

**OCDW 09.23.24**

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**OKLAHOMA CRIMINAL DEFENSE WEEKLY**

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09.23.24

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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**

[Michael Dwain Cypert v. State](#), No. F-2023-97 (Ok1.Cr., September 19, 2024) (unpublished): **Assault & Battery (Corrections Officer)**: Cypert was convicted by jury in Comanche County (the Hon. Jay S. Walker, presiding) of Assault & Battery on a Corrections Officer. The Court affirmed, but addressed a claim on appeal that the complaining witness was not a “corrections officer” because he worked for the private company GEO Group, and not the State. The Court construed the statute to include this situation.

[David Flores Villanueva v. State](#), No. F-2022-686 (Ok1.Cr., September 12, 2024) (unpublished): **Appellate Practice**: In this Murder case out of Comanche County, the Court affirmed, but I included the opinion because the Appellant attempted to

raise an issue concerning admission of a text message, but the Court deemed this claim forfeited and did not address the merits at all because the appellate brief did not contain a statement of the standard of review. The Court deemed this non-compliance with its Rules. NOTE: The Court has been increasingly nit-picky in this area, particularly with briefs raising more than one claim in a proposition of error, but this is the first opinion I have seen that forfeits a claim because there was no statement of the standard of review. This seems like an exceedingly harsh sanction (as if the Court is unaware of the standard of review). As a practice pointer, I always set forth the standard of review in a separate, clearly labeled section to avoid this sort of thing.

## TENTH CIRCUIT

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[United States v. Enrique Martinez-Espinoza](#), No. 23-2139 (10<sup>th</sup> Cir., August 2, 2024) (Published) (McHugh, Murphy & Carson): **Guilty Pleas**: In this illegal re-entry case, the district court rejected a proposed plea agreement, but erred by not informing the accused of his post-plea rejection rights under Rule 11(c)(5). However, the panel applied plain error review and did not grant relief.

[United States v. Francis F. Joseph](#), No. 23-1192 (10<sup>th</sup> Cir., July 29, 2024) (Published) (McHugh, Murphy & Carson): **Confrontation/Cross-Examination; Experts; Federal Sentencing Guidelines (Loss Calculation)**: A physician was convicted by jury of fraud in a COVID-related relief scheme, and the panel affirmed over claims related to: 1) sufficiency; 2) limitations on cross-examination; 3) denial of admission of a defense exhibit; 4) admission of expert testimony by a lay witness relating to math calculations (this was error, but harmless); 5) admission of 404(b) evidence; 6) refusal to give defense requested jury instructions; and 7) loss calculation.

## 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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[United States v. Ethan Sturgis Day](#), No. 23-50636 (5<sup>th</sup> Cir., September 16, 2024): **Federal Sentencing Guidelines (Financial Hardship)**: In this fraud/conspiracy case, the panel held that a six-level enhancement for fraud that “resulted in substantial financial hardship to 25 or more victims” did not apply in this case.

## **VICTORIES**

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**ROBERT “BOBBY DON” GIFFORD**, OKC, secured acquittals in the federal court on a four-count indictment charging the client with Felon in Possession Firearm, Trafficking, and Possession of Short-Barreled Rifle. Trial was before Judge Russell in the W.D., AUSAs Nichols and West, ATF Agent David Moore, and OKC police witnesses as well. The defense called seven witnesses and the client testified. The defense centered around what Bobby Don called the “hot potato defense” meaning that the client may have picked up a gun, but promptly placed it back down upon realizing that it was real. Note that the OKC PD lab does not test for THC quantitative levels. Great job, Bobby Don!

**JAMES BENITEZ**, OKC, won his first jury trial as an OIDS lawyer for Jarrod Stevenson in Kay County. The allegation was Rape I where the complaining witness seemed to have trouble telling the truth when making statements about the incident, and in fact identified the assailant as a dark-skinned black male when the client was very white. Also, and this is a good practice pointer to prepare thoroughly, James called a witness who contradicted the complaining witness that was discovered in a stack of recorded interviews. The State did not call this witness and then complained when the trial judge allowed the defense to tell the jury that the State knew about this witness who proved the complaining witness was lying, but hoped that they would never find out about it. Great job, James!

**JODIE GAGE**, Stillwater, secured an acquittal in Payne County for a client of murdering his older brother. Some jurors were visibly upset upon leaving the courtroom after finding that the killing was justified. Presiding was the Hon. Michael Kulling. Excellent work, Jodie!

## HEARSAY

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**RIP**: The Cleveland County K-9 dog died unexpectedly. This story may take a darker turn because the Cleveland County Sheriff is asking the OSBI to investigate the incident because the dog was found in a **hot patrol car**. It is difficult to believe a law enforcement officer would do that, but nothing much surprises me anymore.

**HAIR**: John Lilley Correctional Center has a new inmate-built barber shop. Also, inmates serving life at **Joseph Harp** are building for children rocking chairs/riding toys that look like motorcycles.

**FIRING**: The OSBI will investigate the firing of the Pawhuska Chief of Police.

**KIT**: A rape kit from an incident in Ada was handled poorly.

**LAYOFFS**: The Cleveland County Sheriff's Office has laid off 24 employees.

**ARRESTED**: A Prague police officer and his wife have been arrested for child abuse.

**SURVIVOR'S ACT**: Oklahoma Voice has alleged that Tulsa County District Attorney Steve Kunzweiler is requiring defendants to waive their rights under the Oklahoma Survivor's Act to facilitate plea deals.

**MONEY**: All 77 county Sheriffs in Oklahoma will receive grant money from the Attorney General.

**RESIGNED**: Brian Lovell has resigned from the bench in Garfield County, citing dementia.

**APPOINTED**: The OJA Board has appointed an interim Director.

**CLARIFICATION**: The OSBI Commission has clarified how it will handle future allegations of wrongdoing by a Director.

**LAWTON**: An OU professor of sociology is going to conduct a comprehensive study on crime and safety in Lawton.

**AI**: The OKC PD is now using an AI program "Draft One" to assist officers in writing police reports.

**TEARS**: As Mark Hoover states, when the local newspaper reports that boxes of Kleenex were distributed prior to a preliminary hearing, you know it is going to be bad.

**SEARCHES**: Gov. Stitt has signed a bill allowing searches of third-party residences in domestic cases.

## WACKY CRIME

**EXCUSABLE?**: A Tulsa motorist caught driving 123 mph...claimed that he had to go #2.

**HEADLINE ALLITERATION**: From The Chronicle: “Pricy Purse Theft Allegation Puts Woman on Probation in the Pokey.”

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