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Category



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

[Burnham v. State](#), 2023 OK CR 6 (May 4, 2023): **Indigents:** Burnham was convicted by jury in Garfield County (the Hon. Paul K. Woodward, presiding) of Lewd Acts Under 16. The Court reversed and remanded because Burnham was forced to trial without counsel because of indigence and there was not an adequate record made to invoke waiver of his right to counsel. **NOTE:** Judge Lumpkin specially concurred, lamenting that the entire case could have been avoided if the district court had refused to allow retained counsel to withdraw, and that a retained lawyer should be bound to represent the client through trial. Comments like this make me wonder if Judge Lumpkin has ever represented a human being as an attorney in a criminal case.

[Arce v. State](#), 2023 OK CR 9 (May 11, 2023): ): **Jury Instructions (Lesser Included; Aiding and Abetting)**: Arce was convicted of First Degree Murder and other crimes in Tulsa County (the Hon. Michelle B. Keely, presiding). The Court affirmed, but I included the opinion because of the in-depth discussion on aiding and abetting jury instructions; and also the fact that Judge Lumpkin inserted footnote 3 which is his personal preference for the lesser-included analysis, but Judge Musseman and Vice-Presiding Judge Hudson rebuked this footnote as “unnecessary, and ultimately harmful” and as the “counter-precedential preference of the author” because it would simply obscure and confuse the test under *Shrum*. **NOTE**: This opinion was released as unpublished initially, but the Court *sua sponte* issued an order publishing it, although I am not sure exactly why, although it appears to be based on making sure that *Shrum* is the law regarding lesser offense instructions and not the analysis favored by Judge Lumpkin.

[State v. Kelly Burtrum](#), 2023 OK CR 7 (May 11, 2023): **DUI (Blood Draws); State Appeals**: In this State appeal out of Garfield County involving a DUI/accident with injury blood draw, the Hon. Dennis Hladik granted a motion to suppress. In this opinion the Court affirmed based on prior precedent that the statutory language must be read to comply with the Fourth Amendment. The Trooper seemed to think that a blood draw was mandatory. But since Burtrum did not consent and the State offered no other legal justification for intrusion, the blood draw was unlawful. **NOTE**: Judge Lumpkin specially concurred, chastising State lawyers for not educating law enforcement on the rules; and Judge Lewis concurred in result based on his prior rulings.

[State v. Winston Whitecrow Brester](#), 2023 OK CR 10 (May 11, 2023): **Jurisdiction; Indians; State Appeals**: This is a *McGirt* case out of Ottawa County where the Hon. Becky Baird, Special Judge, dismissed pending cases and a final conviction of another case via post-conviction. The State properly appealed. The Court reversed the grant of post-conviction relief on the basis of *Matloff* because the conviction was final prior to *McGirt*. However, the Court affirmed the dismissals of the new cases that involved the Ottawa and Peoria Tribes. **NOTE**: Judge Lumpkin concurred in part/dissented in part; as did Judge Lewis.

[Jerry Martin Gustafson v. State](#), No. F-2021-702 (Okl.Cr., May 4, 2023) (unpublished): **Evidence (Hearsay; Child Hearsay)**: Gustafson was convicted by jury in Payne County of Child Sexual Abuse (the Hon. Stephen Kistler, presiding). The Court affirmed, but decided the issue of whether the hearsay statements of a complaining witness who made them when she was under 13, but who is over the age of 13 at the time of trial (14 in this case) are admissible. The Court held that they are.

[William Edward Johnson, Jr., v. State](#), No. S-2022-310 (Okla. Cr., May 4, 2023) (unpublished): **Indictments & Informations (Specific v. General)**: Johnson was bound over in Tulsa County on a charge of A&B w/Dangerous Weapon when he pointed a laser at the Tulsa police helicopter, but the district court granted a motion to quash and remanded for a misdemeanor under the Laser Safety Act, which is the more specific statute governing the conduct. The Court reversed on the basis that the State has discretion to choose the charge. NOTE: This is a terrible decision with thin reasoning by Judge Lewis, with weak and unpersuasive special concurrences by Judge Musseman and Vice-Presiding Judge Hudson. Rowland, P.J. and Lumpkin, J., both dissented on the common sense and legally sensible ground that the Legislature criminalized this specific conduct and prosecutions should proceed under the specific statute.

[State v. Winston Connor, II](#), No. S-2022-188 (Okla. Cr., May 4, 2023) (unpublished): **State Appeals; Racketeering**: In this prosecution of attorney Winston Connor, II, in Tulsa County, Judge Clifford Smith granted a motion to quash multiple counts relating to racketeering and pandering. In this opinion, the Court affirmed. Particularly instructive is the legal analysis of the racketeering charge. NOTE: Judge Musseman recused. Also, this is a great appellate result by Clark Brewster.

## **TENTH CIRCUIT**

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[United States v. Nathan Pehrson](#), No. 21-4133 (10<sup>th</sup> Cir., April 11, 2023) (Published) (Holmes, C.J., Murphy & Hartz): **Experts; Evidence (Hair Testing; Daubert Challenges)**: Conviction of “diverting” Dilaudid while working as a nurse is affirmed over claims related to testimony from two expert witnesses. The first was a medical expert who testified that a drug test on hair indicated likely ingestion of the drug. The second was testimony by a physician but not qualified as an expert, who gave opinion testimony regarding diversion of the drug from its intended use for patients. NOTE: Judge Hartz concurred, arguing that the *de novo* standard should be replaced by abuse of discretion.

[United States v. Arturo Arnulfo Garcia, et al.](#), No. 19-2148 (10<sup>th</sup> Cir., April 17, 2023) (Published) (Tymkovich, McHugh & Carson): **Commerce Clause; Racketeering (VICAR); Speedy Trial (Pre-Indictment Delay); Severance; Sufficiency**: Multiple defendants were convicted of murder/racketeering (VICAR). In this sprawling 101 page opinion, the panel affirmed some counts against attack under the Commerce Clause, Pre-Indictment Delay, and denial of

severance; but dismissed some counts based on insufficient evidence to connect the murder with status of defendants as prison gang members.

## **UNITED STATES SUPREME COURT**

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“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).

[Joseph Percoco v. United States](#), No. 21-1158 (U.S., May 11, 2023): **Jury Instructions (Honest Services Fraud)**: This case involved a private citizen connected to government and whether the jury instructions for “honest services” fraud under Second Circuit precedent were lawful. The Court held that they were not and reversed.

[Ciminelli v. United States](#), No. 21-1170 (U.S., May 11, 2023): **Fraud**: The Court again reigns in the Second Circuit for making it easy for the Government to convict citizens of fraud, holding that because the right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest, the Second Circuit’s right-to-control theory cannot form the basis for a conviction under the federal fraud statutes.

## **OTHER CASES OF NOTE**

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[United States v. Albert Ramos Ramirez, Jr.](#), No. 22-50042 (5<sup>th</sup> Cir., May 10, 2023): **Search and Seizure (Abandoned Property)**: Interesting case where Ramirez was convicted of felon in possession of a firearm after he tossed his jacket over a fence onto his mother’s property and police found a gun in it when they searched without a warrant. The legal issue is whether the jacket was “abandoned” by Ramirez (and thus no warrant needed). The panel held that it was not. NOTE: Judge Ho dissented.

## **VICTORIES**

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**ANDREW CASEY**, OKC, secured a not guilty verdict in a case involving a fatal shooting in downtown Stillwater. Nice work, Andrew!

## **HEARSAY**

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**HENRYETTA**: An attorney for one of the persons killed in the multiple homicide in Henryetta says that 32 different cell phones and persons had been registered to that address.

**CONTRABAND**: The Cleveland County Sheriff's Office has intercepted a contraband drop near LARC.

**FEMALE POLICE**: The City of Tahlequah has a record number of women on the police force (4).

**K-9**: The Tulsa Fire Department has "Arson Annie" the State's only accelerant detection dog.

**OHP**: At least two OHP Troopers may have been involved in a brawl on a golf course in Owasso.

**CHARGED**: The Nowata County volunteer Fire Chief has been charged with embezzling over \$60,000.00 from the Fire Department.

**ALERT**: Gov. Stitt has signed a bill creating "Orange Alerts" to notify the public of escaped inmates.

**BAR**: The Bar Association has taken steps to discipline former Assistant District Attorney Isaac Shields for allegedly spying on deliberating juries in criminal cases.

**PREDATORS**: The Canadian County Sheriff's Office is involved with a "To Catch a Predator"-type show.

**DOC**: A "handing over of the keys" ceremony was held in conjunction with the opening of Great Plains Correctional Center as DOC allowed the contract for North Fork Correctional Center (in Sayre) to expire.

**McVEIGH**: There is a new book (sort of) on Timothy McVeigh.

**STING**: 40 persons were caught in an OKC prostitution sting.

**DRIVERS**: Oklahoma drivers are the fourth worst in the nation.

**RESIGNED**: The Harmon County Sheriff has resigned; also, the Chief of Police in **Eufaula** has resigned; also, the Chief of Police in **Claremore** has retired.

**RESIGNED II**: Cleveland County District Judge Lori Walkley has announced her resignation effective July 31, to return to private practice.

**DEAN**: OKC Mayor David Holt will be the next Dean of the OCU College of Law.

**IGNOMINIOUS TITLE**: Oklahoma is now the World's Prison Capital.

**SWORN IN**: Oklahoma City's newest municipal judge has been sworn in.

**PLATES**: The Guthrie Police Department used its new license plate reader to solve a hit-and-run.

**GUILTY**: A former Assistant Solicitor General at the Attorney General's Office has pled guilty in federal court to felony Eluding while she was in Broken Arrow.

**CHARGES**: In addition to two counts of Possession of Child Pornography, former First Assistant District Attorney Kevin Etherington is now charged with an odd count of Peeping Tom.

### **WACKY CRIME**

**IRONY**: A man bought hundreds of thousands of dollars worth of equipment with bad checks in a scheme to re-sell everything before it went sideways...and his first name is "Truth" (see, because he was not being truthful)

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