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OKLAHOMA CRIMINAL DEFENSE WEEKLY

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[James L. Hankins,](#)
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(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

No notable cases this week.

TENTH CIRCUIT

[United States v. Jody Rufino Martinez](#), No. 22-2034 (10th Cir., February 16, 2024) (Published) (Holmes, C.J., Moritz & Eid): **VICAR; Speedy Trial; Evidence (Unfair Prejudice); Judicial Bias**: Martinez was accused of being a member of the SNM prison gang and convicted of VICAR, conspiracy, and unlawful possession of firearm. In this sprawling 93-page opinion, the panel affirmed over

claims related to: 1) denial of speedy trial; 2) admission of unduly prejudicial evidence; and 3) denial of motion for new trial after evidence emerged that he was involved in threats to kill the presiding judge.

[United States v. Jonathan Alexander Morales-Lopez](#), No. 22-4074 (10th Cir., February 9, 2024) (Published) (Carson, Baldock & Ebel): **Possession (Firearm by Drug User)**: The district court granted a motion to dismiss based on a facial challenge to the constitutionality of the statute for vagueness and as an-applied challenge. The panel reversed on both grounds.

[United States v. Kenneth Devereaux](#), No. 22-1203 (10th Cir., February 6, 2024) (Published) (Carson, Baldock & Ebel): **Federal Sentencing Guidelines (Crime of Violence)**: Sentence for felon-in-possession is vacated where the district court erred in finding a prior conviction for assault resulting in serious bodily injury a “crime of violence.”

[United States v. Steven M. Hohn](#), No. 22-3009 (10th Cir., January 31, 2024) (Published) (*en banc*): **Appellate Practice**: This is an unusual order by the *en banc* Court deciding to hear a case that had already been briefed and assigned to a panel by the *en banc* court in the first instance. The issue deals with Government intrusion into attorney-client communications and whether this is structural error. **NOTE**: Judges Rossman and Bacharach dissented, concluding that there is no compelling reason to deviate from the normal rules of appellate practice.

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. Robert Zenas Whipple, III](#), No. 23-5126 (6th Cir., February 8, 2024): **Search and Seizure (Subpoenas)**: Whipple appealed denial of his several motions to suppress where police issued a subpoena to Wal-Mart for his purchasing history. The panel affirmed, and also rejected a claim regarding police analysis of the contents of his cell phone. Police did not get a search warrant, they just issued a subpoena. I included this case because it contains a good discussion of just how open all of our purchases and business activities are and how little privacy we really have in the digital age.

[United States v. Shawn Malmquist](#), No. 22-50872 (5th Cir., February 6, 2024): **Prosecutorial Misconduct (Breach Plea Agreement)**: Sentence in guilty plea to drug charges is vacated and remanded for resentencing where the Government breached its plea bargain obligation to recommend a three-level reduction for acceptance of responsibility.

[United States v. Miguel Angel Ortega](#), No. 23-50100 (5th Cir., February 15, 2024): **Federal Sentencing Guidelines (Obstruction of Justice)**: In this child porn case, a two-level enhancement for obstruction of justice based on Ortega's conversation with his wife about a letter of support that she was writing for his sentencing proceeding is vacated.

[United States v. James J. Kelly, Jr.](#), No. 23-1481 (6th Cir., February 8, 2024): **Bank Secrecy Act.**: Kelly was convicted of violating the reporting requirements of the Bank Secrecy Act which requires individuals in the United States to file a Report of Foreign Bank and Financial Accounts (FBAR) for foreign bank accounts over \$10,000.00. The panel affirmed, but the opinion contains a good discussion of this aspect of the BSA in case this is an issue for any of your clients.

VICTORIES

CORRECTION: Last week I attributed a victory story out of Cleveland County to attorney Troy Cowin. I have since been informed that Troy had entered his appearance early, but took employment elsewhere and that the case was actually tried by **ARLAN BULLARD**, Deputy Chief of the OIDS Cleveland, Garvin and McClain Counties Satellite Office. Sorry about that, and congratulations on a job well done to Arlan!

TESS MARTIN, OIDS, tried a case in front of Judge Tupper in Cleveland County where she faced a lot of challenges from unsound judicial rulings to rude

prosecutors. She delivered a closing in this Murder II case which resulted in a guilty verdict, but the minimum of 10 years and less than half the minimum on a second count. This case was punctuated by the gratitude of the client to his lawyer regarding her representation. Beating-the-rec results are always good, but gaining the respect of the client as a fighter is something special. Nice work, Tess!

DAN POND, Swain Law Group, Norman, secured a demurrer in front of Judge Misak in Garvin County in a case where the client was charged with possession of drug proceeds (cash). The State used the “shake test” where police shake seized money onto paper and then swab for the presence of drugs. Dan has a *Daubert* motion pending in another court on this subject and also materials indicating that a large percentage of cash in general circulation has drugs on it. Great job, Dan!

RON WILLIAMS, OIDS Lawton, got a nice win in Comanche County where the headline says that “convicted killer not guilty to being accessory to murder.” That sounds like a good result. Great job, Ron!

HEARSAY

BONDS: A news report indicated that more first degree murder suspects are having bonds set in Tulsa County than in the past.

CHECOTAH: Residents of Checotah want to retain the ability to choose their own Chief of Police.

UNSAFE: An Oklahoma-based railway has been prohibited from operating trains because of threats to safety.

COMPLAINTS: The newly created Community Public Safety Advisory Board will review complaints against OKC police officers.

STING: 62(!) men have been arrested in a prostitution sting in OKC.

DOC: Former DOC employees have told Rep. Justin Humphrey what it is really like working inside prisons.

DISCUSSION: A constitutional scholar discussed McGirt/Castro-Huerta/Brackeen/ICWA.

DRUGS: Story about pregnant women being charged with drug crimes. Defense attorney Thomas Griesedieck quoted.

COSTS: Sometimes a Public Defender's appointment is not quite "at no cost" (long but interesting story).

RIOT: Some inmates at the Custer County Jail tried to start a riot last month.

SPEAKER: Former DOC Director Justin Jones will speak at the Coalition to Abolish the Death Penalty dinner in May.

WARRANTS: Oklahoma County will host its first "Warrant Clearing" event of the year.

FIRE: A Tishomingo police officer has been fired after arrest.

TOUGH CASE: Winston Connor represents an attorney in a difficult position.

WACKY CRIME

No wackiness noted this week.

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