 2217  **Precursor definition changed.** Amends 63 O.S. § 2-332; eff. Nov. 1, 2013.

- possession of drug product containing more than 7 and 2/10 (previously 9) grams of ephedrine, pseudoephedrine or phenylpropanolamine or salts, isomers of salts of isomers shall constitute a rebuttable presumption of intent to use as precursor to meth or other CDS

HB 2217  **Registry violation.** Amends 63 O.S. § 2-701; eff. Nov. 1, 2013.

- violation of meth registry prohibition of purchasing schedule V compounds containing pseudoephedrine requires knowledge by person that he or she is subject to the registry
- violation for failure to register requires knowing failure
- knowledge that person subject to registry may be proven through court testimony or other public notice or records, including court records maintained by OSCN and Okla. Court Information system
- OBND shall take necessary actions by promulgation of rules and cooperation with pharmacies to ensure notice is provided

SB 1  **Immunity from prosecution for public drunk.** New law codified at 37 O.S. § 8a; eff. Nov. 1, 2013.

- peace officer may not take person into custody based solely on intoxication caused by alcohol under 37 O.S. § 8, where the officer makes a reasonable determination, and considering facts and surrounding circumstances, reasonably believes that:
  1) the officer has contact with the person because the person requested emergency medical assistance for an individual who reasonably appeared to be in need of assistance due to alcohol consumption,
  2) the person provided the person’s full name and any other relevant information requested by the officer,
  3) the person remained at the scene with the individual needing assistance until emergency medical assistance arrived, and
  4) the person cooperated with emergency medical assistance personnel and officers
- where criteria met, the person is immune from criminal prosecution for an offense under 37 O.S. § 8
- the person may not initiate or maintain an action against the officer or his/her employer based on the officer’s compliance or failure to comply with this law
SB 580  **Admission of electronic meth precursor tracking report.** Amends 22 O.S. § 751; eff. Nov. 1, 2013.

- adds report of electronic methamphetamine precursor tracking service provider, as set forth in Uniform Controlled Dangerous Substances Act, to list of reports admissible without testimony of person making report, subject to exceptions

**Fines, Fees and Costs**

HB 1328  **DA fees.** Amends 22 O.S. §§ 991a and 991c; eff. August 22, 2013.

- unless person is under DA supervision, the offender shall pay $40 per month to the DA during the first 2 years or probation to compensate the DA for prosecution costs and additional work of verifying compliance of the offender with rules/conditions of probation
- DA may waive any part of requirement in best interests of justice
- court shall not waive, suspend, defer or dismiss costs of prosecution in entirety
  - if court determines a reduction in the fine, costs and costs of prosecution is warranted, it shall equally apply the same percentage of reduction to the fine, costs and costs of prosecution owed

HB 1766  **Electronic monitoring.** Amends 57 O.S. § 510.9; eff. Nov. 1, 2013.

- inmate assigned to electronic monitoring program shall, within 30 days of being placed in a community setting, report to the court clerk and DA to address payment of any fines, costs, restitution and assessments owed, if any

**Arson**

HB 1241  **Endeavoring to manufacture CDS.** Amends 21 O.S. § 1401; eff. Nov. 1, 2013.

- adds endeavoring to manufacture a CDS to 1st degree arson definition
- fine up to $25,000 and imprisonment not to exceed 35 years

**Food Stamps**

SB 887  **Fraud.** Amends 56 O.S. § 243; eff. Nov. 1, 2013.

- prohibits the transfer of any food stamps or coupons, or any benefit or debit card or any other device authorizing participation in the program, to a person who is not authorized by the act and rules of DHS regarding acquisition, possession or use of food stamps or coupons, or benefit or debit cards or any other devices authorizing participation in the program
- DA who enters into a deferred adjudication or negotiates a deferred sentence with defendant shall present the defendant with a disqualification consent agreement as part of the deferred adjudication or sentence
Traffic and Motor Vehicles

HB 1069  **Alcohol/substance abuse courses.** Amends 43A O.S. § 3-452; 47 O.S. § 11-902; eff. Nov. 1, 2013.

- successful completion of a DOC-approved alcohol/substance abuse treatment program shall satisfy the recommendation for a 10-hour or 24-hour course or treatment program or both
  - successful completion of an approved DOC alcohol/substance abuse treatment program may precede or follow the required assessment
- person ordered to participate in an alcohol/drug substance abuse evaluation and assessment program offered by a certified assessment agency shall be paid by defendant or on behalf of the defendant by any third party

HB 1743  **Victims impact panel program.** Amends 22 O.S. §§ 991a and 991c, 47 O.S. § 11-902; eff. Nov. 1, 2013.

- increases fee charged for placement in program from $50 to $60
- defines program as a meeting with at least one live presenter sharing personal stories concerning alcohol, drug abuse personally impacting life
- attended by persons who have committed DUI
- certificate of completion shall be issued to person upon attendance and payment of fee

SB 97  **Provisional license.** Amends 47 O.S. § 6-212; eff. Nov. 1, 2013.

- DPS authorized to enter agreement with individual whose license has been suspended or revoked, except for suspensions, revocations, cancellations or denials pursuant to 47 O.S. §§ 6-205(A)(1) (manslaughter or negligent homicide) or (2) (DUI), 753 or 754 (refusal to submit to test) for provisional license
- allows person to drive between place of residence and employment or potential employment, college, university or technology center, child’s school or day care provider, place of worship or court-ordered treatment program
- must pay minimum of $25 per month toward satisfaction of all outstanding driver license reinstatement fees
- violation of law that would result in suspension or revocation shall result in the revocation of the provision license and person ineligible for future application for a provisional license

SB 406  **License revocation.** Amends 47 O.S. § 6-205; eff. Nov. 1, 2013.

- removes from list of mandatory revocations reckless driving without regard for safety of others (47 O.S. § 11-901)
- first license revocation for failure to stop or remain stopped for school bus loading/unloading shall be for 1 year
HB 1441  **Interlock devices.** Amends 47 O.S. §§ 6-205.1, 6-212.3, 11-902, 754.1, eff. Oct. 1, 2013.

- period of interlock installation shall run concurrently with period of revocation and shall be for no less than 1 year, where revocation is pursuant to § 6-205(A)(2) or §§ 753 or 754
- period of interlock shall be for no less than 3 years if 2 or more prior revocations, the record reflects 2 or more prior convictions in another jurisdiction which did not result in a revocation of Oklahoma driving privileges, or any combination of 2 or more prior revocations or convictions

HB 1441  **DUI definition expanded.** Amends 47 O.S. § 11-902; eff. Oct. 1, 2013.

- DUI now includes any amount of a Schedule I chemical or controlled substance as defined in 63 O.S. § 2-204 or one of its metabolites or analogs in the person’s blood, saliva, urine or any other bodily fluid at the time of a test administered within 2 hours after arrest

Human Trafficking

HB 1058  **Expungement - victim.** New law codified at 22 O.S. § 19c; eff. Nov. 1, 2013.

- court, upon own motion or petition by defendant and for good cause, may enter order for expungement of law enforcement and court records relating to charge or conviction for prostitution-related offense committed as result of defendant having been victim of human trafficking
- order shall contain statement that expungement is ordered pursuant to section
- order shall be subject to notice requirements and provisions of subsections B through M of 22 O.S. § 19
- records sealed to public but not to law enforcement agencies for law enforcement purposes

HB 1067  **Victim protection.** Amends 21 O.S. §§ 748.2 and 1029; eff Nov. 1, 2013.

- peace officer having contact with victim shall inform victim of human trafficking emergency hotline and give notice of certain rights
- where the victim of human trafficking or sexual abuse is a child, the officer shall immediately notify DHS, with the child remanded to DHS custody
  - joint investigation between law enforcement and DHS
  - if investigation shows more likely than not the child is a victim of human trafficking or sexual abuse, criminal charges shall be dismissed and DHS case shall proceed
- in prosecution of person 16 or 17 years of age for prostitution, there shall be a presumption that the actor was coerced into committing such offense in violation of human trafficking provisions
Protective Orders

HB 1912  **Procedural changes.** Amends 22 O. S. §§ 60.2, 60.4 and 60.9; eff. Nov. 1, 2013.

- court may not require the victim to seek legal sanctions against the defendant, including but not limited to divorce, separation, paternity or criminal proceedings prior to hearing a petition for a PO
- scheduling of a full hearing on the petition shall be within 14 days (previously 20) of the filing of the petition
- petition shall, on request of the petitioner, renew every 14 days until defendant served
- court shall not impose any term and condition that may compromise the safety of the victim, including but not limited to mediation, couples counseling, family counseling, parenting classes or joint victim-offender counseling sessions
- the defendant, instead of either party, may be required to pay all or any part of the cost of treatment or counseling services
  - should the plaintiff choose to undergo treatment or participate in court-approved counseling services for victims of domestic abuse, the court may order the defendant to pay all or any part of the cost if the court determines that payment by the defendant is appropriate
- peace officer shall (instead of may) take person into custody if officer has reasonable cause to believe that a PO or emergency ex parte order has been issued and served, proof of service the order has been filed with law enforcement agency having jurisdiction, the person named in the order has notice and reasonable time to comply and has violated the order
- court may consider the safety of any and all alleged victims that are subject to the protection of the PO prior to the court setting a reasonable bond pending a hearing of the alleged violation of the order
- Administrative Office of the Courts shall provide annual domestic violence educational training for members of the judiciary

Bail


- act governs licensing and conduct of bail enforcers

Pretrial Release

HB 1085  **Urinalysis testing.** Amends 22 O.S. § 1105.3; eff. Nov. 1, 2013.

- certain persons released upon order of judge may be subject to urinalysis testing, paid for by the defendant
Bogus Checks

SB 177  **Check or order on open account.** Amends 21 O.S. § 1541.4; eff. Nov. 1, 2013.

- a check or order offered to a merchant in payment on an open account of the maker means “a check or order given in exchange for a benefit or thing of value,” notwithstanding that the merchant may debit the account or impose other charges in the event the check or order is not honored

Grand Jury

HB 1449  **Oath.** Amends 38 O.S. § 20.1; eff. Nov. 1, 2013.

- adds to oath “do not otherwise have a mental condition which makes me incapable of performing jury services,” as well as acknowledgment that entire oath under penalty of perjury
- oath may be taken and signed using electronic method provided by court through a court website or otherwise

Law Enforcement

HB 1508  **Expanded investigatory power of OBNDD.** Amends 63 O.S. § 2-103.1; eff. Nov. 1, 2013

- power of OBNDD director to subpoena witnesses and require production of records material to investigation extended to crimes of money laundering and human trafficking

HB 1871  **Tribal law enforcement officers.** Amends 21 O.S. §§ 99 and 99a; eff. Nov. 1, 2013.

- “peace officer” definition to include tribal law enforcement officers
- person acting under the authority of a Federal Bureau of Indian Affairs Commission and certified by CLEET, who is authorized by federal law to conduct any investigation of and make any arrest for any offense in violation of federal law, shall have same authority as peace officer within state in rendering assistance to any law enforcement officer in an emergency, or at the request of any officer, and arrest any person committing any offense in violation of Oklahoma law
- a Bureau of Indian Affairs law enforcement officer or tribal law enforcement officer of a federally recognized Indian tribe who has been commissioned by the Federal Bureau of Indian Affairs and certified by CLEET shall have state police powers to enforce state laws on lands the title to which is held by the U.S. in trust for the benefit of either a federally recognized American Indian tribe or enrolled citizen thereof
- act does not limit or prohibit jurisdiction given to tribal officer pursuant to cross-deputization agreements between state or local governmental agency or another state or federal law
Witnesses

**HB 1509**  *Hearsay exception of child 13 years or older with disability*. Amends 12 O.S. § 2803.1; eff. Nov. 1, 2013

- extends current exception regarding children under 13 and incapacitated persons where describing physical abuse or sexual contact to children 13 years of age or older with a disability
- disability defined as physical or mental impairment substantially limited one or more major life activities or where regarded as having such an impairment by competent medical professional


- prohibition against willfully preventing a person from giving testimony expanded to include attempt to prevent, with testimony expanded to include production of any record, document or other object
- reference to report of abuse or neglect updated to reference 10A O.S. § 1-2-101

Computers


- clarifies that under Oklahoma Computer Crimes Act, a parent, legal guardian, legal custodian or foster parent may monitor the computer usage of, or denial of computer or internet access of child
- child defined as person less than 18 years

Court Filings

**SB 450**  *Provides for additional electronic court filings*. Amends 22 O.S. § 1115.1A; 29 O.S. § 9-112; eff. Nov. 1, 2013.

- plea may be entered by defendant released upon personal recognizance prior to appearance for arraignment of traffic offense or plea entered for violation of Wildlife Conservation Code using electronic method provided by the court for such purpose, either through the court’s website or otherwise
- court clerk may mail proof of receipt of appropriate bail or payment of fine and costs, settlement of citation, etc. to defendant by email if furnished with an email address
**DA Records**


- DA felony case records (now including records relating to felony investigations) can only be destroyed after 10 years if the DA has microfilmed or provided computer storage of such records
- adds records relating to misdemeanor or traffic investigation records which can be destroyed after 5 years, whether or not digitized
- DA can destroy juvenile case records where 10 years have elapsed

**Contempt**

**HB 2166  Community service for indirect contempt to pay child support.** Amends 21 O.S. § 566.1; eff. Nov. 1, 2013.

- punishment for indirect contempt to pay child support, upon finding by obligor is willfully unemployed, may include two 8-hour days per week in a community service program if such program exists

**Scrap Metal**

**HB 1740  Penalty increased for violation of act.** Amends 2 O.S. § 2-4; 59 O.S. §§ 1422-1423, 1425; new law codified at 59 O.S. §§ 1428-1430; eff. Nov. 1, 2013.

- penalty for violating certain provisions of Oklahoma Scrap Metal Dealers Act increased from misdemeanor to felony, punishable by imprisonment not exceeding 2 years and/or fine not exceeding $5,000

**Railroads**

**HB 1524  Railroad conductors.** Repeals 21 O.S. § 955; eff. Nov. 1, 2013.

- removes duty of conductors and brakemen to arrest persons engaged in swindle or confidence games on trains

**HB 1523  Free railroad tickets.** Repeals 21 O.S. § 471; eff. Nov. 1, 2013.

- repeals provision prohibiting railroad, transportation or transmission company from giving free tickets.
Horse Racing

- repeals prohibition against running recklessly any horse race in, along, on or across any public square, street or alley

Firearms

- school authority shall report discovery of a firearm not otherwise authorized by law to be possessed to law enforcement authority
- immediately report to law enforcement the discovery of a firearm upon a student who is not a minor or upon any other person not otherwise authorized by law to possess on school property pursuant to 21 O.S. § 1280.1 and deliver the firearm that is removed or seized to law enforcement for disposition pursuant to 21 O.S. § 1271.1

HB 1462 **Firearm instructors.** Amends 21 O.S. §§ 1290.14 and 1290.15; eff. Nov. 1, 2013.
- firearm instructors not required to submit fingerprints when renewing instructor’s CLEET approval
- expanded registration options

HB 1314 **Handgun license course costs and class sizes.** Amends 21 O.S. § 1290.14; eff. Nov. 1, 2013
- class cost to be determined by instructor (instead of current $60 cost)
- maximum class size determined by instructor; although practice shooting sessions not more than 10

HB 1622 **Handguns in public meetings, private schools.** Amends 21 O.S. §§ 1277 and 1280.1; eff. Nov. 1, 2013.
- removes prohibition against person possessing valid handgun license to carry concealed or unconcealed firearm in any meeting of any city, town, county, state or federal officials, school board members, legislative members or any other elected or appointed officials
- concealed or unconcealed weapon may be carried onto private school property or school bus if person licensed, provided policy has been adopted by governing entity of the private school

HB 2170 **Spring knives.** Amends 21 O.S. § 1272; eff. Nov. 1, 2013.
- removes “spring-type” knives from general list prohibiting the carrying of weapons by a person

- when taken into custody as a child in need of supervision, child shall be detained and held temporarily in the custodial care of a peace officer or placed within a community intervention center, emergency shelter, emergency shelter host home, or released to the custody of the parent of the child, legal guardian, legal custodian, attorney or other responsible adult, upon written promise of such person to bring the child to court at time fixed if a petition is to be filed
  - child shall not be detained in any jail, lockup or other place used for adults convicted of a crime or under arrest and charged
- during course of preliminary inquiry to determine whether further court action should be taken, the intake worker shall hold a conference with the child and parents, guardian or custodian to purpose of discussing disposition of the referral, interview persons necessary to determine whether filing of a petition would be in best interests of the child and community, check records of courts, obtain existing mental health, medical and educational records with consent, administer screening and assessment instruments, and upon review of information presented, the DA may consult with the intake worker to determine interests of child and whether public will be best served by dismissal of the complaint, informal adjustment of the complaint or filing of a petition
- diversion services to be offered to children at risk of being subjected to child-in-need-of supervision petition
  - sets forth parameters and procedures regarding services
- provides that where indigence is established, OIDS shall represent the child in accordance with Indigent Defense Act, or where applicable, the office of the county indigent defender
  - if parent or legal guardian of child is not indigent but refuses to employ counsel, court shall appoint counsel with costs of representation imposed on parent or other legal custodian
- court shall remove all persons from a hearing not having a direct interest in the case or that are not the parents or legal guardian, where evidence of medical or behavioral health conditions of the child or specific instances of deprivation are presented
- judge may, for good cause shown, open the court hearings to educate members of the public about juvenile justice issues, but identities of the juvenile respondents shall not be published in any reports or articles of general circulation
- provision allowing court to defer delinquency adjudication proceedings for 180 days amended to allow such referral where the child enters into a stipulation that the allegations are true or that sufficient evidence exists to meet the burden of proof required for the court to sustain the allegations
• if the child is alleged to have committed or attempt to commit a delinquent offense that if committed by an adult would be a felony, the deferral shall be upon agreement of the DA
• provision regarding when to hold a dispositional hearing changed to require such hearing no later than 40 days after making an order of adjudication
• within 30 days after adjudication, the person, department or agency responsible for supervision of the case shall provide a recommendation, based upon the comprehensive assessment and evaluation process, for disposition to the court and counsel, which shall include the child’s eligibility for probation, placement in community residential treatment or commitment to OJA
  • if recommendation is for custody with OJA or is court-ordered placement in residential treatment, the plan shall be provided to the court and counsel within 30 days after disposition
• sets forth rights of child whose disposition is being considered for revocation or modification
• new provisions permitting the court to order a parent, legal guardian or custodian and any other person living in the home who’s been served to be present at or bring the child to any proceeding, and providing procedure for issuing a bench warrant
  • court shall enter order specifically requiring parent, legal guardian or custodian, or other persons properly served to participate in the rehabilitation process of a child
  • provides good cause exceptions
• new provisions relating to sealing of records

SB 988  
**Training requirements for attorneys with juvenile dockets.** Amends 10A O.S. § 1-8-101; eff. Nov. 1, 2013.

• removes retained attorneys from list of attorneys (DAs, public defenders, OIDS contractors) required to complete at least 6 hours of education and training

SB 301  

• creates State Council for Interstate Juvenile Supervision pursuant to Article IX of the Interstate Compact for Juveniles Act
• council shall advise and may exercise oversight and advocacy concerning participation of state in Interstate Commission activities, development of policy concerning operations and procedures of compact
• comprised of 11 members, including a compact administrator, two presiding judges of a court having juvenile law jurisdiction, an employee of OJA, DHS, one DA or ADA, one licensed attorney who regularly represents juveniles charged with crimes or delinquent acts
Nothing is as exciting as hearing the words “not guilty.” This section is dedicated to the hard work and effort of the criminal defense bar and gives special recognition to those who have recently heard those fantastic words in the courtroom. 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

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<tr>
<th>Attorney(s)</th>
<th>Client Charge(s)</th>
<th>County</th>
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<tr>
<td>Taos Smith/Amanda Everett</td>
<td>Tampering with a Vehicle</td>
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<td>Scott Goode/Bliss Lowe</td>
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## COURTHOUSE VICTORIES

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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.”
OCDLA 2014 MEMBERSHIP APPLICATION

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

[ ] $250 Sustaining Member [ ] $125 Affiliate
[ ] $125 Regular Member (OBA Member 3+ years) [ ] $75 Student Membership
[ ] $100 Regular Member (OBA Member 3 or less years) Law school ______________
[ ] $100 Public Defender / OIDS Rate 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

________________________________________