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Category



**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[State v. Ondriel Layson Smith](#), No. S-2022-728 (Okl.Cr., November 2, 2023) (unpublished): **State Appeals; Burks Notice/Bad Acts**: In this capital case prosecution out of Tulsa County, the State sought to introduce Burks evidence of two other shootings to prove “identity and absence of mistake or accident.” The Hon. Dawn Moody denied this and the State appealed. In this opinion, the Court affirmed, finding no abuse of discretion. NOTE: Judge Lumpkin dissented.

[Calvin E. Burdine, Jr., v. State](#), No. F-2021-1357 (Okl.Cr., November 2, 2023) (unpublished): **Record on Appeal**: Burdine was convicted by jury in Oklahoma County (the Hon. Cindy H. Truong, presiding) of Lewd Acts. During the jury instruction conference he requested an instruction on the defense theory of defense

(dealing with unconsciousness), gave a copy to counsel and to the trial court, discussed it on the record—but never actually marked the requested instruction as an exhibit for the record. This prompted appellate counsel to move to supplement the record on appeal with an affidavit from trial counsel and the instruction. The Court allowed this, but ultimately denied the claim on the merits. NOTE: Judge Lumpkin dissented in part, and would not have allowed the supplementation of the record. This is a practice pointer case highlighting a procedural trap. In the past, I have typed up the requested jury instructions of the accused, slapped on a cover page with the case style and filed them of record in the case to avoid this type of thing. The practice pointer is to always be aware when you need make documents part of the record.

## TENTH CIRCUIT

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[United States v. Larry Coates](#), No. 22-3122 (10<sup>th</sup> Cir., September 18, 2023) (Published) (Moritz, Baldock & Murphy): **Federal Sentencing Guidelines (Pattern of Criminal Activity)**: Coates possessed child porn while on supervised release for child exploitation. The PSR recommended a pattern of activity enhancement. The panel affirmed over his claim that the standard was ambiguous.

[United States v. Michael David Jackson](#), No. 22-7015 (10<sup>th</sup> Cir., September 18, 2023) (Published) (Hartz, Seymour & Matheson) (E.D. Okla., Hon. Ronald A. White): **Double Jeopardy; Federal Sentencing Guidelines (Double Counting); Sentencing Package Doctrine**: Possession of Child Porn case where two counts involved the same conduct and violated Double Jeopardy, so the panel vacated one of the counts. The panel affirmed other claims related to the procedural and substantive reasonableness of his sentence based on double counting. NOTE: The panel described the “sentencing package” doctrine which occurs after an appellate court vacates a count of conviction, which means that the district court may resentence de novo unless specific limits are placed by the appellate court.

[United States v. Quentin Veneno, Jr.](#), No. 21-2101 (10<sup>th</sup> Cir., September 12, 2023) (Published) (Carson, Ebel & Rossman): **Public Trial; Indians; After-Formers; Burks and Bad Acts**: In this case involving a conviction for Domestic Assault in Indian Country, the panel affirmed over claims related to: 1) denial of public trial because of COVID closure and video transmission of trial; 2) authority of Congress to criminalize conduct in Indian Country; 3) overbroad prior conviction in tribal court; and 4) admission of other bad acts evidence under 404. NOTE: Judge Rossman concurred in part/dissented in part.

[United States v. Luis Alfonso Leon](#), No. 22-1070 (10<sup>th</sup> Cir., September 11, 2023) (Published) (Hartz, Seymour & Matheson): **Search and Seizure (Traffic Stops)**: Denial of motion to suppress based on argument that the officer lacked reasonable suspicion to extend a traffic stop and investigate suspected drug trafficking is reversed.

## 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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[Samuel Fields v. Scott Jordan, Warden](#), No. 17-5065 (6<sup>th</sup> Cir., November 3, 2023) (*en banc*): **Jurors; Habeas Corpus (AEDPA Deference)**: This fractured *en banc* opinion in a capital case is a good illustration for new practitioners of how the AEDPA has contorted federal habeas review of a state court legal ruling. The State theory was that the accused unscrewed a porch window with a knife that was admitted into evidence. The defense theory was that it was not possible to do this with the knife because he was intoxicated. The jury experimented with the knife during deliberations by using it to unscrew a cabinet in the jury room. Although many cases in the lower courts have dealt with juror experiments, the majority concluded that the Supreme Court has not established any legal principles in this area; thus, the decision of the lower state court cannot be said to have been an unreasonable application of Supreme Court precedent. The dissent disagreed, concluding that the use by the jury of extrinsic evidence is in fact clearly established. This is the kind of legal analysis that goes on in federal habeas land.

[Samuel Johnson v. Kathy Griffin](#), No. 23-5257 (6<sup>th</sup> Cir., October 31, 2023): This is not a criminal law related case, but an interesting read. The celebrity Kathy Griffin, in California, accused Johnson on Twitter of engaging in homophobic

conduct and urged her followers to have him fired. Johnson was a CEO and was in fact fired because of her actions. Johnson sued her in federal court for tortious interference with his employment. The legal issue was whether her Twitter activity was enough for personal jurisdiction over her in Tennessee. The panel concluded that it was, and the opinion contains some of the tweet-war that went on. This is a sign of the times and also a cautionary tale to perhaps not get too overzealous on social media.

## VICTORIES

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**TOMMY ADLER**, OKC, with help from **DAN POND** and **NICK LEE**, scored a terrific win in Grady County representing a client charged with multiple counts of Lewd Acts/Child Sexual Abuse since 2008, spanning different judges and prosecutors. The Client had been in jail for two years until the State mishandled the case so bad that the judge cut the bail amount to something reasonable w/ankle monitor. The defense announced ready for trial several times, but the case was continued over objection for various reasons attributable to the State, and Tommy lodged a speedy trial motion back in 2020. On the day of trial, the State had not expected the case to go because of other cases first-up, but they all resolved. The problem for the State was that the majority of its witnesses had been released to Florida for a family funeral and were unavailable except by video (which Tommy objected based on the statutory notice requirements). The State moved for a week continuance, which Judge Kirkland denied, and then he dismissed the case and exonerated bail! Great win through hard work and good lawyering by Tommy!

**DAN GOOD**, OKC, and Tommy Adler's partner, continues to win SOK appeal hearings, this one in front of Judge Oakes. This case involved a standard DUI out of Edmond, client pulled over for faulty tail light, admitted to drinking a couple of beers, SFSTs conducted, and BAC of .09. Dan checked the BAC video (obtained from the EPD) and noticed that the officer administering the test never checked the mouth of the client. On cross-examination, the officer was unable to articulate the proper standard for checking the mouth of the person being tested. Revocation set aside. Tips from Dan: 1) always obtain and watch the video of the testing procedure; 2) be aware that many officers are not familiar with the rules; and 3) officers caught not knowing what they are doing will absolutely change their testimony to the detriment of the client if you are unprepared and allow it. Nice job, Dan!

**ADAM R. BANNER**, OKC, heard a verdict of not guilty in Canadian County representing a client accused of Lewd Acts u/12 and the State had a DNA match from the labia of the minor (the client was the minor's grandfather). Adam defended this by extracting testimony from the chemist (a straight shooter) regarding secondary, tertiary, environmental and other methods of secondary transfer. This sounds like a tough case, but with a great result for the client. Great job, Adam!

## **HEARSAY**

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**ARRESTS**: Some arrests have been made in the continuing gang violence in Wewoka.

**CHIEF**: The City of Duncan has a new Chief of Police.

**RESPONSE**: Embattled judge Soderstrom has submitted her response to the allegations of judicial misconduct.

**AWARDS**: Almost 30 women have been awarded diplomas at Mabel Bassett.

**VOICE**: In what appears to be a positive step, DOC aims to give inmates a voice in the operation of prisons.

**DIVERSION**: The Oklahoma Criminal Justice Advisory Committee says that Oklahoma County diversion programs are working.

**TRANSITION**: A new program at the Oklahoma County Jail will assist persons transition to society as they are walking out the door.

**JUVENILES**: This article shows how far we have come in treating juveniles.

## **WACKY CRIME**

**BIGFOOT**: Oklahoma man allegedly killed fishing partner over...fear that the man had summoned Bigfoot to kill him.

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