

## OCDW 07.25.22

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Category



**OKLAHOMA CRIMINAL DEFENSE WEEKLY**

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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

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[Hancock v. State](#), 2022 OK CR 13 (July 21, 2022): **Evidence (DNA)**: In this capital post-conviction case out of Oklahoma County, Hancock filed a motion for DNA testing. The Hon. Cindy H. Truong denied the motion “without any pretense of holding a hearing” required by the statute. The Court vacated the denial and remanded for a proper hearing and findings.

[Fort v. State](#), 2022 OK CR 12 (July 21, 2022): **Judicial Bias**: This opinion made it to the Court from a remand to the district court (the Hon. Paul Hesse) which granted relief in a case where former judge Timothy Henderson was having an affair with the prosecutor during the trial. Judge Hesse recommended reversal, and in this opinion the Court agreed. NOTE: Judge Hudson, V.P.J., specially

concurrent, chastising the dissent of Judge Lumpkin for applying plain error where these State actors hid their actions from discovery so it could not have been litigated prior to trial. Judge Lewis, specially concurred, agreeing this was structural error. Judge Lumpkin dissented on the basis that prejudice must be shown by the actions of Judge Henderson. I watched this hearing on remand, and District Attorney Brian Hermanson conceded the error, for which he should be commended for recognizing this obvious structural error. I am mystified at Judge Lumpkin's dissent, but it is what it is. I am also mystified that two (at least two) practicing female prosecutors in the Oklahoma County District Attorney's Office, Carson Turner in *Fort*, and Kelly Collins in another case, have accused a disgraced former district judge of sexual assault and not a damn thing has been done about it. He admitted to the sexual affair with Collins, but said it was consensual. Collins said it was forced and that he sexually abused her. She said this in a publicly filed affidavit. One of them is lying and either he is a sexual predator and should be prosecuted, or she is making false allegations of forcible sexual assault. Prosecutor Lori McConnell, who is still prosecuting *sex crime* cases, testified at a hearing that Collins is a "very good friend" but McConnell had no idea that Collins was having an affair with Judge Henderson. This is what Irven Box called the worst kept secret at the courthouse, but McConnell testified under oath to not knowing anything about it. Can we imagine what would have happened to our clients if a female prosecutor had accused any of them of forcible sexual assault? It appears that nothing at all is going to happen in this matter other than some reversals involving the named prosecutors and Henderson as the trial judge.

## TENTH CIRCUIT

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[United States v. Connor William Biggs Farley](#), No. 21-8013 (10<sup>th</sup> Cir., June 15, 2022) (Barcharach, Ebel & Carson): **Federal Sentencing Guidelines (Reasonableness)**: Sentence in a production of child porn is vacated on procedural reasonableness grounds because the district court used an erroneous method to arrive at a variance.

[United States v. Shayne Kyle Armajo](#), No. 21-8021 (10<sup>th</sup> Cir., June 23, 2022) (Hartz, Seymour & Baldock): **Burks Notice/ Bad Acts; Self-Defense**: In this self-defense case, Armajo tried to admit prior bad/violent acts of the deceased. The district court found that the evidence was presented for a proper purpose under 404(b), but excluded the evidence as unfairly prejudicial. The panel agreed.

[United States v. David Sidney Wells](#), No. 20-1228 (10<sup>th</sup> Cir., July 6, 2022) (Matheson, Murphy & Moritz): **Federal Sentencing Guidelines (Obstruction of Justice; Abduction; Serious Bodily Injury); Waiver (Appellate Issues/Invited Error)**: Wells was convicted of assaulting his wife in Indian Country. The panel affirmed the convictions, but remanded for re-sentencing finding error in an obstruction of justice enhancement when Wells violated a no-contact order. The panel also rejected challenges to jury instructions based on invited error. The panel found no error for a finding of “abduction” for sentencing enhancement.

## 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)*.

*No new cases.*

## VICTORIES

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*None noted.*

## DNA & BREATHLYZERS

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Assistant Public Defender Thomas Reese sent an article to me that is of general interest. It involves a [cold-case breakthrough](#) out of California where a 76-year-old man was linked to decades-old murders. The breakthrough came via DNA evidence, which is nothing new, but here the key DNA evidence was acquired by law enforcement from the mouthpiece of a breathalyzer.

We all leave our DNA pretty much everywhere we go and on everything we touch. I can envision Oklahoma lawmakers mandating DNA swabs at the same time as breath tests in misdemeanor cases (if that is not being done already).

## **POST-CONVICTION**

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If you practice appellate law or post-conviction, take note of the new post-conviction statute, [22 O.S. 1080.1](#), that will go into effect on November 1, 2022. It imposes a one-year statute of limitations on post-conviction actions and appears to be modeled on the federal counterpart.

## **HEARSAY**

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**THE CENTER**: Tulsa's "Center of the Universe" is becoming Crime Central.

**NAMED**: The Chief of Police in Lawton has been named President of the Oklahoma Association of Chiefs of Police.

**OUSTER**: A grand jury wants District Attorney Allan Grubb removed from office for acts of oppression and corruption, including using a device to search cell phones of employees and making sexual passes at women. Follow-up story [HERE](#).

**HEAT**: DOC says that it is doing all it can to keep inmates cool in the oppressive heat. Also, a prison unit in [Texas hit 149 degrees](#).

**TAG AGENTS**: Tag agency will become a one-stop-shop by 2025.

**ODOT**: ODOT is testing wrong-way driver systems in eastern Oklahoma.

**CRACKDOWN**: Tulsa County is cracking down on...environmental crimes.

**THEFT**: A technique of etching serial numbers onto catalytic converters may stop thefts.

**FAILED**: Efforts to keep the juvenile facility in Manitou open have failed.

**SUIT**: An inmate has filed a civil rights lawsuit against the Oklahoma County Jail, but OKC attorney Ed Blau is not convinced.

**RIP**: A deputy in Tulsa County has passed unexpectedly.

**RIP II**: An Edmond police officer has died in a multi-vehicle crash.

**AWARD**: A Captain with Tulsa County Sheriff's Office won an award...with his car at a car show (perhaps a 1969 Pontiac).

**HONORED**: Three AUSA's from the Northern District have received the Attorney General Award.

## **WACKY CRIME**

**BLACKWELL**: A Blackwell resident tried a stand-off with police...using a sledgehammer. He did not prevail.

**PRYOR CREEK**: Two men in Pryor have been accused of committing burglaries...while wearing angle monitors.

**TULSA**: Police in Tulsa are looking for the owner of...23 pounds of quality reefer.

**TULSA II**: A beer thief in Tulsa was caught on camera...and he looks exactly like the kind of guy who would steal beer.

**RIOT**: Jail inmates in a pod at the Ottawa County Jail saw inmates in another pod get a pencil...so they rioted.

**BIXBY**: The water system in Bixby was shut down by "unauthorized water withdrawal."

**BANK**: Mark Hoover: How did one Oklahoma man bring down a bank a century ago? Hint: it rhymes with "embezzlement."

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