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OKLAHOMA CRIMINAL DEFENSE WEEKLY

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[James L. Hankins](#),
Publisher

(with special thanks to Mark Hoover, OIDS, for contributing regularly)

“I have lived my life, and I have fought my battles, not against the weak and the poor—anybody can do that—but against power, against injustice, against oppression, and I have asked no odds from them, and I never shall.”---Clarence S. Darrow, *Attorney for the Damned* 491, 497 (Arthur Weinberg ed. 1957).

OKLAHOMA

[Felipe Perez, Sr., v. State](#), 2023 OK CR 1 (January 19, 2023): **Evidence (Propensity; Rebuttal)**: Perez was convicted by jury in Kiowa County (the Hon. Clark E. Huey, presiding) of Lewd Acts. The Court affirmed the conviction over a claim that the more “lurid and shocking” propensity evidence rendered the trial unfair, but found error in allowing the State to present propensity evidence in rebuttal after Perez had limited his testimony on direct solely to the charged offense (remanded for resentencing). The trial court had ruled that the rebuttal evidence was inadmissible because the State had not provided notice within the required 15 days. NOTE: Presiding Judge Rowland Specially Concurring, joined by Judge Lewis, to explain in more detail the interplay between rebuttal and character evidence. Judge Musseman Concurred in part, dissented in part, finding

that the evidence affected the finding of guilt as well as the sentence and would reverse for a new trial.

[Aaron Charles Buck v. State](#), 2023 OK CR 2 (January 19, 2023): **Presumption of Innocence; IAC (failure to object); Indians; Jury Instructions (Lewd Acts)**: Buck was convicted by jury in Pottawatomie County of Lewd Acts (the Hon. Tracy McDaniel, presiding). The Court affirmed over claims relating to: 1) denial of presumption of innocence when the trial court referred to the complaining witnesses as “the victims” (although misstatements, did not rise to plain error or structural error); 2) IAC for trial counsel failing to object to the trial court describing the complaining witnesses as “victims”; 3) failure to instruct regarding the element of under 12 for punishment purposes (error but harmless); 4) excessive sentence; and 5) a *McGirt* claim where Buck was an Indian, but the trial court held that the Kickapoo Reservation had been disestablished.

[Matthew Bryan Buttery v. State](#), No. RE-2021-1042 (Okla. Cr., January 19, 2023) (unpublished): **Suspended Sentences**: In this revocation case out of McIntosh County, the Court found error when the trial court ran the revoked sentence consecutively to another sentence. NOTE: Judge Lumpkin and Presiding Judge Rowland concurred in result.

[Misol Duran v. State](#), No. F-2021-356 (Okla. Cr., January 19, 2023) (unpublished): **Informations**: Duran was convicted in Tulsa County (the Hon. Tracy Priddy, presiding) of Rape in the First Degree. The Court affirmed over several claims, including the fact that even though Duran was charged with rape by force or fear, the evidence and the State’s theory of prosecution was rape by use of a drug. The State presented no evidence of force or fear. NOTE: Presiding Judge Rowland Specially Concurred, noting that Duran was correct that the State proceeded at trial under a theory of prosecution different from that charged in the Information, but that since Oklahoma is a notice pleading state, Duran was on notice and there was no prejudice. Judge Lumpkin concurred in results, concluding that a confrontation claim should have been reviewed for abuse of discretion rather than *de novo*.

[United States v. Justin Lee Smith](#), No. 22-CR-230-GKF (N.D. Okla., January 9, 2023): **Search & Seizure (Search Warrants; Delay)**: District Judge Gregory K. Frizzell granted a motion to suppress based on a 296-day delay in the Government obtaining a search warrant.

[United States v. Roger Bryant Harbin](#), No. 21-8038 (10th Cir., December 27, 2022) (Published) (Bacharach, Murphy & Carson): **Federal Sentencing Guidelines (Career Offender)**: Harbin pled guilty to various drug and firearm offenses. On appeal he challenged his sentence enhancement under USSG 4B1.1 (Career Offender based on prior drug offenses). The panel held that there was no plain error.

[Timothy Sumpter v. State of Kansas](#), No. 20-3186 (10th Cir., December 28, 2022) (Published) (Holmes, C.J., Kelly & Matheson): **IAC**: Sumpter was convicted of several kidnapping/sexual assault offenses in Kansas. He filed a 2254, which was granted in part on the basis of IAC. Here, the panel reversed this grant of relief, concluding that the decision of the state court was not unreasonable because there was no prejudice based on the facts which supported the aggravated kidnapping conviction.

UNITED STATES SUPREME COURT

“Only Supreme Court justices and schoolchildren are expected to and do take the entire summer off.” –*Chief Justice John Roberts (statement made while he served as a lawyer in the Reagan Administration).*

No new cases.

OTHER CASES OF NOTE

[United States v. Jacob Boone Wright](#), No. 21-40849 (5th Cir., January 18, 2023): **Search and Seizure (Seized)**: Wright as “seized” when the officer activated her emergency lights and almost simultaneously ordered him to stay in his car, which he continued exiting but stood beside. Because the district court concluded that the seizure occurred later, the case remanded.

[United States v. John Steven Stark](#), No. 22-40557 (5th Cir., January 9, 2023): **Restitution**: The issue was whether the Government can seize an inmates stimulus check for restitution. It can.

VICTORIES

BJ BAKER, Tahlequah, secured a not guilty verdict in a Lewd Molestation case in Cherokee County. Good work, BJ!

HEARSAY

CELL PHONES: Story from The Marshall Project about inmates using cell phones to, as Mark Hoover put it, MacGyver their way through life in prison.

METH: A collaborative in Tulsa is trying to deal with solutions to the meth problem.

NEW JUDGES: New judges in Comanche County have been sworn. Also, new judges in **Creek County** were sworn.

TREATMENT: An attorney in Lincoln County arrested on drug charges has been ordered to inpatient treatment.

JAIL DEATHS: Two officials at the Cleveland County Sheriff's Office have resigned after two female inmates have died within a week.

CAMERAS: DOC needs to upgrade its security camera system.

CLOSING: A DOC Community Corrections Center in OKC is closing.

COMMENT: OKC attorney Ed Blau comments on the murder case in Cyril.

CHARGED: A former deputy in Tulsa County has been charged with stealing more than \$1,000.00 in ammunition from the Sheriff's Office.

APPOINTED: Calvin Prince has been appointed to the Pardon and Parole Board by Gov. Stitt. **Retired Judge Richard Miller** has been appointed to the Pardon and Parole Board by the OCCA.

TIME: Attorney General Gentner Drummond issued a press release asking for additional time between executions.

TIME II: How long between the date of purchase of a firearm to the date of use in a crime? In Oklahoma, it is 6.64 years.

MOVE: Griffin Memorial Hospital may move out of Norman.

THEFTS: Moore police warn of a rise in “distraction-style” thefts.

FOUND: A deputy in Canadian County discovered 40 kilos of cocaine in a hidden compartment of a vehicle (note the “branding” on the packaging).

RETIRED: The Grady County Sheriff is retiring.

PROFILE: Media profile of McClain County Court Clerk Kristel Gray.

HELP: A program called “Justice Link” is trying to help indigent defendants in Tulsa County navigate the criminal justice system.

DOC: DOC is desperate for medical professionals.

GEAR: OKC PD has new less-than-lethal gear.

TROUBLE: Tulsa attorney Jeff Krigel is in trouble with the law.

HOMICIDES: There were 74 confirmed homicides in OKC last year.

OVERPAID: The Oklahoma County Jail Trust accidentally overpaid the IRS more than \$600,000.00 and is trying to give it back.

CHARGED: A Cotton County Commissioner has been charged with embezzlement for utilizing county employees to build his campaign signs on county time.

PHOTO: Photo of the lawyers in the Orders Division of the OCCA.

WACKY CRIME

KANSAS: A man proceeding *pro se* in Kansas claims that his threat to a U.S. Representative was actually from God.

STILLWATER: A cow wandered up to the Olive Garden in Stillwater, according to Mark Hoover, it heard about the soup & salad special (see story).

URGES: A Lincoln County man set many fires because of “uncontrollable urges.”

ROBBERY: A woman tried to rob a liquor store...but locked inside it.

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