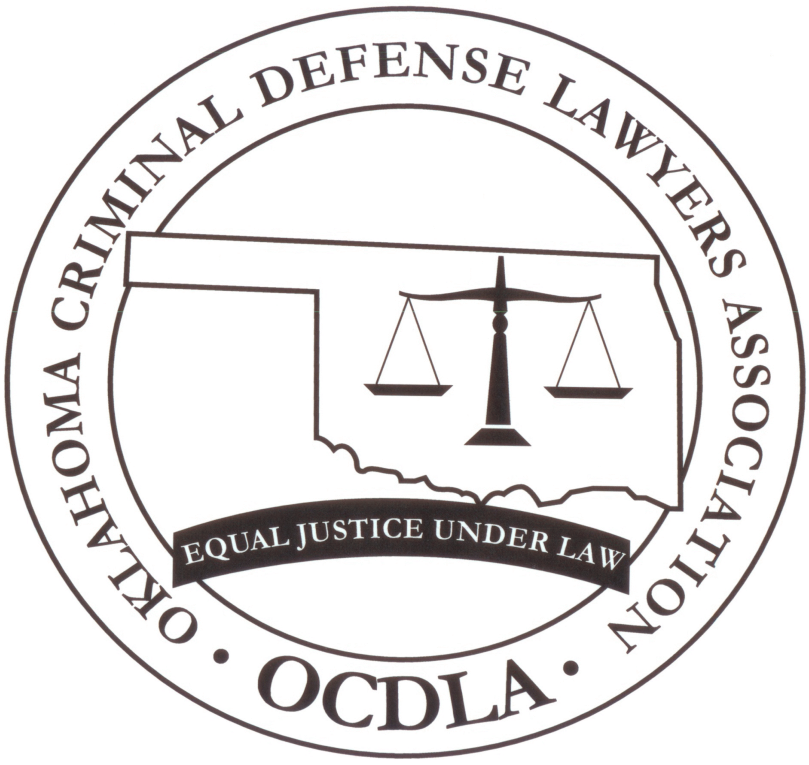
THE GAUNTLET

The Law Journal of the

OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION



SUMMER 2010

THE GAUNTLET

"take up the gauntlet: to accept a challenge to fight; to show one's defiance"

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The Oklahoma Criminal Defense Lawyers Association (OCDLA) disseminates *The Gauntlet* to approximately five hundred (500) members, law schools, law libraries and law professors. The OCDLA also sponsors/cosponsors approximately seventy (70) hours of Continuing Legal Education (CLE) each year and publishes *My Little Green Book*. *The Gauntlet* is a peer-reviewed journal. All articles are reviewed by members of the OCDLA prior to publication; however, the articles do not necessarily reflect the views of the OCDLA. Please send any comments regarding *The Gauntlet* to **James L. Hankins, Editor**, **at jameshankins@ocdw.com.**

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THE PRESIDENT'S PAGE

by

ANDREA D. MILLER

President, Oklahoma Criminal Defense Lawyers Association

Greetings All,

I sit here thinking about this edition of the President's Page in the shadow of the 2010 *Patrick A. Williams Criminal Defense Institute*. I hope that everyone enjoyed the program and the camaraderie. I think we accomplished what we hoped to accomplish when we asked Joe Robertson, Bob Ravitz, and Pete Silva to let us facilitate the seminar which was to present a reinvigorated CDI planned and executed *by* criminal defense lawyers *for* criminal defense lawyers. Shortly we will begin planning for next year's CDI and will build on all we learned this year.

The presentation of this year's CDI with its improved programming is just one piece of a bigger picture. Over the last few years the leadership of this organization has been focused on changing various aspects of the organization to keep up with the times while at the same time staying true to ideals that form our foundation. The option of an e-version of The Gauntlet and our ever evolving and improving website are two more examples of the changes we have made. In the next couple of months we will plan and begin implementation of new and improved ways of presenting *My Little Green Book* for the 2011 edition that will be available next year.

These changes are vital to our continued growth and strength as an organization. We will, in the future, continue to look at what we can update and improve in order to provide our members with the best benefits possible.

It was great to see everyone in June. I am looking forward to the same turn-out for our annual meeting and awards ceremony in November.

Keep fighting the good fight!

Andrea Miller
OCDLA President

THE OKLAHOMA LAWYERS ASSOCIATION

Your Voice at the Capitol

This is a new organization directed by former Oklahoma legislator Thad Balkman. The purpose of the OLA is to promote the interests of the legal profession, advocate positions on law-related issues, encourage public understanding of the law, and promote the effective administration of our system of justice in the criminal and civil courts.

Thad has proven to be an effective and innovative advocate for lawyers at the Capitol. If you have any interest at all in what goes on at 23rd and Lincoln, then OCDLA would encourage you to check out and join OLA. Information about the OLA, Thad, and the Board members can be found on the web at www.oklawyers.org.

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Oklahoma Court of Criminal Appeals Update

(An update of the published cases since March, 2010)

by

James L. Hankins[1]

Simpson v. State, 2010 OK CR 6 (March 5, 2010): **Death Penalty; State Cases**: Capital murder case out of Oklahoma County, the Hon. Twyla Mason Gray, is affirmed over claims relating to: 1) denial of the right to present a complete defense (PTSD); 2) sufficiency of the evidence; 3) failure to instruct on the lesser crime of Second Degree Murder; 4) showing the jury a live demonstration of an assault rifle shooting (no abuse of discretion); 5) second-stage hearsay/confrontation objections regarding letters read to the jury (error but harmless); 6) prosecutorial misconduct (multiple instances); 7) error in the jury instructions on the voluntary intoxication defense; 8) improper opinion evidence and bolstering by police officer witness (no objections; n o plain error); 9) improper photographs of the crime scene; 10) denial of adequate *voir dire* (for some weird reason, trial counsel did not "life-qualify" the jury with the *Morgan* question and the Court held that the trial court had no duty to do so *sua sponte*); 11) HAC aggravator (stricken as to one murder victim, but affirmed as to the other); 12) various IAC allegations; and 13) cumulative error.

Logsdon v. State, 2010 OK CR 7 (April 12, 2010): **1) Racketeering; 2) Restitution**: Logsdon operated a cattle investment/cattle business in Logan County, along with a "travel enterprise." He was convicted of 17 counts, including Securities Fraud, Forgery, Obtaining Money by False Pretenses and Racketeering. The Racketeering count involved the use of his existing cattle and travel business operations to conduct the alleged criminal activities. The Hon. Donald L. Worthington ran all the time consecutively which made the sentence 29-years, including 15-years on the Racketeering count. He raised 14 propositions of error on appeal. The Court affirmed everything except the Racketeering sentence and the restitution order. As to the Racketeering count, the Court found plain error where the jury was not instructed that the defendant would have to serve 50% of the sentence before becoming eligible for parole (a logical extension of *Anderson*, even though trial counsel did not request such an instruction). As to the restitution order, the State did not follow the procedures per statute, but rather relied upon the evidence at trial. The Court held that the trial evidence was not sufficient to ascertain the restitution amount with "reasonable certainty." **NOTE**: The jury was allowed to go home for the evening while they were still deliberating. This appears to contravene state statute, 22 O.S. 857, but the Court found that counsel did not object, the jury was properly admonished, and there is nothing else in the record indicating prejudice.

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[1] James L. Hankins is the Editor-in-Chief of *The Gauntlet* and is in private practice in Oklahoma City, Oklahoma. James produces the weekly newsletter *Oklahoma Criminal Defense Weekly* which is circulated via e-mail. For more information or to contact James just visit www.ocdw.com or e-mail him at jameshankins@ocdw.com.

Marshall v. State, 2010 OK CR 8 (May 13, 2010): **Confrontation/Cross-Examination; Bifurcation**: Marshall was convicted of Murder in the First Degree and Robbery (AFCF) in Tulsa County and sentenced to LWOP and Life, respectively. The Court found a Confrontation Clause error in allowing a state witness to testify regarding a DNA report that he did not prepare, but the error was harmless beyond a reasonable doubt. In addition, claims of the admission of "other crimes" and denial of a continuance are denied. A claim that a search warrant lacked probable cause was waived for all but plain error review because there was no objection at trial. Finally, the Court addressed the issue of bifurcating proceedings that involve non-capital Murder in the First Degree and other crimes enhanced by priors. The procedure is that the jury must decide guilt/innocence and punishment on the Murder charge, but guilt/innocence only on the other charges. Punishment for the other counts are then to be decided in a second stage. This is so because Murder in the First Degree cannot be enhanced by priors.

Watson v. State, 2010 OK CR 9 (June 2, 2010***Note the typo where it says "07/02/2010" in the opinion which is clearly incorrect): **Trial *in Absentia***: Crystal Lea Watson was tried and convicted at a non-jury trial of Trafficking, Unlawful Possession of CDS w/Intent to Distribute, Acquiring Proceeds from Drug Activity, and Possession of a Firearm AFCF. The Hon. Curtis DeLapp, Washington County, sentenced her to 25 years and 10 years. The only problem is that Ms. Watson was not present for any part of her trial! When his client failed to show, defense counsel informed Judge DeLapp that he had spoken to her the previous Monday when he met with her to get ready for trial and he did not know why she did not show up for trial. The judge ordered the trial to continue over objection. Watson eventually turned herself in and appeared for sentencing, telling the court that she "got scared" and left town before trial. HELD: Absent any evidence of a voluntary waiver of the right to be present at trial, and since the trial had not started when she failed to appear, the judge abused his discretion and the case is REVERSED and REMANDED FOR A NEW TRIAL. NOTE: For purposes of when a trial starts for purposes of the constitutional right to be present, it is when jury selection begins (not when the first witness is sworn). I do not get to Washington County very often but I wonder why Judge DeLapp would waste everyone's time like that when reversal was 100% guaranteed under those facts. Even more of a head-scratcher, this opinion was authored by Judge Lumpkin and the lone dissenter was Judge Charles Johnson(??), although he did not elaborate on the reasons for his dissent.

Goode v. State, 2010 OK CR 10 (June 9, 2010): **Death Penalty; State Cases**: Convictions and death sentences are AFFIRMED over claims of: 1) admissibility of a tape of a witness under the rule of completeness; 2) permitting testimony from a jailhouse snitch; 3) admission of a 911 tape (error but not prejudicial); 4) prosecutor referring to the movie *Scarface*; 5) "in life" photo of the child victim; 6) victim impact evidence; 7) various second-stage issues; 8) prosecutorial misconduct in closing arguments; 9) IAC; and 10) cumulative error.

Williams v. State, 2010 OK CR 11 (June 11, 2010): **Appellate Jurisdiction**: Odd case where, in 1978, Williams entered a guilty plea to the crime of Injuring a Minor Child with a plea deal of five years. However, Williams failed to appear at his sentencing. As fate would have it, Williams was apprehended 30 years later in 2008. He was transferred to Oklahoma from jail in Illinois and a new sentencing hearing was set for January 15, 2009. The State withdrew the five year plea offer and Williams moved to withdraw his plea, which was denied. The matter was remanded to the District

Court to make findings of fact and conclusions of law. The District Court found that the State would be prejudiced if forced to proceed to trial and that Williams had "abandoned" the plea agreement. In an opinion with what appears to me to be tortured reasoning, the Court agreed and dismissed the appeal even though Williams absconded prior to the invocation of appellate jurisdiction.

Simpson v. State, 2010 OK CR 12 (June 14, 2010): **Death Penalty; State Cases; Rehearing**: This is an Order in the capital murder case of Kendrick Antonio Simpson titled "Order Granting Rehearing But Denying Recall of Mandate." The conviction and death sentence were affirmed in Simpson v. State, 2010 OK CR 6 (March 5, 2010). Appellate counsel raised an issue regarding trial counsel's failure to "life qualify" the jury under *Morgan v. Illinois*. The Court recognized that it had not addressed the issue on direct appeal; thus, it reheard that issue but denied relief because Simpson could not establish prejudice.

OKLAHOMA COURT OF CRIMINAL APPEALS
RECENT *UNPUBLISHED OPINIONS* GRANTING RELIEF

A digest of unpublished opinions available at the Oklahoma Indigent Defense System website[1]

MARCH 2010

***Copeland, James Lee Jr. v. State*, COCA Case No.** F-2009-236 **(March 25, 2010)**

Affirmed but remanded for nunc pro tunc to strike from the J&S the following language: "the defendant is to serve 85 percent of his sentence" because attempt offense was not an 85 percent crime.

***Doyle, Leslie v. State*, COCA Case No.** S-2009-719 **(March 22, 2010)**

Enhancement of DUI based on prior DUI requires the new conviction to have occurred within the 10-year window.

***Evans, Rodney Dennis v. State*, COCA Case No.** F-2008-1066 **(March 11, 2010)**

Trial court misinstructed jury on minimum sentence. Sentence modified.

***Gillen, Sean Phillip v. State*, COCA Case No.** C-2008-1155 **(March 2, 2010)**

One count remanded to permit withdrawal of plea due to lack of factual basis for the offense.

***Knox, Kenneth Clark v. State*, COCA Case No.** F-2009-149 **(March 16, 2010)**

Trial court exceeded its authority in sentencing defendant to three years post-incarceration supervision. Offense committed before statute allowing post-incarceration supervision took effect. Remanded for nunc pro tunc to remove this provision from the J&S.

***Selders, Christy Anne v. State*, COCA Case No.** S-2009-667 **(March 15, 2010)**

District Court's order dismissing one count against the defendant was affirmed because there was insufficient link between items found in search of hotel room and this particular defendant.

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

APRIL 2010

***Fields, Derrick Andre v. State*, COCA Case No.** F-2009-466 **(April 2, 2010)**

Jury assessed punishment of 9 months, district court first imposed 5 years, all suspended; then on motion for modification, sentenced defendant to 6 months in County Jail, served on weekends. District Court can't deviate from jury assessment, this defendant not eligible under statute for serving weekends in jail. Remanded for resentencing.

MAY 2010

***Jones, Edward Q. v. State*, COCA Case No. RE-2010-0510 (May 7, 2010)**

Appellant has a statutory right to be represented by counsel at a revocation hearing. Remanded for a new hearing with Appellant to be represented by counsel or a valid waiver of counsel.

***Stephens, Charles v. State*, COCA Case No. S-2009-567 (May 11, 2010)**

Magistrate's ruling suppressing evidence was final and State did not timely appeal the ruling. District Court's reliance on that ruling to suppress additional evidence as "fruit of the poisonous tree" was not an abuse of discretion. State Appeal denied.

JUNE 2010

***Hooks, Leon Lee v. State*, COCA Case No. C-2009-900 (June 9, 2010)**

Remanded for new evidentiary hearing on motion to withdraw plea with conflict-free counsel. "Attorney was faced with the dilemma of either trying to prove his client's case that he was ineffective (in counseling the plea) or disputing his claim."

State ex rel. Redman v. $122.44, 2010 OK 19 (March 2, 2010): **Forfeiture**: Forfeiture of weapons in a house where the owner was convicted of Possession of Marijuana with Intent to Distribute is REVERSED because the State failed to show that the weapons facilitated the drug offense.

Oklahoma Criminal Defense Lawyer's Association Presents
ADVANCED FIELD SOBRIETY AND DRE SEMINAR

When: **August 27th, 2010 8:30am to 5:00 pm**

Where: **Rose State College Technical Training Center** Cost: **$295.00**

This seminar is designed to be in depth, so the *CLASS SIZE WILL BE LIMITED TO 35 PEOPLE* on a first come basis.

This course is designed to provide an advanced understanding of SFSTs and DRE. You will learn the actual training of the course the officers go through including what they are supposed to consider BEFORE giving a SFST. You will understand how to interpret a DRE Face Sheet, DRE Narrative Report, and DRE Matrix, and how a 12-Step DRE evaluation is actually given. At the close of the course, you will be able to effectively cross examine a DRE or SFST officer when they testify that your client had all the clues. Every faculty member is a NHTSA certified SFST Instructor with previous SFST teaching experience and is formally trained as a Drug Recognition Expert.

As part of the course, you will receive the DRE Manual and the SFST manual on CD.

Faculty:

Anthony Palacios, of Impaired Driving Specialists, LLC, is the former SFST State Coordinator for the State of Georgia and was one of three full time Impaired Driving Instructors for the Georgia Police Academy. He is a former IACP certified Drug Recognition Expert Instructor as well as a NHTSA DUI/SFST Instructor. Mr. Palacios has trained over 3,000 Georgia, South Carolina and Tennessee law enforcement officers and prosecutors, as well as hundreds of criminal attorneys from all over the nation in the NHTSA/IACP Impaired Driving curriculum. Additionally, Mr. Palacios has lectured at the national and state level on the topics of SFSTs and DRE.

John Hunsucker, Hunsucker DUI Defense Firm, is the co-author of Oklahoma DUI Defense, The Law and Practice (Lawyers & Judges Publishing), *The Oklahoma DUI Survival Guide*, 1st and 2nd Ed, as well as Survival Guides for Georgia, Minnesota, and Florida (Whitehall Publishing). Mr. Hunsucker is a NHTSA certified SFST Instructor and is formally trained as a Drug Recognition Expert.

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Josh D. Lee, Ward & Lee Law Firm, is a NHTSA certified SFST Instructor and is formally trained as a Drug Recognition Expert

Agenda:	8:30-8:45	Welcoming Remarks and Introduction
	8:45-1045	The Proper Administration, Interpretation, and Scoring of the SFSTs- Palacios, Hunsucker, Edge
	10:45-12:00	Common Mistakes Made by Officer's during the SFSTs- Palacios, Hunsucker, Edge
	12:00-1:00	Lunch on your own
	1:00-2:30	The 12-Step DRE Evaluation-Palacios, Hunsucker, Edge
	2:30-4:00	Understanding the DRE Face Sheet, DRE Narrative, and DRE Matrix- Palacios, Hunsucker, Edge
	4:10-5:00	Applying Case law to SFST and DRE-Lee

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Tenth Circuit Update

by

James L. Hankins[1]

United States v. Lopez-Medina, No. 08-4055 (10th Cir., February 19, 2010) (Published) (Henry, C.J., Hartz & O'Brien): **Confrontation/Cross-Examination**: Conviction for possession of meth with intent to distribute is AFFIRMED over claims of: 1) Confrontation Clause violation by the introduction of hearsay statements by a confidential informant (the defense opened the door and thus it was invited error); 2) restriction on questioning a Government witness about the nature of the witness's recent conviction; and 3) the prosecution committed prosecutorial misconduct.

United States v. Ramos-Arenas, No. 09-2165 (10th Cir., February 23, 2010) (Published) (Kelly, Baldock & Holmes): **Statutory Construction (Impersonating Officer)**: Conviction for falsely impersonating an officer or employee of the United States is affirmed over a claim of insufficiency of the evidence. Ramos-Arenas was a passenger in a car driven by his girlfriend when it was stopped for speeding. He told the officer that he was a Border Patrol Agent and the officer reduced the ticket. Ramos-Arenas had entered the United States Border Patrol Academy in 2007, but had failed to graduate. The real issue was the construction of the element that the defendant had to demand or obtain anything of value. The panel read the requirement broadly.

United States v. Washington, No. 09-3091 (10th Cir., February 23, 2010) (Published) (Tacha, Anderson & Briscoe): **1. Interstate Agreement on Detainers; 2. Possession of Firearm by Felon**: Conviction for felon in possession of a firearm is affirmed over claims based upon: 1) denial of motion to dismiss the indictment based on a violation of the Interstate Agreement on Detainers; 2) refusal of the District Court to instruct the jury on "fleeting possession"; and 3) permitting the Government to send certain prior testimony to the jury during deliberation.

United States v. Garcia, No. 08-5090 (10th Cir., February 23, 2010) (Published) (Tacha, McWilliams & Tymkovich): **1. Sufficiency of the Evidence; 2. Verdict Forms**: Drug conviction at jury trial is AFFIRMED over claims of: 1) insufficiency of the evidence; 2) confusing jury verdict form; and 3) cumulative error. NOTE: This is a case out of the Northern District (Tulsa) and if you practice there you might want to take note of the jury verdict form which the panel agreed should have been worded differently, but there was no plain error in this case.

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[1] James L. Hankins is the Editor-in-Chief of *The Gauntlet* and is in private practice in Oklahoma City, Oklahoma. James produces the weekly newsletter *Oklahoma Criminal Defense Weekly* which is circulated via e-mail. For more information or to contact James just visit www.ocdw.com or e-mail him at jameshankins@ocdw.com.

United States v. Gonzalez, No. 09-6069 (10th Cir., March 2, 2010) (Published) (Briscoe, Seymour & Lucero): **Ineffective Assistance of Counsel**: Section 2255 appeal is affirmed over claims of IAC that trial counsel failed to accept the trial court's proposed jury instruction on the defense of withdrawal from the conspiracy and for conceding guilt on the conspiracy count.

United States v. Chavez-Suarez, No. 09-1005 (10th Cir., March 8, 2010) (Published) (Briscoe, McKay & Hartz): **Federal Sentencing Guidelines; Reasonableness**: The sentence in this case was enhanced by a prior drug conviction which occurred back in 1997, and the defendant had stayed out of trouble during that time. He challenged the substantive reasonableness of the sentence on the basis the sentence of 41-months for the crime of Illegal Re-entry was unreasonably long in light of the age of the underlying drug conviction, his essentially clear conduct prior to and following that conviction, and the relatively benign nature of his attempted distribution of marijuana in comparison to the other offenses that trigger the 16-level enhancement (plus, he was only discovered to be in the United States illegally in 2008 because he complied with the law by remaining at the scene of an accident that had been caused by another driver). Although the panel felt his pain, it AFFIRMED the sentence finding no abuse of discretion, even though it adopted a Ninth Circuit case that held that the staleness of an underlying conviction may warrant a below-Guidelines sentence.

United States v. Wise, No. 08-4033 (10th Cir., March 9, 2010) (Published) (Briscoe, Ebel & Gorsuch): **Federal Sentencing Guidelines; Crime of Violence**: Sentence for Felon in Possession of a Firearm is affirmed over claims of: 1) a 2006 Utah conviction for failure to stop at the command of a police officer was not a crime of violence; and 2) since the PSR did not assign him criminal history points for his 2006 conviction, the District Court was precluded from doing so.

United States v. Fisher, No. 09-6142 (10th Cir., March 10, 2010) (Published) (Hartz, McKay & Anderson): **Searches and Seizures; Warrantless**: Fisher was convicted of Felon in Possession of a Firearm after police responded to an emergency "shots-fired" call and found him at the scene armed with a .44 revolver and ammunition. Fisher argued that the *Terry* stop was unlawful but the panel had no problem finding that it was.

United States v. Frownfelter, No. 10-4016 (10th Cir., March 11, 2010) (unpublished) (Kelly, Ebel & Gorsuch): **Bail; Federal (Pending Appeal)**: This is an unpublished order REVERSING a denial of a motion for release pending appeal under 18 U.S.C. sec. 3143(b). The underlying conviction on a plea of guilty dealt with stealing government funds when Frownfelter failed to notify the government to stop sending him checks for his special needs child when the child went to live with Frownfelter's ex-wife. The issue was whether the indictment charged a felony or a misdemeanor (which is sometimes difficult to determine in federal court). Frownfelter was sentenced to one year and one day, and sought release pending appeal. In this Order, the panel found that Frownfelter' s appeals "raises a substantial question of law that is likely to result in a reduced sentence as set forth in section 3143(b)(1)(B)." The case was remanded for the District Court to set appropriate conditions for release pending appeal.

United States v. Livesay, No. 09-5080 (10th Cir., March 16, 2010) (Published): **Insanity/Competency**: Unusual federal jury trial on gun charges where the jury found Livesay not guilty by reason of insanity, however the District Court (Judge Payne in N.D. Okla.) committed

Livesay to the custody of the Attorney General but leaving open the possibility of release at a later date. In this opinion, the panel affirmed, holding that the statute does not provide for pre-commitment conditional release. This is a good case on this issue that explains the legal steps that occur after an insanity verdict.

United States v. Fox, No. 09-5131 (10th Cir., March 22, 2010) (Published) (Briscoe, Seymour & Lucero): **Searches and Seizures; Consent**: Interesting search and seizure case where police had a house under surveillance and one of them stopped a woman who had been in the house but drove away. She stopped in the middle of the street and asked what was wrong and the Tulsa cop showed his badge and just jumped into her car and directed her to a convenience store parking lot where he subsequently questioned her and got her permission to search the house. HELD: The initial seizure of the woman in the car was unlawful and not consensual; and her subsequent consent was not "purged of the taint of her unlawful seizure."

United States v. Bergman, No. 08-1472 (10th Cir., March 25, 2010) (Published) (Holmes, Baldock & Siler, sitting by designation from the Sixth Circuit): **Right to Counsel**: This is an oddball case where Bergman was found incompetent to stand trial. At a subsequent competency hearing, Bargman was declared competent and was convicted at a bench trial, but the lawyer she had hired had never been a licensed attorney. Before sentencing, this fraud was uncovered by the District Court and new counsel was appointed for her sentencing. HELD: Because Bergman was not represented by counsel when the court declared her competent, we REMAND for the district court to consider whether it can make a retrospective competency determination. NOTE: Judge Homes penned a lengthy separate opinion in which he concurred as to the constitutional violation, but dissented on the remedy of a remand regarding restrospective competency, which he viewed as a "disfavored remedy" (he would simply remand for a new trial, assuming she is competent to participate in one.

Richie v. Workman, No. 08-5091 (10th Cir., March 25, 2010) (Published) (Tacha, Lucero & Hartz): **Habeas Corpus; Capital Habeas Cases**: In this capital habeas case out of Oklahoma, the N.D. Okla., the district court granted new-trial relief on a *Beck* claim where the jury should have been instructed on second-degree murder. In this appeal, the panel affirmed, finding that writ should issue on the Murder One charge but not the other counts.

United States v. Ferrel, No. 09-1002 (10th Cir., March 29, 2010) (Published) (Tacha, Anderson & Briscoe): **Guilty Pleas; Federal**: Guilty plea in a drug case is AFFIRMED over several Rule 11 claims involving failure to inform Ferrel of the drug-quantity element of the crime (error but not rising to the level of plain error warranting relief); misinforming Ferrel of the statutory maximum sentence (no objection and no plain error); and failing to submit to a jury the question of the quantity and purity of the meth ("A defendant has no right to plead guilty to some elements of an offense but have a jury decide others. If a defendant wants a jury to decide an element, he must go to trial.").

United States v. Torre, No. 09-3029 (10th Cir., March 30, 2010) (Published) (Murphy, McWilliams & Gorsuch): **1. Federal Sentencing Guidelines; Safety Valve; 2. Interrogations; Pre-Trial Services**: Torre was convicted by a jury of drug counts involving both meth and marijuana. On appeal, he challenged only the meth conviction and sentence. The panel AFFIRMED the conviction over his claims of error involving: 1) a jury instruction that stated that the Government did not have

to prove beyond a reasonable doubt that he knew the precise nature of all contraband substances he possessed (no error since the Government must prove simply that the Defendant knew that he possessed a controlled substance); 2) admission of a statement made by Torre to Pre-Trial Services that he used meth in 2007. Concerning the statement, the panel noted that the statement was used against Torre for impeachment, rather than direct evidence of guilt, and affirmed the use of such statements for ***impeachment*** purposes (citing other circuit court decisions). Finally, Torre made an enterprising argument regarding the "safety valve" provision to the effect that his trial testimony about the crime, in which he admitted that he knew he possessed marijuana but denied knowingly possessing meth, met the requirements of the safety valve statute. The District Court categorically rejected the idea that trial testimony alone could qualify under the statute, but the panel disagreed. The panel noted that it might be a rare case in which it would happen, but the statute simply mandates that the accused tell all he knows about the crime before the sentencing hearing and that is what Torre did. The panel remanded to the District Court in order to determine in the first instance whether the safety valve statute applied. **NOTE**: The panel's ruling on the use of statements made to Pre-Trial Services for impeachment purposes is significant. The statutes governing such statements indicate no exceptions but of course since it helps the Government convict the accused the court will approve it.

United States v. Cook, No. 08-2297 (10th Cir., April 5, 2010) (Published) (Briscoe, McWilliams & Murphy): **Interrogations/Fifth Amendment**: The Government sought interlocutory review of a suppression order. Cook was an inmate suspected in an inmate murder. He was questioned by state authorities, invoked his right to counsel, and the interview ceased. Later the FBI took over and, without knowledge of the prior invocation of the right to counsel, planted an informant in the cell to whom Cook made statements. The panel held that since there was no custodial interrogation based upon the fact that Cook did not know that the informant/cell mate was working for law enforcement, *Miranda* and its progeny do not apply, and the prior invocation makes no difference.

United States v. Begay, No. 09-2163 (10th Cir., April 12, 2010) (Published) (Briscoe, McWilliams & Tymkovich): **Superseding Indictments**: This is a shameful opinion where Begay was indicted on a single count of child sexual abuse, but the Government sought to introduce multiple instances of abuse of the same complaining witness under Rule 414. The District Court denied this as too prejudicial and, on interlocutory appeal, the Tenth Circuit affirmed. The Government then sought to get around this ruling by obtaining a superseding indictment which simply alleged as separate counts the original "bad act" evidence that the District Court deemed unfairly prejudicial. The District Court dismissed the superseding indictment with prejudice, but the panel reversed, finding an abuse of discretion. Ugh.

United States v. Martinez, No. 09-1140 (10th Cir., April 12, 2010) (Published) (Tymkovich, Alarcon, Senior Circuit Judge for the Ninth Circuit sitting by designation, & Ebel): **Federal Sentencing Guidelines; Threat of Death**: In this bank robbery case, a "threat of death" enhancement is affirmed where everyone was ordered to the ground but one woman was paralyzed with fear and stood where she was, thereafter a co-defendant thrust a hard object into her side and told her to get down. The case stands for the proposition that "threat of death" does not have to be an overt threat, only one where a reasonable person would perceive a threat of death.

United States v. McCalister, No. 09-5101 (10th Cir., April 16, 2010) (Published) (Murphy, Gorsuch & Holmes): **Rule 60**: McCalister tried to avoid some procedural hurdles by using Rule 60(b) of the Rules of Civil Procedure to challenge his sentence under section 3582(c)(2). The panel held that since Rule 60 is a civil rule, it cannot be used to challenge a section 3582(c) motion because that motion is a criminal proceeding.

United States v. Martinez, No. 09-6049 (10th Cir., April 19, 2010) (Published) (Hartz, Seymour & Gorsuch): **Federal Sentencing Guidelines; Crime of Violence**: The Armed Career Criminal Act punishes defendants who commit crimes after having been convicted previously of a "violent felony." Also, the Guidelines punish offenders who have been convicted previously of "crimes of violence." Although similar, these are not the same and the panel in this case clarifies the point by holding that the prior convictions of Martinez for Attempted Second-Degree Burglary qualify as "crimes of violence" under the Guidelines enhancement provision, but are nonetheless not "violent felonies" under the ACCA.

United States v. Batton, No. 09-8079 (10th Cir., April 23, 2010) (Published) (Lucero, Baldock & Tymkovich): **1. "Bad Acts"; 2. Experts**: Batton was convicted of sexually assaulting a 14-year-old family friend while transporting the youth to Chicago. He was sentenced to 360 months. Affirmed over his claims of: 1) admission of another, strikingly similar sexual assault of another 14-year-old boy; 2) the jury instructions regarding the prior sexual assault; and admission of expert testimony regarding the methods sex offenders use to recruit and groom victims.

United States v. Burkhart, No. 09-7091 (10th Cir., April 23, 2010) (Published) (Tacha, Kelly & Holmes): **Searches and Seizures; Search Warrants; Staleness**: In this Possession of Child Porn case, the search of a home is constitutional under the Fourth Amendment because probable cause existed to search Mr. Burkhart's home and, in any case, the good faith exception applies. The investigation started in Europe ("Europol") where Italian authorities arrested a person who ran a child porn web site. During the search of that persons home, e-mails to U.S. citizens were turned over to the FBI which led them to McAlester, Oklahoma and then to Mr. Burkhart and his cache of DVDs. Burkhart attacked the search warrants on the basis that the info rmation was stale, that there was no nexus between his home and the suspected child porn, and warrants for two different addresses undermined each other.

United States v. Steele, No. 09-7108 (10th Cir., April 26, 2010) (Tacha, Briscoe & O'Brien)(Published): **Standards of Review**: 18-month sentence for a second violation of supervised release is affirmed over procedural and substantive reasonableness claims (the Guidelines range was only 4-10 months). The reason why this case is published is because of the novel argument regarding the standard of review. When the District Court imposed sentence, it asked if there was anything further. The defense did not object to the sentence at that time. However, the Eleventh and Sixth Circuits have a rule whereby simply asking if there is anything else is inadequate to solicit objections to the sentence. The Third and Ninth Circuits have rejected such a rule. In this case, Steele presents the issue to the panel and it sided with the Third and Ninth Circuits (against the defendant) "in concluding a trial judge is not required to specifically elicit objections after announcing a sentence." Applying plain error to Steele, the panel affirmed.

United States v. Silva-Arzeta, No. 07-5140 (10th Cir., April 27, 2010) (Briscoe, Holloway & Hartz) (Published): **Searches and Seizures; Consent**: Drug/Firearm convictions are affirmed in this case over claims: 1) that Silva-Arzeta did not give consent to search his apartment; 2) that his right to Due Process was violated when a police officer questioned him in Spanish without using an interpreter; 3) and that he was entitled to discovery regarding alleged evidence tampering between his first trial (which ended in a mistrial) and the trial at which he was convicted. This opinion is noteworthy for the dissent of Judge Holloway who found no legal error in the analysis of the majority, but would nonetheless reverse under the circumstances of the case because there appeared to be evidence tampering by law enforcement between the first and second trials (the majority gave the issue short-shrift on a technicality).

United States v. Campbell, No. 09-3212 (10th Cir., May 10, 2010) (Published) (Hartz, Baldock & Gorsuch): **Searches and Seizures; Search Warrants; Good Faith**: Lengthy opinion affirming the denial of a motion to suppress where the District Court held that the search warrant was supported by probable cause, the officers who prepared the affidavit did not deliberately mislead or act with reckless indifference to the truth, and that in any event law enforcement relied in objective good faith upon the warrant. This case appears to be published because it applies an aspect of the Supreme Court's decision in *United States v. Herring*, 129 S.Ct. 697 (2009) which "appears to have described another situation in which Leon would not apply---when the warrant's flaw results from recurring or systematic police negligence." However, the Court found no such negligence in this case.

Phillips v. Workman, No. 08-7043 (10th Cir., May 12, 2010) (Published) (Henry, Murphy & O'Brien): 1. **Jury Instructions; Lesser-Included Instructions; 2. Habeas Corpus; Capital Habeas Cases**: Oklahoma death row inmate Ernest Eugene Phillips gets habeas relief on a *Beck* claim when the lower court refused to instruct on Second Degree depraved mind murder.

United States v. McConnell, No. 09-3036 (10th Cir., May 19, 2010) (Published) (Henry, Anderson & Tymkovich): **Federal Sentencing Guidelines; Crime of Violence**: In this Felon in Possession of a Firearm case, McConnell pleaded guilty. In calculating the sentence under the Guidelines, the District Court determined that his prior Kansas conviction for Fleeing and Eluding police under Kansas law constituted a "crime of violence" for sentencing purposes. Although the circuit had held a similar Utah statute to be a "crime of violence" in a prior case, McConnell argued that the Supreme Court's subsequent decision in *Chambers v. United States*, 129 S.Ct. 687 (2009) overruled circuit precedent. The panel was not persuaded and affirmed the sentence.

Bunton v. Atherton, No. 09-1152 (10th Cir., May 25, 2010) (Published) (Briscoe, Hawkins & O'Brien): **Habeas Corpus**: Federal habeas relief is denied on claims of IAC for failing to call a witness and failing to impeach a State witness on his purported vantage point when he claimed to have witnessed the murder (this claim was procedurally barred), and a cumulative error claim.

Hooks v. Workman, No. 07-6152 (10th Cir., May 25, 2010) (Published) (Lucero, Murphy & O'Brien): **Jury Instructions; *Allen* Charge**: Oklahoma capital habeas corpus case is affirmed on first-stage issues, but the death sentences are vacated based upon a claim that an *Allen* charge to the deliberating jury during the second stage coerced the jury into returning verdicts of death. NOTE: This was a 2-1 opinion with judge O'Brien penning a strong dissent.

United States v. Smith, No. 09-2040 (10th Cir., June 3, 2010) (Published) (Briscoe, McWilliams & Tymkovich): **Interrogations/Fifth Amendment; Hearsay**: Smith was convicted by a jury of sexual assault and sentenced to 60 months. He appeals based upon: 1) the District Court refused to suppress his confession (he claimed it was not voluntary because he was high on alcohol and drugs; for future reference, this argument never works); 2) admitted evidence under the excited utterance exception to the hearsay rule; 3) found the evidence sufficient; and 4) imposed special conditions of supervised release restricting his contact with minors and the disabled. AFFIRMED.

Welch v. Workman, No. 07-5061 (10th Cir., June 7, 2010) (Published) (O'Brien, Tymkovich & Holmes): **Habeas Corpus; Capital Habeas Cases**: Oklahoma capital habeas case where the denial of relief is AFFIRMED over several claims including: 1) prejudicial hearsay; 2) improper prosecutorial comments; 3) jury instructions; 4) improper victim impact testimony; 5) the trial court's improper answer to the jury question; 6) the omission of jury instructions that prevented consideration of mitigation factors; 7) aggravating circumstances not supported by sufficient evidence; 8) failure to instruct the jury that it could reject the death penalty even if it found aggravating factors; 9) ineffective assistance of counsel; and 10) cumulative error.

United States v. Mutte, No. 10-2093 (10th Cir., June 16, 2010) (unpublished) (Kelly, O'Brien & Tymkovich): **Release Pending Sentencing**: District Court's decision releasing the Defendant pending sentencing for the crime of Assault Resulting in Serious Bodily Injury is affirmed over the Government's appeal because the District Court applied properly The Mandatory Detention Act of 1990.

United States v. Sanchez, No. 09-2239 (10th Cir., June 15, 2010) (Published) (Lucero, Baldock & Tymkovich): **Searches and Seizures; Apparent/Common Authority**: Probation officers discovered 100 kgs. of marijuana during a home visit. Sanchez moved to suppress on the basis that his 15-year-old daughter, who was at home babysitting at the time, validly consented to the home inspection. The panel agreed, holding that the daughter had actual authority to consent to the home visit. NOTE: The fact that the daughter was a minor is not a bar to consent. Age is but one factor within the totality of the circumstances a court considers when determining whether the consent was voluntary. Judge Lucero concurred, but expressed "dismay" that the court applies third-party consent rules designed for adult relationships involving children: "A child is not a roommate; our third-party consent doctrine should recognize this fact." BONUS: Judge Lucero used the word "elide" (to suppress; omit; ignore, pass over).

United States v. Terrell, No. 09-3074 (10th Cir., June 15, 2010) (Published) (Tacha, Kelly & Hartz): **Federal Sentencing Guidelines; Double Counting**: Sentence modification under a double-counting theory is rejected because there is no overlap between section 2K2.1(b)(1) of the Guidelines and section 924(c); as the circuit stated: Put another way, a sentence for using, possessing, brandishing, or discharging a firearm in violation of section 924(c) does not punish the additional and separate wrong of utilizing multiple weapons as part of the underlying drug-trafficking or violent-crime offense or offenses."

United States v. Silva, No. 09-2035 (10th Cir., June 14, 2010) (Published) (Briscoe, Baldock & Hartz): **Federal Sentencing Guidelines; Crime of Violence**: Prior convictions for Burglary and Aggravated Assault under New Mexico law qualify as "violent felony" convictions under the ACCA to enhance Silva's conviction. NOTE: Judge Hartz dissented with regard to the Aggravated Assault conviction.

United States v. Corrales, No. 09-3259 (10th Cir., June 14, 2010) (Published) (Hartz, Baldock & Gorsuch): **Jury Instructions; Deliberate Ignorance**: Drug convictions are affirmed over claims regarding the District Court instructing the jury on "deliberate ignorance" (since there was sufficient evidence of actual knowledge); and a purported restriction on cross-examination of the Government witness (but there appears to be little actual restriction by the District Court.

INSTRUCTIVE DRIVER'S LICENSE REVOCATION CASE

Travis A. Rhoades v. State of Oklahoma, ex rel., Department of Public Safety, No. 107,165 (Okl.Civ.App., Div. III, February 5, 2010) (Not for Official Publication): **DUI; DPS Administrative Hearings**: This DL revocation case stemmed from Major County where Rhoades caught a second DUI and DPS revoked his license for one year without the possibility of modification. Rhoades argued that since the prior DUI suspension of his license had occurred in 1999, the later-enacted 10-year "look back" provision of 47 O.S. 6-205.1(A)(2)(a) did not apply to him; rather, DPS had only a 5-year "look back" period based upon the law in effect at the time of his prior. Rhoades made the enterprising argument that the 10-year look back statute is unconstitutional as applied to him pursuant to Okla. Const. art. 5, sec. 52, which bars revival of a remedy that had become barred by the laps of time (note: this is not the same thing as arguing an *ex post facto* violation which would have been a loser). The panel agreed! **NOTE**: The judges split 2-1 with Judge Joplin dissenting and citing authority from Iowa. This one might be headed to the Supreme Court for resolution.

UNITED STATES SUPREME COURT UPDATE

by

JAMES L. HANKINS[1]

Johnson v. United States, No. 08-6925 (U.S., March 2, 2010): **Federal Sentencing Guidelines; Crime of Violence**: Under the ACCA, the Florida felony offense of batter by "actually and intentionally touching" another person does not have "as an element the use...of physical force against the person of another." Justice Scalia penned this opinion which inserts some rationality into the this area of the law since the lower courts accepted pretty much any felony as "violent" under the ACCA.

Bloate v. United States, No. 08-728 (U.S., March 8, 2010): **Speedy Trial**: Speedy Trial Act case where the Court held that the time granted to prepare pretrial motions is not automatically excludable from the 70-day limit under the Act. Such time may be excluded only when a district court grants a continuance based on appropriate findings under the Act.

Berghuis v. Smith, No. 08-1402 (U.S., March 30, 2010): **Habeas Corpus**: Unanimous rebuke of the Sixth Circuit on a "fair cross-section" claim where an African-American defendant objected to the composition of the jury pool on the bases that African-Americans were underrepresented. The key issue is actually an esoteric habeas application of the "clearly established" federal law requirement. The Court held that prior Supreme Court precedent (*Duren v. Missouri*, 439 U.S. 357 (1979)) was not clearly established law such that would require relief for Smith.

Padilla v. Kentucky, No. 08-651 (U.S., March 31, 2010): **Guilty Pleas**: Padilla had been a lawful permanent resident of the United States for 40 years. He entered a guilty plea to a drug charge in Kentucky and then found out that he faced deportation, even though he claimed that his counsel not only failed to advise him of this consequence of the plea but also told him not to worry about it since he had been in the country for so long. HELD: Counsel must inform the client whether his plea carries a risk of deportation.

United States v. Stevens, No. 08-769 (U.S., April 20, 2010): **Statutory Construction; First Amendment**: This is the case dealing with the federal statute that criminalizes "crush videos" which depict the torture and killing of helpless animals (although this specific case dealt with videos of pitbull fights). Notably, the statute [18 U.S.C. 48] criminalizes the depiction of animal cruelty; it does not address the underlying acts harmful to animals, only the portrayals of such conduct. **HELD**: The statute is substantially overbroad and thus violates the First Amendment.

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Renico v. Lett, No. 09-338 (U.S., May 3, 2010): **Habeas Corpus; AEDPA Deference**: This is a reversal of a habeas grant by the Sixth Circuit. The state trial court judge granted a mistrial after the jury foreman announced that the jury was unable to reach a unanimous verdict. The Sixth Circuit granted relief on the basis that there was no manifest necessity to grant the mistrial at that point. In this case, the Supreme Court reversed, holding that the opinion of the Michigan Supreme Court was not an unreasonable application of federal law under the AEDPA.

United States v. Comstock, et al., No. 08-1224 (U.S., May 17, 2010): **Sexually Dangerous Person**: This is a challenge under the "Necessary and Proper Clause" to a federal statute that allows a District Court to order the civil commitment of a mentally ill, sexually dangerous prisoner beyond the date he would otherwise be released in an underlying criminal case. In this opinion, the Court held that the Clause is not violated and that the Government can do this. NOTE: Justices Thomas and Scalia dissented.

Graham v. Florida, No. 08-7412 (U.S., May 17, 2010): **Juvenile/Youthful Offender**: Graham was 16-years-old when he committed armed burglary and another crime. He was sentenced to probation, which he subsequently violated by committing other crimes, was revoked, and sentenced to life imprisonment which under Florida law actually means life since there is no parole in that state. HELD: The Eighth Amendment does not permit a state to sentence a juvenile offender to a sentence of life without parole for a non-homicide crime.

Jefferson v. Upton, No. 09-8852 (U.S., May 24, 2010) (*per curiam*): **Habeas Corpus; Capital Habeas Cases; Presumption of Correctness**: In this capital habeas case, Jefferson raised an IAC claim based upon counsel's failure to investigate a traumatic head injury that he had suffered as a child. The state courts rejected the claim after making a finding that trial counsel was advised by an expert that such investigation was unnecessary. Concerning this finding of fact, it is presumed correct unless one of the eight exceptions applies under 28 U.S.C. 2254(d)(1)-(8). The Eleventh Circuit considered itself "duty-bound" to accept this state finding, but considered only one of the exceptions when doing so. In this opinion, the Supreme Court vacated the judgment because the Eleventh Circuit did not fully consider several remaining potentially applicable exceptions.

United States v. Marcus, No. 08-1341 (U.S., May 24, 2010): **Standard of Review; Plain Error**: Marcus was indicted and convicted of engaging in forced labor and sex trafficking between January, 1999, and October, 2001. However, the statute under which he was convicted was not enacted until October, 2000; thus, the Indictment and evidence at trial (he claimed) allowed the jury to convict him on pre-enactment conduct. Unfortunately, he did not raise this claim in the District Court. On direct appeal, the Second Circuit nevertheless granted relief on plain error review, holding that even in cases of a continuing offense, retrial is necessary if there is "any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct." This case is really about the plain error standard, and in this opinion the Supreme Court vacated because the standard used by the Second Circuit failed to consider whether the error affected the substantial rights of Marcus and the fairness, integrity, or public reputation of judicial proceedings.

United States v. O'Brien, No. 08-1569 (U.S., May 24, 2010): **Federal Sentencing Guidelines**: O'Brien and a co-defendant each carried a firearm during an attempted robbery. They were charged with various counts, including using a firearm in furtherance of a crime of violence, and use of a machinegun in furtherance of that crime. However, the Government moved to dismiss the use of a machinegun count because it could not prove it, but still sought to enhance the first count with the machinegun evidence as a sentencing factor rather than an element of the offense. The lower courts rejected this attempt and the Supreme Court affirmed, holding that whether the firearm used in furtherance of the crime of violence is an element to be proved to the jury beyond a reasonable doubt and n ot a sentencing factor to be proved to a judge at sentencing.

Carr v. United States, No. 08-1301 (U.S., June 1, 2010): **Sex Offender Registration**: SORNA provisions for failing to register do **not** apply to offenders whose interstate travel occurred prior to SORNA's effective date. NOTE: The Court decided this issue on the basis of statutory construction and thus resolved the circuit split, but explicitly did not address whether the *Ex Post Facto* Clause is implicated.

Berghuis v. Thompkins, No. 08-1470 (U.S., June 1, 2010): **Interrogations/Fifth Amendment**: Police properly advised Thompkins of his *Miranda* rights and then proceeded to interrogate him over a three hour hour period during which he was silent except toward the end when he made an incriminating statement. HELD: In a phrase that just does not sound right, the Court stated: "Thompkins' silence during the interrogation did not invoke his right to remain silent"; and Thompkins waived his right to remain silent when he talked at the end of the interview.

United States v. Juvenile Male, No. 09-940 (U.S., June 7, 2010): **Sex Offender Registration**: The Ninth Circuit held that SORNA violates the *Ex Post Facto* Clause as applied to persons who were adjudicated juvenile delinquents under federal law prior to SORNA's enactment. The Court appears to be willing to answer this question, but since his federal juvenile duty to register has now expired the Court thought the case might be moot. In this opinion, the Court certified to the Montana Supreme Court a question whether the duty to register as a sex offender under state law is contingent upon the validity of the federal adjudication or is an independent requirement under state law. If it the Juvenile Male still has to register then we might get an answer to the *Ex Post Facto* question.

Barber v. Thomas, No. 09-5201 (U.S., June 7, 2010): **Good Time Credits**: This case challenges the method by which the BOP awards "good time credits" (up to 54 days a year) in federal sentences. BOP does this by awarding the 54 days of credit at the end of each year the prisoner serves and sets those days aside. When the difference between the time remaining in the sentence and the mount of accumulated credit is less than one year, BOP awards the prorated amount of credit for that final year proportional to the awards in other years. The method is very convoluted, but the opinion provides a very good walk-through and gives an example. The prisoners challenged this method, urging the Court to force BOP to rely upon the sentence actually imposed by the judge, but the Court held that BOP's method is in compliance with the statute.

Holland v. Florida, No. 09-5327 (U.S., June 14, 2010): **Habeas Corpus; Statute of Limitations/Equitable Tolling**: This is an important decision holding that the one-year statute of limitations provision under the AEDPA is subject to equitable tolling in appropriate cases. All eleven courts of appeals that had considered the question had found equitable tolling applied, but until the Supreme Court weighed in we were never really sure. A petitioner is entitled to equitable tolling if he can show: 1) diligence in pursuing his rights; and 2) some extraordinary circumstance that stood in his way of timely filing. In this case, Holland wrote his lawyer repeatedly to file a federal habeas petition but the lawyer never did so Holland filed one *pro se* but it was late. The Court held that Holland had been "reasonably diligent" but that since no court had passed on the second prong, a remand was in order for the lower courts to hash out whether extraordinary circumstances existed. NOTE: This opinion also features the highly annoying phrase "to be sure" which, along with "at the end of the day" is one of the legal writing abominations that must be banned from formal legal writing. I blame Justice Scalia for this because in his most recent book on advocacy he over used "to be sure" and indicated that there is nothing wrong with it (nor nothing wrong with ending sentences with prepositions).

Dolan v. United States, No. 09-367 (U.S., June 14, 2010): **Restitution**: This is a restitution case Dolan plead guilty to an assault that resulted in bodily injury. Restitution was part of the plea agreement; however, at the time of sentencing there was no amount yet available. The Mandatory Victims Restitution Act mandates that if an amount is not available at the time of sentencing the District Court shall set a date to determine the loss amount not to exceed 90 days after sentencing. In this case, the hearing and the amount were not held and determined until after the 90 days. Dolan argued that this divested the District Court of jurisdiction to order restitution. The Court disagreed: "A sentencing court that misses the 90-day deadline nonetheless retains the power to order restitution--at least where, as here, that court made clear prior to the deadline's expiration that it would order restitution, leaving open (for more than 90 days) only the amount."

Dillon v. United States, No. 09-6338 (U.S., June 17, 2010): **Federal Sentencing Guidelines; Retroactivity**: This case deals with the crack cocaine amendments to the Guidelines which retroactively lowered the range. This case presents the question whether *Booker* applies in these cases to allow a further variance. The Court held that it does not.

OTHER CASES OF NOTE

by

JAMES L. HANKINS[1]

NOTE: The cases below are from other jurisdictions, but I have plucked them out of the ether because they are either a winner for the defense and/or otherwise notable to practitioners of criminal law. I hope you can use some of them, but a word of caution to everyone is to make sure they are still good law, some of them are controversial in the jurisdiction or might have caught the attention of the Supreme Court .—Ed.

Doody v. Schriro, No. 06-17161 (9th Cir., February 25, 2010) (For Publication): **Interrogations/Fifth Amendment**: This monstrous *en banc* opinion (the majority opinion is 64 pages long; the whole thing is 106 pages long) involves an Arizona murder case from 1991 in which a Buddhist Temple was ransacked and nine people were killed. Arrested and convicted was seventeen-year-old Johnathan Doody, who confessed. In this habeas proceeding, he asserted that his confession was coerced because the Miranda warnings were inadequate and that his confession was not voluntary. HELD: "We agree on both counts. Specifically, we conclude that the advisement provided to Doody, which consumed twelve pages of transcript and completely obfuscated the core precepts of *Miranda*, was inadequate. We also hold that nearly thirteen hours of relentless overnight questioning of a sleep-deprived teenager by a tag team of officers overbore the will of that teen, rendering his confession involuntary."

Gentry v. Sevier, No. 08-3574 (7th Cir., February 26, 2010): **Ineffective Assistance of Counsel**: Gentry was tried in state court for burglary and theft. Evidence was obtained against him in violation of the Fourth Amendment when officers conducted a pat down of his person and a warrantless search of a wheelbarrow he was pushing. However, his trial attorney failed to file a suppression motion or move for suppression at trial. HELD: Trial counsel was ineffective for failing to pursue suppression. Denial of the writ is REVERSED.

United States v. Cha, No. 09-10147 (9th Cir., March 9, 2010) (For Publication): **Searches and Seizures; Search Warrants; Seizure of Premises**: Interesting case where police had probable cause and were allowed to seize a lounge while they obtained a warrant; but the 26 hours they seized the lounge (it was used for prostitution) before executing the warrant was unreasonable. Grant of suppression motion is AFFIRMED.

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Valdovinos v. McGrath, No. 08-15918 (9th Cir., March 10, 2010) (For Publication): **Prosecutorial Misconduct; *Brady* Issues**: Denial of federal habeas relief is REVERSED in this state murder case on the basis of the prosecution's withholding of favorable evidence in violation of *Brady*, including a photo line-up, an anonymous letter, a photograph, police documents indicating that a witness had drugs and a gun, and a statement implicating one of the State's witnesses.

United States v. Banegas, No. 08-10915 (5th Cir., March 9, 2010): **Shackling**: Drug conviction of *pro se* defendant REVERSED and remanded for a new trial where the trial court for some odd reason made him wear leg shackles during trial.

Stanley v. Schriro, No. 06-99009 (9th Cir., March 11, 2010) (For Publication): **Habeas Corpus; Capital Habeas Cases**: Capital habeas case where the panel affirmed the convictions but vacated the death penalty on the basis of IAC for failing to investigate and present mental health evidence and other mitigating factors.

People v. McKown, No. 102372 (Ill., February 19, 2010): **DUI**: In-depth treatment of the Horizontal Gaze Nystagmus test in DUI cases. On remand, the trial court held a *Frye* hearing and determined that HGN is generally accepted (that is, the limited principle that HGN may be an indicator of alcohol consumption), but some of the foundational criteria before admissibility is discussed as well.

Jones v. Cain, No. 09-30174 (5th Cir., March 15, 2010): **Confrontation/Cross-Examination**: "Finding that a state court unreasonably applied clearly established federal law by holding that no Sixth Amendment violation occurred when a jury heard recorded testimony from a deceased witness to a murder, the district court granted the defendant's petition for a writ of habeas corpus...We affirm."

United States v. Janvier, No. 08-5978 (2nd Cir., March 26, 2010): **Supervised Release**: Order revoking supervised release and imposing sentence of additional incarceration and supervised release is REVERSED because the District Court lacked jurisdiction because no warrant or summons was issued before the end of the supervised release term.

In Re: Bryan Gates, Jr., No. 09-4125 (4th Cir., March 26, 2010): **Contempt**: Attorney who was 15 minutes late to court for a sentencing hearing was held in contempt and fined $200.00. REVERSED because the District Court erroneously imposed punishment in a summary proceeding without affording Gates notice or a meaningful opportunity to respond to the charges against him.

Ray v. Boatwright, No. 08-2825 (7th Cir., April 1, 2010): **Confrontation/Cross-Examination**: Federal habeas case where the District Court denied relief, but the panel held: "Because it was error for the state court to admit the co-actors' statements through the police detective's testimony at trial, violating Ray's right of confrontation, we reverse and remand."

People v. Mothersell, No. 43 (N.Y. App., April 1, 2010): **Searches and Seizures; Search Warrants; Strip Searches**: Denial of suppression motion is reversed where Mothersell was subjected to a body cavity search pursuant to a search warrant that purportedly allowed the search of all persons present at the target residence, and he was present. An officer testified that he had no other authority to search Mothersell and that officers routinely strip-searched persons present on

property when they served "all-persons-present" warrants, including anal and genital cavities. The Court held that the affidavit did not support the issuance of an "all-persons-present" search and would be invalid even if it did because inspection of a person's anal/genital cavities requires extra justification.

Goff v. Bagley, No. 06-4669 (6th Cir., April 6, 2010): **Allocution**: Sentencing phase relief is granted in this capital habeas case on the basis of IAC appellate counsel where appellate counsel failed to raise on direct appeal that Goff was denied his right of allocution. The panel held that even though there might not be a constitutional right to allocution before sentencing, the claim here is IAC under the Sixth Amendment and there is prejudice because under Ohio law Goff would be entitled to a new sentencing hearing had this issue been raised timely on direct appeal.

United States v. Andrews, No. 09-30072 (9th Cir., April 7, 2010): **Restitution**: Restitution order is REVERSED on the basis that the District Court did not allow the defendant to call an expert witness regarding the proximate cause of the victim's injuries.

Blakemore v. State, No. 49A02-0907-CR-614 (Ind. Ct. App., April 16, 2010): **Sex Offender Registration**: Blakemore was convicted of failing to register as a sex offender, even though there was no such registration requirement when he committed the underlying offense or when he was convicted of it. HELD: "That retroactive application of the sex offender registry requirement violated the Indiana constitutional prohibition of ex post facto laws, and we accordingly must reverse." NOTE: This case was an application of the recent holding of the Indiana Supreme Court in Wallace v. State, 905 N.E.2d 371 (Ind. 2009).

United States v. Taylor, No. 09-3019 (6th Cir., April 13, 2010): **Searches and Seizures; Apparent/Common Authority**: Taylor was arrested on an outstanding warrant in an apartment rented by a woman named Arnett who was the permanent tenant. The cops suspected that Taylor had contraband in the apartment and sought permission to search from Arnett which she gave. In a spare bedroom, they found a shoe box containing a handgun and ammunition belonging to Taylor. Both the District Court and the Sixth Circuit panel held that the warrantless search of the shoe box in the apartment was unconstitutional even though Arnett had given permission to search the premises because Arnett did not have actual or common authority over the sho e box; and she also did not have apparent authority because the ownership of the shoe box was at the very least ambiguous and the officers made no inquiry to resolve the ambiguity. **NOTE**: This was a 2-1 split panel opinion where Judge Kethledge dissented on the basis that the majority had extended to shoe boxes "a degree of Fourth Amendment protection that our court has previously afforded to luggage." He viewed such an extension as "unwise."

United States v. Struckman, No. 08-30463 (9th Cir., May 4, 2010) (For Publication): **Searches and Seizures; Warrantless**: Police received a call from a neighbor reporting that the owners of a home were at work and that a white male wearing a black jacket, age unknown, had thrown a red backpack over the fence and climbed into the backyard. Officers went to the scene without a warrant and with guns drawn, one scaled the fence and another kicked open the padlocked gate leading into the backyard. It turned out that Struckman lived at the house but he was a felon and had a gun in the backpack. HELD: The warrantless search and seizure was unconstitutional.

United States v. Stever, No. 09-30004 (9th Cir., May 4, 2010) (For Publication): **Right to Present a Defense**: Stever sought to defend a drug case on the ground that the marijuana growing operation found on an isolated corner of his mother's 400-acre property was the work of one of the Mexican drug trafficking organizations that had recently infiltrated Oregon. He was prevented from doing so by two district court rulings that denied him discovery on the issue and the second declaring such a defense off-limits at trial. HELD: "We hold that Stever was denied his Sixth Amendment right to make a defense, the error was not harmless beyond a reasonable doubt, and his convictions must therefore be reversed."

United States v. Torres, No. 09-1771-cr (2nd Cir., May 5, 2010): **Sufficiency of the Evidence**: "On appeal, Torres contends that the evidence at trial was insufficient to prove beyond a reasonable doubt that he acted knowingly and with the specific intent to further a conspiracy for the distribution of narcotics. Finding merit in his contention, we reverse the judgment of conviction."

Kirk Douglas Williams v. State, No. SC08-965 (Fla., May 20, 2010): **Death Penalty**: Death sentence vacated on the basis of proportionality: "As to the imposition of the death sentence, we conclude that this crime is not one of the most aggravated and least mitigated of murders to qualify for the ultimate penalty---death. Rather than a carefully planned murder, the evidence demonstrates that this murder occurred after an argument erupted with the victim, with whom Williams lived." Remanded for the district court to impose LWOP.

People v. Gravino, No. 77 (N.Y. Ct. App., May 11, 2010): **Sex Offender Registration**: In the still-developing jurisprudence of this subject, the New York Court of Appeals holds that in a guilty plea case, sex offender registration is a collateral rather than a direct consequence of a the plea, therefore failure to inform the accused about sex offender registration does not alter the knowing and intelligent nature of the plea.

Maxwell v. Roe, No. 08-55534 (9th Cir., May 20, 2010) (For Publication): **Insanity/Competency**: Habeas relief is granted in this first-degree murder case where the state courts did not give Maxwell a hearing as to his mental competency to stand trial.

United States v. Oluwanisola, No. 08-4442-cr (2nd Cir., May 21, 2010): **Proffer Statements**: In this drug case, the defendant had made two proffer statements prior to trial but ultimately ended up going to trial during which defense counsel wanted to argue the sufficiency of the evidence. The District Court disallowed this on the basis that by doing so it would open the door for the Government to use the proffer statements per the written agreement. The panel reversed, holding that under circuit precedent sufficiency of the evidence arguments do not open the door.

Gagne v. Booker, No. 07-1970 (6th Cir., May 25, 2010): **Right to Present a Defense; Rape Shield**: Gagne and a co-defendant were convicted of forcible sexual activity with Gagne's ex-girlfriend. The case came down to a question of consent. Habeas relief is granted on the basis that Gagne was deprived of his right to present a defense when certain evidence of the sexual background of the ex-girlfriend was excluded at trial (the fact that she had three-way sex with him and another person prior to the three-way that gave rise to the charges). NOTE: This is a 2-1 opinion so it might get some more play down the line.

Lunbery v. Hornbeak, No. 08-17576 (9th Cir., May 25, 2010): **Right to Present a Defense**: In a murder case involving a confession to the crime (later repudiated at trial), federal habeas corpus relief is granted on the basis that Lunbery was denied her right to present a defense since another person admitted to being the killer.

Taylor v. Sisto, No. 09-15341 (9th Cir., May 25, 2010): **Jury Instructions**: This is one of those "Ninth Circuit cases" where the panel granted habeas relief, in a 2-1 opinion, on the basis that the state trial court told the jurors to disregard their life experiences during their jury service. It is a good case, but one that I suspect is going to show up on the Supreme Court's docket in a *per curiam* reversal.

United States v. Lorne Allan Semrau, No. 07-10074 (W.D. Tenn): **Brain Fingerprinting**: This is the written opinion of a federal magistrate after the conclusion of a *Daubert* hearing where the Government moved to preclude evidence of an fMRI (functional Magnetic Resonance Imaging) result which purported to show that Semrau was not deceptive when he denied intent to defraud. The Magistrate granted the Government's motion and excluded the test results. This is a very interesting issue and one that will surely get more play in the federal courts.

Thomas v. Allen, No. 09-12869 (11th Cir., May 27, 2010): **Death Penalty; Mental Retardation**: Grant of habeas relief on an *Atkins* (mental retardation) claim is affirmed.

Ross v. State, No. SC07-2368 (Fla., May 27, 2010): **Interrogations/Fifth Amendment**: Capital murder case reversed and remanded for a new trial on the basis of *Miranda* violations during custodial interrogation. The court stated: "Specifically, the police, over a period of several hours of custodial interrogation, deliberately delayed administration of the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), obtained inculpatory admissions, and when the warnings were finally administered midstream, minimized and downplayed the significance of the warnings and continued the prior interrogation---all of which undermined the effectiveness of *Miranda*."

State v. Bodyke, et al., No. 2008-2502 (Ohio, June 3, 2010): **Sex Offender Registration**: Instructive opinion holding that the reclassification of sex offenders by the Attorney General violates separation of powers where the offenders had been previously classified in a judicial proceeding.

United States v. Lall, No. 09-10794 (11th Cir., May 28, 2010) (Published): **Interrogations/Due Process**: In this credit card fraud case, police responded to an emergency call regarding an armed robbery at the home where the twenty-year-old Lall lived with his parents and siblings. The robbers apparently were after Lall's credit card fraud equipment. Although a detective administered *Miranda* warnings on the front lawn of Lall's house, the detective also told Lall, prior to entering the bedroom where the illegal equipment was located, that he was not going to pursue any charges against him. This representation contradicted the *Miranda* warnings previously given and was misleading. The court held that Lall did not make a 'voluntary, knowing and intelligent waiver of his privilege against self-incrimination and his right to counsel"; AND also made the **second confession** at the police station involuntary as well. Concerning the **suppression of physical evidence** related to the statements, the panel made a critical distinction: suppression of physical evidence is not mandated by a *Miranda* violation; but "the rule is otherwise" for evidence derived from an involuntary confession obtained in violation of the Due Process Clause.

PADILLA v. KENTUCKY: SUPREME COURT CREATES THE CRIMMIGRATION DEFENSE LAWYER

by

Barry L. Derryberry[1]

Last March the Supreme Court ruled that criminal defense attorneys must advise their non-citizen immigrant clients about the deportation consequences of conviction. The advice may take either of two forms. If deportation is clearly required by statute, counsel must accurately advise the client about the consequence of a guilty plea. If the law is not straightforward, counsel must advise the client that conviction may carry a risk of adverse immigration consequences. Whether ICE (Immigration and Customs Enforcement) will detect the defendant's deportation standing and pursue removal is not mentioned in *Padilla* and appears to lie outside the advice counsel must provide.[2]

Padilla provides a glimpse into the deportation consequences of drug convictions. Padilla, a native of Honduras, pled guilty to transportation of marijuana in Kentucky state court. For 40 years he had been a lawful permanent resident of the U.S. Defense counsel advised that since he had been in the U.S. for so long, he did not have to worry.

However, most drug convictions other than possession of 30 grams or less of marijuana spell trouble.[3] Padilla's conviction made deportation "virtually mandatory," and sure enough, ICE went after him. The Supreme Court had no empathy for the state court criminal defense attorney's lack of expertise on federal immigration law: "Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which

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[2] Modern immigration statutes have been modified to replace "deportation" with "removal." They are synonymous.

[3] Title 8 U.S.C. §1227(a)(2)(B)(i), as depicted in *Padilla*, provides: "Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance..., other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." The Defending Immigrants Partnership advises that as an alternative to arranging a plea to less than 30 grams, counsel should strive to keep the amount of marijuana out of the record. *See* http://defendingimmigrants.org/, Powerpoint Presentation. Courts have held that a second conviction for possessing under 30 grams of marijuana can trigger deportation if the offense is punishable as a felony under state or federal law. *United States v. Garcia-Olmedo*, 112 F.3d 399 (9th Cir. 1997); *Amaral v. I.N.S.*, 977 F.2d 33 (1st Cir. 1992).

addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." Failure to meet this duty to advise "fell below an objective standard of reasonableness," fulfilling the first prong of the ineffective assistance of counsel standard.[4] *See Strickland v. Washington*, 104 S.Ct. 2052 (1984).

If deportation consequences are not "succinct and straightforward," then "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Padilla*, 130 S.Ct. at 1483

Justice Alito's concurrence makes the case that rendering deportation advice is problematic because the analysis is "often quite complex." Most deportation predicates are not mentioned in the immigration laws, and fall under broad categories of "aggravated felonies" or "crimes involving moral turpitude." A third category is controlled substance offenses, which *Padilla* addresses.

The Immigrant Defense Project maintains an online Immigration Consequences of Convictions Summary Checklist. *See* http://www.immigrantdefenseproject.org/ (it is attached to this paper as Appendix A). While helpful, it lacks statutory citations. It also lacks case law which, as Justice Alito's opinion makes clear, is an important component of the analysis.

A better reference may be the ABA Criminal Lawyer's Guide to Immigration Law, relied on by Justice Alito and available for purchase at www.abanet.org. *See also What Constitutes "Aggravated Felony" for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of Immigration and Nationality Act*, 168 ALR Fed 575. Naturally, an immigration lawyer is the ideal resource.

Bear in mind that inadmissibility is a whole other problem. *See* Summary Checklist (Appendix A). A conviction that does not trigger deportation may prevent a green-carded resident ("lawful permanent resident") from re-entering the U.S. after traveling abroad. Additionally, as is common with federal law, deferred dispositions are deemed convictions although they patently aren't. *See Padilla,* 130 S.Ct. at 1490, n.2 (Alito, J., concurring).

While the focus of *Padilla* is advice about potential deportation, the case indicates that counsel's obligations extend to structuring plea agreements that soften the deportation consequences for immigrant clients. "[A] criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood

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[4] Appellate attorneys note: regarding the prejudice prong of *Strickland*, the Court commented that "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 130 S.Ct. at 197. This is a new twist on the established prejudice standard, which asks whether "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *See Hill v. Lockhart*, 106 S. Ct. 366 (1985).

of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequences." 130 S. Ct. at 1486.

This blending of criminal and immigration objectives converts the practitioner into a "crimmigration" lawyer who must be aware of a number of ways in which structuring a plea bargain could impact the client's future. For instance, clients often return to the U.S. after deportation. Those who return after an "aggravated felony" conviction are liable for drastically increased federal sentences. The offense of unlawful re-entry after conviction for, among many others, burglary punished by imprisonment of one year or more, statutory rape, or drug possession with intent to distribute, gets a 16 level boost in the federal Sentencing Guidelines. *See* USSG §2L1.1 in Guidelines at www.ussc.gov This gets a sentencing range of 57-71 months.

If the pre-deportation conviction is a non-aggravated felony, the range would be 12-18 months. Additionally, in the wonderland of federal criminal law, misdemeanors can magically become felonies. See *United States v. Graham*, 169 F.3d 787 (3d Cir. 1999) (misdemeanor conviction for petit larceny in New York was an aggravated felony for deportation purposes).

PADILLA IN THE COURTROOM

Padilla notes that many states already require judges to advise defendants of possible immigration consequences of conviction. *See Padilla*, 130 S.Ct. at 1486 n.15. *Padilla* could serve to encourage judges to ask defense attorneys what immigration consequences they ascertained and what advice they rendered to their client.[5]

Oklahoma case law already has an example of a court going far beyond this point and interrogating defendants about their legal status in the country. In *Ochoa v. Bass*, 2008 OK CR 11, 181 P.3d 727, questions asked just before sentencing unearthed probable cause to believe that the defendants were unlawfully in the U.S. As a result, they were detained while ICE was notified, albeit they had been sentenced to probation. ICE did not initiate federal proceedings. The OCCA granted a writ of habeas corpus, finding that the defendants could only be held 48 hours on an ICE hold. The defendants were illegally imprisoned for four months.

Ochoa held that the sentencing court had legal authority to question about legal status "on the facts of the cases presented to us[.]" The authority rested, not on new Oklahoma immigration law as the sentencing court supposed, but on the basis that legal status could be relevant to sentencing.

For instance, if the defendant "is an undocumented alien and is released on probation into the community, he becomes subject to deportation. That contingency would obviously weigh heavily

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[5] In federal court, attorneys will find that the players are often hip to the client's status. Interviews that clients must undergo with probation officers in order to seek pretrial release or for preparation of presentence investigation reports make it difficult to protect information pertaining to legal status.

on a sentencing judge's decision about whether a defendant should be released on probation." 181 P.3d at 731.

No mention is made of *Kabali v. State*, 1981 OK CR 139, 636 P.2d 369, in which the OCCA held: "the refusal of the trial court to consider granting a defendant a deferred or suspended sentence, solely because he is a foreign national, is a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution, and invidiously discriminates between an alien and a citizen." *Cf.*, *Ochoa*, 181 P.3d at 731 n.8. If a factor cannot be relied on when considering probation or deferment, arguably the court should not conduct an inquisition about that factor.

Having said in *Ochoa* that the court could inquire about legal status prior to sentencing, the OCCA cautioned that "a trial judge probably ought not to ask such questions." One concern raised but not ruled on by the OCCA is questioning in regard to what may be commission of a federal crime, which could invoke *Miranda v. Arizona*.

The OCCA also tiptoed around the issue of legal status questioning prior to entry of the guilty plea, declining to address whether *Miranda* rights should be recited, but cautioning that the defendant should be warned that he will be subject to such questioning in the case of a negotiated plea. To this writer, most of this discussion misses the point.

The Fifth Amendment grants a right to resist self-incrimination. Since the potential federal criminal violations referenced in *Ochoa* are separate from the criminal case before the inquisitional state judge, it is clear that the right is not waived by the admission of guilt.[6]

Moreover, the Supreme Court has held that the self-incrimination protection continues to exist *after guilty plea* with regard to matters beyond "the narrow inquiry at the plea colloquy[.]" *Mitchell v. United States*, 119 S.Ct. 1307 (1999); *see also State v. Rosas-Hernandez*, 42 P.3d 1177 (Ariz. Ct. App. Div. 1 2002) (Fifth Amendment right of one who had pled guilty was maintained through time to file for state post-conviction relief).

Ochoa added that "a judge who becomes aware of a possible violation of a law which is not the object of the case before him should refer that matter to the appropriate authorities." 181 P.3d at 733. Given the district court's duty to report immigration law violations, as well as the real possibility that others in the courtroom, such as the D.A., may be likely to also report, *defense attorneys should not disclose possible violations of immigration laws.* Disclosing that the client is in the country illegally does nothing to help the client. The ethical duty of loyalty to the client would be violated. So would the attorney-client privilege to the extent that information gained from the client is disclosed, because such a damaging disclosure would not be "impliedly authorized in order to carry out the representation[.]" Okla. Rules of Professional Conduct, Rule 1.6(a).

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[6] If the client has possessed a firearm, disclosure that he is unlawfully in the U.S. or is present on a non-immigrant visa is directly incriminating, because firearm possession by such a person is a federal crime punishable by up to ten years. *See* 18 U.S.C. §922(g)(5).

An intention by defense counsel to make a record on deportation advice given to the client in order to address *Padilla* concerns is, in this writer's view, misguided. *Padilla* did not impose any requirement on the plea-taking judge or address what should be reflected in the record. In an analogous area of attorney-client advice, the Supreme Court has held that "counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either: (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal); or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

In making this determination, courts must take into account all the information counsel knew or should have known." *Roe v. Flores-Ortega*, 120 S.Ct. 1029, 1036 (2000). The details of such advice are not routinely put in the record. Instead, it generally suffices to have counsel state that the client has been advised about his right to appeal. Similarly, counsel should go no further on the record than to say that the client has been advised of any immigration consequences of conviction to the best of counsel's ability. As with advice on the right to appeal (where the client does not want to appeal), it is prudent to record the specific advice given and maintain it in the case file for purposes of any later hearing on ineffective counsel.

This discussion of quite different cases (*Padilla* and *Ochoa*) encompasses different scenarios: presence in the country illegally, presence even more illegally (re-entry after prior deportation), and presence in the country legally, while facing deportation or future inability to re-enter as a result of conviction.

In all of them, the client's ICE situation may be adversely impacted by conviction or entry of a guilty plea. Disclosure of the legality of the client's presence may be the critical event that leads to the adverse outcome. Clients and attorneys alike should resist efforts by prosecutors and judges to win damaging disclosures under the pretense of identifying pertinent sentencing facts per *Ochoa*, or complying with *Padilla* (to make the case appeal-proof). *Padilla* is about ineffective assistance of counsel, and as with countless other duties effective counsel owes the client, it is not standard procedure to make a court record every step of the way.

Appendix A

Immigrant Defense Project

Immigration Consequences of Convictions Summary Checklist*

GROUNDS OF DEPORTABILITY (apply to lawfully admitted noncitizens, such as a lawful permanent resident (LPR)—greencard holder)

Aggravated Felony Conviction

➢ *Consequences* (in addition to deportability):
- Ineligibility for most waivers of removal
- Ineligibility for voluntary departure
- Permanent inadmissibility after removal
- Subjects client to up to 20 years of prison if s/he illegally reenters the US after removal

➢ *Crimes covered* (possibly even if not a felony):
- Murder
- Rape
- Sexual Abuse of a Minor
- Drug Trafficking (may include, whether felony or misdemeanor, any sale or intent to sell offense, second or subsequent possession offense, or possession of more than 5 grams of crack or any amount of flunitrazepam)
- Firearm Trafficking
- Crime of Violence + 1 year sentence**
- Theft or Burglary + 1 year sentence**
- Fraud or tax evasion + loss to victim(s) > $10,000
- Prostitution business offenses
- Commercial bribery, counterfeiting, or forgery + 1 year sentence**
- Obstruction of justice or perjury + 1 year sentence**
- Certain bail-jumping offenses
- Various federal offenses and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.)
- Attempt or conspiracy to commit any of the above

Controlled Substance Conviction

➢ EXCEPT a single offense of simple possession of 30g or less of marijuana

Crime Involving Moral Turpitude (CIMT) Conviction

➢ For crimes included, see Grounds of Inadmissibility
➢ One CIMT committed within 5 years of admission into the US and for which a sentence of 1 year or longer may be imposed (e.g., in New York, may be a Class A misdemeanor)
➢ Two CIMTs committed at any time "not arising out of a single scheme"

Firearm or Destructive Device Conviction

Domestic Violence Conviction or other domestic offenses, including:

➢ Crime of Domestic Violence
➢ Stalking
➢ Child abuse, neglect or abandonment
➢ Violation of order of protection (criminal or civil)

GROUNDS OF INADMISSIBILITY (apply to noncitizens seeking lawful admission, including LPRs who travel out of US)

Conviction or *admitted commission* of a **Controlled Substance Offense**, or DHS has reason to believe individual is a drug trafficker

➢ No 212(h) waiver possibility (except for a single offense of simple possession of 30g or less of marijuana)

Conviction or *admitted commission* of a **Crime Involving Moral Turpitude** (CIMT)

➢ Crimes in this category cover a broad range of crimes, including:
- Crimes with an *intent to steal or defraud* as an element (e.g., theft, forgery)
- Crimes in which *bodily harm* is caused or threatened by an intentional act, or *serious bodily harm* is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes)
- Most sex offenses

➢ *Petty Offense Exception*—for one CIMT if the client has no other CIMT + the offense is not punishable > 1 year (e.g., in New York can't be a felony) + does not involve a prison sentence > 6 months

Prostitution and Commercialized Vice

Conviction of **2 or more offenses** of any type + **aggregate prison sentence of 5 years**

INELIGIBILITY FOR US CITIZENSHIP

Conviction or admission of the following crimes bars a finding of good moral character for up to 5 years:

➢ **Controlled Substance Offense** (unless single offense of simple possession of 30g or less of marijuana)
➢ **Crime Involving Moral Turpitude** (unless single CIMT and the offense is not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months)
➢ **2 or more offenses** of any type + **aggregate prison sentence of 5 years**
➢ **2 gambling offenses**
➢ **Confinement** to a jail for an aggregate period of 180 days

Aggravated felony conviction on or after Nov. 29, 1990 (and murder conviction at any time) *permanently* bars a finding of moral character and thus citizenship eligibility

CONVICTION DEFINED

A formal judgment of guilt of the noncitizen entered by a court or, if adjudication of guilt has been withheld, where:

(i) a judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, AND

(ii) the judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty to be imposed.

THUS:

➢ A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated)
➢ A deferred adjudication disposition without a guilty plea (e.g., NY ACD) is NOT a conviction
➢ A youthful offender adjudication (e.g., NY YO) is NOT a conviction

INELIGIBILITY FOR LPR CANCELLATION OF REMOVAL

➢ Aggravated felony conviction
➢ Offense covered under Ground of Inadmissibility when committed within the first 7 years of residence after admission in the United States

INELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BASED ON THREAT TO LIFE OR FREEDOM IN COUNTRY OF REMOVAL

"Particularly serious crimes" make noncitizens ineligible for asylum and withholding. They include:

➢ Aggravated felonies
- All will bar asylum
- Aggravated felonies with aggregate 5 year sentence of imprisonment will bar withholding
- Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding

➢ Other serious crimes—no statutory definition (for sample case law determination, see Appendix F)

*For the most up-to-date version of this checklist, please visit us at **http://www.immigrantdefenseproject.org**.

See reverse ➤

**The 1-year requirement refers to an actual or suspended prison sentence of 1 year or more. [A New York straight probation or conditional discharge without a suspended sentence is not considered a part of the prison sentence for immigration purposes.]

[12/06]

OCDLA COMMITTEE ASSIGNMENTS FOR 2010

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3. Andrea Miller

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3. Barry Derryberry
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4. Jill Webb
5. James Hankins

Contact Jack Pointer (405) 232-5959 if you desire to participate on one of the OCDLA committees!

Voice Stress Analyzers: The Psychological Wedge

by

Michael C. Murphy[1] and Michael R. Wilds[2]

Truth verification is not unique to modern man. The ancient Chinese attempted to ascertain truthfulness by placing a pinch of dry rice in a suspect's mouth, observing that the truthful individual would produce saliva, thus resulting in "wet" rice. During the 18th century, individuals were deemed to be truthful if they could walk across red hot stones without burning their feet. Similarly, the pilgrims would throw fully clothed individuals into the water to determine truthfulness.[3]

More recently, modern man has sought to detect deception by measuring blood pressure, heartbeat rates, galvanic skin response, and even brain images. Our culture is enamored with truth verification, and even the popular television show, "Lie to Me," is built upon the premise that involuntary human responses occur when an individual tells a lie.[4]

Since 1924, the most common device used by law enforcement to detect deception has been the polygraph. This instrument detects and records physiological functions of the body by utilizing an arm cuff to measure blood pressure, bands on the chest and diaphragm to measure respiratory rate, and electrodes on the fingertips to measure changes in electrical response of skin (a measure of changes in sweat gland activity). The technology is based on the postulate that volitional deception causes involuntary, physiological responses in the deceitful individual's autonomic nervous system that are capable of detection by the polygraph machine.

However, the polygraph's status as the premiere deception device is being challenged by a newer technology, the voice stress analyzer (VSA). VSAs are reported to be used by more than 1,800 law enforcement agencies in the United States. This equates to usage by 10% of the 17,976 state and local law enforcement agencies recognized by the U.S. Department of Justice.[5]

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[1] Michael C. Murphy directs undergraduate business programs and interns at Langston University-Tulsa. He is licensed to practice law in Oklahoma and Illinois.

[2] Michael R. Wilds is Director of Northeastern State University's Crime and Justice Institute. He is also a former board member for the OCDLA.

[3] Nida Elley, *To Tell The Truth*, Psychology Today (June 13, 2006), http://www.psychologytoday.com/articles/200109/tell-the-truth (*last visited* 3/5/2010).

[4] "Lie to Me" is a popular television drama series inspired by the scientific discoveries of a real-life psychologist who can read clues embedded in the human face, body and voice to expose the truth and lies in criminal investigations, http://www.fox.com/lietome (*last visited* 3/5/2010).

[5] Stu Smith, *Law Enforcement Employment Grew Between 2000-2004*, Bureau of Justice Statistics, Justice Department Study (June 28, 2007), www.ojp.usdoj.gov/bjs (*last visited* 3/5/2010).

One VSA manufacturer, NITV, reports sales of its Computer Voice Stress Analyzer (CVSA) to law enforcement agencies in forty-four (44) of fifty (50) states in the U.S.[6]

Unlike the polygraph, VSA measures psychophysical frequency modulations in the human voice. The hypothesis behind the VSA technology is that a deceptive subject's autonomic or involuntary nervous system will cause an audible increase in micro tremors of the voice. These inaudible tremors, in the range of 8 to 14 Hz, are detected through computer amplification and recorded into voice graphs called "voice-grams."[7]

Similar to polygraph examiners, trained VSA analysts analyze the voice-gram charts in an attempt to determine the percentage of stress (micro tremors) detected in the suspect's voice. Accordingly, both the VSA and the polygraph results are extremely subjective, and interpretation depends upon the training and degree of expertise of the examiner.

The most obvious benefit of the VSA over the polygraph is the ability to use the device without the suspect's knowledge. In contrast to the wiring necessary for a polygraph, the VSA only needs a wireless microphone to detect an input signal. In addition to stealth, VSA proponents report that the amount of time needed to train an examiner and the amount of time to administer a VSA exam is considerably less than that required for a polygraph.[8]

ACCURACY OF DETECTION DEVICES

Similar to placing dry rice in a suspect's mouth, neither the polygraph nor the voice stress analyzer is infallible in terms of detecting deception. Most experts concur that the accuracy of a polygraph is not more than 65%.[9] Considering the fact that this yields a 35% error rate, the results are generally deemed to be unreliable for determining guilt or innocence of an individual. Even the 65% accuracy rate is dubious. In 2003, the National Academy of Sciences concluded that most of the polygraph research studies were unreliable and unscientific.[10]

False negatives and false positives can be deleterious to society. A 2005 study by the British Psychological Society revealed that polygraph examiners inaccurately classified up to 47% of

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[6] The NITV® is the manufacturer and sole source for the patented Computer Voice Stress Analyzer® II. The CVSA® II is used by 1,800 local, state and federal agencies, as well as by US Military Special Operations and Intelligence units. National Institute for Truth Verification, http://www.cvsa1.com (last visited 3/5/10).

[7] Research is not yet conclusive as to whether such micro tremors actually exist in muscles associated with speech. John Palmatier, *The Computerized Voice Stress Analyzer*, American Bar Association, General Practice and Solo firm Division Magazine, http://www.abanet.org/genpractice/magazine/199/jun/palmatr.html (*last visited* 3/1/10).

[8] Donald J. Krapohol, *Voice Stess Devices and the Detection of Lies*, Policy Review, International Chiefs of Police National Law Enforcement Policy Center (2010), http://www.scpolygraph.com/documents/33.html (*last visited* 3/5/2010).

[9] *Id.* at footnote 3 this document.

[10] Matt Clarke, *Use of Questionable "Lie Detectors" by Law Enforcement Expands Nationwide,* Prison Legal News (2010), https://www.prisonlegalnews.org (*last visited* 3/5/2010).

innocent subjects as guilty.[11] Such high rates of false positives are alarming, considering that the falsely implicated never recover their financial outlay nor clear their tainted name once acquitted of the crime. In contrast, false negatives indicating innocence allow undetected guilty perpetrators to remain free to commit more crimes. The famed Green River Killer Gary Ridgeway and CIA double agent Aldrich Ames both passed polygraph tests, and remained free to roam the streets and resume their criminal activities.[12]

The accuracy rates of the VSA are no better than those of the polygraph.[13] A National Institute of Justice (NIJ) field study tested the two most popular VSA programs used by law enforcement, finding each to be at best 50% accurate in detecting deception. One study, conducted under the auspices of the Oklahoma Department of Mental Health, involved 319 recent arrestees who had been detained in the Oklahoma County jail for less than 24 hours. Researchers questioned the arrestees about their possible use within the previous 72 hours of cocaine, heroin, PCP, and methamphetamines.

Additionally, they were asked about marijuana usage over the past 30 days. Upon completion of his interview, each respondent/arrestee provided a urine sample for drug analysis. Urinalysis results were then utilized to determine the veracity of the arrestee's prior responses regarding drug use. Once truth or deception was determined, the outcome was compared to VSA output/conclusions to measure VSA effectiveness at detecting deception or truth. In conclusion, the researchers proclaimed, "Our findings suggest that these VSA software programs were no better in determining deception about recent drug use among arrestees than flipping a coin."[14]

Researchers at the University of Florida also conducted a double-blind experiment testing voice stress analyzers in 2006, and found a false-positive rate of 41-49% in field tests. The false negative rate was 62-81%. This test, conducted by the U.S. Department of Defense, confirmed that almost half of all innocent suspects would erroneously be implicated as guilty. Similarly, 62-81% of guilty suspects would be found to be innocent by VSA field results. In response, the Department of Defense quickly commented that it does not sanction the use of voice stress technology because it "has yet to be validated by research and replicable scientific studies."[15]

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[11] *Id.*

[12] Steve Silberman, *Don't Think About Lying, How Brain Scans Are Reinventing the Science of Lie Detection*, Wired Magazine, http//www.wired.com/wired/archive/14.01/lying.html (*last visited* 3/5/2010).

[13] V.L. Cestaro (1996) tested the CVSA system and concluded that CVSA did detect micro tremors in speech, but could not detect deception at rates any different than chance, whereas polygraph results were significantly greater than chance. Cestaro, V.L., *A Comparison Between Decision Accuracy Rates Obtained Using the Polygraph Instrument and the Computer Voice Stress Analyzer (CVSA) in the Absence of Jeopardy*, Polygraph Magazine, 25:2 (1996), pp. 117 – 127.

[14] Kelly R. Damphousse, Ph.D., *Voice Stress Analysis: Only 15 Percent of Lies About Drug Use Detected in Field,* National Institute of Justice (March 17, 2008), http://www.ojp.usdoj.gov/nij/journals/259/voice-stress-analysis.htm (*last visited* 3/5/2010).

[15] *Id.* at footnote 10 this document.

BENEFITS OF DECEPTION

Despite the high error rates revealed by double-blind field tests, some law enforcement and government installations continue to purchase and advocate use of polygraphs and VSA in detecting crime.[16] When questioned, officers either deny the error rates of the deception devices or claim that the devices are invaluable in deterring suspects from lying. This deterrent effect, called the "bogus pipeline effect," is a form of deception practiced by law enforcement whereby the suspect is convinced that the officers are using a reliable form of lie detection.

The hypothesis behind the bogus pipeline effect is that when a suspect is connected to a bogus (or fake) device that purportedly provides questioners with a direct "pipeline" into the mind and thoughts of the subject, the suspect will be more forthcoming with information, even information that is detrimental to the individual. Suspects attached to the bogus device perceive deception to be futile, and are more likely to reveal incriminating information.[17]

The bogus pipeline effect has been validated by numerous research studies, and experiential events confirm its potency.[18] In 2007, the London Burroughs of Harrow reported positive results in deterring welfare fraud when their fraud investigators requested voice stress analysis for insurance claims, thus resulting in a savings of $828,000 in only ten months. Of the nearly 1,500 claimants requested to submit to voice stress analysis, nearly a third changed their mind about filing their claim.[19]

Earlier in 2003, the New Mexico Department of Insurance experienced similar behavior when they requested insured claimants to submit to a Layered Voice Analysis. As summarized by New Mexico's Superintendent of Insurance Eric Serna, "The tool is helpful as a deterrent…. When individuals call us to file a claim, we'll sometimes suggest that they come in for an interview and allow us to record their voices. We explain that we're using a new technology to help determine whether or not they are being truthful. Sometimes, they'll decide not to file a claim."[20]

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[16] Military interrogators reportedly used voice stress analysis systems in Iraq and at Guantanamo Bay military prison. According to Robert Rogalski, Deputy Undersecretary of Defense for Counterintelligence, VSA results were not reliable, and its use was discontinued. *See*, *Innocent Until Proved Guilty*, ABC News (March 30, 2006), http://abcnews.go.com/Primetime/story?id=1786421&page=1 (*last visited* 3/5/2010).

[17] E.E. Jones and H. Sigall, The Bogus Pipeline: A New Paradigm for Measuring Affect and Attitude,. Psychological Bulletin 76(5) (1971), pp. 349-363.

[18] A meta-analytical review of thirty-one (31) studies confirmed the validity of the bogus pipeline effect. N.J. Roese and D.W. Jamieson, *Twenty Years of Bogus Pipeline Research: A Critical Review of the Meta-Analysis,* Psychological Bulletin, 114(2): pp. 363-375 (1993).

[19] *Improving Lie Detectors*, The Economist (May 8, 2008), http://www.economist.com/science/displaystory.cfm?story_id=11326202 (*last visited* 3/5/2010).

[20] Michaels Fickes, *What is the Truth*?, Government Security (Dec. 1, 2004), http://govtsecurity.com/mag/truth (*last visited* 3/5/2010).

If VSA is merely an investigative tool that deters deception, why spend the $10,000-$20,000? Why not merely put a bicycle helmet on the suspect's head, run wires from the helmet to a laptop computer with preprogrammed answers, and tell the suspect he has failed the test. The answer is simple: "It's the fear of the machine that gives it its greatest power."[21] Subjects believe the VSA works and, consequently, make confessions.[22] The VSA is a more convincing investigative prop than a copy machine rigged with a bunch of wires.

But, the downside to the bogus pipeline effect is false confessions that result in wrongful convictions. In 2006, ABC News "Primetime" reported that Michael Crowe confessed to killing his 12-year old sister after intense interrogation tactics and being told that he had failed a VSA. Although Crowe confessed to the killing, he was subsequently exonerated by DNA evidence.[23] The reason for the confession was the bogus pipeline effect. As stated by Crowe, "I started to think that, you know, maybe the machine's right, especially when they added on top of it that the machine was getting my subconscious feelings on it, that I could be lying and not even know it…. I didn't want to go to prison, and I just wanted to be out of that room."[24]

Whether created by the bogus pipeline effect or questionable custodial interrogation tactics, there is a correlation between "false confessions" and wrongful convictions. In the 250 DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty in 25% of the wrongful conviction cases according to the Innocence Project. When faced with deception by law enforcement and questionable interrogation tactics, suspects question their own memory, reach a state of helplessness and confess to crimes that they did not commit.

LEGALITY OF LIES AND DECEPTION

The U.S. Supreme Court has held that law enforcement must inform an individual of Miranda Rights upon custodial interrogation; however, no such protection is afforded when law enforcement utilizes lies or deception. Officers may inform a suspect that he failed the lie detector when, in fact, he did not fail the test or the test results were inconclusive. Somewhat ironically, law enforcement officers are allowed to use deception and lie in the quest for truth.[25]

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[21] Christina Lewis, *Is the Lie Detector Telling the Truth?*, Court TV News (2010), http://www.courttv.com/trials/tuite/lieetector.html (*last visited* 3/5/2010).

[22] *Id*. at footnote 14 this document.

[23] Crowe's family sued the company that manufactured the VSA, the National Institute for Truth Verification, and settled for an undisclosed amount. *See Crowe v. City of Escondido, U.S.D.C.* (S.D. Cal), Case No. 3:99-cv-00241-JM-RBB.

[24] *Id.*

[25] *Chavez v. Martinez*, 538 U.S. 760 (2003).

As opined by the U.S. Supreme Court in *United States v. Russell*, the use of deception and lies by law enforcement to obtain a confession is legal as long as the methods are not deemed unconscionable.[26]

Even though polygraph results are not admissible in most state courts or in federal courts unless introduced by stipulation, law enforcement officers continue to employ the devices. But, the United States Supreme Court did open the door to admission of polygraph results in *Daubert,* ruling that the judge is to act as a "gatekeeper" for the admission of expert witness testimony.[27] As such, state courts have discretion as to whether polygraph results are admitted in criminal courts.

However, in 1998 the United States Supreme Court blocked the door to admission of polygraph results in federal courts, finding that there is "no consensus that polygraph evidence is reliable" and noting the sharp difference between the "opinion" advanced by a polygraph technician and the "objective evidence" produced by "fingerprints, ballistics, or DNA."[28] Subsequently, the Court limited admissibility, holding that any court can exclude polygraph evidence per se, evaluating it on a case by case basis.[29]

Many states, such as Oklahoma, have ruled that "in light of the potential unreliability of polygraph examinations at this time, we feel that in all future cases the introduction into evidence of polygraph examination results for any purpose, even if admitted upon stipulation of all parties, will be error."[30]

Similar to polygraphs, VSAs have neither proven reliable nor have they been generally accepted by the scientific community. The documented accuracy rate appears to be no better than flipping a coin. Accordingly, VSAs are not likely to survive a *Daubert* or *Frye* analysis.

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[26] *United States v. Russell*, 411 U.S. 423, 434 (1973).

[27] *Daubert v. Merrill Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).

[28] Most experts place the polygraph's accuracy no greater than 65%, not much better than flipping a coin. The National Research Council concluded that "the device was too unreliable to be used for personnel screening at national labs." *See Are Brain Scans the Ultimate Truth in Detection*?, American College of Radiology, http://www.acr.org/SecondaryMainMenuCategories/NewsPublications/FeaturedCategories/CurrentHealthCareNews/More/BrainScanstheUltimateinTruthDetection.aspx (*last visited* 3/5/2010).

[29] *United States v. Scheffer*, 523 U.S. 303 (1998).

[30] n *Leaks v. State*, the Court observed that "the figures show the [polygraph] tests prove correct in their diagnosis in about 75% of the instances used. In other words it is pointed out therein such factors as mental tension, nervousness, psychological abnormalities, mental abnormalities, and unresponsiveness in a lying or guilty subject account for 25% of the failures in the use of the lie detector. Hence the lie detector is not judicially recognized and it is error to project its results into a criminal case. It is therefore obvious that the prosecutor must meticulously guard against its injection into the state's case. . . . But, extreme caution should be invoked to exclude error of this kind in a capital case, where the life or death of the defendant is involved...." *Fulton v. State*, 1975 OK CR 200, 541 P.2d 871 (*quoting Leaks v. State*, 95 OK CR 326, 245 P.2d 764, 771).

CONCLUSION

VSA devices lack scientific validity. However, they may be used as an investigative tool that creates a psychological wedge to open the mind and the lips of the accused. Skilled interrogators can use them as a placebo that triggers the bogus pipeline effect. Despite deception, they may be efficacious screening and investigative tools.

Law enforcement officers would not have to resort to deception and lies if they had a strong case. Scientifically, polygraphs and VSA are inherently unreliable and yield accuracy rates no better than flipping a coin. The true value of such devices is intricately linked with the examiner's interrogation skills.

Yet, most states allow use of such deception devices during custodial interrogations. And, they are currently used to determine whether sex offenders are complying with the terms of probation. In fact, forty-one states require sex offenders to submit to polygraph exams upon leaving prison. The general rationale for using such statistically unreliable devices is they provide an incentive to tell the truth.

But, in light of false confessions generated by overzealous law enforcement officers, has the government's use of deception and lies during custodial interrogations outlived its usefulness? Is the use of such modern day Ouija boards justified? At what point does the need to obtain a confession outweigh the need to protect the innocent?

Legal Lessons from Cecil Cooper and Baseball
(a short essay)

by

Cindy Brown Danner[1]

The headline in the newspaper grabbed my attention:

CECIL COOPER ADJUSTS TO LIFE OUT OF BASEBALL

I'm not much of a baseball fan, and I knew nothing of Cecil Cooper's apparently illustrious 41-year career in and around in Major League Baseball. Cecil Cooper played in the World Series for the 1975 Boston Red Sox and the 1982 Milwaukee Brewers. He also coached on the Houston 2005 Houston Astros World Series team. This was all news to me.

Yet, the name was instantly recognizable. The lore of "Cecil Cooper" is related to a legal lesson I learned many years ago, in an appellate victory obtained by my boss at the time.

I had just gone to work for the Appellate Public Defender office (now the Oklahoma Indigent Defense System). I quickly learned that writing briefs seeking relief for those convicted of criminal offenses required more than just reviewing transcripts, identifying legal issues, and putting them on paper. Real appellate advocacy is a craft, an art form, a creative endeavor of persuasion with facts and legal principles.

Gloyd McCoy, my boss at the time, and an avid baseball fan, represented a *different* Cecil Cooper in appealing a conviction and sentence received in an Oklahoma court. The Cecil Cooper that Gloyd represented was convicted as a habitual offender, based on documents showing that man named "Cecil Cooper" had been convicted of various offenses in the courts of another state.

In arguing that the prosecution failed to prove that the "Cecil Cooper" on trial was the same Cecil Cooper named in the out-of-state court documents, Gloyd drew upon his love and knowledge of another subject–baseball. As Gloyd noted in the brief:

> The name "Cecil Cooper" is not a totally uncommon name. For instance, a baseball player named Cecil Cooper had a long career in the major leagues playing for the Boston Red Sox and the Milwaukee Brewers. *See* THE BASEBALL ENCYCLOPEDIA (7th ed. 1988) at 859-60; *see Smith v. State*, 695 P.2d 1360 (Okl.Cr. 1985) (name "James E. Smith" was too common to support a prima facie case based on documents alone); *see also Charach*, *supra*, at 56 n. 113 for an analysis of the commonality of names.

The published opinion that followed, *Cooper v. State*, 1991 OK CR 54, 810 P.2d 1303, did

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[1] Cindy Brown Danner is the Chief of the General Appeals Division at OIDS.

not credit the example, but the Court granted a re-sentencing proceeding. The Court held that in proving prior convictions, "in addition to identity of a name, there must be other facts and circumstances for the jury to consider in reaching their verdict." *Cooper*, ¶ 8.

Twenty years after that brief was written, Cecil Cooper's case is indelibly inked on my brain. I remember and have cited the "baseball player case" often. Sometimes "real life" examples make arguments persuasive (and certainly more memorable)!

INSTRUCTIVE CASE ON FLIGHT

Ralph Taitingfong v. State, No. F-2009-332 (Okl.Cr., April 30, 2010) (unpublished): **Jury Instructions; Flight**: Taitingfong was convicted by a jury in Tulsa County of Shooting with Intent to Kill, two counts of Feloniously Pointing a Firearm, and Possession of a Firearm AFCF. He was sentenced to Life on the principal charge by the Hon. P. Thomas Thornbrugh. The Court affirmed everything, even though it found error in a flight instruction that was deemed harmless. The Court stated: "We find in Proposition II that the trial court erred in instructing the jury on flight where there was no evidence that Taitingfong offered an explanation for his actions in leaving the scene...We note that even where self-defense is claimed, a flight instruction is only appropriate where evidence is presented that the defendant attempted to explain his flight."

The Useful, Fun, Interesting and Bizarre at Your Fingertips on the Internet

by

Wyndi Hobbs[1]

The following is a list of some of the websites we use to search for information and people. Most of these sites are free, or offer limited search options for free. Hopefully, I will be able to provide a few of these in each edition of *The Gauntlet*. If anyone else has some suggested sites, please send them to me at wyndi@oids.state.ok.us. Also, if you are looking for a particular type of information and are having problems locating the information, please contact me at your convenience and I'll be glad to share any information or suggestions I can.

OBVIOUS AND USEFUL

- **Google** (www.google.com) and **Yahoo** (www.yahoo.com)
  - Two of the biggest search engines available. A great place to begin when searching for anything from specific reported case law, people, news, science, forensics, etc.
- **Oklahoma State Court Network** (www.oscn.net) and **On Demand Court Records** (www.odcr.com)
  - With these two sites, Oklahoma is really much better off than most states when it comes to finding case information. Both offer free searches.
  - OSCN also offers decent and free legal research abilities.
- **Oklahoma Indigent Defense System** (www.ok.gov/OIDS)
  - Web site includes unpublished opinions since 1999.

PEOPLE

- **Facebook** (www.Facebook.com) and **My Space** (www.myspace.com)
  - Social Networking sites that allow a user to search by name. Can be useful for finding married women who have changed last name, as many women will also list their maiden name. Also, it's easy and somewhat disturbing to discover how much people share about themselves in a public forum.

---

[1] Wyndi was admitted to the Bar in 1993. She currently works for OIDS.

- **Social Security Death Index** (http://ssdi.rootsweb.ancestry.com/)

  - Basic and advance search feature that assists when trying to locate people.

- **The Ultimates** (www.theultimates.com)

  - A White Pages, Yellow Pages and E-mail finder all in one. It is a free site, but will offer various pay options after providing some basic information.

- **OSU People Search (https://app.it.okstate.edu/directory/) OU People Search** (www.ou.edu/ousearch.html)

  - If you are looking for an OSU or OU Student, these sites are wonderful for locating information. I'm sure other universities offer similar options, but these are the two biggest in our state and merely examples of what you can get.

- **Department of Corrections Offender Information** (http://docapp065p.doc.state.ok.us/servlet/page?_pageid=395&_dad=portal30&_schema=PORTAL30)

  - Some of the people you may be looking for can be found in the various state and privately run facilities managed by DOC.

- **DOC Employee Email** (http://infotech.doc.state.ok.us/emaildir/email_list.aspx)

  - This offers Email addresses for DOC employees by facility or division.

USEFUL

- **Tulsa World Databases** (www.tulsaworld.com/webextra/content/2008/databases/)

  - This is a fairly new offering by the Tulsa World. It contains information regarding a broad range including: Teacher Salaries (good way to locate individual teachers as it is searchable by name); City of Tulsa, Tulsa County, State of Oklahoma, and Oklahoma Higher Education payroll information (again searchable by individual name); Tulsa County Land and Property Records (free on this site, but a pay service through the County Clerk's office); State Restaurant Inspections; and much more.

- **Oklahoma Maps** (http://www.ok.gov/genthree/maps.php)

  - A nice little site that will allow you to search for specific local Oklahoma resources (post offices, libraries, hospitals, schools, police stations, etc.) by zip code or county.

- **Phone Number and Customer Service Shortcuts** (http://gethuman.com)

- A way to get real people when you need assistance.

- **RX List Pill Identification Tool** (www.rxlist.com/pill-identification-tool/article.htm)
  - Allows you to look up pills by imprint code, color, and/or shape.

- **Medscape** (http://www.medscape.com/)
  - Excellent site to research general medical information.

FUN

- **Virtual Bubble Wrap**
  (www.sealedair.com/products/protective/bubble/funstuff/game/default.htm)
  - Sometimes you just gotta pop some bubbles.

- **Everyday Mysteries from the Library of Congress**
  (http://www.loc.gov/rr/scitech/mysteries/)
  - Questions presented to the Library of Congress and answered by librarians in various areas.

- **Everyrule** (http://www.everyrule.com/)
  - A site that provides every rule for about every game you can imagine.

THE DEFINITION OF CHUTZPAH: This story is about a jury trial in The Bronx where the accused was on trial for credit card fraud. Apparently one of the jurors in the case pilfered a credit card from another juror–during the trial–and proceeded to buy things with it during breaks in the trial, even bringing bags of goods purchased with the stolen card into the trial. This criminal mastermind, 20-year-old Jennifer Mercado, was caught when she was captured on video cameras at stores where the jurors went on breaks. Scary to think that these people decide issues of freedom for other citizens.

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Name _____

Address _____

City _____ State _____ Zip _____

OBA # _____ County _____

Telephone (_____) _____ Fax (_____) _____

E-mail _____

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

Credit Card Number _____ Exp. Date _____

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

Signature

_____