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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

[State v. Clay A. Ballenger](#), 2022 OK CR 11 (June 30, 2022): **DUI; State Appeals:** Ballenger was charged with misdemeanor DUI in Tulsa County. He was in his own parked truck with the engine turned off in his own driveway. The Hon. J. Anthony Miller granted a motion to suppress based upon a warrantless arrest. In this opinion, the OCCA reversed on the basis that APC committed in the presence of the officer amounted to PC to arrest. NOTE: Judge Lewis dissented, finding no abuse of discretion and incredulous at the majority’s handling of this case.

[Robert Douglas Phillips v. State](#), No. F-2021-315 (Okl.Cr., July 7, 2022) (unpublished): **Interrogations (Fifth Amendment):** Phillips was convicted by jury in Oklahoma County (the Hon. Richard W. Kirby, presiding) of Lewd Acts.

The Court affirmed, but the opinion has a good discussion of Miranda issues when the client is otherwise in custody on something else (here, an Emergency Order of Detention).

[DeWayne Arnell Williams v. State](#), No. F-2021-432 (Okl.Cr., June 16, 2022) (unpublished): **Evidence (Gang Affiliation)**: Williams was convicted by jury in Oklahoma County (the Hon. Heather E. Coyle, presiding) of Murder I and Conspiracy. The Court affirmed, but the opinion has a good discussion of “gang affiliation” evidence admitted under 2404(B) and the law governing such evidence.

TENTH CIRCUIT

[United States v. Aaron Michael Shamo](#), No. 20-4116 (10th Cir., June 10, 2022) (Published) (Hartz, Kelly & Murphy): **Sufficiency; Experts; Evidence (Drug Jargon); Prosecutorial Misconduct (Improper Argument); Excessive Sentence**: Shamo received mandatory life as head of a drug enterprise. The panel affirmed over his claims relating to: 1) sufficiency of the evidence regarding the chemical makeup of the drug; 2) sufficiency that he knew he was distributing a controlled substance; 3) admissibility of screenshots and expert testimony of drug jargon; 4) prosecutorial misconduct suggesting that he was responsible for uncharged overdose deaths; and 5) the constitutionality of a life sentence.

[United States v. Jesus Arellanes-Portillo](#), No. 20-3165 (10th Cir., May 27, 2022) (Published) (Bacharach, Seymour & Phillips): **Federal Sentencing Guidelines (Aggravated Role)**: Drug and Money Laundering sentences are vacated by misapplication of aggravated-role enhancement (plain error met).

[United States v. Devonte Jemell Starks](#), No. 19-3256 (10th Cir., May 27, 2022) (Holmes, Lucero & Phillips): **Prosecutorial Misconduct (Improper Argument; Vouching); Cumulative Error; Evidence (Experts; Drug Jargon)**: In this drug case, the prosecutor argued during closing that the right to be presumed innocent no longer existed after the presentation of the trial evidence. Compounding matters was the fact that there was no objection. However, the panel reversed, finding prejudicial error combined with other errors (introduction of expert testimony regarding characteristics of drug traffickers; and improper vouching for the credibility of a witness).

[United States v. Dalton R. Hartley](#), No. 22-3010 (10th Cir., May 17, 2022) (Matheson, Briscoe & Eid): **Early Termination of Probation; Waiver (Appeals**

Waiver): Denial of motions for early termination of probation are reversed because the blanket policy of the district court against such motions denied the appellants individualized consideration; and an appeal waiver was insufficient to cover this situation.

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).*

The [HON. KETANJI BROWN JACKSON](#) has been sworn in as the 104th Associate Justice of the Supreme Court of the United States.

[Oklahoma v. Castro-Huerta](#), No. 21-429 (U.S., June 29, 2022): **Indians; Jurisdiction:** In this follow-up to *McGirt*, the Court held that the State has concurrent jurisdiction with the federal government to prosecute crimes committed by non-Indians against Indians in Indian Country.

[Concepcion v. United States](#), No. 20-1650 (U.S., June 27, 2022): **First Step Act:** The First Step Act allows the district court to consider intervening changes of law or fact in exercising discretion to reduce a sentence.

[Ruan v. United States](#), No. 20-1410 (U.S., June 27, 2022): **Statutory Construction; Scienter:** Physicians were convicted of unauthorized distribution of CDS. The legal question concerned the mens rea requirement under the statute. The Court held that the “knowingly or intentionally” dispensing CDS applies to the “except as authorized” part of the statute. This means that once a defendant produces evidence that his conduct was authorized, the Government must then prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner.

OTHER CASES OF NOTE

[United States v. David Abram Ziesel](#), No. 20-4240 (6th Cir., June 29, 2022):

Federal Sentencing Guidelines (Physical Restraint): Split panel reverses a sentencing enhancement for “physical restraint” under 2B3.1(b)(4)(B) in this bank robbery case.

[United States v. Joshua Deunte Caldwell](#), No. 21-10509 (5th Cir., July 6, 2022):

Waiver (Appeals Waiver): In this brief order, the panel held that a subsequent change in the law that benefits the accused cannot be used to defeat an appeals waiver. The panel cited as support the recent Supreme Court activity involving opinions regarding denial of cert in [Grzegorzcyk v. United States](#), in which five Justices supported the idea that plea waivers preclude any argument based on new case law.

[United States v. Brooks Prentice Lesane](#), No. 20-7144 (4th Cir., July 14, 2022):

Coram Nobis: This is a rare winner via writ of error *coram nobis* where the petitioner invoked it to attack his conviction for felon in possession of a firearm by application of a circuit case which rendered him actually innocent of the crime (because neither of his priors would be felonies).

VICTORIES

[EDDIE WYANT](#), Enid, secured a dismissal of an Embezzlement charge in Major County after preliminary hearing. Nice job, Eddie!

HEARSAY

THE SYSTEM: The conservative Oklahoma Council of Public Affairs presents a point of view that the criminal justice system can be used as a weapon.

FIRED: The Chief of Police and one police officer in Wister, Oklahoma, have been fired.

INVESTIGATED: Two prosecutors in Rogers County are being investigated for spying on jury deliberations.

ARRESTED: The Chairman of the Oklahoma College Republicans has been arrested for child sexual abuse.

HOMICIDE: Oklahoma City had 41 homicides in 2022 thus far.

FOILED: A drone-drop at Lawton Correctional Facility has been foiled by a traffic stop.

FOILED II: Two lobbers got caught after getting a black backpack of contraband onto the property of James Crabtree CC.

RIP: Longtime Muskogee County attorney Bob Locke has passed.

RIP II: David Hammer, who had just been elected District Attorney in Lincoln County has died of a heart attack at the age of 47. **HERE** is a more in-depth article.

PROFILING: The Muskogee Police Department has been accused of racial profiling in a Facebook post.

GUILTY: Former Ottawa County District Attorney Daniel Giraldi has pled guilty in federal court.

ENDORSED: Runners-up to the race for District Attorney, Jacqui Ford and Robert Gray, have endorsed Kevin Calvey.

A.G.: An assistant A.G. got into some trouble in Tulsa.

TIP: An Illinois man has accused the Atoka County Sheriff's Office of tipping off a cockfighting operation that was about to be raided.

SHERIFF: There is a new Sheriff in Love County.

THE WORST: A study has found that Oklahoma is the worst state for women.

NEW CHIEF: The City of Kingston (near Lake Texhoma) has a new Chief of Police.

CRACKDOWN: OKC police have cracked down on lewd acts at Trosper Park.

COST: The deaths at the Oklahoma County Jail are becoming expensive. Also, an **inmate beaten** by his cellie at the Oklahoma County Jail has died. Also, the Jail is facing up to **\$350,000.00 fines** from the Health Department (details **HERE**).

BUST: Wetumpka police discovered about 20 kilos of marijuana during a traffic stop.

LOCKDOWN: Lawton Correctional Facility is on lockdown again because of a surge in violence.

DISBARRED: Attorney Jay Silvernail has been disbarred for practicing law while in jail...and reports that he would do it all over again.

ALERT: OHP Troopers are gearing up for school safety.

DNA: A 1982 murder of a child in California may have been solved by DNA evidence.

EXECUTIONS: The Intercept took a look at Oklahoma's "Looming Execution Spree" coming up.

SHOOTING: Attorney Ed Blau commented on a case where the victim of a car theft shot and killed the thief as he drove away.

WACKY CRIME

SAPULPA: Vandals stole flags on display in downtown Sapulpa.

HAUNTED: Lawton's KLaw reported on Oklahoma's most haunted...bridge.

PLATES: A list of personalized license plates that have been denied by the Oklahoma Tax Commission.

OKC: A homeless man in OKC broke into a school and made himself at home.

TOP TEN: Oklahoma is in the top ten states...for catalytic converter theft.

TAHLEQUAH: A naked man wandered around a daycare.

PONTOTOC COUNTY: A man killed his noodling partner...because Bigfoot was part of a set-up to kill him.

DRIVE-BY: The "Death War Paint" veteran who did the drive-by shooting on his own family has died in custody.

TULSA: A Tulsa man asked to be arrested...then assaulted the arresting officer.

TULSA II: An undercover Tulsa police officer was robbed...while conducting a prostitution sting.

TULSA III: Tulsa police are investigating a homicide...at the center of the universe.

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