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OKLAHOMA CRIMINAL DEFENSE WEEKLY

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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

[State v. Fuller](#), 2024 OK CR 4 (March 7, 2024): **Indians; State Appeals:** In this State appeal out of Ottawa County, the State charged Fuller with DUI and associated charges. Fuller moved to dismiss under *McGirt* because he is Indian and the offenses occurred on the Wyandotte Reservation. Special Judge Becky R. Baird granted the motion. The Hon. Rebecca Gore affirmed, and in this appeal the Court affirmed, holding that the Wyandotte Reservation was established and has never been disestablished. NOTE: Judge Lumpkin dissented, characterizing the Stat appeal as an advisory opinion since the State abandoned other claims and pressed only the claim of whether the Wyandotte Nation reservation is intact. Judge Lewis concurred in part, dissented in part, agreeing that the Wyandotte Reservation has never been disestablished, but accused the majority of using dicta

in Castro-Huerta to charter a “counterrevolution in Indian law.” Judge Hudson concurred specially.

[State v. Bradford](#), 2024 OK CR 3 (March 7, 2024): **Self-Defense; State Appeals:** In this State appeal, Bradford was charged in Bryan County with Murder in the Second Degree and alternatives in the shooting death of his half-brother. At PH, he filed a motion for immunity based on self-defense. The Hon. Abby C. Rogers granted the motion. The State appealed. In this opinion, the Court affirmed, finding that the district court followed the correct procedures and did not abuse its discretion. **NOTE:** Judge Lumpkin concurred specially, joined by Judge Hudson, quibbling with the term “immunity” which is something that only the executive branch can provide when it really should be just a finding that the homicide was justified.

[In Re Adoption of the 2024 Revisions to Oklahoma Uniform Jury Instructions—Criminal \(Second Edition\)](#), 2024 OK CR 6 (March 6, 2024): The Court updated some more of the jury instructions.

TENTH CIRCUIT

[United States v. Paul Curtis Pemberton](#), No. 22-7028 (10th Cir., March 4, 2024) (Published) (Tymkovich, Briscoe & Moritz) (E.D. Okla., Hon. John F. Heil, III): **Pro Se Representation; Indians; Search and Seizure (Jurisdiction):** Pemberton was a *McGirt* refugee who was initially prosecuted in state court but then prosecuted in federal court and convicted of murder. On appeal, he asserted error in the denial of a motion to quash the fruits of the illegal (without jurisdiction) investigation of state agents; and also in the district court refusing his request for self-representation and allowing counsel to represent him at sentencing.

[United States v. Whitney McBride and Odyssey International, Inc.](#), No. 22-4119 & 22-4122 (10th Cir., March 5, 2024) (Published) (Eid, Seymour & Kelly): **Waiver (Appellate Issues); Invited Error:** McBride was convicted of fraud and conspiracy in a government bidding scheme and argued that *Ciminelli v. United States*, decided subsequently to her convictions, affected several counts. However, the panel refused to address the merits because of several procedural stumbling blocks related to invited error (counsel requested the jury instructions she now attacks; also note that there is an exception to invited error when a litigant relies on settle law that subsequently changed), failure to follow FRAP 28 which requires appellants to set forth the standard of review in the brief, and failing to plead plain

error. NOTE: Judge Eid concurred in part/concurred in the judgment, stating that the majority discussion of invited error was unnecessary. Note also that this opinion is a brutal takedown of appellate counsel and features some appellate traps of which you need to be aware when drafting briefs in the Circuit.

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).

[Trump v. Anderson, et al.](#), No. 23-719 (U.S., March 4, 2024) (*per curiam*): This is the opinion reviewing the decision of the Colorado Supreme Court striking former president Trump from the ballot in Colorado and reversing that decision on the basis that Congress is the governmental entity with such powers under the Fourteenth Amendment.

OTHER CASES OF NOTE

[United States v. Samuel Arce-Ayala](#), No. 21-1511 (1st Cir., January 17, 2024): **Guilty Pleas**: Defendant pled guilty to various drug/firearms counts, but with the understanding that credit for time served for various related non-federal convictions would reduce his federal sentence. Upon finding out this was not the case, he moved to withdraw his plea prior to sentencing. The district court denied the motion, but the panel reversed upon finding that this rendered his decision to plead guilty not “knowingly” entered.

[United States v. Rodriquez M. Evans](#), No. 21-4181 (4th Cir., January 5, 2024): **Federal Sentencing Guidelines (Drug Quantity)**: Sentence in a drug case vacated because the district court erred in attributing large drug quantity to Evans.

[United States v. Jeffrey Fortenberry](#), No. 22-50144 (9th Cir., December 26, 2023): **Venue**: Conviction of former congressman Jeffrey Fortenberry of Nebraska for

false statements during an investigation is reversed because California was not the proper venue when he was interviewed by federal agents in Nebraska and D.C.

VICTORIES

DANIEL B. POND, Norman, chalked up a fine win Bryan County securing self-defense immunity for his client in front of Judge Abby C. Rogers, and then winning in the OCCA in the *Bradford* opinion above when the State appealed. Fine lawyering, Daniel!

HEARSAY

FACILITY: District Attorneys in southwest Oklahoma are banding together to create a regional facility to treat drug addiction.

NAMED: The City of Norman named a municipal courtroom after former judge Ted Roberts and court administrator Judy Simpkins.

PENALTY: An Oklahoma police officer convicted of sexually assaulting a woman during a traffic stop faces a tough new VAWA penalty in federal court.

DECREASE: The inmate count at the Canadian County Jail is down.

E-FILING: Article about the long road to e-filing in Oklahoma courts.

ARRESTED: A Mannford police officer has been arrested for the rape of a student.

911: An inmate at the Allen Gamble CC in Holdenville entered an unlocked office and called 911 three times.

DENIED: The Pardon and Parole Board has denied clemency for Michael Smith.

SCANNING: The Carter County Court Clerk is undertaking the project of scanning and archiving the 2.5 million court documents filed between 1897 and 2000.

PRINTS: The McAlester P.D. has a new fingerprint machine.

DNA SCANDAL: The Wall Street Journal showcased a story about a DNA scandal in Colorado involving a “star” analyst who may have altered data.

CRITICAL: State Representative Kevin McDugle has some harsh criticism of District Attorneys in their handling of capital cases.

LEGISLATION: Some interesting bills were proposed (and are now dead) during the legislative session.

LEADER: The Pontotoc County D.A. announced the hiring of a unit leader for its homicide cases.

NAMED: The Comanche County Jail named an interim Jail Administrator.

WACKY CRIME

PORCH PIRACY: It is best to not commit porch piracy on the porch of the OKC Chief of Police.

DUNCAN: A Duncan man assaulted his cousin...for taking a long shower.

EXPIRED: OKC P.C. stopped a driver with a dealer’s paper tag...that had been expired for more than a year.

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