

# Q & A The Newsletter of the Criminal Law Section

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Spring 2004

## FBI's Bullet Testing Forensics Unit Under Fire

Forensic scientists usually match bullets to a gun by comparing unique striations left on bullets when they are fired through a barrel. However, if the bullets are too mangled to view rifling marks, FBI examiners may conduct what is called a lead compositional analysis to compare a suspect's bullets with those at the crime scene.

To compare bullets, the FBI measures the levels of seven elements that are found in bullet-lead. Generally, the FBI deems bullets to be "analytically indistinguishable" if concentrations of the seven elements in a crime scene bullet and a suspect's unfired bullet fall within a certain range of deviation. The FBI says the chances of a *false match* using this procedure are one in 2,500.

Due to high error rates, the FBI has agreed to discontinue a statistical method known as "chaining." In data chaining, forensic scientists conclude that if the lead content of bullet A matches bullet B, and bullet B's content matches bullet C, then it is safe to testify that bullet A and bullet C are a match, even if their test results don't directly match. Said another way, the FBI can match two dissimilar bullets if it can find a third — from a manufacturer, for instance — that matches both. This method was used in lead-bullet comparisons for the Kennedy assassination. Today, the FBI has a database of lead-test results exceeding 13,000 samples.

However, such bullet matching techniques are suspect because of wide variations in the bullet manufacturing process. According to the National Academy of Sciences, there is *inadequate data to support statements that a crime scene bullet came from a particular box of ammunition or that it was manufactured on a given date*. The Academy further concluded that because very limited information exists on where bullets are distributed, FBI examiners should not testify as to the probability that a crime scene bullet came from a defendant.

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***REPORT FROM THE CHAIR***

I am delighted to report that as of February 6, 2004, the Criminal Law Section (CLS) had 280 members, with more than \$4,700 in its OBA account. It is very gratifying that so many attorneys have decided to participate in what we envision as a dynamic forum for debate on criminal justice issues. Every branch of law involves some adversarial tension, but nowhere is there more line-drawing in the sand than in the practice of criminal law.

Thus far our energies have been directed toward recruitment and publication of the newsletter, Q & A. With the legislature in session, we expect that this Issue #3 will be followed by a new issue devoted to legislative proposals within 4-6 weeks.

Mike Wilds, Q & A Editor, has also been working on a Section brochure on criminal justice for the public, similar to the other public brochures to be found at the Bar Center. Part of our budget will go to production of this brochure.

The key to an interesting section and publication is debate and dialogue. We urge you to submit articles (500-2000 words), or to make suggestions about articles or crossfire issues the Section should address. It is vital that we have a multiplicity and diversity of voices. All articles should be submitted to Mike Wilds, e-mail address [wilds@nsuok.edu](mailto:wilds@nsuok.edu). His telephone number is (405) 449-6532.

From my perspective, as a member of the Sentencing Commission, I do not think it egregious to note that prosecutors have more influence on the course of legislation and appropriations than the defense bar. Whether this is deplorable or right and natural surely depends on your side of the fence. The defense bar is making strenuous efforts, through the Oklahoma Criminal Defense Lawyers Association and the two metropolitan county defense organizations, to establish more balance.

Given the fact that the public tends to identify with the prosecutors as a constituency, and that the defense bar's constituency is (rather inaccurately) viewed as the field of criminals who

typically do not or cannot vote, none of this is surprising. The importance of the defense as an essential ingredient in the adversarial system is sometimes lost in the flurry of public anger toward defendants and those who represent them.

It isn't my purpose to rail against that, but to observe that it has implications for the operation of the Section. Prosecutors seem to have less at stake in being persuasive to the Bar than defenders. I think it is safe for me to observe that Defender interest and work contribution to the Section thus far has exceeded that of prosecutors. My main job has been trying to encourage and solicit prosecutor contributions to the newsletter and participation in the debate. Thus, I am pleased the Larry Stuart, *sua sponte*, offered to respond to last issue's Spitting Case article, when the Creek County prosecutors ultimately declined to do so.

If the Section is to have real impact, we need balanced participation. It will be useless and ineffectual if it becomes a bullhorn for one side or the other. We need to seek consensus on some issues and debate the rest openly and vigorously. SO – I encourage every member to speak up! This is your Section!

Finally, let us know how you want your money spent – options include CLE, a more elaborate publication such as that of the Family Law Section, Law Day activities, etc. If this Section is worth the effort, then it's important to focus on making a difference. My own bias would be toward expanding the publication; however, I would prefer an active discussion and consensus before making any commitments. Please respond on the questionnaire on Page 26 or e-mail me or Mike Wilds, Editor, Q & A. Our e-mail addresses are listed in this publication.

It's my pleasure to serve as your Chair. I look forward to your guidance and direction as well.

*Jim Drummond*

Chairman, Criminal Law Section of the OBA

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*A Comment from the Editor*

**Just a note of thanks** to all the Criminal Law Section members for their *voluntary* contributions to this issue of the *Q&A*. With just three issues, this newsletter is starting to look more and more like a law journal than a newsletter. Please, keep up the good work.

Kurt Hoffman has issued a challenge to the prosecutors. Can you justify, in a Crossfire, the need to use hearsay evidence in a preliminary hearing? If so, respond to me with an attachment in Word or WordPerfect to me, Mike Wilds, at wilds@nsuok.edu. My telephone number is (918) 449-6532. Again, thanks for all the great work!

Mike Wilds  
Editor, *Q&A*

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**WHY E-MAIL THE Q&A NEWSLETTER IN PDF FORMAT?**

According to OBA information, approximately 90% of bar members have the ability to access the Internet and read HTML or PDF files. If we send the newsletter in Word or WordPerfect, different printers will destroy the imbedded formatting such as fonts, indentation and spacing, thereby printing a newsletter that looks absolutely horrible!

**How to Download Adobe Acrobat Reader to read PDF files**

In the event you do not have software to access PDF files, you can download free copies of Adobe Acrobat (PDF) by accessing <http://www.adobe.com/products/acrobat/readstep.html> or <http://www.pdf995.com>.

**CRIMINAL LAW SECTION  
WEB PAGE**

Go to <http://www.okbar.org/members/sections/crimlaw/default.htm> for an online copy of the *Q & A*. You can also go to the OBA home page, click on sections, then click on crimlaw. Special **thanks to Matt Gayle**, Web Developer at the Oklahoma Bar Association for his assistance and guidance in the design and layout of our web page!

## GOODNIGHT GENTLE GIANT

**Patrick A. Williams**

**1930 - 2004**

By

**Jonathan R. Grammer**

**Jonathan R. Grammer** is an associate with the Oklahoma City law firm of Ogle & Welch, P.C. He has written extensively on the Locust Grove Girl Scout Murders, the T. Cullen Davis murder case and the Sirlain Stockade killings. As an attorney, his work focuses primarily in the area of criminal defense, both federal and state.

My father's grandfather was known affectionately by his grandchildren, back in Texas, simply as "Papa Tim." An ex-wrestler, and life-long dock worker on the Houston ship channel, he was known for his quick wit and even quicker fists, silent amongst a crowd, but grand in his one-on-one storytelling. With youngsters upon his knee, he was always apt to sing the kind lullaby or the enchanting tall tale.

This first time I met Pat Williams, I could think of nothing else but the stories I had heard my father tell of his beloved Papa Tim, of his persona, his aura and his compassion. This past month marked the passing of a legend in Oklahoma, and no doubt the closing of an era. Patrick A. Williams passed away at his desk in Tulsa, Oklahoma on New Year's Day, only hours after his address to the Oklahoma Bar Association where he spoke under the appropriate title of "A Legend."

A native son of Oklahoma, Pat Williams was born on December 13, 1930. Raised in Oklahoma City, he was a stand out basketball player at Classen High School, a role which was inevitable given his six-foot, six-inch height. It was a height that would later contribute to his dominating presence, both in and out of Oklahoma courtrooms.

Born perhaps of time gone by, when the west was a little wilder, the wind a little more free, and barbed-wire fences a little more few, Williams' cowboy persona, captured most impressively in his stitched-upper cowboy boots, led him to much success, first as a prosecutor, and later as a defender of the accused. His courtroom demeanor proved to be nothing less than pure dominion over the jury box, his cross-examinations impeccable. He was a storyteller of the first rate, a periodic actor, and a heart-felt harmonica player.

Educated a Sooner, Williams labored diligently at his studies and acquired a degree in Business Administration in 1952. Rather than enter the business environment of corporate America with his business degree, Williams left college life in Norman, for a greater calling...that of an officer in the United States Air Force. After a two-year service for his country, Williams enrolled in law school at the University of Oklahoma. While there he served as president of his class, but perhaps more indicative of things to come, as a National Moot Court Champion and member of OU Law's Honor Code Council.

Upon graduation, Williams went to work for the Osage County Attorney's office, and then later as a distinguished prosecutor for the Tulsa County District Attorney's Office.

But like so many men cut from the same cloth, Williams' call in life, his charge to keep, was for that of the poor, the underprivileged and the accused. Alas, in 1969 he tendered his resignation as a prosecutor and began his thirty-plus year stint as Oklahoma's prizefighter of the criminal defense bar.

His contributions to his field are unmatched. Perhaps most notable is his defense of Jose Silva, in which Williams duked it out with federal prosecutors on a substantial drug charge, along with an old friend, and sidekick, named "Racehorse", who had come up the trail from Texas at Williams' request. Long a subject of coffee shop conversations in Tulsa, Pat Williams was a common law talkin' subject over the spittoons and beer troughs of Tulsa as his defense of socialite Barbara Bell garnered state-wide attention in the 1990's.

Said one Oklahoma City defense attorney, "you always know how effective you are by how much the other side, the media and the public hate you for what you do." Perhaps Williams knew this like no other, as a survivor of a failed car bomb attempt on his life in the late 1970's. Williams was in the car when the bomb went off, yet walked away unscathed. Perhaps no better analogy could describe the career of this man now gone. Always venturing unto the horizon, always dodging bullets, yet always walking away with nary a scar to show, save for the final scar of age, which has now taken him home.

Over the course of his career he was adorned with honors and awards that would trump even those of the late George Patton. In his career he was blessed as the Recipient of the Distinguished Faculty Award for the National College of District Attorneys in 1956 while still a law student, the Clarence Darrow Award, the Lord Erskine Award, and the only Tulsa criminal defense attorney to ever be

listed among the Best Lawyers in America. His friends and colleagues both alike, readily affirm what so many organizations and clients have bestowed upon Williams throughout his life.

Longtime friend and fellow trial lawyer Jack Pointer said it best when reflecting on Pat's life. When asked, Pointer replied that Pat was known above all else for "his concern for the law which he loved and literally defended to the date of his death...and his unyielding concern for his clients and their welfare and future." Within hours of his death, Pat posted a comment on the Oklahoma Criminal Defense Lawyers Association web page with respect to a young client laboring his way through Oklahoma County's Drug Court. "I'm guardedly optimistic," Pat wrote, " that he might make it. If he keeps his present attitude, he can make it." Even at three o'clock on the afternoon on the eve of his death, Pat was thinking only of the client, and of the client he always will.

Perhaps the next generation of criminal defense attorneys, who will no doubt soon find themselves amongst a similar call, which Williams answered thirty years ago, could learn much from this gentle giant. Talk it up at the local watering hole of your success, your money and adorn the flashy wardrobe if you will, but you only feed the public's perception of the trial lawyer even more. If Williams left any legacy behind for the next generation it is this: leave it all on the field when the clock runs out.

There should always be a mixture of blood, sweat and tears on the floor of the courtroom as you exit. Absent that, one has failed to do their job. A legend is not made, they're born, thus it has been before, and thus it will always be, and thus it was certainly in the case of Pat Williams. No doubt the old criminal defense attorney himself Abraham

Lincoln was jostled from his grave on that cold December night in 1930 when Patrick A. Williams was born. And no doubt Lincoln was just as enthralled when the two finally met in person for the first time last month. And though Pat is now gone, all that he worked for remains calling to the next generation of young cowboys to saddle up for the cause and

ride on. But despite Pat's passing, I swear that just yesterday evening I heard, on the slow evening wind, the whisper of a distant harmonica's tune, coming from the direction of the setting sun...

## LEGISLATIVE UPDATE

by  
**Mike Wilds**

### SOME BILLS TO WATCH . . .

**HB 1820 Balkman Wilkerson**

Relating to driving under the influence of alcohol or other intoxicating substances; fines and punishment. 02-11-04 H Reported from committee - Do Pass House Criminal Justice

**HB 1853 Turner Wilkerson**

Creating the Mary Rippy Violent Crime Offenders Registration Act; providing certain registration requirements; directing DOC to maintain a file of all offender registrations; allowing DNA testing of offenders. 02-09-04 H Voted from committee - Do Pass as substituted House Corrections

**HB 2121 Worthen**

Allowing a jury to determine if an object is drug paraphernalia; modifying direct and circumstantial evidence to find intent; prohibiting sale of paraphernalia under certain circumstances. 01-29-04 H Referred to Committee on House Criminal Justice

**HB 2166 Young Wilcoxson**

Prohibiting the cultivation of a synthetic controlled substance. 02-11-04 H Reported from committee - Do Pass House Criminal Justice

**HB 2176 Nance Wilkerson**

Adding pseudoephedrine to Schedule V controlled dangerous substances; requiring that anhydrous ammonia equipment and containers be secured with a locking device. 02-10-04 H Voted from committee - Do Pass as substituted House Criminal Justice

**HB 2178 Nance Wilkerson**

Allowing the use of hearsay evidence in preliminary examinations and proceedings.

02-11-04 H Reported from House Criminal Justice Committee - Do Pass House Criminal Justice

**HB 2243 Cargill Aldridge**

Increasing from \$50 to \$200 the fine for transporting an open container of intoxicating beverages or low-point beer. 02-10-04 H Voted from committee - Do Pass House Criminal Justice

**HB 2254 O'Neal**

Authorizing the court to waive the prohibition against community sentencing of an inmate convicted of two or more felonies upon application by the district attorney. 01-29-04 H Referred to Committee on House Criminal Justice

**HB 2271 Coleman**

Requiring expungement of a record if no charges of any type are filed or charges are dismissed; removing language limiting such requirement to within one year of the arrest. 01-29-04 H Referred to Committee on House Criminal Justice

**HB 2540 Lamons**

Abolishing the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control; transferring duties to the Oklahoma State Bureau of Investigation. 01-29-04 H Referred to Committee on House Public Safety and Homeland Security

**HB 2545 Winchester**

Adding a penalty for intoxicated reckless driving that results in death and requiring two years in a penitentiary for intoxicated negligent homicide. 01-29-04 H Referred to Committee on House Rules

**HB 2569 Morgan**

Expanding scope of second or subsequent offenses pursuant to the Uniform Controlled Dangerous Substances Act; requiring certain dismissed cases to constitute a prior conviction. 01-29-04 H Referred to Committee on House Criminal Justice

**HB 2710 Toure**

Prohibiting execution of persons with severe developmental disability; providing procedure to be followed by a jury; establishing procedures to be followed. 01-29-04 H Referred to Committee on House Criminal Justice

**SB 619 Wilcoxson**

22 O.S., S. 18. Provides for expungement of criminal record for certain nonviolent offenders after certain period of time and under certain conditions. 02-03-04 S Referred to Committee on Senate Judiciary

**SB 1154 Corn**

Adding the manufacture of methamphetamine to mandatory minimum percentage requirement of sentence. 02-03-04 S Referred to Committee on Senate Appropriations

**SB 1168 Lawler**

Modifying the crime of identity theft; prohibiting creating, modifying or altering certain information for certain purposes; EMERGENCY. 02-11-04 S Voted from committee - Do Pass Senate Appropriations

**SB 1172 Corn**

Prohibiting manufacture of methamphetamine within certain distance of certain properties; creating a rebuttable presumption for child's presence; EMERGENCY. 02-04-04 S Voted from committee - Do Pass S-Appropriations Sub on Public Safety

**SB 1173 Corn**

Limiting the quantity of ephedrine products sold at retail; providing for reporting on customer information under certain circumstances; EMERGENCY. 02-09-04 S Voted from committee - Do Pass Senate Business & Labor

**SB 1194 Shurden**

Creates the Criminal Resentencing Act; directing reduction of certain criminal sentences for incarcerated offenders; providing procedure for resentencing; directing the Department of Corrections to restore certain credits. 02-03-04 S Referred to Committee on S-Appropriations Sub on Public Safety

**SB 1198 Reynolds**

Relates to expungement of criminal records; allowing expungement for dismissed charges; EMERGENCY. 02-03-04 S Referred to Committee on Senate Appropriations

**SB 1234 Coffee**

Creating a Movie Piracy Act; prohibiting the recording of motion pictures without consent at a site where a person picture is being exhibited; EMERGENCY. 02-04-04 S Rereferred to Committee on Senate Judiciary

**SB 1324 Coffee**

Allows probable cause to be based in whole or in part on hearsay. 02-03-04 S Referred to Committee on Senate Judiciary

**SB 1368 Williamson**

Directing implementation of a uniform data network system for reporting and retrieving civil and criminal documents and information; requiring the Criminal Justice Resource Center to assist in designing the system; EMERGENCY. 02-03-04 S Referred to Committee on Senate Appropriations

**SB 1407 Coffee**

Expanding municipal jurisdiction for specific offenses including private property; authorizing law enforcement officers to issue citation for certain violations on private property; EMERGENCY. 02-03-04 S Referred to Committee on Senate Judiciary

## CREEK COUNTY SALIVA CASE: THE REST OF THE STORY

by

**Larry Stuart**

**District Attorney Osage County**

*Larry D. Stuart* is the District Attorney for District No. 10, Osage and Pawnee Counties, Ok. His earlier employment history includes a position as an Assistant District Attorney, Craig County, Ok. He graduated from the University of Oklahoma, College of Law and enjoys golf and hunting. He is a Board of Director and Past President for the Oklahoma District Attorney's Association, a Past President for the Osage County Bar Association and a member of National District Attorney's Association. He can be contacted at 918-287-1510 or via e-mail at [larry.stuart@dac.state.ok.us](mailto:larry.stuart@dac.state.ok.us).

Upon first hearing about the Creek County saliva case in which defendant, Marquez, received a life sentence for spitting on a police officer, I, too, was shocked at the severity of the sentence. Upon further consideration, I did a little research concerning the case and the defendant's background. Doing no more than calling the Creek County DA's office and performing a DOC record check answered my questions.

I found that the Creek County DA had made a plea offer that was quite reasonable considering the defendant's prior record. The defendant refused the offer and requested his constitutional right of a trial by a jury of his peers. He received what he wanted and apparently a whole lot more. The life sentence recommended by the jury and followed by the judge is very understandable considering the fact that the defendant had at least five prior felony convictions which resulted in prison incarceration. Yes, that is correct—at least five priors. Count them—Rape 1<sup>st</sup> Degree, Burglary 2<sup>nd</sup> Degree, UUMV, Burglary 1<sup>st</sup> Degree and another Rape 1<sup>st</sup> Degree. This does not count any prior offenses for which the defendant may have received probation or other prison time which was not included on

the DOC website.

I further found that the defendant had just been released from prison on the second Rape 1<sup>st</sup> degree sentence when he committed the assault on his girlfriend, the assault on the police officer and the spitting offense.

Was the jury justified in returning the sentence they did? Was the judge justified in following the jury recommendation? Did they lockup Marquez for the reason Senator Cal Hobson believes we should lockup people because they were "afraid of" him? It is my opinion that they did. This defendant had shown himself to be a person with a very dangerous character—two separate rapes and two new assaults. Should this jury have been "afraid of" him?

As Paul Harvey would say, "Now you know the rest of the story."

I disagree that the Marquez case "illustrates the extremes of a corrections policy which threatens to choke Oklahoma's budget and produce an ever harder criminal class." Marquez asked for and deserved the very sentence he received. He had already

shown that he was a hardened criminal and should not have been loose on the streets after having served approximately ten years of his twenty-five year sentence for the second Rape 1<sup>st</sup> degree charge.

However, since we are at the point of discussing corrections policy in Oklahoma, regardless of what brought us here, let us discuss it.

Most discussions regarding corrections policy and sentencing include statements to the effect that 'we cannot afford to incarcerate as many people as we are incarcerating' and to the effect that 'we are incarcerating the wrong people or people who do not deserve incarceration or should not be incarcerated'. Or, as Senator Hobson would say, "We are locking up too many people that we are mad at and not just the ones we are afraid of."

If that sentiment and opinion are really true, why are they true?

Under the current status of the criminal law in Oklahoma, with a very few exceptions, we Oklahomans are incarcerating the very people that have earned and deserve incarceration. Persons who have committed violent and dangerous criminal acts or persons who have habitually committed other felony criminal acts and have usually been given more than one chance on probation but continually fail to comply with probation or continue to commit other criminal acts. Most persons who commit non-violent felony acts usually have to work at it to be placed into prison.

So again, if we are incarcerating the wrong people or if we cannot afford to incarcerate as many people as we do, why? Perhaps we need to reconsider which acts we consider to be criminal offenses and what our goals are concerning those acts.

To be sure, I believe that the judges, juries, prosecutors and defense should have sufficient sentencing options which would allow each of them to exercise their judgment to reach a just and fair sentence in each particular case. Each case and each individual who commits a criminal act is unique and may deserve a sentence unique to it and him. The "one size fits" all mentality, which, by the way, was the Truth in Sentencing matrix position, is not the solution to fair and just sentencing.

Is eliminating mandatory minimum sentences the answer? Although it might partially lessen the problem, it will not fix the problem and definitely is not the solution. The Marquez case is a prime example in which elimination of a mandatory minimum sentence would not have made a difference in the outcome.

What is the solution? Perhaps we need to shift the focus of this effort to where it truly belongs. At present, the largest, most vocal and most influential group complaining of the prison overcrowding problem is the legislature. Of course, they blame the prosecutors and the judges for the overcrowding and continually urge us to use alternatives to incarceration. Fair inspection of the records will show that prosecutors and judges are, in fact, using alternatives and are incarcerating only those persons who deserve incarceration, as the law is now written.

I say, 'as the law is now written', because this really appears to be the cause of the large prison population and the real root of this discussion.

Apparently, many legislators, as well as many others, do not believe that certain crimes deserve penitentiary incarceration. If the legislature truly believes that most property crime offenders and drug user type offenders should not be incarcerated in prison,

then they, the legislature, should change the law.

What are the possibilities of change without greatly endangering the public and still meeting the goal of incarcerating the people they, the legislature, think should be incarcerated?

**Consider the following:**

*Property Crimes:*

Raise the monetary value required in property crimes to become felonies. Twenty dollars in 1907 would be approximately \$2500.00 today.

Eliminate enhancement of petit larceny to felony status.

Simplify the theft crimes eliminating the difference in punishment depending upon the type of property stolen. Five hundred dollars is five hundred dollars regardless of whether it is a cow, an automobile, or pecans.

*Drug and other substance abuse crimes including DUI:*

Reduce simple drug possession and drug user offenses to misdemeanor status.

Modify misdemeanor enhancement to felony status to provide enhancement only upon a subsequent conviction with a limited period, such as two within one year of each other or three within two years. Provide that the first felony offense of this type requires mandatory inpatient treatment for a specific period followed by out patient treatment and further provide for incarceration only if the defendant fails to complete treatment. Of course this will require a funding source for these treatment services.

*Require Mandatory Percentage of*

*Sentence before release:*

On the other side, eliminate the extremely early release of those prisoners who are sentenced to the penitentiary. Prosecutors, judges and juries alike would be more apt to recommend a reasonable sentence if they knew with some accuracy the time a defendant will actually serve. Five years should mean five years, not forty-five days or one and one-half years. Early release should be earned by exemplary good behavior, participation in educational, training, or treatment programs and should be limited. Marquez's release after serving only ten years of a twenty-five year sentence was absurd. It should not have occurred.

The above is just a sampling of what the legislature could do to decrease the incarceration rate in Oklahoma. The real point of this message is that we need to put the ball back in the field of play where it truly belongs.

Oklahoma judges and prosecutors have faced public scrutiny for many years now. We have tread the waters of balancing and weighing the conflicting interests of the demand for "law and order", "protection of the public", and "sentencing criminals according to the law" with the competing interests of "conserving funds and facilities for those criminals who we are afraid of," the treatment needs of addicts and the need for State funds for education, health care and other positive needs.

If we are ready to attack the incarceration rate and if the problem lies with the large number of drug, alcohol and property offenders who are incarcerated, and if the legislature really believes that those offenders should not be incarcerated, then they, the legislature, need to act as they speak. If the prisons are full of people who do not belong there, then the legislature needs to eliminate

the sentence of incarceration in prison for those offenses which placed those people there.

The judges and prosecutors will continue to use alternatives to incarceration, but for as long as the legislature fails to

provide adequate resources for those alternatives and for as long as the ultimate sentence for those property and drug user offenses is incarceration, the prisons will continue to receive those "persons who do not belong in prison."

## UNSPITTING THE SPIT: WHAT'S STILL WRONG WITH THE CREEK COUNTY SALIVA CASE

by

**Jim Drummond**

I truly appreciate Mr. Stuart's thoughtful and eloquent response to my critique of the result in the case of State v. Marquez, Creek County Case No. 2002-352. However, I would like to make some observations.

First, Marquez did have 5 prior convictions— all in 1985, when he was 18 years old. He got probation for Rape-First Degree in April of that year, and then late in the year re-offended, drawing rape, burglary and UUMV charges in the same case. He was released only after 16-17 years on the 25 year charge -- not after 10 years, as Mr. Stuart reports. DOC records are not clear – or readily available -- on this point, but his attorneys say Mr. Marquez had been out of prison only months before July 2002, when the incident occurred.

Second, his first plea offer was 40 years, with all but 32 years suspended. This was a liberal offer – and it was accepted by the Defendant. Judge Thompson refused to accept that plea. The offer pre-trial went to 15 in, 25 out. The Defendant thought he could do better with a jury – not an unreasonable decision, though poor with hindsight.

Mr. Marquez was convicted of two misdemeanors— Assault and Battery (a year in jail), Resisting an Officer (lesser included of A&B on Officer, a year in jail), and Placing Bodily Fluids on a Government Employee (life).

In all likelihood Mr. Marquez was intoxicated when he assaulted his wife and the police officer; he beat her fairly badly though not life-threateningly. Certainly a case could be made for imposing a stiff sentence, and I believe the rejected plea agreement was reasonable. Nonetheless, it seems that life imprisonment— more than the DA requested (25 years) was extreme. Was society best served by this sentence? Or would a treatment and rehabilitation regime have worked more effectively in the first place?

Regardless of the karmic appropriateness of Mr. Marquez' life sentence, the fact remains that the sentence for the crime of which he was convicted— spitting on a police officer – is on its face ludicrous. The sentencing range was outlandish. While the press did not dig deep for the details, Oklahoma should punish the crime according to the crime; socking him for spitting (or,

perhaps, inadvertently drooling) is hardly truth in sentencing.

This said, there is much I agree within Mr. Stuart's discussions of sentencing policy. I agree that while eliminating mandatory minimum sentences for all but violent crimes is a good jurisprudential idea, doing so will not strike at the core of our high incarceration rate. The District Attorneys Council has proposed this, and I favor it, but most line defense attorneys do not foresee a huge impact on corrections receptions.

The DA Council also proposes making alternative programs (drug court, community sentencing) presumptive for first-time drug offenders. This is also an excellent idea, if adequately funded and staffed with regard not only to drug court personnel but to defender and prosecutor staffing. The DA Council is asking for 29 new attorneys, and OIDS will probably ask for more funding as well, not just for our own staff but for the 80% of the state caseload in the non-capital trial arena which is handled by contractors. OIDS requires contractors to serve drug court without additional compensation at present. If the caseload doubles with more funding, as it easily could, the burden would be too onerous without more money.

Mr. Stuart proceeds to offer certain suggestions: raise the property crime felony threshold to \$2,500, which would be excellent; eliminate enhancement of petit larceny to felony status; and eliminate the difference in punishment depending on the type of property stolen.

I agree with all these suggestions, and that the Legislature is the entity in the hot seat. I also do not blame the DA for the Marquez outcome. They made a reasonable offer, and did not ask for the life sentence. This is not about finger-pointing; it IS about sentencing policy. And life imprisonment for his crime

was extreme. His crime derived from alcoholism – not an excuse, but an indicator of society's smartest response: treatment and rehabilitation. Rehabilitation costs much less and ultimately protects society more predictably.

I further agree that simple possession of drugs should be a misdemeanor, and with the time constraints on enhancement Mr. Stuart suggests. The Highway Patrol also suggested that possession of marijuana under an ounce should be a misdemeanor with fine only– avoiding even the need for appointing counsel because the sentence does not carry jail time. This idea passed the Senate but failed 84-13 in the House.

It may also be true that if we had truth in sentencing, huge sentences would decline because the sentence would be served at least 85%. The matrix could target more precisely, and with assurance, the time to be imposed at sentence.

Finally I agree with everything Mr. Stuart asserts in his last four paragraphs. We need treatment and diversion– not to coddle criminals but to be smart about reducing recidivism and increasing public safety.

If Mr. Stuart's views represent those of prosecutors in the mainstream, I would hope to see the Criminal Law Section crystallize these suggestions into a proposed Bar Resolution which would reflect the best interests of the criminal justice system and would reflect the views of all three stakeholders in the courtroom – judges, prosecutors, and defenders.

Of course if Oklahoma gets reasonable, I will miss those calls from CNN and Fox about the latest sentencing body-slam from Oklahoma. . . .

**END**

# DEFENDING DUI CASES: A Few Basics for Beginners

by  
Charles L. Sifers

## I. DEFENDING A DUI CASE

For the attorney just out - or not long out - of law school, representation of DUI's appears to be an attractive and easy matter to handle. It is frequently the type of matter that young, freshman attorneys start their practice with; cut their teeth on. It is not that complicated of a representation. After all, it is not uncommon for the prosecutors to negotiate misdemeanor cases to a non-alcohol related charge (or even a deferred!) and the client can get a modification of the revocation of license, or "work permit", that can keep him driving. Further, these younger attorneys can - and usually do - charge less than more experienced, veteran lawyers. The client will be more willing to part with a lower fee than a higher one. The first time or second time DUI, particularly those in Municipal Courts in this State, will often be represented by these younger, less experienced attorneys. Consequently, we find a likely majority of these cases represented by our younger brethren. It seems to be a good place to start a practice.

*Well, it's just a traffic ticket. Besides, every one knows you can't win one of these things anyway! What's the big deal?*

DUI defense has, in the last ten (10) years or so, rapidly become a specialty area of law. Many attorneys have given up all other areas of practice to concentrate on becoming competent in this area of law. The reason is that the government has been, with storm trooper step, marching over the individual charged with this crime for about twenty-five (25) years. The legislature re-writes the DUI related laws EVERY time it meets.<sup>1</sup> And, the ratchet ALWAYS turns one direction only: to make the acts they have labeled as DUI and APC (actual physical control) more and more punished. The legislature and the courts have, with almost random disregard for accuracy and reliability, mixed a form of "voo-doo" science with the law. It involves various machines testing and adjudging the client as guilty with the burden shifting to him to prove he is not! With the enactment of the aggravated DUI statutory provisions, the government has NOW legislatively de-marked the disease of alcoholism as ANYONE who can blow a .15 BAC and requires them to go to inpatient therapy!<sup>2</sup> Simultaneously, the courts' holdings have been continually reducing the DUI-charged individual's

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<sup>1</sup> In fact, review of the hard-bound copies of the statute books is only valuable for the annotations. To stay up to date on the statutes, even the pocket parts are near useless. The author has to review the bills as they are introduced and the Session Laws to know what the current status of the law on this topic might be at any given time.

<sup>2</sup> The prima facie level for DUI under the present statutes is .08% BAC, lowering the previous .10% BAC. The level BEFORE it became .10% BAC was .15% BAC. In other words, in the '60's, the BARE minimum to get arrested for this crime was a level that, NOW, is legislatively determined as alcoholism, deserving in-patient treatments!! Does ONLY the author see a problem with this?? **Noteworthy here** is that this statute has had successful constitutional attacks made upon it. In the case of *Thompson v. State*, the Pottawatomie County District Court ruled that

rights to the point that there is NOW almost a DUI exception to his Constitutional protections!

These cases CAN be - and MUST be - aggressively defended. With EACH case that is NOT aggressively investigated, reviewed , AND each issue attacked, this slippery slope just keeps sliding. No big deal? This author strongly disagrees.

### A. The Foundational Requirements - Statutes, Books, Materials, Memberships, etc.

It is an utter misunderstanding that DUI defense is simple AND that anyone can do it with no specialized education or training.<sup>3</sup> The list below is a "laundry list" of statutes and other items that this author believes is mandatory for a person to become familiar to properly handle a DUI case.<sup>4</sup> Not any one thing listed is more - or less - important than any of the other(s).

There are certain statutes with which you must be familiar in defending these cases. The following references must be read in conjunction with each other to properly understand the topic and defend your client. Copy the following and create a file for them for later reference.<sup>5</sup>

47 OS § 751 through § 761(The Implied Consent Hearings, chemical tests, and DWI (Driving While Impaired) Statutes);  
47 OS § 11-902 through § 11-904 (DUI/APC - misdemeanors/ felonies - forfeiture of vehicles);  
47 OS § 6-205 through §6-205.2 (periods of license revocations and grounds therefor);  
47 OS § 6-211 (appealing a license revocation, after hearing at the DPS, to district court);  
47 OS § 6-107 & 6-107.1 (youth driver considerations);  
47 OS § 11-906.1 *et seq* (Youth DUI statutes);  
47 OS § 6-303 (Driving under Suspension/Revocation and additional revocation of license upon conviction);  
22 OS § 991a (sentencing requirements); and, read each of the cases listed in the annotations following each that relate to DUI.

You should, also, obtain a copy of the Rules of the Board of Tests for Alcohol and Drug Influence, OAC ch. 40, from the Board of Tests at the Department of Public Safety ("DPS"). Request a copy of all the Actions and Memos by the Board as well. Add these to your file, too.

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it was unconstitutional on due process grounds. The State appealed the ruling but the Court dismissed the appeal on procedural grounds. (See *Thompson v. State*, SR 2001-289, COCA). The reader should get a copy of the pleadings in this case from the COCA for an excellent resource for attacking this statute!

<sup>3</sup> For more on this topic, see Charles L. Sifers, *Ethical Considerations in DUI Representations: "Simple" Cases That Are NOT So Simple*, *The Gauntlet*, p.45, Spring 2002.

<sup>4</sup> This is NOT to become a "DUI specialist"; but to just properly represent one!

<sup>5</sup> **IMPORTANT:** These statutes - and cases found relating to each - AS WELL AS, any other authority, i.e., concerning the Intoxilyzer 5000, are those referenced throughout the balance of this paper. If the reader questions the authority of any statement or point in subsequent sections of this paper, refer back to this list. The supporting authority is found there.

Next, obtain the following books. These can be purchased through West, mostly. For those your West representative does not carry, he/she can put you in contact with the right publisher. These are:

Donald H. Nichols & Flem K. Whited, III, *Drinking/Driving Litigation, Criminal and Civil 2<sup>nd</sup> ed.*, Vol. 2, West Group, 1998;  
John Tarantino, *Defending Drinking Drivers*, James Publishing, 2001; and last - but NOT least,  
Lawrence Taylor, *Drunk Driving Defense, 5<sup>th</sup> ed.*, Aspen Law & Business, 2000.

These will provide an immeasurable wealth of information about every aspect of DUI, from trials to the science involved.

For **Oklahoma specific information**, contact the Oklahoma Criminal Defense Lawyers Association ("OCDLA"). There have been no less than seven (7) seminars on DUI that the OCDLA has provided since 1998. The written material(s) of these seminars has expansive articles on the Standardized Field Sobriety Tests and the Intoxilyzer 5000 breath machine that were written by this author or his staff. Request, and buy, copies of these previous written materials and read them carefully. These can be used as a "how to" manual to attack the two (2) above referenced topics!

For on-going and continual up-dates in this field, certain newsletters and newspapers are equally helpful to stay abreast of trends and case law. The best ones are:  
*DWI Journal: Law & Science*, Whitaker Newsletters, Inc., POB 192, Fanwood, NJ 07023;  
*Drunk/Driving Law Letter*, Flem Whited, editor, West Pub.; and,  
*Lawyers Weekly*, Lawyers Weekly Publications, 41 West St., Boston, MA 02111-1233.

These have various scientific articles, trial tips, and/or cases from other jurisdictions that can be extremely helpful.

Certain memberships can also maintain the edge that our young, less experienced lawyer has now achieved by following the above directives. The best one is to become a member of the National College for DUI Defense, Inc. ("NCDD"). This is an organization of the TOP DUI defense attorneys in the nation. NCDD provides what is considered to be the very best training seminar each year at Harvard Law School. Annually, only hundred (100) persons are allowed to attend this seminar. Any lawyer who plans to - or DOES - represent more than a handful of DUI cases each year should be a member of this organization (as well as the OCDLA!) and attempt to attend this three (3) to four (4) day seminar.<sup>6</sup>

Also, certain list-serves exist through Yahoo that can be almost as valuable as ALL the above references. NCDD has one for its members.<sup>7</sup> Another list-serve is available called

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<sup>6</sup> Other seminars that would help the beginner in this field (or even one who has not practiced in it for a while) would be NACDL's annual DUI seminar in Las Vegas. This is held each October and is considered by this author as the next-best seminar to NCDD's in the nation. It does NOT have a maximum number attendees.

<sup>7</sup> Each of the above referenced authors of the books listed to obtain are on this list-serve and frequently answer the members' questions and offer assistance!!

OKLAHOMADUINEWS@yahoogroups.com that the author is a moderator.<sup>8</sup> The members of these groups can post one e-mail with a question or a problem relating to DUI and receive, literally, dozens of suggestions, answers, and/or even briefs to adapt to your case within a few hours! The author has personally seen these serve to eliminate the necessity for HOURS of research by one simple e-mail sent out over these list-serve groups.

Once ALL the above are in hand, the attorney should NOW have the foundations for understanding and defending these cases.

## **II. THE DUI CASE: TWO (2) SEPARATE PROBLEMS FOR THE CLIENT**

A DUI case involves TWO (2) separate problems for your client: a criminal case, filed anywhere from a minor misdemeanor in a municipal court, to a multiple prior felony; and, a driver's license case, which puts at jeopardy the client's driving privileges for a period of time from six (6) months to three (3) years. Representing only one of these is NOT protecting the best interests of your client. In almost EVERY instance, the problems created by the Department of Public ("DPS") to your client's license has already occurred by the first court date for the criminal charge, AND, is often more devastating to the client than those consequences from the court in his criminal case. Unfortunately, THIS part of a DUI representation is given less attention by the less experienced attorney.

### **A. DPS's Revocation of your client's drivers' license**

Every DUI arrest - like any other criminal arrest - begins with, and MUST be supported by probable cause. Once past that, of course, an arrest for the DUI can occur. ANY AND EVERY PERSON arrested for DUI will be requested to submit to a chemical test.<sup>9</sup> The client may refuse OR submit. If he chooses to refuse, no test will be given. If he chooses to submit a test, it will likely be a breath test on either a Breathalyzer or - more likely - an Intoxilyzer 5000-D.<sup>10</sup> A test of .08% BAC is a failure in the context of the DPS; .02% or more if the person is under 21 years old. Either a failure OR a refusal will set into motion the revocation of the client's driver's license. The client's license will be seized and forwarded to the DPS in either event.

The length of revocation of the license will be for 180 days for the person whose failure/refusal is the only one he has had within the last five (5) years. It will be one (1) year if it is the client's second time within five (5) years. The revocation will be for 36 months if it is the third time or more within this five (5) year period of time.

### **1. How to Stop this Revocation**

To stop this revocation, there must be a hearing requested of the DPS within fifteen (15)

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<sup>8</sup> Contact C. Jeffrey Sifers at the author's office to be added to this list. The only requirement is that the member is NOT associated with prosecution offices. There is no charge or membership dues for this.

<sup>9</sup> An arrest is MANDATORY to have occurred BEFORE a test is requested. Any test taken BEFORE an arrest renders the test inadmissible.

<sup>10</sup> See the author's previous material from OCDLA seminars for a very good explanation of these machines and how to attack them both before the DPS and the Court.

calendar days of the date of the arrest of the client. The author recommends that this be done *via* certified mail OR hand delivered to the legal division of the DPS. If this is done, the revocation is stayed and the client is given an extension of his driving privileges pending the hearing which is usually set about six (6) weeks after the request.<sup>11</sup> This hearing is the ONLY way to avoid the revocation. It must be held and won. Otherwise, NO MATTER WHAT HAPPENS IN COURT, this license will be revoked, period.<sup>12</sup> If this hearing is NOT requested of - AND RECEIVED BY - the DPS within this time frame, the opportunity for this hearing is forever lost. The client's license WILL BE REVOKED . . . no matter WHAT defense you COULD have offered.

## 2. How to Win one of These Hearings

These are informal, administrative hearings before a DPS hearing officer, held either at the DPS, the district court house, or by telephone conference. Only the officer(s), the hearing officer, and the client or his attorney are at these hearings. The issues that must be proven are in § 754 and the burden, which is ONLY preponderance of the evidence or "more likely than not", is on the officer to prove EACH of these issues.<sup>13</sup> The attorney should become familiar with the statute(s) and case law on EACH OF THESE ISSUES. Showing the failure of ANY ONE OF THESE will thwart the DPS's revocation of the client's license regardless of whether all of the others are shown.

Always investigate the legality of the arrest. If it is "bad", for whatever reason, ALL of the other issues of whether the test was failed, given within two hours, etc, are NEVER reached! This is the same even with a refusal. The most common - and successful - attack to use to win these hearing is non-compliance with the Rules of the Board of Tests in the administration of the test. The violation by the officer may appear extremely minor, however, equally useful in winning this hearing to save the client's license. Therefore, the attorney MUST be very familiar with these Rules.

Moreover, these hearings are under oath and are tape recorded. They are wonderful for discovery for the use in the criminal case. No D.A. is there to help the officer. His answers can be used to impeach him later just like any other sworn testimony, i.e., a deposition. In fact, another way to view this is that a DUI is the only crime that will effectively allow for a "preliminary hearing" in a misdemeanor!! Therefore, no matter what the outcome of your hearing, always have this hearing tape transcribed for later use!

## 3. What To Do IF You Don't Win

If you lose the hearing, you MAY have as many as three (3) options. One is to do nothing

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<sup>11</sup> Between the date of the request and the hearing itself, the DPS will send the attorney a letter advising that you must choose either a modification OR a hearing. They will advise you that, if you choose a hearing, you can NEVER have a modification. THIS IS A BLUFF. DO NOT GO FOR IT.

<sup>12</sup> **REMEMBER:** Even if you get a deferred sentence in court, the client's driving record will STILL reflect a revocation of license due to this DUI arrest. The statutes for expungements DO NOT allow for removal of this entry on his driving record.

<sup>13</sup> If the cop is having any problems proving this, the hearing officer will frequently "help" them along!

and let the client's license be revoked.<sup>14</sup> Another is to appeal the decision to the District Court in the county in which the arrest occurred under § 6-211.<sup>15</sup> Another is to appeal for the purpose of a modification under § 755 and § 754.1. On this latter option, however, not ALL revocations are modifiable. By statute, only the 180 day revocations can receive a modification or "work permit" for the entire revocation. One year and three year revocations can NOT be modified AT ALL effective November 1, 2003. Until then, only the LAST TWO YEARS of the period can be modified.<sup>16</sup>

### B. The DUI Criminal Case in Court

Unlike the license aspect of your client's case which is consistent with the DPS's responses and procedure no matter WHERE the arrest occurred, the same is NOT true as far as your client's criminal case. What to expect varies as to what court in which it is filed (municipal or district), whether it is a misdemeanor or a felony and what judge or D.A. the attorney draws. Some courts will NOT allow deferred sentences if the client has EVER had a prior DUI arrest, regardless of the disposition of that older case. Some of these will go to trial EVEN ON A DOG OF A CASE rather than agree to a deferred.<sup>17</sup> Others are more case specific. Some district courts WILL NOT file aggravated DUI cases because the D.A. thinks the statute is bad. Others regularly file these. Therefore, knowing the court and its policies can have almost as much effect on the representation of a DUI as the facts of the case.

#### 1. Should The Case Be Tried or Pled?

This is the question in EVERY criminal case. The author recommends that EACH DUI case that the attorney represents be approached as if, from the VERY beginning, it will be going to trial! The same investigation, effort, thought, brainstorming, and concern should be mustered. This includes trying the Implied Consent or license case, too, BEFORE any plea is discussed or the decision for trial is made. Do not hesitate to file motions. It is AMAZING how much the other side's case weakens when the attorney has done all this homework. Only THEN can the question of trial or plea be answered. However, the plea that the attorney DOES GET will be better than if he HAD NOT done this level of service to his client! In short, never take the D.A.'s offer without doing this service of representation. Malpractice may very well be committed by doing so!

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<sup>14</sup> Bad idea.

<sup>15</sup> The author recommends that you get help from another experienced attorney when to attempt this for the first time. There are "land-mines" in the procedure that are sometimes difficult to avoid.

<sup>16</sup> HOWEVER: remember that it is the law that is in effect ***AT THE TIME*** of the request for relief that applies; NOT the law that was in effect when the person's license was revoked! That means that revocations for the last 2 years of these 3 year revocations can ONLY be granted until November 1, 2003! See *Bell v. State of Oklahoma*, ex rel., *Department of Public Safety*, 1998 OK CIV APP 3, 952 P.2d 55; *Carl v. State of Oklahoma*, ex rel., *Department of Public Safety*, 1995 OK CIV APP 147, 909 P.2d 1196.

<sup>17</sup> Set these barkers for trial!

## 2. Go Watch Someone Do a DUI Trial OR Motion Hearing

This can be one of the best training experiences the younger attorney can have. Check the dockets in the court house and try to schedule attending both a DUI trial and any Motion Hearings that a more experienced attorney has set. Freely take notes and "steal" whatever seems to work. Discuss these points with this lawyer later. Find out why he did things about which you have a question. Learn from those that have gone before. You should be cautious, however, to employ your OWN style and technique with these "borrowed" tools. If you try to COPY these attorneys, you will probably fail. Try using anything that works for these other successful attorneys, but remember to be yourself in doing so. You must remember that you are far more familiar with YOU than him or her.

### III. SUMMARY

Become more familiar with the statutes and resources than you may NOW think that you need to be. Exercise this new found knowledge. The D.A.s will not know what hit them. Lastly, do not hesitate to ask questions of the "old heads" in this field. Most will take it as a compliment to be asked to help. Besides, how do you think THEY learned all this?

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#### ABOUT THE CONTRIBUTOR

**CHARLES SIFERS** can be contacted at (405) 232-3388 or [charles@siferslaw.com](mailto:charles@siferslaw.com). His practice is 99% alcohol and drug related traffic offenses. He is one of only twelve Regents for The National College for DUI Defense ("NCDD"). He is a member of the Board of Directors for both the Oklahoma Criminal Defense Lawyer's Association and the Oklahoma County Criminal Defense Lawyers Association.

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## THE FOLLOWING TWO JOKES WERE SUBMITTED FROM INTERNET SOURCES

by  
**Jim Drummond**

*A doctor and a lawyer* in two cars collided on a country road. The lawyer, seeing that the doctor was a little shaken up, helped him from the car and offered him a drink from his hip flask. The doctor accepted and handed the flask back to the lawyer, who closed it and put it away. "Aren't you going to have a drink yourself?" asked the doctor. "Sure, after the police leave," replied the lawyer.

*One night a police officer* was staking out a particularly rowdy bar for possible DUI violations. At closing time, he saw a fellow stumble out of the bar, trip on the curb and try his keys on five different cars before he found his. The man sat in the front seat fumbling around with his keys for several minutes. Meanwhile, all the other patrons left the bar and drove off. Finally he started his engine and began to pull away. The police officer was waiting for him. As soon as he pulled onto the street, the officer stopped him, read him his rights and administered the breathalyzer test to determine his blood-alcohol content. The results showed a reading of 0.0. The puzzled officer demanded to know how that could be. The driver replied, "Tonight I'm the designated decoy."

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## Your help is needed in creating a NEW CRIMINAL LAW OBA BROCHURE

We are in the process of creating a two-page brochure (similar to those distributed by the OBA for family law and probate) that describes the Criminal Justice System and some vocabulary terms. This brochure would be available through the OBA for distribution and would be a tool you could give to your clients. Please review the following skeleton template and provide any additions, deletions, or comments to Mike Wilds via e-mail at wilds@nsuok.edu.

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### CRIMINAL LAW AT A GLANCE

#### **Crimes**

Crimes are generally classified as a felony or a misdemeanor. To be a felony, the punishment listed in the statute is generally one year or greater and the place of incarceration is prison (rather than jail). However, an individual may be convicted of a felony, receive probation and not step inside prison walls.

#### **Criminal Proceedings**

Terminology in criminal proceedings is often confusing. To assist in diffusing this confusion, the following is an analysis of the criminal proceeding process.

1. **Arrest and Booking** (sometimes called an arrest and booking report)
2. **Initial Appearance:** The magistrate advises the arrestee of charges, bond is set and a date for a preliminary hearing is usually set.
3. **Pre-Preliminary Hearing or Announcement Dockets:** Reports to the court are due, discovery requests are formalized and charges are formalized for the Preliminary Hearing.
4. **Preliminary Hearing or Waiver of Hearing:** The purpose of this hearing is to make sure probable cause (probability that a crime has been committed and you committed the crime - enough evidence to go forward) exists to support the charge. If the elements for probable cause of the crime do not exist, the attorney will demur to the evidence (essentially request the charge to be dismissed). If a plea bargain is agreed upon, there is no need for the judge to review probable cause for the crime. Defendants may, but do not have to, present evidence. However, the defense attorney can ask questions to any witnesses presented by the prosecution. This hearing is under oath. Based on a finding of probable cause, the judge will determine if the defendant should be bound over for trial. **Note: this is called a sounding docket for misdemeanors.**
5. **Pretrial and Pretrial Motions:** A motion is a request to the judge. These motions might be a Demur (dismissal based on duplicitous of offenses), Motion to Quash (dismissal due to insufficient evidence), Motion to Suppress (evidence), Notice of Alibi, Motion for Discovery (of evidence) and Briefs (arguments) in support.

6. **Jury Call Dockets:** This is the selection of the jury from a jury pool called a venire. Jurors who are prejudiced may be eliminated from the jury pool and your attorney has some peremptory challenges that may be used to balance the jury.
7. **Jury Trial or Bench Trial** (where the judge determines the verdict)
8. **Opening Arguments** - a summary of the case and the evidence to be presented.
9. **Direct Examination** - the first interrogation or examination of a witness.
10. **Cross Examination** - an examination of a witness by a party opposing that witness.
11. **Closing Arguments** - a summation of the case and the evidence presented.
12. **Jury Instructions** - directions given by the judge concerning the case.
13. **Jury Deliberation and Verdict.**
14. **Sentencing.**

The defendant must be at all of the above steps or a bench warrant might be issued for their arrest.

#### YOUR RIGHTS UPON ARREST

**The Right to Remain Silent:** Upon custodial arrest, you have the right to remain silent. This is guaranteed by the Fifth Amendment. You do not have to answer any questions or make any statements. Anything you say or write could be used as evidence against you. As soon as possible after your arrest, you should request the presence of an attorney.

**The Right to be Represented by an Attorney:** The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." A judge must appoint an attorney for indigent defendants (defendants who cannot afford to hire attorneys) at government expense only if the defendants might be actually imprisoned for a period of more than six months for the crime.

**The Right to Confront Witnesses:** The "confrontation clause" of the Sixth Amendment gives defendants the right to "be confronted by the witnesses against" them. This Clause gives the right to cross-examine witnesses, and the right to require the witnesses to come to court and confront those witnesses. The Sixth Amendment prevents secret trials, and except for limited exceptions, forbids prosecutors from proving a defendant's guilt with written statements from witnesses who do not appear in court.

**The Right to a Jury Trial:** The Sixth Amendment to the U.S. Constitution gives a person accused of a crime the right to be tried by a jury. This right may be waived for a Bench Trial where the judge determines guilt. If a decision by the jury is not unanimous, the verdict is a "hung jury," and the defendant will go free unless the prosecutor decides to retry the case.

**The Right to a Speedy Trial:** The Sixth Amendment gives defendants a right to a "speedy trial." However, no time limits are set. Judges review the circumstances on a "case-by-case" basis. Some factors for consideration include: reasons for the delay, whether the delay has prejudiced (harmed) the defendant's position, and if the defendant caused the delay.

**Double Jeopardy:** The Fifth Amendment provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." This provision, known as the double jeopardy clause, protects defendants from harassment by preventing them from being put on trial

more than once for the same offense.

One important exception to the rule against double jeopardy is that defendants can properly be charged for the same conduct by different jurisdictions. For example, a defendant may face charges in both federal and state court for the same conduct if some aspects of that conduct violated federal laws while other elements ran afoul of the laws of the state.

Furthermore, the double jeopardy clause forbids more than one criminal prosecution growing out of the same conduct. A defendant can be brought once to criminal court (by the government) and once to civil court (by individuals) for the same acts (i.e., the O.J. Simpson criminal and civil trials).

**Bail:** Bail may be allowed by the judge. Bail may be made by a bail bondman through a surety bond or by an individual who posts their own money or property (i.e., a personal recognizance bond). The surety, property or money posted is forfeited if you fail to show for trial. Also, a warrant for your arrest will be posted if you fail to show for trial.

**Again, this is your criminal law section. Please review the draft brochure and take the time to respond with comments to Mike Wilds, wilds@nsuok.edu or call 918-449-6532. We would love to hear from some Prosecutors on the development of this brochure.**

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## THE FOLLOWING JOKE WAS SUBMITTED

by

### Robert Manchester, Oklahoma City

*SPEEDING TICKET:* An Oklahoma County Deputy pulled a car over on I-35 about 2 miles north of I-44 and I-35. When the Deputy asked the driver why he was speeding, the driver answered that he was a magician and a juggler and he was on his way to Stillwater to do a show that night and didn't want to be late. The deputy told the driver he was fascinated by juggling, and if the driver would do a little juggling for him that he wouldn't give him a ticket. The driver told the deputy that he had sent all of his equipment on ahead and didn't have anything to juggle. The deputy told him that he had some flares in the trunk of his squad car and asked if he could juggle them. The juggler stated that he could, so the deputy got three flares, lit them and handed them to the juggler.

While the man was doing his juggling act, a car pulled in behind the squad car, a drunk got out and watched the performance briefly, then went over to the squad car, opened the rear door and got in. The deputy observed him doing this and went over to his squad car, opened the door and asked the drunk what he thought he was doing. The drunk replied, "Might as well take me on to jail, there's no way in hell I can pass that test."

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**CONTRIBUTORS NEEDED:** If you have heard a good joke or have the desire to write an article, contact Mike Wilds at (918)449-6532 or wilds@nsuok.edu.

## **HEARSAY OR NOT TO HEARSAY: THAT IS THE QUESTION!!**

**by  
Kurt K. Hoffman**

Kurt Hoffman maintains a private law practice in Tulsa, Oklahoma. He is a member of the Board of Directors for the Oklahoma Criminal Defense Lawyers Association and is a member of the Tulsa County Bar Association,. He may be contacted at (918)582-9339 or via e-mail at [tulsadefender@hotmail.com](mailto:tulsadefender@hotmail.com).

Many of you may have already read or heard about what is being called the "Hearsay Bills". For those of you that haven't yet heard. House Bill 2178, and Senate Bill 1324, both move to add language to the existing language of Title 22 O.S. 2001 section 258, the preliminary hearing procedure Statute. The bills' intent is to have judges take hearsay evidence "in whole or in part" at preliminary hearings.

Now, many District Attorneys and Judges may be thinking that this is the magic change they have always hoped for. However, it will prove to be a double-edged sword. Prosecutors will be able to support the probable cause burden of proof, in most cases, by calling only the investigating officer. The officer will need to do no more than recite his affidavit or report to meet the preliminary hearing burden of proof. The judge will still be able to cut off the preliminary hearing as soon as they feel the State has met its burden.

The passage of these bills would significantly alter the way that defense attorneys may approach the preliminary hearing. I dare argue that the preliminary hearing would become nothing more than a potential grand stand for the prosecutor's case, especially in high profile cases. They will be able to present the evidence with whatever twist and emphasis they can get the officer to present, using the alleged hearsay statements of every witness in the case. The media will eat this up! That being the case, defense counsel may consider the possibility of just waiving preliminary hearing. Yes, waiving!!! You will have already received the preliminary hearing discovery with the reports that the officer is going to recite anyway. Therefore, very little discovery will be able to be obtained from the preliminary hearing itself. After waiving the preliminary hearing, defense counsel will be able to file all of the necessary motions normally addressed and explored under the current preliminary hearing setup.

Motions filed by defense counsel at the district court level will need to be set for evidentiary hearings. Thereby the district judge will be putting on all of the evidentiary hearings that are currently decided by presentation of a motion and supported by the preliminary hearing transcript. This proves even more burdensome for the district judges as well as for the prosecution, especially on motions to suppress. Since the burden is on the State to support the search, the prosecution will have to ask for that evidentiary hearing on every suppression motion.

Looking at the bill in the best light possible it could also be to the advantage of the defendant. They will not need to purchase the preliminary hearing transcripts any longer. The evidentiary hearings held before the district judges will be on the record however a transcript of all of those will not normally be necessary to purchase.

The hope of the defense bar is that these bills can be derailed, but if they are not, then this form of procedure by the defense will become common place.

*Any thoughts or comments responding to Kurt Hoffman's ideas are welcomed!*

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