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**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**

[Laura Ann Freeman v. State](#), No. F-2021-1211 (Okl.Cr., August 11, 2022) (unpublished): **Indians; Jurisdiction (Appellate)**: In this termination from Drug Court case out of Tulsa County, the Court refused to consider a *McGirt* claim because the appeal was not prosecuted as a certiorari appeal attacking the plea, but rather as an appeal of the termination only. NOTE: This is a procedural trap for the unwary appellate practitioner. The client may pursue both an appeal of the termination order and a certiorari appeal at the same time, but in this case only the appeal of the termination order was prosecuted.

[Donna Lynn LaForge v. Hon. Khristan Strubhar](#), No. MA-2022-553 (Okl.Cr., August 8, 2022) (unpublished): **Sentence Modification**: This is a writ out of

Canadian County where the Petitioner had filed a motion for a sentence modification prior to the one-year deadline, but a hearing was not set until after the one-year. The district court held that there was no jurisdiction for a hearing at that point, but in this order the OCCA reversed. NOTE: The old rule was that the prisoner had to file the motion and have the hearing/order of modification within one year; however, the wording of the statute has changed. So if your client is otherwise eligible for a modification (blind plea), just make sure to file the motion timely and you should at least get a hearing.

## **TENTH CIRCUIT**

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[United States v. Rolando Cifuentes-Lopez](#), No. 21-6053 (10<sup>th</sup> Cir., July 26, 2022) (Published) (Tymkovich, C.J., Briscoe & Matheson): **Federal Sentencing Guidelines (Pattern of Activity & Double Counting)**: In this case involving commercial sex with two minors, the sentence was enhanced both with a “pattern of activity” enhancement and also for multiple counts. On appeal, the defendant raised arguments that the pattern did not apply because he engaged in only one act with each minor, and also that the application of the multiple count enhancement was double counting. The panel rejected these claims and affirmed.

[United States v. Robert James McCrary](#), No. 21-6047 (10<sup>th</sup> Cir., July 26, 2022) (Published) (Moritz, Ebel & Kelly) (W.D. Okla., Hon. Bernard M. Jones, presiding): **Jurisdiction (Appeals Waivers); Federal Sentencing Guidelines (Reasonableness)**: McCrary was given a 48-month sentence for possession of fentanyl w/intent, which carries a 20 year max. His sentence was four times higher than the advisory Guidelines range because the district court varied upward because the fentanyl he distributed caused a death. The panel applied an appeals waiver to his procedural reasonableness claim, and denied on the merits his substantively reasonable claim (this was allowed in the written waiver).

[United States v. Orlando Cortez-Nieto](#), No. 20-3184 (10<sup>th</sup> Cir., August 5, 2022) (Published) (Hartz, Holmes & Bacharach): **Jury Instructions (Impeachment of Witnesses); Judgment of Acquittal (Lesser Conviction)**: Defendants were convicted of drug distribution within 1,000 feet of a playground. The district court granted, in part, judgment of acquittal because of insufficient evidence of the proximity element, but entered judgment on the lesser crimes; also, the jury was given an instruction that it should not consider the guilt of any persons other than Defendants (*i.e.*, witnesses). In a split decision, the panel affirmed. NOTE: Footnote three contains a meandering discussion of the proximity issue, complete

with application of the Pythagorean Theorem to show that the lab was less than 1,000 feet from the playground and that the jury could have used this “common sense.” Judge Holmes concurred, specifically not adopting the nonsense in footnote three; and Judge Bacharach dissented, finding that the instructional error was reversible.

## 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.*

## OTHER CASES OF NOTE

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[Odraye G. Jones v. Margaret Bradshaw, Warden](#), No. 07-3766 (6<sup>th</sup> Cir., August 22, 2022): **IAC**: Capital case where the panel affirmed the conviction, but vacated the death sentence based on IAC where defense counsel presented damaging evidence from an expert that urban black men were more likely to have Antisocial Personality Disorder, that it was incurable, and that the best treatment was to lock them up.

[William Glenn Rogers v. Tony Mays, Warden](#), No. 19-5427 (6<sup>th</sup> Cir., August 3, 2022): **IAC**: Capital case where the death sentence is vacated based on failure to investigate and present available mitigation evidence of abuse and mental health issues.

[United States v. James Clark, III](#), No. 21-6038 (6<sup>th</sup> Cir., August 18, 2022): **Federal Sentencing Guidelines (Retroactivity)**: Clark pled guilty to a drug crime that was enhanced based upon his prior marijuana convictions, but the drug schedules were subsequently amended to narrow the definition of marijuana to exclude hemp. Thus, Clark argued that his priors could not be used to enhance. The issue was whether the legal definitions at the time of the prior crimes control

or the definitions at the time of sentencing. The panel held that the law in place at the time of the prior convictions controlled.

[United States v. Ann Nwoko Sheperd](#), No. 19-20073 (5<sup>th</sup> Cir., August 11, 2022):

**IAC:** Conviction for Medicare fraud is reversed where pre-trial counsel for Sheperd also represented one of the Government's star witnesses.

## **VICTORIES**

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[ELTON JENKINS](#), Norman, got a Trafficking charge dismissed, but it is not clear why. [Here](#) is the docket. In any event, great result, Elton!

## **HEARSAY**

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**[JAIL DEATH](#):** There has been another inmate death at the Oklahoma County Jail, but this one appears to be natural causes.

**[RIP](#):** A Canadian County Sheriff's Deputy had a heart attack and died.

**[RIP II](#):** The former Sheriff of Cimarron County has died (story also has his obituary).

**[RESIGNED](#):** The entire police force of Arkoma, Oklahoma, resigned last week. The LeFlore County Sheriff's Office will provide service until a new police force is hired.

**[DOGS SHOT](#):** The Mayor of Grove may have ordered the shooting of two stray dogs in town. DA Matt Ballard is investigating.

**[ROLE MODEL](#):** A sex offender in Mayes County stated that he would be a great role model for young boys, but his actions suggest otherwise.

**[ORDERED](#):** The former Sheriff of Delaware County has been ordered to surrender his law enforcement license.

**[FIRE](#):** A police officer in Durant has been terminated for firing warning shots during a pursuit.

**CHARGED**: A Texas woman has been charged with bringing contraband into Lawton Correctional Facility.

**BEWARE**: A new chain of gas stations in Oklahoma called “Casey’s” appears to have an organized crime ring either working inside it or targeting it with fraudulent charges on the debit cards of customers.

**PROMOTION**: Tulsa County Special District Judge David Guten will replace the spot vacated by Judge Musseman because his opponent, private practice attorney R. Kyle Anderson, has withdrawn from the race.

**EPIDEMIC**: Theft of trailers in Oklahoma have apparently reached epidemic levels.

**NOT LIABLE**: Canadian County Judge Jack McCurdy has found a venue not liable in the DUI death of a woman.

**QUESTIONS**: Questions are asked when a woman is found dead...in a car that police checked twice.

**RAISE**: The Oklahoma County Jail Trust is pushing for employee raises.

**YELLOW FLAG**: Tulsa County Sheriff Vic Regalado wants a “yellow flag law” to stop gun violence.

**CHARGED**: The Attorney General has filed charges against an insurance company receiver appointed by a district judge in Oklahoma County because the receiver allegedly embezzled over \$1 million.

**OSAGE**: Attorneys for the Osage Nation are pursuing an appeal of a district court decision that their nation was disestablished.

**ROUNDUP**: Non Doc reports on various news stories, including a state representative investigated after the death of a passenger on his motorcycle, a second Oklahoma County Assistant District Attorney has resigned in the aftermath of the Judge Henderson scandal, and the two ADA’s in Rogers County are still in trouble.

**CLEARED**: Ballistics have cleared a suspect in a Tulsa County homicide.

**DUNCAN**: A private search-and-rescue organization has formed in Duncan, Oklahoma.

**DECISIONS**: The grandmother in Cleveland County who had opted to proceed *pro se*, has decided that the better course of action is proceed with counsel.

**RETIRED**: The Deputy Director of the OSBI has announced his retirement, just six months after joining the OSBI and shortly after a few Director had been named.

**RESIGNED**: Some police officers at the Nowata Police Department have resigned.

**LEAVE**: The Adair County Sheriff is on leave after an off-duty shooting.

**CONSULATE**: The opening of the Mexican consulate in Oklahoma City has been pushed back to 2023.

## **WACKY CRIME**

**UNEXPECTED**: A man saw his stolen bicycle for sale on Facebook Marketplace and set up the thief to sell it back. Story does not end the way you might expect.

**BEAR**: A black bear may be wandering through the back yards of Edmond.

**PERKINS**: Officials in Perkins are trying to figure out why some mailboxes were dumped inside city limits.

**GUTHRIE**: A woman in Guthrie has been arrested for DUI...after she **ran over several mailboxes**.

**CRIME**: After a woman found hidden cameras in an OKC air bnb the police have launched an investigation for the crime of Loitering Around Residence to Watch Occupants...an offense of which neither Mark Hoover nor I have ever heard.

**OKC**: A woman kicked a man off her cell phone plan...so naturally there is a shooting.

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