

Q & A | The Newsletter of the Criminal Law Section

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REPORT FROM THE CHAIRMAN



Oklahoma Bar Association
Criminal Law Section

MICHAEL WILDS

Personal success is a difficult term to define. Surviving law school, passing the bar exam and that first big win in court could all be classified as successes. But success is but a fleeting moment. Once achieved, it seems to redefine itself.

Our “First Annual Forensics Academy” was an overwhelming success! Thanks to the planning of Ben Brown and other Criminal Law Section officers, a record 148 individuals (26 of whom were judges) registered for the conference and 132 of the 148 were able to attend. More importantly, the evaluations of the conference were outstanding, with most individuals stating that this was the best conference that they have attended!

But, the success of the moment is fleeting. Even now, your Criminal Law Section officers are busy planning the next big success, that of locating an “excellent speaker” for the Criminal Law Section Luncheon to be held during the Annual Bar Convention meeting in November. We have enough money in our treasury to bring in one of the best! We are also considering topics for the Criminal Law

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Section Track for the Annual Meeting. So, if you have any recommendations on either a speaker or a topic, please e-mail me via wilds@nsuok.edu.

Upon reflection, I believe personal success is defined as having access to “fun people” who make you successful. Of course, personal success is closely aligned with personal goals. As noted on ButlerWebs.com

Success is ...

At age 4 success is not peeing in your pants.

At age 12 success is having friends.

At age 16 success is having a drivers license.

At age 20 success is having sex.

At age 35 success is having money.

At age 50 success is having money.

At age 60 success is having sex.

At age 70 success is having a drivers license.

At age 75 success is having friends.

At age 80 success is not peeing in your pants.

According to Irving Berlin, “[t]he toughest thing about success is that you've got to keep on being a success. So, contact me. Let me know what your eyes would make the Criminal Law Section even more successful in the future. We are here to serve you!

CRIMINAL LAW CHAIRMAN

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U.S. SUPREME COURT REVIEW

by

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The United States Supreme Court only had a few cases decided in the area of criminal law since my last column. In addition, there were some cases that were decided that touched on issues that may be of interest to section members. I will discuss those that deal with criminal issues and note the others so you can review them if you wish.

The first case we will discuss is *Georgia v. Randolph*, 547 U.S. __ (2006), case No. 04-1067 decided by the Supreme Court on March 22, 2006. This case created many news stories and I believe many of you may already be familiar with it.

Respondent Randolph and his wife had separated in May, 2001. She moved out of the family home with the child of the marriage and moved in with her folks. In July, 2001 she returned to the family home with the child. The Court was unsure if this was reconciliation or merely her picking up her property.

Mrs. Randolph called the police after a domestic dispute. When the police arrived, Mrs. Randolph told them that her husband was a cocaine abuser, and she told them of the marital difficulties. While she was talking to the police, Mr. Randolph returned home and when asked denied any drug use.

Mrs. Randolph then told the police about evidence of drugs that existed inside the home. The police asked Mr. Randolph for permission to search his home, which he refused. The police officer

then turned to Mrs. Randolph and asked for permission to search the home. She consented to the search.

The police were able to gather the evidence of drug use during the warrantless search. The police then called the District Attorney who instructed them to stop the search and get a search warrant. Mrs. Randolph then withdrew her consent. After the search warrant was issued, other evidence of drug use was found. Mr. Randolph was charged and convicted of possession of cocaine.

During the trial Mr. Randolph sought to suppress the search, but the trial court found that Mrs. Randolph had “common authority to consent to the search”. The Georgia Court of Appeals reversed, which was affirmed by the Georgia Supreme Court. The ruling at the State appellate level was based on the premise that “the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search.” The Georgia Supreme Court distinguished this decision from *Matlock*, 415 U.S. 164, which held that “the consent of one who possesses common authority over premises or effects is valid as against the absent, non-consenting person with whom that authority is shared.”

Further citing to *Matlock*, the Georgia Supreme Court had held that “an individual who chooses to live with another assumes a risk no greater than an inability to control access to the premises during [his] absence.”

In reviewing case law, the U.S. Supreme Court found that none of the co-occupant cases had dealt with the issue of a second occupant being physically present and refusing to give permission for the search and then filing a motion to suppress the search. Under the narrow issues of this case, and because there was no basis for entering the home to protect any person nor any basis for exigent circumstances, the U.S. Supreme Court held “[t]his case invites a straightforward application of the

rule that a physically present inhabitant's expressed refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant."

It should be noted that this opinion has concurring opinions from Justice Stevens and Justice Breyer, as well as Dissenting Opinions by Justice Thomas, Justice Scalia and one by Justice Roberts which was joined by Justice Scalia.

Salinas v. United States, 547 U.S. __ (2006) decided Per Curiam on April 24, 2006, Case No. 05-8400, vacated a judgment of the Fifth Circuit and remanded the matter back to the Fifth Circuit for further consideration. The Court stated that the Fifth Circuit erred in treating Mr. Salinas' conviction for simple possession of a controlled substance as a "controlled substance offense" in that the term "controlled substance offense" is defined as "the possession of a controlled substance with *intent to manufacture, import, export, distribute, or dispense.*" The simple possession conviction did not show an intent to manufacture, import, export, distribute or dispense the substance.

In *Day v. McDonough*, 547 U.S. __ (2006), decided on April 25, 2006, Case No. 04-1324, the U.S. Supreme Court was faced with a statute of limitations question. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provided a one-year statute of limitations for filing a state prisoner's federal habeas corpus petition. Under Eleventh Circuit precedent, which was not challenged in this case, Mr. Day's statute of limitations had run prior to his filing of his federal habeas request for relief. The State of Florida's answer incorrectly asserted that the petition was timely filed. The Magistrate Judge determined that the State had miscalculated and that the petition was filed after the statute of limitations had expired. The Magistrate Judge, after giving Mr. Day an opportunity to be heard, found that Mr. Day had failed to give any adequate reason why his petition should not be dismissed and recommended dismissal. Both the District Court and the Eleventh Circuit concurred in the Magistrate's decision.

The question that the case presented was whether the State's action in stating that the appeal was timely filed acted as a waiver of the statute of limitations problem, much like it would be if the Defendant failed to raise the statute of limitations as a defense in his answer or in any amendment to said answer. The Court held that it was not jurisdictional in nature and the administration of justice would be better served by allowing the case to go forward.

In this case we again have two dissents. Justice Stevens, with whom Justice Breyer joined, filed a dissent and Justice Scalia, with whom Justice Thomas and Justice Breyer joined also filed a dissent. While Justice Stevens' dissent is only because he thought the decision should have been held until another case before the Supreme Court is decided, Justice Scalia's dissent took issue with the majority's holding.

Holmes v. South Carolina, 547 U.S. __ (2006) was decided on May 1, 2006 in Case No. 04-1327. This was a South Carolina murder conviction upon which the State heavily relied on a significant amount of forensic evidence. In his defense, the Defendant had used expert testimony to attack the forensic evidence of the State and claimed that the police had been engaged in a plot to frame him. The Defendant also sought to put on evidence that another person had committed the crime.

The Trial Court had excluded the Defendant's evidence about the third-party's involvement holding that the evidence merely cast a bare suspicion or raised a conjectural inference as to the third-party's guilt. The State Supreme Court, in its review, went on to state that "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence."

Justice Alito, writing his first opinion, stated for the unanimous Court that while States and

Federal rule-makers have broad latitude to establish rules excluding evidence from criminal trials, the latitude has its limits. “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense.”

Commenting upon the ruling of the State Supreme Court, Alito wrote “[u]nder this rule, the trial Judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution’s case...”

The Court further expressed concern that the State Supreme Court’s rule provided for little examination of the credibility of the prosecutor’s witnesses or the reliability of its evidence. In conclusion, Alito wrote “[i]t follows that the rule applied in this case by the State Supreme Court violates the defendant’s right to have a meaningful opportunity to present a complete defense.”

More recently, the U.S. Supreme Court held that police officers may go into a home uninvited, without knocking and unannounced, and without a search warrant to break up a fight they have seen through a window. In, *Brigham City, Utah v. Stuart, et al*, Chief Justice John Roberts held that a fight in progress is the kind of emergency that justifies quick action by the police.

According to the facts, police responded to a complaint regarding a loud party. Upon arrival, police saw two juveniles drinking beer in the backyard, then saw a man swing his fist and strike one of the adults in the kitchen. According the Chief Justice Roberts, the officers entered the house under the exigent circumstance exception, an emergency that justifies immediate police action. Objective facts, rather than subjective motives are what counts.

In these circumstances, the officers had an objectively reasonable basis for believing

both that the injured adult might need help and that the violence in the kitchen was just beginning. Nothing in the Fourth Amendment required them to wait until another blow rendered someone ‘unconscious’ and ‘semi-conscious’ or worse before entering... The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties.

See, <http://www.supremecourtus.gov/opinions/05pdf/05-502.pdf>.

Two other cases merit a brief mention in that they are not criminal in nature, but arose from criminal cases. It is my belief that these cases may be helpful to the members of the Section.

The first case is *Scheidler v. National Organization For Women, Inc.*, 547 U.S. __ (2006) decided on February 28, 2006 in Case No., 04-1244 and 04-1352. This case dealt with a class action brought because Petitioners were attempting to shut down health care clinics that performed abortions. Part of the claims of the Respondents was that the Petitioner’s actions were racketeering under the Hobbs Act.

The second case that bears mentioning is *Hartman v. Moore*, 547 U.S. __ (2006) decided on April 26, 2006 in Case No. 04-1495. This case arose over a dispute over the activities of the Post Office and their actions that were felt to induce criminal prosecution in retaliation for speech.

Because the two cases mentioned directly above are only generally dealing with criminal law issues, I will not discuss their holdings, but merely let you be aware of their existence.

On the Lighter Side

Question of the Day: Why does Oklahoma use sterilized needles for death by lethal injection?

Hot off the Press!

COURT OF CRIMINAL APPEALS CASES

by

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BREWER V. STATE, 2006 OK CR 16 (4/18/2006)

Standard of Review for Prosecutorial Misconduct

Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such as to deprive the defendant of a fair trial. *Powell v. State*, 2000 OK CR 5, ¶ 151, 995 P.2d 510, 539; *Martinez v. State*, 1999 OK CR 33, ¶ 48, 984 P.2d 813, 826. Reversal is not required, unless in light of the entire record, a defendant has suffered prejudice. *Martinez*, 1999 OK CR 33, ¶ 48, 984 P.2d at 826.

Prosecutorial Misconduct

1. Prosecutor's improper comments and focus on "mud throwing" constituted prosecutorial misconduct.
2. The prosecutor's focus on defendant's refusal to give a written statement to police when *Miranda* affords the "right to remain silent" constituted improper prosecutorial conduct. Of course, defendant was not required to give a written statement and had the right to refuse comment. *See Connecticut v. Barrett*, 479 U.S. 523, 530, n.4, 107 S.Ct. 828, 832, 93 L.Ed.2d 920 (1987) (finding *Miranda* gives defendants "a right to choose between speech and silence" and recognizing "there may be several strategic reasons why a defendant

willing to speak to the police would still refuse to write out his answers to questions.”)

The Prosecutor also claimed that the defendant had “lawyered up” by speaking to defendant’s son, whom the prosecutor described as “a lawyer from Edmond, Oklahoma, who operates his legal shop out of the back of his house.”

Remedies

A modification of defendant’s conviction for cruelty to animals to lesser included offense of abandonment of animals, rather than a reversal of conviction, was appropriate remedy for substantial prosecutorial misconduct.

DUFRIES V. STATE, 2006 OK CR 14, (Apr 13, 2006)

Facts

Defendant was stopped for driving an RV on the shoulder of I-40 at 78 m.p.h. in a 70 m.p.h. zone at 5:30 a.m. While proceeding to make a stop, the Oklahoma Highway Patrol Trooper also noticed Appellant had a broken taillight.

Arrest: Probable Cause

1. Subjective intentions of a police officer play no role in an ordinary probable cause Fourth Amendment analysis. If an officer has probable cause to believe a driver had violated some traffic law, stopping the driver's vehicle is lawful regardless of the officer's subjective motivation for the stop. The Supreme Court held in *Whren*, that where an officer has probable cause to believe a traffic violation has occurred, his subjective motivation for stopping the vehicle is irrelevant to the legality of the stop. “Subjective intentions play no role in ordinary probable cause Fourth Amendment analysis.” *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 1774, 135 L. Ed.2d 89 (1996). Thus, if the officer’s actions

were “objectively justifiable behavior,” because the officer had probable cause to believe a driver had violated some traffic law, stopping the driver’s vehicle is lawful regardless of the officer’s subjective motivation for the stop. *McGaughey v. State*, 2001 OK CR 33, ¶ 25, 37 P.3d 130, 136-37.

2. A police officer has probable cause to arrest a defendant during a traffic stop, given defendant's movement in car prior to officer contact, his nervous demeanor when providing license and registration, the strong smell of baby powder and cologne (which the officer knew were often used to mask a drug smell) and the smell of marijuana. A trained drug dog also twice alerted on car.

Sentencing: Enhancement: Prior Convictions

Appellant claimed his conviction was improperly enhanced because the State failed to prove his two prior **federal** convictions were applicable to the Oklahoma’s version of the Uniform Controlled Dangerous Substances Act (UCDSA). Appellant had two prior federal convictions for conspiracy to violate the controlled substances act and for possession of marijuana with intent. Appellant’s specific claim is twofold: first, that the State failed to prove the convictions would have been felonies in Oklahoma; and second, that out of state felonies are not included in the specific enhancement provisions of the UCDSA.

The Court of Criminal Appeals held that while the State has the burden of proof to prove prior convictions, the prior felonies were, as the State puts it, “obvious (state) felonies.” In 1988, Appellant pled guilty to the crime of conspiring with four others over a two year time period in Georgia to violate the U.S. Code “by knowingly and intentionally possessing with the intent to distribute and distributing cocaine, a Schedule II substance”. This would be a violation of 63 O.S. 2001, § 2-408, a felony, both now and in 1988. Also, in 1996, Appellant

pled guilty to the crime of possessing 166 pounds of marijuana with the intent to distribute in Kansas. This is more than six times the amount for trafficking in Oklahoma and a violation of 63 O.S. 2001, § 2-415, a felony. It would also be a violation of 63 O.S. 2001, § 2-401, a felony. As Appellant's prior federal felonies were obvious felonies in this state, no relief is necessary.

FENTANYL

A NEW ILLINOIS DRUG OF CHOICE

Source: DEA Diversion Control Program

<http://www.streetdrugs.org/fentanyl.htm>

Chicago police report that a new synthetic drug called Fentanyl that is being sold on the streets as heroin. Fentanyl is used by cancer patients and is many times stronger than morphine. The drug has been linked to as many as twelve overdoses in Chicago.

The drug was first synthesized in Belgium in the late 1950s. It has an analgesic potency of about 80 times that of morphine. It is also used in veterinary practice to immobilize certain large animals. Fentanyls are most commonly used by intravenous administration, but like heroin, they may also be smoked or snorted. Fentanyl oral transmucosal lozenges (Actiq®) are typically sold at \$20-25 per unit or \$450 per carton (contains 24 units) while transdermal patches (Duragesic®) are sold at prices ranging from \$10 to \$100 per patch depending upon the dose of the unit and geographical area. See <http://www.lawyersandsettlements.com/articles/fentanyl.html>.

LEGISLATIVE UPDATE

BY
TRENT BAGGETT

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Copies of the full text of bills are available from the Legislative Services Bureau web site at <http://www.lsb.state.ok.us>.

HB 1807 LAMB Status: Sent to the Governor on 5/26/06

Creates guidelines for proving that someone is mentally retarded. The defendant has the burden of production and persuasion to demonstrate mental retardation by showing significantly subaverage general intellectual functioning, significant limitations in adaptive functioning, and that the onset of the mental retardation was manifested before the age of eighteen (18) years. An intelligence quotient of seventy (70) or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning; however, it is not sufficient without evidence of significant limitations in adaptive functioning and without evidence of manifestation before the age of eighteen (18) years.

HB 2999 WINCHESTER Status: Sent to the Governor on 5/26/06

Reorganizes the Office of Juvenile Affairs and grants special privileges to nonprofit Oklahoma Youth services agencies.

HB 2615 CALVEY Status: Signed by the Governor

Creates the “Stand Your Ground Law.” This amends the “Make My Day Law” by creating a presumption that a person held a reasonable fear of imminent peril of health or great bodily harm that makes them justified in using deadly force against an intruder in their dwelling or occupied vehicle, or if the offender had removed or was attempting to remove another from the dwelling or vehicle against their will and that the person using the force knew or had reason to believe an unlawful act was occurring or had occurred. The presumption doesn’t apply if the offender had a right to be in the dwelling or vehicle, or the person using force is engaged in an unlawful activity.

SB 1037 PADDACK Status: Signed by the Governor

This bill will be known as the **Caitlin Wooten Act**. It currently does these things:

1. Provides that bail may be denied for capital offenses, violent offenses, crimes punishable by Life or LWOP, crimes charged AFC 2 or more felonies, and CDS crimes where the maximum punishment is at least 10 years.
2. Creates “a rebuttable presumption that no condition of release would ensure the safety of the community if the state shows by clear and convincing evidence that the person was arrested for kidnapping.”

SB 1470 WILSON Status: Signed by the Governor

Creates “Safe Net” law that targets investigation and prosecution of cases involving online child predators and child pornographers. It also creates new penalties for predators who solicit minors online (punishable by a fine not more than \$10,000 and a prison sentence of not more than 10 years).

- SB 1503** **COFFEE** **Status: Signed by the Governor**
- Prohibits cross examination of victims and victim designees who appear personally at formal sentencing.
- SB 1755** **RILEY** **Status: Sent to the Governor on 5/26/06**
- Creates a new crime of Domestic Violence against a pregnant woman with a penalty of not less than 15 years. Creates a new crime of lewd molestation of a child under 12 and sets the penalty at not less than 15 years.
- SB 1964** **CORN** **Status: Sent to the Governor 5/25/06**
- Creates a “sex offender” zone of safety of 2,000 feet at schools, bus stops, playgrounds, or licensed day care facilities.
- SB 1760** **RILEY** **Status: Sent to the Governor on 5/26/06**
- Makes persons 15, 16 or 17 years of age who are convicted of Murder I subject only to adult punishment. They are not subject to reverse certification or the youthful offender penalties.
- SB 1800** **NICHOLS** **Status: Sent to the Governor on 5/26/06**
- Allows a jury to consider life without parole or the death penalty for those convicted of a second child abuse offense.
- SB 1858** **MORGAN** **Status: Signed by the Governor**
- Makes Eluding an Officer where a death ensues Murder I under the felony-murder rule.
- SB 1476** **GASS** **Status: Signed by the Governor**
- Creates procedures for VPOs; creates an automatic renewal of a hearing date until the accused is served; creates misdemeanor for violation of VPO.

WHAT'S HAPPENING AROUND THE NATION

by

DOUG DRUMMOND

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DNA PROFILES ADDED TO ANTI-CRIME DATABASES

Federal and state governments are seeking to add millions of DNA profiles to anti-crime databases by including genetic information about people who are charged - but not yet convicted - of crimes. The trend is being driven by families of victims of unsolved crimes, but privacy advocates say searching profiles of persons not yet convicted is unfair.

The arrestee-testing laws generally permit a person's DNA to be taken after he or she is charged with a felony. If a defendant is acquitted or the charges are dropped, the profile is expunged from the database and the biological sample is destroyed. As long as the profile is in the database, it can be matched to other crimes.

However, New Mexico and Kansas this year enacted laws that require DNA testing for all people arrested for alleged felonies, and similar plans are under consideration in New York, New Jersey, Michigan, Illinois and Tennessee. The federal government and five states - California, Louisiana, Minnesota, Texas and Virginia - already permit DNA testing of arrestees. The measures represent an increasingly aggressive effort to expand the reach of the nation's Combined DNA Index System (CODIS), a network of state and federal computer indexes that matches DNA found at crime scenes to genetic profiles of known or suspected criminals.

See: www.usatoday.com/news/nation/2006-04-30-dna-testing_x.htm.

COUGH SYRUP GROWS AS A DRUG OF CHOICE

Desperate teens in search of a cheap and convenient high are turning to cough medicines, which can cause heart problems and, in rare cases, death.

Although a recent string of accidents involving intoxicated teenage drivers has heightened awareness about underage drinking, substance abuse counselors say parents should be aware of drugs teens use when alcohol is unavailable

The Partnership for a Drug-Free America says one in 11 teenagers has abused cough syrup to get high. Slang terms for it include robo-tripping, skittling and dexing.

See: <http://www.argusleader.com/apps/pbcs.dll/article?AID=/20060501/NEWS/605010321/1001>

LETHAL INJECTION A CRUEL DEATH?

Probably awake and suffocating silently, Robert Glen Coe felt the searing pain when Tennessee's executioner injected him with a deadly drug to stop his heart. That's according to an internationally known medical expert who studied the autopsy of the Tennessee inmate put to death by lethal injection in 2000, the first execution in the state since 1960.

The new evidence in Coe's death is being presented by defense attorneys as part of the case of Sedley Alley, a Memphis-area man sentenced to die May 17.

In addition to Alley, at least one other Tennessee death row inmate, Abu-Ali Abdur'Rahman, is challenging the constitutionality of the state's lethal injection protocol on claims that condemned inmates may not be properly anesthetized and therefore experience horrific, torturous pain.

They object to other parts of the protocol, as well, including the use of a drug that is banned

in Tennessee to euthanize pets and the lack of medical or scientific training for members of the execution team.

These challenges to Tennessee's lethal injection protocol come at a time when this predominant method of execution is moving into the spotlight in several other cases around the country.

In the Ohio execution last week of Joseph Clark, one of his veins collapsed, and as the poisonous chemicals began flowing, Clark raised his head and upper body off his gurney and said, "It don't work. It don't work," according to press accounts.

Late last month, U.S. Supreme Court justices clashed in a Florida case over whether inmates can file last minute civil rights challenges claiming that their deaths would be cruel and unusual punishment. And executions in other states have been delayed because of challenges to lethal injection. But to one victim rights advocate, debating whether lethal injection is cruel and inhumane is a waste of the court's time and taxpayers' money.

www.tennessean.com/apps/pbcs.dll/article?AID=/20060507/NEWS03/605070353/1017/NEWS

GROWING OLD BEHIND BARS

Aging inmates raise questions from health care to whether they should be sprung. It costs taxpayers up to three times as much as other inmates to keep seniors like Smith behind bars. As the number of geriatric jailbirds climbs each year, a controversy is brewing over what to do with prisoners like Smith.

Smith and the 2,850 other seniors locked up in Pennsylvania's prisons should be freed, some argue, because they're too old and infirm to kill or maim again, and cost too much to keep them behind bars. "In addition to the economic burden, the incarceration of the elderly poses fundamental

questions of how we as a society treat our elders," wrote Brie Williams, lead author of a study on geriatric prisoners in last month's Journal of the American Geriatrics Society. "What do we want to do with a prisoner who is so demented he doesn't remember his name, or who has had a stroke and is completely paralyzed?"

But prosecutors and victims' families say old age can't erase convicts' crimes and shouldn't earn them an early exit from jail. The debate promises to deepen as state lawmakers take sides. Pennsylvania legislators now are considering a "compassionate release" bill that would allow judges to free infirm, elderly inmates and others crippled by chronic health conditions.

See: <http://www.philly.com/mld/philly/14526792.htm>

ARIZONA LOOKS AT LOWERING BLOOD ALCOHOL CONTENT (BAC) THRESHOLD

Arizona is drafting legislation seeking to lower the BAC for 2nd time (or more) offenders to what is being called the "Vermont" standard. The bill drafter and media have inferred there are as many as 23 other states with similar standards. That is, if an offender has a subsequent DUI, the level of presumption for impairment will be .04 or .05.

WHAT IS "ASCLAD" CERTIFICATION?

ASCLAD/LAB is a non-profit professional organization dedicated to promoting and maintaining the highest standards of practice in forensic science. There are approximately 305 crime labs currently accredited by ASCLAD/ALB. But, there is a higher standard: ASCLAD International! ASCLAD certification can be in either fingerprints, crime scene evidence collection, DNA, and audio/visual analysis or many other areas of crime scene forensics.

--- *Scholarly Article* ---

VENUE AS RELATED TO COMPUTER SEX CRIMES:
State v. Fletcher

by
Adam Langsam

Adam is an Assistant Professor of Sociology with Northeastern State University. He received his doctorate in Sociology from the University of North Texas. In addition, he attended the George John Beto School of Criminal Justice where he studied criminology, multivariate statistics, police administration and management, law, and research methods. His research interests include corrections, drugs and society and consensual crime. Adam can be contacted at (918) 449-6000, x3523 or via e-mail at langsam@snuok.edu.

Virginia Delaney and her husband own and operate U.S. Cyberwatch in Loveland, Colorado. The purpose of Cyberwatch is to identify and intercept potential pedophile e-mails before they reach a child. In the fall of 2004, Ms. Delaney profiled a fictitious thirteen year-old child named “Amy” in an Internet chat room. The court records show that the defendant initiated contact with “Amy” in October 2004. The Delaneys had their computer located in Colorado, but told the defendant that “Amy” was physically located in Norman (Cleveland County), Oklahoma. The defendant attempted to contact “Amy” on the Delaney’s computer in Colorado from his home computer located in Ardmore, Oklahoma.

A copy of the Internet chat between “Amy” and the Appellee from October 16 through October 20 is now part of the court record. The defendant sent a picture of himself via a web cam and identified himself as “Brian”. In addition, the defendant told “Amy” that he liked her age but wished that she was a few years younger. He also asked her if she was a virgin, whether they could “mess around”, that he would bring alcohol, and asked whether she would dress sexy for him.

The defendant also sent a picture of his penis to “Amy” on two separate occasions. He then

discussed taking pictures of the young girl in sexually descriptive positions, having sex with her, and described acts that he would like to perform on her. The defendant then requested a meeting with “Amy” in Norman at which time they would procure a hotel room.

A meeting was set up by Appellee at Grandy’s Restaurant in Norman, Cleveland County. “Amy” was waiting in the back of the restaurant for the arrival of the defendant. When the defendant entered the restaurant, he was immediately arrested by the Norman Police Department.

The only issue before the Court was whether proper venue existed in Cleveland County, Oklahoma. Article 2, section 20, of the Oklahoma Constitution states that the accused has the right to be adjudicated in the county in which the crime occurred. However, “[w]hen a public offense is committed partly in one county and partly in another county, or the acts or effects thereof, constituting or requisite to the offense, occur in two or more counties, the jurisdiction is in either county” 22 O.S. 2001 §124. The sexual remarks and repeated requests for sex were sent via the defendant’s computer in Ardmore (Carter County), Oklahoma. Therefore, proper venue exists in either Carter County or Cleveland County.

The argument was put forth that the appellee committed numerous criminal offenses. The Court, therefore, found that the magistrate incorrectly dismissed the State’s case. As a result, the State’s appeal was granted. Therefore, the Court of Criminal Appeals held that proper venue was in the county in which the defendant committed an overt act toward commission of an attempted offense. However, Presiding Judge Chapel wrote a dissent that merely stated, “In my opinion, venue for these offenses clearly is in Carter County. I would affirm the trial court's order.”

Quote of the Day: We are what we do. Excellence, then, is not an act, but a habit. Aristotle.

--- Scholarly Article ---

**CONFRONTATION
AND THE PRELIMINARY HEARING**
by
D. MICHAEL HAGGERTY, II

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I. INTRODUCTION

The right of confrontation was recently thrust back onto centerstage by the groundbreaking U.S. Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36 (2004). In rejecting the standard for admissibility of hearsay, at least for "testimonial" hearsay, which it had created in *Ohio v. Roberts*, 448 U.S. 56 (1980), the Court opened up questions regarding the admissibility of evidence which had been settled for nearly 25 years.

In the spirit of this reexamination, a colleague recently suggested something to the author: if testimonial hearsay is inadmissible without confrontation, then how can a report from an Oklahoma State Bureau of Investigation (OSBI) laboratory be admitted without a sponsoring witness at a preliminary hearing? His position was that *Crawford* would effectively bar the use of the lab report at preliminary hearing, thus requiring the State to put on a live witness to testify, for example, to identify various illegal drugs.

Square in the path of this reasoning stands *State v. Tinkler*, 1991 OK CR 73, 815 P.2d 190. In *Tinkler*, thirteen years before *Crawford*, the Court of Criminal Appeals decided that criminal

defendants do not have a right to confront witnesses at preliminary hearing.

II. CONFRONTATION AND TINKLER

The right to confrontation, of course, is rooted in the Sixth Amendment to the U.S. Constitution and Article 2, § 20 of the Oklahoma Constitution. Those provisions read as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI (emphasis added).¹

In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed or, where uncertainty exists as to the county in which the crime was committed, the accused may be tried in any county in which the evidence indicates the crime might have been committed. Provided, that the venue may be changed to some other county of the state, on the application of the accused, in such manner as may be prescribed by law. He shall be informed of

¹The federal right of confrontation was extended to the States by *Pointer v. Texas*, 380 U.S. 400 (1965).

the nature and cause of the accusation against him and have a copy thereof, and ***be confronted with the witnesses against him***, and have compulsory process for obtaining witnesses in his behalf. He shall have the right to be heard by himself and counsel; and in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of the witnesses that will be called in chief, to prove the allegations of the indictment or information, together with their post office addresses.

OKLA.CONST. art. 2 § 20 (emphasis added). In Oklahoma, two additional statutory provisions provide for the right to confront witnesses. Title 22 O.S. § 13(3) generally provides a right to confront in criminal cases, while 22 O.S. § 258 (First) provides for the right specifically at preliminary hearing.

The purpose of these provisions is to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). It has three elements: (1) the witness must be placed under oath, (2) the witness must be subject to cross examination, and (3) the trier must be allowed to observe the witness's demeanor while testifying. *Id.* at 845-46. According to the Court:

The combined effect of these three elements . . . serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings.

Id. at 846. Oklahoma applies this same reasoning. *See Burke v. State*, 1991 OK CR 116, ¶¶ 22-23, 820 P.2d 1344, *cert. denied* 504 U.S. 973 (1992) (following *Craig*). The right is so important that it has been held to be a component of due process, independent of the specific confrontation clauses. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *McMinn v. City of Oklahoma City*, 1997 OK 154, ¶¶ 20-22, 952 P.2d 517. It is this critical right which was examined by the Court of Criminal Appeals in *Tinkler*.

The statute which led to the decision in *Tinkler* was 22 O.S. § 751. That statute was originally enacted in 1976.² It provides for the admission, at pretrial hearings, of OSBI or other forensic lab reports, medical examiner's reports, and other similar reports. § 751(A)(1)-(5).³ In order for those reports to be admissible, they must be "made available" or "served"⁴ at least 5 days in advance to the defendant; if not, the defendant is entitled to a 5-day continuance of the hearing. *Id.* In the event of compliance, the reports are admissible without the need of the witness appearing in court to testify, thus dispensing with the requirement of authentication as well as making them admissible hearsay. *Id.*

The purpose of this statute, clearly, is to save the burden and expense of having scientific experts appear at preliminary hearings and other pretrial proceedings around the state. *See Tinkler*, 815 P.2d at 192 (noting that the statute was "economically minded"). In the view of the legislature,

²1977 OKLA.SESS.LAWS ch. 259 § 15.

³References to the provisions of § 751 are made to the current version, last amended in 2004 (2004 OKLA.SESS.LAWS ch.130 § 5), unless otherwise indicated. The version in *Tinkler* was somewhat different, applying solely to preliminary hearings, while the current version applies to "any hearing prior to trial or a forfeiture hearing." *Compare* 22 O.S.Supp.1989 § 751 with 22 O.S.Supp.2005 § 751. However, for purposes of the issue presented in this discussion, there is no practical difference, and so no distinction between the two versions will be made herein.

⁴Both terms are used interchangeably in the statute, and so it appears that the legislature intended that the report actually be provided to the defendant (or his attorney) rather than just making it "available" through the district attorney's "open file" policy, or similar measures.

a certified copy of the forensic report is sufficiently reliable to be used at pretrial proceedings, with their lower burden of proof. *Id.* The apparent collision between this legislatively-created exception to the hearsay and authentication rules and the right of confrontation led to the decision in *Tinkler*.

Tinkler was a state appeal from a ruling at preliminary hearing excluding an OSBI lab report. The magistrate had held that § 751 violated the Defendant's right to confront the witness authoring the lab report at preliminary hearing. The State appealed this decision pursuant to 22 O.S. § 1053.1, which mandates an appeal from any decision holding a state statute unconstitutional in a criminal case.

A unanimous Court of Criminal Appeals reversed. *Id.* at 193. For the Court, the issue which decided the case was whether the defendant had the right to confront witnesses at preliminary hearing. The Court noted, initially, that a preliminary hearing was different from a trial, and that different rights would often apply at one proceeding versus another. *Id.* at 192. The sole example cited by the Court was the inapplicability of the speedy trial right to preliminary hearing, due to the language of the constitutional provision which provided that right. *Id.* The Court then quoted *dicta* from *Barber v. Page*, 390 U.S. 719 (1968)⁵ to the effect that the right of confrontation is "basically a trial right." *Tinkler, supra* at 725, quoting *Barber*. While noting that preliminary hearing was, again, not a trial, but was for the limited purpose of requiring the State to prove that a crime was committed and that there was probable cause to believe the defendant committed the crime, the Court held that § 751's exception to the hearsay rule was constitutional. *Id.* at 193. While the Court did not explicitly say so, it appears clear from the opinion that the Court believed that confrontation

⁵See discussion of *Barber*, *infra*.

was not applicable at the preliminary hearing.⁶ This holding has not been overruled.⁷

III. ANALYSIS OF TINKLER

The holding in *Tinkler*, such as it is, has not been widely analyzed. Indeed, it appears to have largely flown under the radar of most attorneys, whether they be defense attorneys, prosecutors, trial judges, or judges on the Court of Criminal Appeals. Even discussion by commentators is rare. What little discussion exists is critical, at best, of *Tinkler's* shallow treatment of its subject. For instance, in his treatise on Oklahoma evidence law, Professor Whinery describes the Court's apparent conclusion that confrontation is eliminated at preliminary hearing by statute as "overreaching" and "difficult to sustain on a basis of existing judicial authorities." WHINERY, *supra* at n.6. This lack of support in other authorities becomes plain when one searches for support for *Tinkler's* conclusion. Indeed, support for *Tinkler's* reasoning is notably lacking.

First, there is no support for *Tinkler's* limitation of confrontation to trial in the text of either constitutional provision. The text of neither the Sixth Amendment nor Section 20 say anything about limiting the right of confrontation to trials alone. Other rights, contained in both provisions, do have such express limitations.⁸ The absence of a similar textual limitation on confrontation would tend to indicate that it is applicable in other proceedings, as well as trials.

In fact, this is the approach taken by courts in examining a related right, the right to counsel.

⁶See LEO H. WHINERY, OKLAHOMA EVIDENCE, § 33.03 (2d ed. 2000). After all, the legislature cannot repeal constitutional protections by statute.

⁷But see *LaFortune v. Dist. Court of Tulsa Co.*, 1998 OK CR 65, 972 P.2d 868, and discussion *infra*. An unrelated holding in *Tinkler* was overruled in *State v. Johnson*, 1992 OK CR 72, 877 P.2d 1136, where the Court reversed its decision in *Tinkler* as to the effect of the State prevailing in its appeal. Other than *Johnson*, *Tinkler* has not been cited in any published opinion by the Court.

⁸For example, the rights to speedy trial, and trial in a particular venue, are by their nature trial rights. As discussed *supra*, the limitation on the right to speedy trial was expressly noted by *Tinkler*. See *Tinkler* at 192.

The right to counsel is not limited to trial, but extends to "any critical stage of a criminal proceeding, including preliminary hearing." *Norton v. State*, 2002 OK CR 10, ¶ 9, 43 P.3d 404. *See also Coleman v. Alabama*, 399 U.S. 1, 7-10 (1970) (holding that Alabama preliminary hearing was "critical stage" requiring counsel; cited by *Norton*). The right to counsel in criminal cases is found in both the Sixth Amendment and Section 20; in both cases, the rights of confrontation and to counsel are separated in the text only by the right to compel witnesses to appear. Both rights are listed as applicable to all criminal defendants, and ***neither contain any text limiting them to trial.*** Given the way the rights are expressed, there appears to be no reason in the text to limit the right to confront witnesses to trial, yet provide a broader right to counsel.

Second, the legislative history of the preliminary hearing indicates that, as created by the Oklahoma Constitution, it included a right to confront witnesses. The preliminary hearing actually existed as a statutory creation prior to statehood in the Oklahoma Territory, and the defendant had a right to confront witnesses in that proceeding. W.F. WILSON, WILSON'S REVISED & ANNOTATED STATUTES OF OKLAHOMA § 5285(First) (1903).⁹ It was then made constitutionally mandatory for all prosecutions by information at statehood. OKLA.CONST. art. 2 § 17. The territorial statute giving the right to confront witnesses was then brought forward into state law. OKLA.CONST., Schedule

⁹An important distinction between procedure since statehood and in the Oklahoma Territory is the requirement that all Territorial felonies were prosecuted by indictment. *See Gibbons v. Territory*, 1911 OK CR 66, syl. 2, 115 P. 129; WILSON, *supra*, § 5304. The preliminary hearing, under Territorial law, was required only for holding a defendant in custody until his case was presented to a grand jury. This made it similar to the 48-hour probable cause determination required by *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). The *Gerstein/McLaughlin* hearing can be *ex parte*, and resolved by mere presentation of an affidavit to a magistrate. *Gerstein* at 120-22; *Black v. State*, 1994 OK CR 4, 871 P.2d 35, 39 n.7. However, the Court of Criminal Appeals has noted that the Oklahoma preliminary hearing provides greater protection to defendants than the *Gerstein/McLaughlin* hearing. *Id.* For example, the *Gerstein/McLaughlin* hearing is not a "critical stage" of the proceedings requiring appointment of counsel, *Gerstein* at 122-23, while the Oklahoma preliminary hearing is a "critical stage" where counsel or waiver of counsel is required. *Norton, supra.*

§ 2; 34 Stat. 275 (1906). *See* GEN. STAT. OF OKLA. § 1942 (First) (1908). Hence, it would appear that the Constitutional Convention, in creating the preliminary hearing, was referring to the territorial version of that proceeding ***which expressly required giving the defendant a right to confront witnesses.***

Third, the source of authority for the decision in *Tinkler* is of little assistance. The sole authority cited to limit confrontation to trial was the statement in *Barber v. Page, supra*, wherein the U.S. Supreme Court stated that "[t]he right to confrontation is basically a trial right." *Id.* at 725. *Barber*, which originated in Oklahoma, involved the use of a preliminary hearing transcript at trial. The Court held under the confrontation clause of the Sixth Amendment, the State must show the use of sufficient diligence to obtain the witness's presence at trial, in order to use that witness's prior testimony in lieu of the witness's appearance. *Id.* at 725-26. Since the issue in *Barber* involved the confrontation right at trial, rather than pretrial proceedings, the language relied on by *Tinkler* which purports to limit confrontation to a trial right is purely *dicta*. It is also unsupported by any authority in *Barber*; in short, it is merely an ancillary portion of the discussion, and is not relied on by *Barber* as a basis for its decision.

Fourth, the Court of Criminal Appeals has not consistently held that the right of confrontation does not apply at preliminary hearings. Instead, in cases decided both before and after *Tinkler*, the Court has apparently assumed that a right to confrontation exists at preliminary hearing. For example, in *Williams v. State*, 1986 OK CR 101, 721 P.2d 1318, the defendant complained that he had been improperly removed from his preliminary hearing, thus depriving him of his right to confront witnesses. Rather than simply holding that confrontation did not apply, and thus quickly disposing of this issue, the Court assumed that it did apply, and held that the defendant had waived his right to confront witnesses at his preliminary hearing due to his own misconduct. *Id.*, 721 P.2d

at 1320-21. A post-*Tinkler* example is *Primeaux v. State*, 2004 OK CR 16, 88 P.3d 893, *cert. denied* 543 U.S. 944 (2004). In *Primeaux*, the defendant claimed that the evidence at his preliminary hearing was insufficient, since hearsay statements relied on by the magistrate were later ruled inadmissible at trial due to confrontation problems; thus, they would have been inadmissible at preliminary hearing due to confrontation. Again, rather than citing *Tinkler* and ruling that no such right applied, the Court noted that the defendant waived any Confrontation Clause violations in the admission of hearsay at the preliminary hearing by introducing hearsay statements himself. *Id.*, 2004 OK CR 16 at ¶ 19.

Most perplexing of all, however, is *LaFortune v. Dist. Court of Tulsa Co.*, *supra*. In *LaFortune*, the Court held that the State must provide all law enforcement reports to a defendant, with or without an express request, at least five days before preliminary hearing. *Id.*, 1998 OK CR 65 at ¶¶ 14-15. In reaching this decision, the Court gave as part of the basis of its holding the following:

At the preliminary hearing, a defendant must not be denied his Constitutional right to be confronted with his accusers, and must be allowed to produce evidence material to the two issues in a preliminary hearing.

Id. at ¶ 11 (emphasis added). *Tinkler* is nowhere to be found, either in the majority opinion or in either of the dissents. Thus, it could not be more plain that by 1998 the Court was of the opinion that the constitutional right of confrontation applied to preliminary hearings, and *Tinkler* was all but forgotten.¹⁰

¹⁰Other than a disturbing unfamiliarity with its own decisions, the only way that the Court's reasoning in *Williams* and especially *Primeaux* and *LaFortune* could be squared with *Tinkler* is if the cases were discussing the **statutory** right of confrontation rather than the **constitutional** right. However, none of the cases contain any reference to the statutory right of confrontation as opposed to the constitutional right. Instead, *Williams* expressly refers to the "Sixth Amendment", while *Primeaux* refers to the "Confrontation Clause", legal shorthand for the Sixth Amendment, and *LaFortune* states that confrontation is a "Constitutional right" at preliminary hearing. *Williams* at

Finally, there is the nature and importance of the preliminary hearing itself. The hearing is of constitutional magnitude since it is required by Article 2, Section 17. The purpose of the preliminary hearing is "to prevent a person from becoming the victim of an unjust and malicious prosecution." *Beird v. Ramey*, 1969 OK CR 195, ¶ 7, 456 P.2d 587. "It is a most important part of our system of Jurisprudence and should not be treated lightly." *Id.* In fact, it is a "critical stage" of a criminal prosecution. *Norton, supra.* The critical nature of the preliminary hearing has led to questions about *Tinkler's* reasoning. See STEPHEN JONES, HOLLY HILLERMAN & JENNIFER GIDEON, VERNON'S OKLA. FORMS 2d § 9.10 (1999). Quite simply, given the critical nature of the preliminary hearing, and its importance in Oklahoma procedure, there appears to be no logical basis at all to conclude that the constitutional right of confrontation should not exist in that proceeding. This was apparently recognized by the Court in *LaFortune*, when the Court expressly stated that the right did exist at preliminary hearing.

IV. CONCLUSION

Notwithstanding its myriad of flaws, *Tinkler* still appears to be good law. There are strong financial reasons for *Tinkler* to remain good law; in this day and age of fewer labs and tighter budgets, it would clearly be burdensome on the State to produce chemists, among others, at every preliminary hearing rather than simply introducing a report into evidence. Given this situation, despite the lack of legal support for its decision, it is doubtful, at best, that *Tinkler* would be overruled. However, it may be an appropriate issue to raise, given the proper situation.

1320; *Primeaux* at ¶ 19; *LaFortune, supra.*

First Annual Forensic Academy

--- Presented on 4/14/06 ---

SUPER SNOOPING

CELL PHONE TRACKING, FISA, & WIRETAPS

by

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Tulsa, Oklahoma

Reprinted in substance - Unfortunately, Paul's graphics (pictures) would have made the file too large to transfer via e-mail.

CELL PHONE TRACKING

In Re: Application for Pen Register and Trap/Trace Device with Cell Site Location Authority, 396 F. Supp. 2d 747 (S.D. Tex. 2005)

The United States sought a court order to compel a cell phone company to disclose records of a customer's cell phone use. Among the records that were sought was "cell site data," which revealed the user's physical location while the cell phone was turned on.

The issue was what legal standard the United States had to satisfy to compel disclosure of such prospective or "real-time" cell site data. Permitting surreptitious conversion of a cell phone into a tracking device without probable cause raised serious Fourth Amendment concerns, especially when the phone was monitored in the home or other places where privacy was reasonably expected.

In the Matter of an Application of the United States for an Order (1) Authorizing the use of a Pen Register and a Trap and Trace Device and (2) Authorizing Release of

Subscriber Information and/or Cell Site Information, 396 F. Supp. 2d 294 (E.D. NY 2005)

The court concluded that existing law did not permit the government to obtain the contemporaneous cell site information on a prospective, real-time basis without a showing of probable cause. The court reasoned that the government's planned use of a mobile telephone as a means for contemporaneously tracking the movements of its user impacted Congressional compromise between effective law enforcement and individual privacy rights and required a showing of probable cause.

In the Matter of the Application of the United States of America for an Order Authorizing the Installation and Use of a Pen Register and a Caller Identification System on Telephone Numbers and the Production of Real Time Cell Site Information, 402 F. Supp. 2d 597 (D. Md. 2005)

The issue presented was whether existing statutes allowed the government to obtain real time cell site information upon a showing of less than probable cause. Accordingly, the court was left with only its general authority to issue a Fed. R. Crim. P. 41 warrant upon a showing of probable cause.

In the Matter of the Application of the United States of America for an Order Authorizing the Release of Prospective Cell Site Information, 2006 U.S. Dist. LEXIS 589 (D. DC 1/11/2006)

The government once again seeks an order that would require a cell phone company to provide it with "the location of cell site/sector (physical address) at call origination (for outbound calling), call termination (for incoming calls) and, if reasonably available, during the progress of a call, on a real time basis." It claims entitlement to the order on the ground

that there is "reasonable cause to believe that the requested prospective cell site information is relevant and material to a criminal investigation."

Three standards that might pertain to the government's application:

(1) the government may secure a pen register upon the certification that the information sought to be captured by the device is relevant to a criminal investigation;

(2) the government may secure the "contents of wire or electronic communications in a remote computing device" or "records concerning electronic communication or remote computing service" securing a court order upon a showing of specific and articulable facts that the information sought is relevant to and material to an ongoing criminal investigation; and

(3) the government may secure a warrant pursuant to Rule 41 of the Federal Rules of Criminal Procedure upon a showing, that there is probable cause.

In the Matter of the Application of the United States of America for an Order Authorizing the Installation and Use of a Pen Register and/or Trap and Trace for Mobile Identification Number (585) 111-1111 and the Disclosure of Subscriber and Activity Information Under 18 U.S.C. § 2703, 2006 U.S. Dist. LEXIS 8697 (W.D. NY 2/10/2006)

In the last several months at least seven Magistrate Judges have considered applications for cell site data and issued comprehensive written decisions. Five courts rejected the government's request for prospective or real time cell site data. Two courts have determined that the statutory scheme relied on by the government can appropriately authorize disclosure of prospective site data.

In the Matter of the Application of the United States of America for an Order Authorizing the Installation and Use of a Pen Register and/or Trap and Trace for Mobile Identification Number (585) 111-1111 and the Disclosure of Subscriber and Activity Information Under 18 U.S.C. § 2703, 2006 U.S. Dist. LEXIS 7653 (W.D. NY 2/15/2006)

The court would issue a warrant for the seizure of the requested real time cell location information upon a showing that there existed probable cause to believe that the data sought would yield evidence of a crime.

In the Matter of the Application of the United States of America for Orders Authorizing the Installation and use of Pen Registers and Caller Identification Devices on Telephone Numbers, 2006 U.S. Dist. LEXIS 7345 (D. Md. 2/27/2006)

The government sought orders authorizing pen register and caller identification device use for a suspect's cell phones and directing cell providers to disclose tower locations and subscriber and billing information concerning calls to and from the phones. The court granted all requests except the tower location request.

FISA

In Re: All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611 (USFISC 2002)

The Department of Justice moved the court to vacate the minimization and "wall" procedures in cases brought pursuant to FISA, seeking electronic surveillance and physical searches so that information gathered could be more readily used for law enforcement as well as foreign intelligence gathering.

The court granted the Department of Justice's motion but modified certain provisions to insure that criminal prosecutors were not directing or controlling FISA searches and

surveillance toward law enforcement objectives.

In Re: Sealed Case No. 02-001, 310 F.3d 717 (USFISC 2002)

The constitutional question posed by the case-whether Congress's disapproval of the primary purpose test through its amendment of FISA by (the Patriot Act), was consistent with the Fourth Amendment-had no jurisprudential answer. Notwithstanding the absence of clear precedent, the court reached the conclusion that the procedures and government showings required under FISA, if they did not meet the minimum Fourth Amendment warrant standards, came close. Thus, FISA, as amended by the Patriot Act, was constitutional because the surveillance it authorized was reasonable.

United States v. Sattar, Yassir Al-Sirri, Mohammed Yousry and Stewart, 2002 U.S. Dist. LEXIS 14798 (S.D. NY 8/12/2002)

Pursuant to FISA, the United States obtained information by way of electronic surveillance of terrorist activities by defendants. The motion for disclosure regarding non-court authorized surveillance was moot since the United States represented that it would have sent notification to defendants of any surveillance conducted under the FISA. Further, the United States represented that it was not conducting any "un-notified" surveillance.

United States v. Sattar, Yassir Al-Sirri, Stewart, Yousry, 2003 U.S. Dist. LEXIS 16164 (S.D. NY 9/15/2003)

Defendants moved to suppress evidence the government obtained through electronic surveillance conducted pursuant to FISA.

The government obtained evidence through several years of electronic surveillance of

defendants' home telephones, computers, fax machines, and visits to a prisoner. The court, reviewed the surveillance applications in camera, held that there was probable cause to believe that each of the targets was an agent of a foreign power, that each of the facilities to which the surveillance was directed was being used or about to be used by an agent of a foreign power, and none of the targets were deemed to be an agent of a foreign power solely based on activities protected by U.S. Const. Amen. I.

WIRETAPS

United States v. Squillacote, 221 F.3d 542 (4th Cir. 2000)

Defendants argued that the surveillance of them was improper because there was no probable cause to believe that defendants were agents of a foreign power. The court disagreed, finding that the documents submitted by the government were sufficient to determine the legality of the surveillance.

FISA, 50 AU.S.C.S. § 1801 et seq., provides that the district court must review in camera and ex parte the FISA application and other materials necessary to rule upon a defendant's suppression motion if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States.

United States v. Ramirez-Encarnacion, 291 F.3d 1219 (10th Cir. 2002)

Defendant moved to suppress all evidence against her as a result of wiretaps, which she argued had not met the necessity requirement. The evidence showed the DEA had engaged in substantial surveillance prior to obtaining the wiretap; other agencies assisted the DEA; and the investigation grew to some extent as a result of the wiretap. Abuse of discretion

standard was the proper measure as to whether the wiretap was necessary.

United States v. Garcia, 232 F.3d 1309 (10th Cir. 2000)

The court held that the warrant was properly obtained by explaining that the normal investigative techniques of surveillance, witnesses, search warrants, undercover infiltration, and pen registers were insufficient to collect necessary information. Traditional investigative procedures had been attempted and further reliance on these means would be unhelpful or counterproductive, even the preceding wiretaps did not obviate the need for the wiretap which implicated defendant. Wiretaps properly minimized the interception of the communications by limiting the recordings to matters related to the government's investigation of gang-related drug activity.

United States v. Smart, 278 F.3d 1168 (10th Cir. 2002)

Five of the offenses in the application were clearly enumerated by statute as subject to investigation by wiretap, two of the seven offenses were not. The directives authorizing the wiretap were limited to only three enumerated offenses. The incorrect description of suspected non-enumerated offenses did not invalidate the order where the authorization to wiretap itself was limited to only enumerated offenses.

United States v. Iiland, 254 F.3d 1264 (10th Cir. 2001)

Good general discussion of applicable law.

United States v. Mitchell, 274 F.3d 1307 (10th Cir. 2001)

Defendants did not meet their burden of overcoming the presumption that the authorization orders were proper.

United States v. Burciaga, 66 Fed. Appx. 812 (10th Cir. 2003)

The evidence against defendants obtained through wiretaps authorized pursuant to Wyoming's wiretap statute. Subsequent to his plea, each defendant learned that, pursuant to a sunset provision, the wiretap statute had expired before the wiretap warrants were issued. In a similar case, a panel of the court had held that the claim that evidence obtained pursuant to the illegal wiretaps must be suppressed was procedurally barred.

United States v. Vanmeter, 278 F.3d 1156 (10th Cir. 2002)

Federal agents provided full and complete statements showing the necessity of the wiretap and did not violate the nondisclosure requirement of the wiretap statute when they briefly quoted intercepted communications to establish probable cause.

"I'm beginning to think that my lawyer is too interested in making money." "Why do you say that?"

"Listen to this from his bill: 'For waking up at night and thinking about your case: \$25'."

Many years ago, a junior partner in a firm was sent to a far-away state to represent a long-term client accused of robbery. After days of trial, the case was won, the client acquitted and released. Excited about his success, the attorney telegraphed the firm, simply stating: "Justice prevailed." The senior partner quickly replied: "Appeal immediately."

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