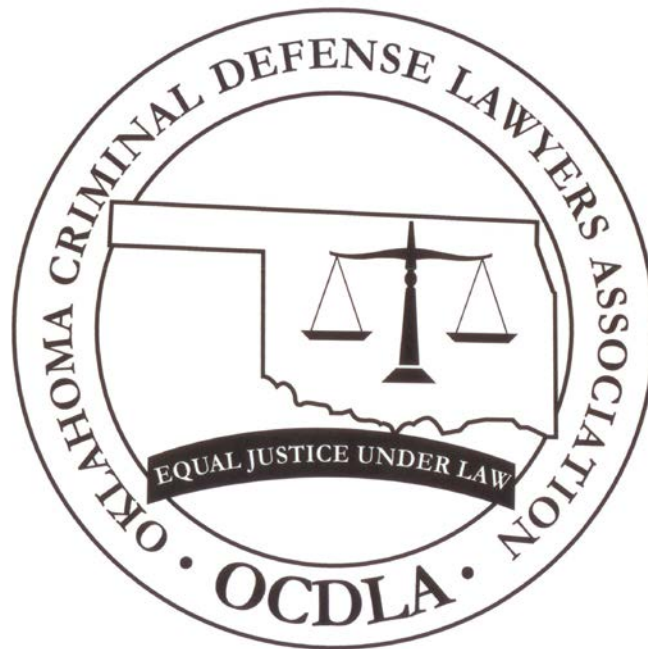


# THE GAUNTLET

*The Law Journal of the*

**OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION**



**FALL 2019**

*OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION*

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# THE GAUNTLET

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

JACQUELYN FORD  
*Editor-in-Chief*

*Associate Editor*  
MIKE WILDS, *Broken Arrow*

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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 **ocdla @ bdp@for-the-defense.com**.

## **The President's Page**

Katrina Conrad-Legler  
President,  
Oklahoma Criminal Defense Lawyers Association

Fellow OCDLA Members:

I am happy to present the Fall 2019 edition of *The Gauntlet*. Many thanks to Jacqui Ford, Brandon Pointer, and our contributing writers and editors who made this issue possible. I really appreciate all of their hard work in getting this issue out and ensuring that *The Gauntlet* remains relevant and maintains the high standards our membership has come to expect.

The CLE committee has also been hard at work this Fall. As a result, I would like for you to Save-the-Date on several upcoming events. On **Friday, October 18<sup>th</sup>**, the OCDLA will be presenting a day-long seminar at the Moore-Norman Vo-Tech. This will be a great opportunity to learn about the intersection of criminal and immigration law and how to avoid common pitfalls as we represent our clients in state courts.

We will also be holding the Cindy Foley Criminal Defense Seminar on **Friday, December 13<sup>th</sup>** at the Moore-Norman Vo-Tech. This is a chance for our newly admitted and other young attorneys to gain some insight and perspective from seasoned practitioners on how to prepare a case through trial, as well as an opportunity for the attorneys who have been practicing a while to brush up on motions and trial techniques.     ]

Finally, the OCDLA will be hosting its second holiday party after work and the Cindy Foley Seminar on December 13<sup>th</sup> at the Belle Isle Brewery in Oklahoma City. We would like to celebrate each other and the holiday season, as well as have an opportunity to give back to the less fortunate in our community. The price of admission will be a new unwrapped toy that will

then be given to the Marine Corps' Toys for Tots or a new or gently used winter coat to be given to the Red Andrews Christmas Dinner.

I have been serving as president of the OCDLA for a little over a year now. Throughout this year, I have been reminded of what a great membership we have in the OCDLA. We are a great group of attorneys who care deeply about our clients, their families, and the criminal justice system. But, we also care about each other. We are there to celebrate each other's victories and there to help console each other's losses.

I hope that each of you appreciate the OCDLA as much as I do. Thank you for your continued support of this incredible organization. I look forward to continue serving as your president this year.

Katrina Conrad-Legler  
President, OCDLA

## **LETTER FROM THE EDITOR**

Dear Friends and Members,

Thank you for your continued membership and participation in Oklahoma's largest criminal defense organization. As you know, we not only support each other but we teach, mentor and share information in a way that separates us from other groups. I would echo our President's gratitude and I would invite you all to consider, what can I do to do for this organization to keep it strong, keep it relevant, and to engage new members as well as reengaging older members? A great way to do that is to contribute to the Gauntlet. The board and I would like to have more issues published annually but the largest barrier is finding willing contributors.

You have knowledge that others can learn from. You have unique experiences in court, with clients, and before juries, that our members can learn from. I would encourage you to think about those experiences, to include motions that moved the judge, the government or you to do something different. Inspire us!

If you are thinking to yourself like I often do, "Oh I do not have anything to contribute." Or, "People are not interested in my insight." Or anything that sounds like I am not good enough, qualified enough or important enough, you cannot be more wrong. We all have something to share and I would encourage you to reach out to me, Katrina Ledger, Brandon Pointer, or any board member to discuss ideas.

The very thought of authoring an article can be a daunting prospect. We are here to help, so you are not alone in the process. We can lend a hand as you tailor an idea, set a goal for teaching through writing, and finally help you organize, edit and cite the article. Being published

in a peer reviewed article is great for your resume and does not hurt to stroke the ego that lives in us all.

In that spirit, we are always looking for new and creative ideas for CLE's and CLE speakers. What do you want to see more of? Who would you like to hear from? What can we do to bring you the best CLE's for your unique needs? Please feel free to email me, Katrina or Brandon and let us get to work for you. We are committed to being the best place for criminal lawyers to grow individually and as a community.

We hope you enjoy this issue. We have some commitments for future articles and are looking for more writers for the Winter Issue. We hope to publish it as early as December or late as January. We would love to hear from you. We look forward to seeing many of you at the fall CLE's and as always, in the courtrooms fighting the government from its overarching, overwhelming grips on the citizens of Oklahoma.

Thank you again for your continued support and commitment to each other and our shared cause.

With love,

Jacqui Ford  
Director of Publications

## **A Short History of *Miller v. United States* and the Second Amendment (A Series on the Second Amendment by Bill Campbell)**

The effect and affect of the Second Amendment to the Constitution of the United States is a topic subject to much debate presently. States are passing laws which seemingly attempt to circumvent federal statutory construction and application. In this serial presentation, I will attempt to place in readable form the historical and legal events which have led us to our present situation. To understand the interplay between State and Federal firearm jurisdiction suggests some degree of background development is necessary to serve as our canvas on which we can paint the current picture. There was a time, during the lifetime of some of us, in which this morass of firearm laws and regulations did not exist. It was a time no less dangerous than today, in fact, in some ways it was probably more dangerous.

But the government was content to limit its intrusion into what could be arguably described as obvious criminal conduct. For example, one could not use a firearm to rob, threaten, assault, murder or recklessly endanger others. If a person committed such an act they would be duly prosecuted, and, upon conviction, be sentenced to an appropriate term of incarceration. Beyond that punishment, our early history shows us almost no regulatory structure on firearm possession. There are laws which predate the American Revolution which were prohibitive of Freed Slaves or other Freedmen from possessing firearms. These laws later included immigrants in the late Nineteenth Century in their prohibitions. Also the Post Civil War era "Black Codes" attempted to prevent former slaves from possessing the means to defend themselves with firearms.<sup>1</sup>

To continue to flesh out the historical canvas, without becoming bogged down in historical minutiae, I have selected two representative states, commonwealths actually, from our original thirteen state nation. Massachusetts will represent the course of northern gun legislation, though admittedly with great imprecision. Virginia will represent the southern gun legislation with the same infirmities as Massachusetts.<sup>2</sup> In the case of Massachusetts, the first gun laws were

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<sup>1</sup> Babat, David, "The Discriminatory History of Gun Control" p.1 (2009).Senior Honors Project, University of Rhode Island.

<sup>2</sup> No one state, North or South, can truly represent the laws of its sister states but these two are among the oldest and have been emulated by others to a greater extent within their regions than have their sister States.

codified in 1906.<sup>3</sup> The importance of this codification is the fact that it is a Twentieth Century enactment and coincides with the major influx of immigrants from Europe. Yet, even at that time, the specific prohibitions which are reflected in 18 U.S.C. §922 are not to be found. While originally having more stringent firearm punishment for slave and prior slave possession of firearms, like Massachusetts, Virginia shifted its focus to include the influx of immigrants in the late 19<sup>th</sup> and early 20<sup>th</sup> Centuries.<sup>4</sup>

What should be evident at this point is that 125 years into the Federal Republic and there is no discussion of the existence of national gun laws. The federal government had yet to get into the gun control business.

Oddly, the cause of federal gun control legislation was alcohol. Rather the cause was the 18<sup>th</sup> Amendment's prohibition of alcohol and its implementing legislation, the National Prohibition Act, colloquially called the Volstead Act. More specifically, it was the bootlegging organized crime operations which fomented the turf wars and associated violence. The invention of the Thompson sub-machine gun and its drum fed magazine came to epitomize the gangland violence of the 1920s and speak easy prohibition. The St. Valentine's Day massacre and the drive-by shootings using the "chopper", as the Thompson was colloquially known, led to federal interest in regulating firearms.

The repeal of prohibition with the passage of the 21<sup>st</sup> Amendment in 1933 did little to abate the interest in removing automatic weapons from the hands of those engaged in organized crime. The result of this interest was the National Firearms Act of 1934. This Act was the first attempt by the federal government to regulate the ownership of firearms. The Act was restricted to two types of weapons: the machine gun and short barrel shotguns. The drafters of this legislation, including the sitting Attorney General, did not ban such weapons for fear of running afoul of the Second Amendment; rather, they sought to tax them out of existence. Even today many charged firearm violations will have a Title 26<sup>5</sup> (tax code based) count charged in addition to the Title 18 counts. This original federal gun control legislation provides us with the most mis-understood case ever decided in Supreme Court gun jurisprudence.

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<sup>3</sup> Supreme Judicial Court of Massachusetts, *Gemme v. Holden*, SJC 11682, *AMICUS CURIAE BRIEF OF COMMONWEALTH SECOND AMENDMENT, INC.*, Karen L. MacNutt, p.5 Filed October 14, 2014.

<sup>4</sup> *Babat*. Id.

<sup>5</sup> 26 U.S.C. §5801 Covers taxation and transfers of firearms. While § 5841 contains the language of federal registration of firearms and §5845 definitions for firearms, machine guns, rifles, shotguns, other weapons, Destructive devices and antique firearms, as well as other important definitions under the Title.

Enter *Miller v. United States*, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939) and its convoluted progeny. Before discussing the high court's decision, a little bit about Mr. Miller. <sup>6</sup> Jackson "Jack" Miller was a gambler, roadhouse owner, and small-time hood from Claremore, Oklahoma. Born in about 1900, he grew into a hulking, 240-pound thug. By 1921, he was in trouble with the law. But Miller did not hit the major leagues until he joined the O'Malley Gang in 1934. The Depression was the Golden Age of Midwestern bank robbery, and the O'Malleys executed some of the era's most daring and successful heists. From 1932 to 1935 they claimed "most of the major bank robberies in the Southwest," hitting banks in Missouri, Arkansas, Kansas, and Illinois. Originally known as the Ozark Mountain Boys, the gang consisted of a score of hoods, most of whom met in the Missouri State Penitentiary.

A reporter christened them the O'Malley Gang after the dashing Leo "Irish" O'Malley, notorious for his sensational but remarkably inept kidnapping of August Luer.<sup>7</sup> Then, on December 22, 1934, the O'Malleys robbed two Okemah, Oklahoma, banks at the same time, one of the few successful simultaneous bank robberies in American history. They drove a Plymouth and a Ford into Okemah at dawn, wore bandages concealing their faces, and struck shortly before the banks opened. Gilmore, O'Malley, Short, and Cooper hit the Okemah National Bank, while Heady, Melton, and Reese hit the First National Bank of Okemah. Miller "was stationed at the Okemah city limits to guard against possible breakdowns and to pick up members of the gang if their autos failed." Armed with pistols and machine guns, the O'Malleys bound and gagged the unsuspecting bank employees as they arrived, then forced a bank officer to open the safe. The Okemah National Bank yielded \$13,186 and the First National Bank of Okemah yielded \$5,491.25. The police pursued, to no avail.<sup>8</sup> On May 3, 1935, the O'Malleys hit the City National Bank of Fort Smith, Arkansas, stealing about \$22,000. It was their last big job. The police arrested Cooper as a likely suspect and struck gold. Cooper ratted out Gilmore, who was already on the lam. The police caught up with Gilmore on May 22, outside of Lancaster, Texas. Gilmore sang too, fingering the rest of the gang. The police pinched O'Malley and Heady in Kansas City, where they'd rented a swanky pad from James Maroon. O'Malley immediately confessed to the Luer kidnapping and was

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<sup>6</sup> NYU Journal of Law & Liberty, *The Peculiar Story of United States v. Miller*, Bryan L. Frye, 2008 NYU J.L&I Vol 3:48. Selected biographical quotations from pp. 52 though 60.

<sup>7</sup> Ibid. Internal citations omitted.

<sup>8</sup> Ibid. Internal citations omitted.

extradited to Illinois. But the FBI took Heady to Muskogee, Oklahoma, to face federal charges on the Okemah job. A couple of weeks later, the police nabbed Short in Galena, Missouri. And on August 8, they caught up with Melton and Reese at a fishing camp in Taney County, Missouri. The FBI took all three to Muskogee for trial.<sup>9</sup>

In the meantime, federal prosecutors indicted the O'Malleys in the Eastern District of Oklahoma. The Oklahoma trial came first. Federal prosecutors charged Gilmore, Cooper, O'Malley, and Short with robbing the Okemah National Bank and

Heady, Melton, and Reese with robbing the National Bank of Okemah. All seven pleaded not guilty and the trial was set for October 16. But on October 2, the United States re-indicted the lot of them, added Jack Miller to both counts, and postponed the trial to November 25. Miller soon flipped, confessing to his role in the Okemah job and turning state's evidence.<sup>10</sup>

Miller was the government's ace in the hole. To preserve the surprise, federal prosecutors sequestered him in the county jail until trial. As soon as the trial began, Miller's lawyer H. Tom Kight announced, "Jack Miller, my client, will testify only on condition that he be granted complete immunity." Judge Robert L. Williams agreed, on the condition Miller "gives a complete and truthful account of the crime."<sup>11</sup>

The trial was over almost as soon as it started. On November 27, the jury convicted the seven defendants on all counts. Judge Williams acquitted Miller as promised, but added an admonishment. "You had a narrow escape this time . . . and you won't be so lucky again."<sup>12</sup>

Indeed, Jack Miller's luck was about to take a decidedly different twist. The trial judge set the sentencing for the robbers on December 9, 1935, but the week before there was a daring jail break. Having obtained a pistol, Heady, Gilmore, Short, Cooper, and others, shot their way out of the jail fatally wounding the Muskogee Chief of Detectives. A massive posse was assembled to recapture the convicts, aided by bloodhounds and spotter airplanes. Miller was so afraid of O'Malley the FBI locked him up in a county jail until the escapees were either killed or recaptured. He then continued his cooperation with the government and

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<sup>9</sup> Ibid. Internal citations omitted.

<sup>10</sup> Ibid. Internal citations omitted.

<sup>11</sup> Ibid. Internal citations omitted.

<sup>12</sup> Ibid. Internal citations omitted.

was a witness against the robbers of the bank in Fayetteville, Arkansas. All initially pleaded not guilty and then Gilmore changed his plea and the others soon followed with their own guilty pleas.

Miller's foray into the big time seems to have ended with the sentencing of the last of his bank robbery compatriots. He went back to Claremore where he picked up with his petty criminal activities. Jack Miller fell into an association with a man named Frank Layton. Layton was another small time Claremore miscreant and petty crook. The pair wound up outside Siloam Springs, Arkansas, where they were stopped by Arkansas and Oklahoma state police. It should be noted, in those days, extradition between Arkansas and Oklahoma often involved simply throwing the wanted person across the state line into the waiting arms of some Oklahoma law enforcement agency. The pair were taken to Fort Smith to face an Indictment in federal court for violating the National Firearms Act. The NFA was designed, essentially to tax certain firearms out of existence. It levied fees which were exorbitant for the times. It also prohibited interstate transportation of covered, but unregistered, firearms.

Hiram Heartsill Ragon was influential in Arkansas politics and a fervent New Dealer. He served several terms in the U.S. Congress as representative of the Fifth District of Arkansas. He was a noted advocate of federal gun control.<sup>13</sup> Sitting on the powerful Ways and Means Committee, he helped push through the New Deal legislation of the nascent Roosevelt presidential administration. Upon leaving Congress, Ragon was nominated by FDR to the federal bench. Now he was positioned perfectly to sit on the case of *United States of America v. Jackson Miller* filed in the Western District of Arkansas. Ragon refused to accept the pleas of Miller and Layton, instead choosing to appoint counsel to represent them. The appointed lawyer filed a motion to quash based on violating the Second Amendment to the Constitution of the United States. The NFA was a part of the New Deal and had passed with broad support, but the Federal Firearms Act of 1938 was encountering considerable popular opposition, most of it based on the Second Amendment. Judge Ragon granted the motion and dismissed the case, in a summary order barren of either facts or legal analysis. It is more interesting that this opinion conflicted with a Florida decision which had rejected the Second Amendment argument.<sup>14</sup> Yet, it served its purpose well. The government now had its Constitutional challenge test case to take to the United States Supreme Court.

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<sup>13</sup> 66 CONG. REC. 725, 734 (Dec. 17, 1924).

<sup>14</sup> *United States v. Adams*, 11 F. Supp. 216, 218-19 (S.D. Fla. 1935)

The appeal was instantaneous and made directly to the United States Supreme Court.<sup>15</sup> The previously appointed lawyer was busy defending his controversial appointment to the Arkansas State Senate and did not contest the appeal. The Supreme Court docketed the appeal and the Solicitor General's Office churned out a multi-pronged defense of the legislation. There was nothing but silence from the defense. The Clerk of the Court wrote to Miller's trial lawyer on March 15, 1939 informing him the government had filed a brief and that oral argument was set before the high Court on March 31. The lawyer noted that he had not received such brief and further noted that he had conducted this representation *pro bono*. The Clerk of the Court suggested the argument be continued to mid-April, but the lawyer replied by telegram suggesting the case be heard solely on the Appellant's brief.

On March 30, 1939, the United States Supreme Court, less newly appointed Justice William O. Douglas (recused) and Chief Justice Charles Evans Hughes (out sick) heard the oral argument of the case of *United States v. Miller*. The only voice heard was that of the Gordon Dean representing the United States. No one appeared on behalf of Miller or Layton. The decision came with unusual speed and was delivered by Justice McReynolds on May 15, 1939. The language which has sparked much debate over the last 70 years is, "We construe the amendment as having relation to military service and we are unable to say that a sawed-off shotgun has any relation to the militia." Specifically, the words "having relation to military service" formed the basis for the "collective rights" argument which came to predominate federal jurisprudence. The Supreme Court remanded the case to the Western District of Arkansas.

Jack Miller had disappeared after his indictment had been dismissed. But he could not resist returning to his old ways. While this case was pending in the highest court in the land, Jack Miller went back to robbing. Unfortunately, his next target was the Route 66 bar in Miami, Oklahoma, where he and his accomplices reputedly got away with \$80.00. It was unfortunate because the bar belonged to the uncle of two notorious bank robbers. On the morning of April 3, 1939, Jack Miller was picked up at his home in Ketchum, Oklahoma by some men in a car. Around noon on April 4, 1939, on the bank of Little Spencer Creek some nine miles Southwest of Chelsea, Oklahoma, a farmhand found the bullet riddled body of Jack Miller. Though arrests were subsequently made, no one was ever convicted of the murder of Jack Miller.

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<sup>15</sup> The Criminal Appeals Act, 18 U.S.C. § 682, at the time, permitted the United States to appeal directly to the United States Supreme Court criminal cases which raised Constitutional questions. This section has since been repealed.

Co-defendant, Frank Layton, pleaded guilty to the re-instated charges and Judge Ragon sentenced him to five years probation. Judge Ragon was anticipating an appointment to the Court of Appeals for the Eight Circuit but died of a heart attack before that occurred.

[Series #2 “Was the *Miller* Decision Inheriting the Wind?”]

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**\*\*SAVE THE DATE-SEMINAR ANNOUNCEMENT\*\***

*Cindy Foley*  
**Criminal Defense Basics**

**December 13, 2019**

**Moore-Norman Technology Center  
South Pennsylvania Campus-Room 109  
13301 S. Pennsylvania Ave, Oklahoma City, OK 73170**

**Agenda & registration will be available on  
[www.ocdlaoklahoma](http://www.ocdlaoklahoma) after November 1, 2019.**



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**Jesse Wilson** is a communications specialist and jury trial consultant who impacts audiences with his high energy delivery and practical content inspired from his work in the theater.



**Jacqui Ford** is an award-winning trial lawyer who has dedicated her practice to defending the criminally accused and advocating for the injured.



**Jeff Chapdelaine** is an attorney, forensic social worker, and psychodrama therapist who consults nationally on trial strategy, jury selection and trauma informed client focused case preparation.

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**OCDLA Files Another AMICUS BRIEF supporting a Petition for SCOTUS Certiorari**  
**SAFETY VALVE: FEDERAL SENTENCING GUIDELINES**

by

Dr. Michael R. Wilds  
Criminal Justice and Legal Studies Professor  
Northeastern State University

The OCDLA has signed off on three (3) Petitions for Certiorari with the U.S. Supreme Court in the past five (5) years. Most recently, the OCDLA was a signatory on the Amicus Brief supporting a petition for U.S. Supreme Court Certiorari in *Giovanni Montijo-Dominguez v. U.S.A.* This Amicus, filed in September 2019, addressed the issue of:

Whether the federal safety valve statute or the applicable implementing advisory sentencing guideline prohibits a sentencing court from applying the safety valve provision and departing or deviating from an otherwise applicable mandatory minimum sentence for a controlled substance conviction following a trial.

For those of you who are unfamiliar with the safety valve provisions, the provisions afford judicial discretion in application of downward deviation from sentencing guidelines if five criteria are met (18 U.S.C. § 3553(f)). The five criteria are:

1. The defendant's past criminal record must be minimal,
2. The defendant must not have been a leader, organizer, or supervisor in the commission of the offense,
3. The defendant must not have used violence in the commission of the offense,
4. The offense must not have resulted in serious injury,
5. Prior to sentencing, the defendant must tell the government all that he knows of the offense and any related misconduct.

Essentially, the safety valve permits a sentencing court to disregard a statutory minimum sentence for the benefit of a low-level, nonviolent, cooperative defendant with a minimal prior criminal record, convicted under several mandatory minimum controlled substance offenses. See *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions*, Congressional Research Service. p. 1 (Feb 22, 2019), <https://fas.org/sgp/crs/misc/R41326.pdf>.

In the case before the court, there is no disagreement that the defendant met the first four criteria. However, the prosecutor argues on the fifth criteria that the defendant must not have fully disclosed “all he knows of the offense and any misconduct” in a truthful manner; otherwise, the jury would not have convicted the defendant. The defendant argues that he should not have to waive his Fifth Amendment right to testify assuming the additional risk that, if convicted, he would not be able to invoke the benefits of the safety valve. Obviously, federal courts are split on the issue.

One Amicus argument is that “nothing in the safety valve statute, 18 U.S.C. § 3553(f), or the applicable implementing advisory federal sentencing guideline, U.S.S.G. § 5C1.2, prohibits a sentencing court from applying the safety valve provision and departing or deviating from an otherwise applicable mandatory minimum sentence for a conviction following trial.” The safety valve statute and guideline applies regardless of whether a defendant testifies and regardless of whether a defendant is found guilty by the jury. The plain language of the statute provides that: “the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission . . . without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation,” that the defendant meets the five necessary criteria. 18 U.S.C. § 3553(f).

The second Amicus argument is that “the determination is to be made prior to sentencing and by the court, not a jury.” According to the plain language of the safety valve statute and guidelines, a defendant who is convicted at trial may meet the five criteria for safety valve qualification “*prior to sentencing.*” Specifically, a defendant convicted at trial may nonetheless well be able to demonstrate that he or she “has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. . . .” *prior to and at sentencing.* 18 U.S.C. § 3553(f)(5). The beginning of subsection (f)(5) specifically states “*not later than the time of sentencing....*” That language plainly contemplates meeting the criteria after a conviction *prior to sentencing*. Understandably, a defendant may have made such disclosure prior to trial, but that is not required by statute.

Of course, a safety valve proffer may arise during the plea bargain process. However, the defendant may “tell the government all he knows of the offense and any related misconduct,” but choose to subsequently go to trial should the prosecutor appear weak in proving the elements of the crime or if a witness or coconspirators made untruthful statements to law enforcement officers.

The statute is rather wide in scope and intended to be broadly applied for qualifying defendants. For example, even where the information that the defendant can provide is not useful, or is already known to the Government, it does “not preclude a determination by the court that the defendant has complied with this requirement.” 18 U.S.C. § 3553(f)(5). As the determination is left to the court, the jury’s verdict need not control. Neither the language of the applicable statute, the implementing federal sentencing guideline, nor its commentary, present any bar to

The third Amicus Argument is that the jury verdict is not controlling in regard to the safety valve provisions. That determination is left to the court, not to the jury. The inquiry, according to the safety valve criteria, is whether the defendant “told the government all that he knows of the offense and any related misconduct” prior to sentencing. In fact, the Second Circuit has gone so far to rule lies and omissions do not disqualify defendant from safety valve relief so long as defendant makes complete and truthful proffer not later than commencement of sentencing hearing. See *United States v. Schreiber*, 191 F.3d 103, 108–09 (2d Cir. 1999).

Since the Amicus was just filed, word has not been received as to whether certiorari has been granted or denied. So, stay tuned for the next edition of *The Gauntlet*. **But, be assured, your OCDLA Board is actively involved in U.S. Supreme Court Arguments. Three Amicus briefs that support Petitions for Certiorari have been filed in the past three years.**

**Oklahoma Criminal Defense Lawyers Association**

*Presents*

**First Line of Defense:  
Shielding Noncitizen Defendants from  
Immigration Consequences**

**October 18, 2019**

**Moore-Norman Technology Center  
South Pennsylvania Campus-Room 109  
13301 S. Pennsylvania Ave, Oklahoma City, OK 73170**

**Approved for 6 Hours CLE**

**8:45 – 9:00 a.m.      Registration**

**9:00 – 9:50 a.m.      Introduction to Immigration Law Basics,  
*Hena Mansori, National Immigrant Justice Center, Chicago, IL***

Role of the criminal defense attorney, basic concepts of immigration,  
immigration status overview, deportability vs. inadmissibility

**10:00 – 10:50 a.m.      Crim-Imm. Basics  
*Hena Mansori, National Immigrant Justice Center, Chicago, IL***

Definition of a conviction, overview of categorical and circumstance-  
specific approaches, criminal grounds of removability

**11:00 – 11:50 a.m.      Defenses Against Deportation  
*Hena Mansori, National Immigrant Justice Center, Chicago, IL***

Explanation of the various applications a non-citizen can file to remain  
lawfully in the U.S. or obtain lawful status

**Lunch (Included with registration)**

**1:00 – 2:00 p.m.      Working with Foreign-Born Clients,  
*Julia Summers, Asst. Federal Public Defender, Oklahoma City***

**2:00 – 3:30 p.m.      Panel Discussion:  
*William Campbell, Hena Mansori, Julia Summers***

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**\*\*SPACE IS LIMITED TO 50 ATTENDEES\*\***

## Changes in Cannabis and Criminal Law by Clayburn Curtis

Uncertainty on cannabis enforcement began in Oklahoma's legal system before the first dispensary opened its doors. A motorist, long plagued by chronic back pain after multiple surgeries, was pulled over for a broken taillight. When she told the officer she had cannabis on her, she was not worried; she also had her license to possess cannabis. The problem is that no dispensary had yet to open its doors, and the officer charged her for possession of cannabis. These charges were eventually dropped.

State Question 788 states that "[a] person in possession of a state issued medical marijuana license shall be able to ... legally possess up to three (3) ounces of marijuana on their person" without reference to any purchasing requirement. Both the officer and the license holder acted in good faith to enforce and follow the law, respectively. But for all the clear language of State Question 788 and the accompanying Unity Bill, gaps remain—leaving much discretion in the hands of police and prosecutors. Oklahoma House Speaker and Unity Bill author Jon Echols (R-Oklahoma City) said the goal of HB 2612 was "not to fix every issue or deal with every issue that will pop up."

Some have demanded that further clarity from the legislature is needed. And in the wake of changing law, there are numerous cannabis-related issues that will require the discretion of law enforcement and prosecutors.

Until the legislature clarifies gaps left between existing state law and SQ788/HB2612, some have pushed for law enforcement and the state to follow the will of the people and err toward minimizing or avoiding charges altogether. Echols has acknowledged that district attorneys have discretion to prosecute or not file charges while they wait for legislative guidance, but that "they just got guidance from the people in a vote."

Public perception and legal ramifications for cannabis possession and use have changed dramatically in recent years. State Question 788 asked voters to decriminalize cannabis not only for licensed users, but also made possession of less than 1.5 ounces subject to a misdemeanor and a \$400 fine. Under pre-788 law, however, any amount of cannabis could carry a felony conviction, a maximum sentence of five years in jail and a fine of up to \$20,000. The question today is: what does a district attorney do when a defendant is arrested with less than 1.5 ounces of cannabis (and no valid medical cannabis license) along with indications of possible distribution? This issue is remedied. 63 O.S. 420(B) provides: Possession of up to one and one-half (1.5) ounces (42.45 grams) of marijuana by persons who can state a medical condition, but not in possession of a state-issued medical marijuana license, shall constitute a misdemeanor offense punishable by a fine not to exceed Four Hundred Dollars (\$400.00) and shall not be subject to imprisonment for the offense. Any law enforcement officer who comes in contact with a person in

violation of this subsection and who is satisfied as to the identity of the person, as well as any other pertinent information the law enforcement officer deems necessary, shall issue to the person a written citation containing a notice to answer the charge against the person in the appropriate court. Upon receiving the written promise of the alleged violator to answer as specified in the citation, the law enforcement officer shall release the person upon personal recognizance unless there has been a violation of another provision of law.

Importantly, indication of distribution may need to be reconsidered in relation to cannabis and the changing landscape. First, the science behind cannabis subspecies is becoming much clearer. For instance, per the National Institute on Drug Abuse, THC can increase appetite and reduce nausea, while it may also decrease pain, inflammation and muscle control problems. Another cannabinoid, CBD, found in higher percentages in certain strains, may be useful in “controlling epileptic seizures, and possibility even treating mental illness and addiction.” Additionally, strains may be hybrids of subspecies with different percentages of THC and CBD, and each strain has similarly unique properties. The reality of this issue is that there are understandable and responsible reasons a person might have different strains separated in separate bags, yet could be charged with a felony, even though they fall directly in line with the new penalties mandated by State Question 788.

Historically, the element of intent involves a question of fact – in many instances the sheer quantity of the narcotic substance, presence of sale paraphernalia, individual packaging sufficient circumstantial evidence to allow presentation of the case to the jury as intent to distribute. *King v. State*, 1977 OK CR 136, *Massengale v. State*, 1976, OK CR 265, *Davis v. State* 1973 OK CR 416, *Reynolds v. State* 1973 OK CR 284 Possession of Marijuana with Intent to Distribute and how it has been prosecuted should change in the face of modern medical marijuana laws. As stated above it may be as simple as to argue 788 is more specifically on point than the case law that proceeded it and gave guidance to when the State of Oklahoma may pursue felony intent to distribute charges. *If the amount is below the ounce and a half threshold and a person can state a valid medical reason, 788 allows the State to punish with only up to a \$400 fine (misdemeanor) regardless of packaging or the presence of paraphernalia.* Even if the amount is above an ounce and a half, it seems that there are now medical explanations for why packaging or scales should be disregarded as evidence of intent to distribute. At the very least the weight (pun indicator) to be given to that evidence seems to have shifted to considerable to very little and there are now many experts who can testify to that effect to the benefit of our clients.

788 seems to do more than just allow legal medical users to possess marijuana. It also allows a change in the way we perceive people who use marijuana. As society’s viewpoints on marijuana user’s change, so to should the way that prosecutors approach users or even sellers of marijuana. The district attorneys are our elected officials and as such they should further our will. The reality is that these prosecutors have their own vested interests in seeing that business continues as

usual. They have financial interests in civil forfeiture as well as the fee's associated with both prosecution and probation. There are many other simple questions that need to be asked. Who should pay the costs of our criminal justice system. Should the burden fall largely on the defendants themselves or should society at large be responsible. Does prosecuting marijuana users or even sellers further any important society goals? If so, do those goals outweigh the cost to the general public? How do these prosecutions affect the individuals they pursue? Do we care?

When 788 was passed and even now after the Unity bill, they've created two different areas of law that govern cannabis and related offenses. In neither case did they purport to amend or repeal any of the statutory law for offenses that previously existed.

SQ 788 is at odds with Oklahoma law forbidding driving under the influence of an intoxicating substance (DUI). When HB 1441 amended these DUI statutes, liability was expanded to cover any person who has in her body any amount of a Schedule I chemical or controlled substance or its metabolite. Marijuana is still categorized Schedule 1 (both federally and in Oklahoma), and its metabolites remain detectable in a user's system long after its intoxicating effect. This means an illogical result; a sober driver could be criminally culpable for DUI. The change here by the legislature that is of note for criminal defense attorneys is relatively simple, although often overlooked, is the fact that while Marijuana remains a schedule one drug in Oklahoma, THC, or Tetrahydrocannabinol, has been changed to a Schedule 3 drug. This is sensible sense we are now a medical cannabis State and the identifiers for Schedule 1 drug mention lack of medical uses as a factor in the scheduling. This thoughtful change does not account for why Marijuana is still listed as a Schedule 1, and, critics have argued these metabolite-specific drugged-driving laws run afoul of the Constitution due to over breadth, vagueness, and other legal theories. Similar legal challenges outside of Oklahoma have been largely unsuccessful, however. Regardless of this inexplicable inconsistency, the State does not have a test in place to quantify the use of Marijuana outside of THC and its metabolites, and due to the change of scheduling of THC, it takes us out of the per se analysis that the State tends to cling to in their prosecution of DUI Drugs-marijuana. In other words, they must prove that not only is THC present, but that a driver is under the influence of it while operating a motor vehicle, and that doing so may or did render said person from safely driving or operating a motor vehicle. Interestingly enough it should also be noted that most drug tests administered by the State of Oklahoma do not test for THC itself, but rather THC-COOH. As such these tests do very little other than identify use at some point in the past 90 days. Further, the federal government amended the Controlled Dangerous Substance Act last year, and in doing so explicitly excluded hemp-based THC from Schedule 1. Most tests performed are unable to distinguish between THC from hemp versus THC from marijuana.

The gaps and inconsistencies between criminal statutes and new cannabis law create understandable confusion for patients and lawyers alike. The obvious solution to changing law is, as always, legislative action. The fact that cannabis

remains a Schedule I drug is somewhat baffling—in a class of drugs defined by statute as “high potential for abuse” and “No accepted medical use in the United States . . . “. The embarrassment of classifying cannabis as without accepted medical use in a state that has legalized medical cannabis falls squarely on the legislature. Until something changes, practitioners should argue for lenity in cases where these gaps create obvious confusion for clients. The doctrine of lenity asks the court to presume that when conflicting criminal laws create confusion, the resolution should favor the defendant and be construed strictly against the state as long as that result is not contrary to legislative intent. Further, arguments as to vagueness rely on the due process requirement that citizens need not guess as to the application of unclear laws.

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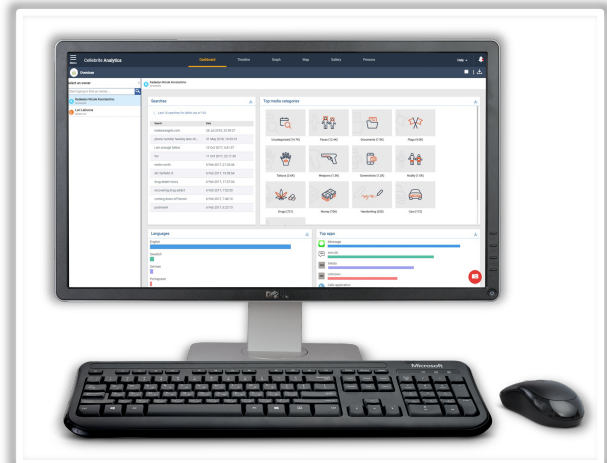
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# OCDLA

## Holiday Party

**In appreciation of another successful year,  
the OCDLA invites you for dinner, drinks,  
and holiday cheer.**

### **WHEN**

**Friday December 13, 2019**  
6:30pm – 9:00pm

### **WHERE**

**Belle Isle Brewery-50 Penn Place**  
1900 NW Expressway, OKC, OK 73118  
Party on 2<sup>nd</sup> Floor of Brewery-Park & Enter  
From West Side Parking Lot (Off Penn Ave.)

The OCDLA will be collecting new, unwrapped toys & new or used(not abused) coats for donation @ Red Andrews Christmas Dinner. Please bring your item to the party or drop off at Belle Isle Brewery anytime after December 1<sup>st</sup>. Call 405-361-0989 for more info.

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