

THE Oklahoma Bar JOURNAL

Volume 87 ♦ No. 8 ♦ March 12, 2016

CRIMINAL LAW

ALSO INSIDE

Legislative Report • Solo & Small Firm Conference
Attorney Discipline Reports



Zephyr Teachout
Associate Professor of Law, Fordham University

CITIZENS UNITED:

ARE AMERICA'S DEMOCRATIC TRADITIONS AT RISK OF CORRUPTION?

A panel discussion moderated by OBA President Garvin Isaacs

Including: Zephyr Teachout, Professor, Fordham Law School
The Honorable Keith Rapp, Court of Civil Appeals
The Honorable Roger Stuart, Oklahoma County District Court
Renee DeMoss, GableGotwals, former OBA President, Tulsa
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WHAT IS GOOD PARENTING?

EXPLORING PARENTAL COMPETENCY
IN A LEGAL CONTEXT



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OKLAHOMA BAR CENTER, OKC



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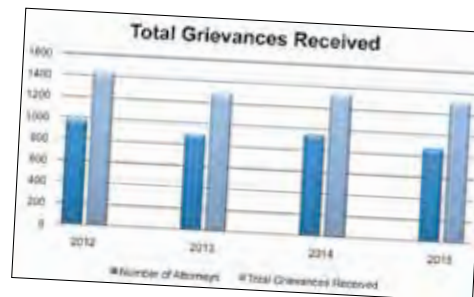
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The Jesse Owens Rule: Never Be Intimidated

By Garvin A. Isaacs

Where are we in history? In 2015, Oklahoma had more than 900 earthquakes over the 3.0 scale. Seismologists from all across the United States agree the earthquakes are caused by injection wells. Gov. Mary Fallin in her State of the State address did not mention the word earthquakes one single time.

Our Legislature offers no regulation on the oil and gas industry that would limit the disposal wells which cause the earthquakes.

What will we do as lawyers when our legislative and executive branches of the government ignore the people?

Thinking about these issues my mind flashes back to my days as a basketball player and being down on the court. Basketball players learn that fear is good. Fear prepares you for the competition. In any warm-up you feel the fear. I flash back to warm-up music of Aretha Franklin, Buddy Holly, Chuck Berry, Archie Bell and the Drells and Hugh Masekela.

We learned on the court that it was okay to be afraid because when you are afraid more oxygen gets to the brain. You are focused. Your thought process is sharp and accurate.

Once the game starts, you enter a different world. In that world fear prepares you for the fight on the court that will go on for 40 minutes. From that experience we all learned it is okay to be afraid, but we will not be intimidated by anyone.



Garvin A. Isaacs

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I will never forget going to Ohio State University to play the Buckeyes during my junior year. As the Texas Christian University Horned Frogs got out of the bus and entered the building about two hours before tipoff, we walked around the arena and saw inside a glass monument the shoes of one of the greatest athletes who ever lived, Jesse Owens.

When I saw Owens' track shoes, my mind flashed back to films that I had seen

of the 1936 Olympics when black athlete Jesse Owens represented the United States in one of the most dangerous Olympic competitions on this planet. Adolph Hitler and the Nazis

thought they would rule the universe, and the Germans and Nazis thought they were the superior race on this planet.

Jesse Owens won four gold medals — the 100 meter, 200 meter, broad jump and 400-meter relay. No other athlete in history has ever done that.

As I stood there with my teammates looking at those track shoes,

Jesse Owens inspired me and taught me that it is okay to be afraid, but we are not going to be intimidated in the real world as well as down on the court.

INSPIRATION FOR TODAY'S CHALLENGES

It is time for all of us as lawyers to stand up for people and the judicial branch of government. It is our oath as attorneys to uphold public confidence in the judicial system.

Let us meet the standard that Jesse Owens set when he represented us in the 1936 Olympics in Berlin and won four gold medals at a time Adolph Hitler and the Nazis were on the verge of World War II. This is a Jesse Owens moment for us as lawyers. Let us meet the Jesse Owens standard.

*It is time for all
of us as lawyers
to stand up for
people and the
judicial branch
of government.*

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Case Comment: *Rodriguez v. United States* Clarifying Traffic Stops and *Caballes*

By Taos C. Smith

In 2005, the Supreme Court held in *Illinois v. Caballes*¹ that a dog sniff performed during a lawful traffic stop does not violate the Fourth Amendment. Ten years later, the court clarified the scope of lawful traffic stops and when conducting a dog sniff during a stop becomes constitutionally suspect in the case of *Rodriguez v. State*.² This article will explore the ramifications of the court's decision on search and seizure law in Oklahoma and explore the recent history of traffic stop decisions in Oklahoma beginning with the leading case of *Seabolt v. State*.³

FACTS

On a long and lonesome highway west of Omaha our story begins. The key players are Officer Struble of the Valley Nebraska Police Department and Dennys Rodriguez. They met one evening during an otherwise ordinary and routine confrontation almost anyone who has driven a vehicle has experienced — a traffic stop.

Mr. Rodriguez's Mercury Mountaineer was pulled over when Officer Struble observed the vehicle veer onto the shoulder of the highway and then jerk back onto the road. Nebraska law prohibits this particular driving maneuver so Officer Struble initiated a traffic stop.

Of note, and to the later chagrin of Mr. Rodriguez, is the fact that Officer Struble is a K-9 officer and that night his dog, Floyd, was with him in the patrol car.

Officer Struble made contact with the driver, Rodriguez, and questioned him as to why he

drove onto the shoulder. Rodriguez's explanation was that he swerved to avoid a pothole. Struble collected Rodriguez's license, registration and proof of insurance and asked Rodriguez to follow him to his patrol car. Rodriguez asked if he was required to follow Struble who told him he was not so Rodriguez waited in his vehicle.

Once Struble completed a records check on Rodriguez, he returned to the vehicle to question the passenger of the vehicle, Scott Pollman. Struble obtained Pollman's license, questioned him about their travel plan and again returned to his patrol car to run a history check on Pollman. At this point, Struble called for a backing officer.

Struble began writing a warning to Rodriguez for driving on the shoulder and then returned to Rodriguez's vehicle a third time to deliver the written warning. The stop began at 12:06 a.m. and by 12:27 or 12:28 a.m. Officer Struble had finished explaining the warning

and returned all documents to Rodriguez and Pollman.

At this point Officer Struble asked Rodriguez if he could run his dog around the vehicle. Rodriguez said no and the officer then ordered Rodriguez to turn off his vehicle, exit and wait in front of Struble's patrol car while a second officer arrived. At 12:33 a.m. a deputy sheriff arrived. Struble led the dog around the vehicle twice and to perhaps nobody's surprise, the dog alerted on the vehicle. The officers searched and discovered a rather large bag of methamphetamine.

PROCEDURAL HISTORY

Rodriguez was indicted in the U.S. District Court of Nebraska on possession with intent to distribute. He moved to suppress the evidence on the ground that Struble had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff. The magistrate judge recommended the motion be denied, however, also made a finding that there was no probable cause to search independent of the dog sniff and further found that no reasonable suspicion supported the detention once Officer Struble issued the written warning. Unfortunately for Rodriguez, the judge found that under 8th Circuit precedent, extension of the stop by seven to eight minutes was only a *de minimis* intrusion on Rodriguez's Fourth Amendment rights and was permissible.

The district court above adopted the magistrate judge's findings and denied the motion to suppress. The court noted that "dog sniffs that occur within a short time following the completion of a traffic stop are not constitutionally prohibited if they constitute only *de minimis* intrusions."⁴

Rodriguez entered a conditional guilty plea and was sentenced to five years in prison. The 8th Circuit affirmed and noted the delay here was an acceptable *de minimis* intrusion. The court did not reach the issue of whether Struble had reasonable suspicion to extend the stop.

The Supreme Court granted *certiorari* to determine whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff. Lower courts were split on the issue,⁵ including Oklahoma which allowed reasonable extensions of traffic stops.⁶

SUPREME COURT

The court held that a traffic stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution.⁷ They noted, "[t]he critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff 'prolongs' — i.e., adds time to — 'the stop.'"⁸ Because the 8th Circuit did not review the finding of reasonable suspicion, the court did not reach the issue of whether individualized suspicion justified the extension of the stop and left that issue open for the 8th Circuit to consider on remand.

Dog sniffs are permissible during lawful traffic stops per *Caballes*, but when does a traffic stop actually end? The court in *Caballes* provided a vague answer, "[L]ike a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' — to address the traffic violation that warranted the stop and attend to related safety concerns.⁹ The stop 'must last no longer than is necessary to effectuate th[at] purpose.'"¹⁰

The *Rodriguez* court clarified the *Caballes* court's stance with some additional guidance on this "tolerable duration" in what is probably the most important sentence of the entire opinion: "Authority for the seizure thus ends when tasks tied to the traffic infraction are — or reasonably should have been — completed."¹¹ Thus, there are two limits at play here. The traffic stop must end when the investigation and safety-related tasks are completed or the stop must end when safety-related tasks should have been completed. "If an officer can complete traffic-based inquiries expeditiously, then that is the amount of 'time reasonably required to complete [the stop's] mission.'"¹²

The court went on to discuss what these "safety-related tasks" are and what an officer may do during an ordinary lawful stop. The officer may check the driver's license, determine whether there are outstanding warrants and inspect the vehicle's registration and insurance.¹³

However, while an officer may conduct certain unrelated checks during an otherwise lawful stop he may not do so in a way that prolongs the stop without reasonable suspicion.¹⁴ "[A] traffic stop 'can become unlawful if it is prolonged beyond the time reasonably required to complete 'th[e] mission' of issuing a warning ticket.'"¹⁵ The officer must be diligent in his

traffic investigation.¹⁶ “On-scene investigation into other crimes, however, detours from that mission . . . [s]o to do safety precautions taken in order to facilitate such detours.”¹⁷ The officer’s actions must be viewed through the dual lens of diligence and whether the stop is, or reasonably should have been, completed.

Post-*Rodriguez* courts must look at whether the officer exceeded the mission of the stop and, if so, whether he or she possessed individualized suspicion to do so. The *Rodriguez* court noted the only way to answer these questions is to look at what the police in fact do.¹⁸

OKLAHOMA STATE OF THE LAW

In Oklahoma, the authority of police to expand traffic stops beyond their initial scope has slowly expanded since the Court of Criminal Appeals decision in *Seabolt v. State*.¹⁹ In *Seabolt*, the court ruled that reasonable articulable suspicion is required to extend an otherwise lawful traffic stop. The court looked at the scope of a traffic stop and analyzed it from a reasonableness standard under a “totality of the circumstances” analysis:

The Court is unwilling to impose a rigid time limitation on the duration of a traffic stop; however, we are concerned with the duration of the traffic stop in the present case. An examination of the record shows no circumstances which justify the length of the detention. Indeed the record leads us to conclude this was a routine traffic stop, which should have resulted in a correspondingly abbreviated detention. The officer should have issued the warning citation to Seabolt expeditiously. Had he done so, Seabolt would have left the scene prior to the arrival of the canine unit. Without evidence in the record to show some reason why it took the officer 25 minutes to fill out the warning citation and complete his traffic stop duties, a finding that the length of the detention exceeded the scope of the traffic stop is justified. We must decide whether the officer’s justification for prolonging the detention was reasonable under the totality of the circumstances.²⁰

“It is clear that after *Rodriguez*, the *de minimis* exception advanced in *Johnson v. State* or any other jurisdiction will not stand.”

Rodriguez seems to echo the sentiment in *Seabolt*, however, there are important limits on the stop the *Rodriguez* court placed that goes beyond just simply “totality of the circumstances.” The officer is limited to addressing the traffic violation and attending to related safety concerns.²¹ He may not detour into on-scene investigation into other crimes.²² “[A] traffic stop ‘prolonged beyond’ that point [time required to complete stop’s mission] is ‘unlawful.’”²³

Two years later the court in *Coffia v. State* determined a traffic stop could be extended into a consensual encounter²⁴ if the officer returned the driver’s license and other documents and the driver was otherwise free to leave without an overbearing show of authority on the officer’s part.²⁵

Finally, in 2013 the court decided two cases that expanded the officer’s authority to extend traffic stops. In *State v. Bass* the court ruled an officer could release a person and then re-engage and set up a consensual encounter even if such consensual encounter was a subterfuge to search and the officer possessed adequate reasonable suspicion.²⁶ The court found no constitutional issue with the officer’s actions, even though the district court found the officer’s action troubling.²⁷

In *Johnson v. State*²⁸ the court advanced a *de minimis* exception much like the 8th Circuit’s jurisprudence. In that case, a five to seven minute delay spent waiting for a backing officer to help determine if there was reasonable suspicion to detain the driver further was held to not be unreasonable.²⁹

It is clear that after *Rodriguez*, the *de minimis* exception advanced in *Johnson v. State* or any other jurisdiction will not stand. *Seabolt v. State* remains good law insofar as it pertains to the requirement that an officer have reasonable articulable suspicion to extend an otherwise lawful traffic stop. Whether other unrelated tasks like requesting consent or questioning in regards to travel plans is permissible is yet to be seen.

CONCLUSION AND RODRIGUEZ AFTERMATH

The right to be free from unreasonable searches and seizures during a lawful traffic stop is clarified by the *Rodriguez* opinion. The Supreme Court decision is consistent with both *Caballes* (allowing sniff during lawful stop) and *Florida v. Royer* (traffic stop must be limited to purpose of the stop).³⁰ The only significant change is the blow to the *de minimis* exception. No longer can the government routinely extend lawful traffic stops to run a dog around a vehicle under the *de minimis* exception. However, the ruling is not an absolute prohibition on dog sniffs during lawful traffic stops. The key question is “does the K-9 sniff extend the stop?” If so, “was such extension supported by reasonable articulable suspicion?”

The dissent in the opinion spent some time discussing the existence of reasonable suspicion in this case even though the magistrate judge found none. Courts have already begun spending the majority of their time analyzing the question of reasonable suspicion when faced with extended traffic stops.³¹

In perhaps a sad postscript for Mr. Rodriguez, on remand, the 8th Circuit did not reach the question of reasonable suspicion the dissent in this case spent so much time discussing. Instead, the 8th Circuit affirmed the conviction by holding the exclusionary rule did not apply in situations such as these where an officer conducts a search based on reasonable reliance on long-standing precedent.³² Here, the *de minimis* exception once again claimed a search from the brink of suppression.

1. 543 U.S. 405 (2005).

2. 135 S.Ct. 1609.

3. 152 P.3d 235, 2006 OK CR 50.

4. *Rodriguez* at 1614 (quoting *United States v. Alexander*, 448 F.3d 1014, 1016 (CA8 2006)).

5. *Rodriguez* at 1613.

6. “We find the few minutes Officer Buckley took to call for assistance served a legitimate purpose and created only a minimal intrusion on Appellant’s liberty interest under the totality of the circumstance.” *Johnson v. State*, 2013 OK CR 12 ¶ 15, 308 P.3d 1053.

7. *Rodriguez* at 1612.

8. *Id.* 1616.

9. *Caballes*, 543 U.S., at 407, 125 S.Ct. 834.

10. *Id.*

11. *Rodriguez* at 1611.

12. *Id.* at 1616.

13. *Id.* at 1611.

14. *Id.*

15. *Id.* at 1614-1615 (quoting *Caballes* at 407).

16. See *United States v. Sharpe*, 470 U.S. 675, 686, 105 S.Ct. 1568 (in determining the reasonable duration of a stop, “it [is] appropriate to examine whether the police diligently pursued [the] investigation”).

17. *Rodriguez* at 1616.

18. *Id.*

19. 152 P.3d 235, 2006 OK CR 50.

20. *Id.* At ¶9.

21. *Rodriguez* at 1614. “Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure’s “mission” — to address the traffic violation that warranted the stop, *Caballes*, 543 U.S., at 407, 125 S.Ct. 834 and attend to related safety concerns.”

22. *Rodriguez* at 1611.

23. *Id.*

24. 191 P.3d 594, 2008 OK CR 24 at ¶14.

25. See *State v. Goins*, 2004 OK CR 5, ¶17, 84 P.3d 767, 770. A driver must be permitted to proceed after a routine traffic stop if a license and registration check reveals no reason to detain the driver unless the officer has reasonable articulable suspicion of other crimes or the driver voluntarily consents.

26. 300 P.3d 1193, 2013 OK CR 7.

27. *Id.* at ¶15.

28. 308 P.3d 1053, 2013 OK CR 12.

29. *Id.* “We find the few minutes Officer Buckley took to call for assistance served a legitimate purpose and created only a minimal intrusion on Appellant’s liberty interest under the totality of the circumstance.” See *U.S. v. Sharpe*, 470 U.S. 675, 687, n. 5, 105 S.Ct. 1568, 1576, n. 5, 84 L.Ed.2d 605 (1985).

30. 460 U.S. 491, 103 S.Ct. 1319 (1983).

31. See *US v. Moore* 795 F.3d 1224 (2015 10th Cir.)(Suppression overruled after finding of reasonable suspicion); *US v. Archuleta* 2015 WL 4296639 (2015 10th Cir.)(Suppression sustained after analyzing reasonable suspicion factors, reaffirmed the non-existence of *de minimis*); *US v. Pettit* 785 F.3d 1347 (2015 10th Cir.)(Suppression sustained after finding of reasonable suspicion).

32. 799 F.3d 1222. Under *Davis*, therefore, the exclusionary rule does not apply because the circumstances of Rodriguez’s seizure fell squarely within our case law and the search was conducted in objectively reasonable reliance on our precedent.

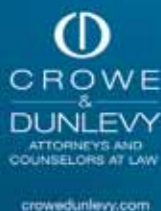
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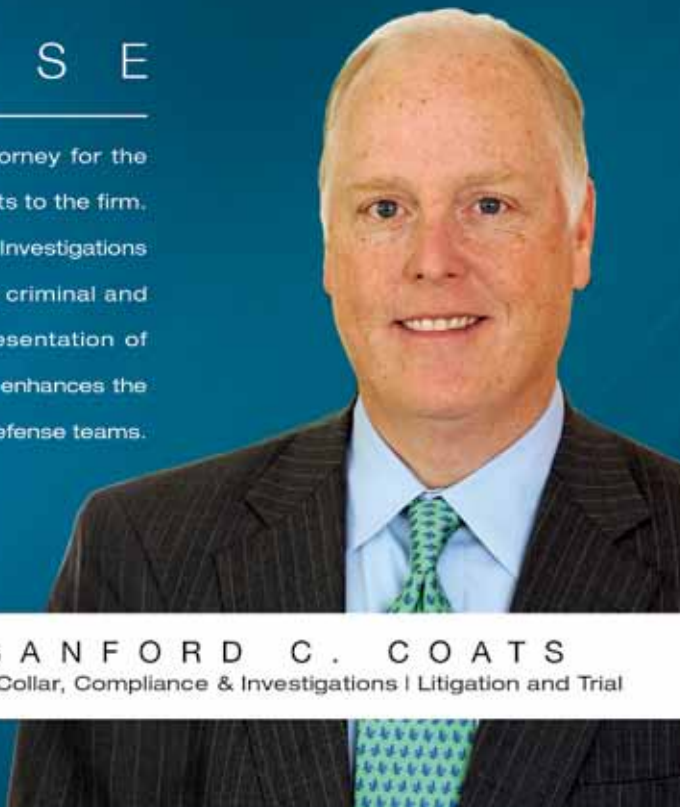
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Self-Defense: Oklahoma Lays Some New Ground Rules (Sort Of)

By James L. Hankins

When asked to explain why he had sentenced a murderer to a fine and banishment, but a horse thief to be hanged, the colorful Texas Judge Roy Bean, self-proclaimed law west of the Pecos, purportedly replied, “I’ve met men who needed killin’, but I never met a horse that needed stealin.’”¹

Judge Bean’s sentiments, or if one prefers other colloquialisms such as “better tried by 12 than carried by six,” can often color our perceptions of self-defense, particularly in male-on-male encounters that end in the death of one of the combatants. Self-defense in these types of cases is a mainstay in the arsenal of the criminal defense attorney because, in general, the defense is readily understood by lay jurors, the evidence to support it is usually obvious from the facts of the case, and jurors often seem to grasp intuitively that defending oneself against an attacker is a powerful right of the accused and not a legal technicality proffered by a lawyer.

There has been a spate recently of defense verdicts from juries during the September and October 2015 jury terms where self-defense has been offered by the accused, including jury trial wins by Tahlequah attorney Tim Baker in Muskogee County, Oklahoma City attorney Jarrod Stevenson in Kay County, Enid attorney Greg Camp in Garfield County and Tulsa attorney Thomas Mortensen in Tulsa County. These jury trial acquittals are spread out along diverse geographical lines and would appear to be fueled, at least in part, by the strong public policy enacted by the Oklahoma Legislature in the form of the so-called “stand your ground” law.²

THE LAW

This law was enacted in 2006 and tweaked in 2011, to provide clear legal support to citizens who are accused of a crime but who assert self-defense. The law makes it clear that a citizen has no duty to retreat from their homes or businesses as long as they are not engaged in an unlawful activity or are “attacked in any other place where he or she has a right to be.”³ The statutory language is particularly aggressive, characterizing the right of the citizen to “stand his or her ground and meet force with force, including deadly force” as long as the citizen believes reasonably that such force is necessary to prevent death or great bodily harm to himself or herself or another, or to prevent the commission of a forcible felony.⁴

As powerful as this language is, it gets even better for the citizen when defensive force is used while inside a home, business or occupied vehicle. The Legislature stated explicitly that citizens of the state of Oklahoma have a right to expect absolute safety within their own homes or places of business.⁵ In these circumstances, the law establishes a legal presumption that the person attacked has the requisite reasonable fear of death or bodily harm to justify the use of defensive force.⁶

Finally, perhaps to drive the point home more forcefully, the law provides the most powerful right of all for the legally justified use of defensive force: immunity from criminal and civil prosecution.⁷ An ounce of prevention is worth a pound of cure. Much like it is preferable to avoid being ill in the first place rather than going through illness and getting cured, avoiding the gauntlet of a criminal jury trial in the first place is much more preferable to going through the experience with an acquittal at the end.

IMMUNITY: THE RULES

But is the type of immunity set forth in the statute self-executing, or does the accused have to assert it? If so, when and how? What are the duties of the trial judge? What are the standards to be used? And is a judgment of immunity or nonimmunity appealable by either party? If so, how and when? The contours of the immunity granted by the Legislature, and how criminal defense lawyers are required to implement it for clients accused of criminal offenses, have largely been opaque since the stand your ground law was enacted.⁸

However, this changed on June 9, 2015, when the Oklahoma Court of Criminal Appeals issued an extraordinary, but unpublished, opinion in a case out of Woodward County styled *State v. Julio Juarez Ramos and Isidro Juarez Ramos*.⁹ This was a first-degree murder prosecution presided over by then District Judge Ray Dean Linder.¹⁰

The Ramos brothers, illegal immigrants from Guatemala, were charged with the strangulation death of Antonio Lopez Velasquez, who apparently loaned money to Julio, and the two men had been arguing over the loan. The brothers eventually confessed to killing Velasquez and led police to the body. However, it appeared that the prosecution was going to be in shambles when Judge Linder ruled that the confessions were inadmissible, and in addition that prosecution was precluded by the immunity provisions of the stand your ground law. The state appealed.¹¹

In a fractured series of opinions in which Judge Lewis delivered the opinion of the court, but in which every judge of the Court of Criminal Appeals penned an opinion of some type, the court answered some of the fundamental questions regarding the immunity of the stand your ground law, how and when such immunity must be raised and the nature of appeals

of such rulings by the district courts of our state. The multiple opinions of the court contain seven key legal holdings that Oklahoma criminal defense practitioners and trial court judges must know:

- 1) A pretrial order granting statutory immunity under the stand your ground law is appealable by the state solely as a reserved question of law. This means that the accused walks free.¹²
- 2) Arrest and prosecution of the accused is allowed upon a showing of probable cause to believe that the use of force was unlawful.¹³
- 3) The accused must assert immunity prior to trial or the immunity is waived. The proper procedure is for the accused to file a motion to dismiss and request for an evidentiary hearing at the district court arraignment (and at the hearing the defendant need only show, by a preponderance of the evidence, that the use of force warrants immunity).¹⁴
- 4) A defendant may seek pretrial appellate review of denial of immunity (via writ of prohibition).¹⁵
- 5) In the *Ramos* case, the factual determination by the district court that the entry by the decedent was unlawful is not reviewable as a reserved question of law.¹⁶
- 6) The statute applies to the Ramos brothers, even though they are not citizens.¹⁷
- 7) The fact that the defendants may have been in the country illegally is not the sort of criminal conduct that would vitiate immunity.¹⁸

EFFECTS OF THE DECISION

Thus, in *Ramos* the court issued sweeping legal guidelines on the law of self-defense and addressed issues of first impression regarding the stand your ground law.¹⁹ What is the bench and bar to make of the *Ramos* opinion? First and foremost, the court saw fit to issue these sweeping legal guidelines in self-defense cases, including a procedural trap regarding waiver of the right to statutory immunity if it is not asserted properly pretrial, in an unpublished opinion which stated specifically, "These procedures shall govern future cases."

This pronouncement seems to be at odds with the role of unpublished opinions, which

generally are not intended to provide binding authority that governs future cases. But this phenomenon is not unprecedented. One example is the ruling in *Daniel Hawkes Fears v. State*²⁰ in which the court dealt with the issue of whether jurors should be instructed on the consequences of a verdict of not guilty by reason of insanity. This was a tough argument to make by the defendant because the issue had been decided against such instructions in a published opinion.²¹ In *Fears*, the court recognized the authority of *Ullery*, the urging by *Fears* to revisit it and agreed with *Fears* that it should be overruled.

To be sure, under the rules of the Oklahoma Court of Criminal Appeals, unpublished opinions are not binding upon that court, but it remains unclear if they are binding upon the district courts.²² One thing is for certain, the court has made it clear in *Ramos*, unpublished opinion or not, that the procedures announced in that opinion govern application of the stand your ground law in future cases beyond the facts of the *Ramos* case.

1. The quote is almost certainly apocryphal, accrued as urban myths often are from colorful or flamboyant historical figures, but Judge Roy Bean was a real person and jurist, ladies' man, survivor of two duels over women, himself arrested and imprisoned, and escaped before being a judge, and certainly eccentric enough to have said such a thing in earnest. Despite his reputation as "the hanging judge" it is believed that Judge Bean sentenced only two persons to death in his career (one of whom escaped).

2. See 21 O.S. §1289.25.

3. See 21 O.S. §1289.25(D) ("A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.")

4. *Id.*

5. See 21 O.S. §1289.25(A).

6. See 21 O.S. §1289.25(B).

7. See 21 O.S. §1289.25(F).

8. The first incarnation of the statute was actually styled the "make my day" law. *State v. Anderson*, 1998 OK CR 67, ¶4, 972 P.2d 32; see also *Dawkins v. State*, 2011 OK CR 1, ¶9, 252 P.3d 214. The Oklahoma Court of Criminal Appeals addressed some aspects of the law, but had avoided any meaningful discussion of the immunity aspect in a published opinion. See, e.g., *State v. Anderson*, 1998 OK CR 67, 972 P.2d 32 (after jury trial acquittal, the court held that the term "occupant" included visitors and was not limited to the actual homeowners); *Dawkins v. State*, 2011 OK CR 1, 252 P.3d 214 (defendant not entitled to immunity when he used an illegal sawed-off shotgun for defensive force).

9. A copy of the opinion can be found on-line at www.ocdw.com/main/wp-content/uploads/2016/02/Ramos-Julio-Juarez-2.pdf.

10. Judge Linder assumed the bench as a district judge in 1982 and remained until his retirement in January 2015.

11. Judge Linder had originally suppressed the confessions based upon the failure of law enforcement to advise the Ramos brothers of their rights pursuant to the Vienna Convention on Consular Relations. However, this decision was reversed in a prior appeal. See *State v. Ramos*, 2013 OK CR 3, 297 P.3d 1251.

12. The court recognized the "formidable power" of the district court judge in this regard, but stated, "We trust that trial courts do not lightly exercise the power to grant immunity from criminal prosecution, and leave the wisdom of this policy for the judgment of the Legislature." *Ramos* at 8-9.

13. *Ramos* at 9.

14. *Ramos* at 10 (citing *State v. Jones*, 311 P.3d 1125, 1130-1133 (Kan. 2013); and *Guenther v. State*, 740 P.2d 976, 980-81 (Colo. 1987)).

15. The court fashioned this right of pre-trial appellate review based upon analogous cases dealing with a claim of double jeopardy, which makes sense because if an accused is erroneously forced to stand trial then the privilege of immunity is effectively lost. See *Ramos* at 11 (citing *Todd v. Lansdown*, 1987 OK CR 167, ¶8, 747 P.2d 312, 315 (granting writ of prohibition to prohibit trial of murder charge in violation of double jeopardy), and *Sussman v. District Court*, 1969 OK CR 185, 455 P.2d 724 (granting timely filed application for writ of prohibition where prosecution was barred by former jeopardy).

16. This conclusion is congruent with the nature of appellate review of reserved questions of law. As the court noted, if it were tasked in every case with determining the applicability of the law to a given set of facts, "We would constantly be engaged in a re-trial of every case involving an acquittal." *Ramos* at 12-13 (citing *State v. Anderson*, 1998 OK CR 67, ¶2, 972 P.2d 32).

17. The court concluded that the fact the Ramos brothers were illegal immigrants did not preclude them from asserting statutory immunity. This holding was based upon the expansive wording of the statute which affords such immunity to any "person" and does not make a distinction based upon citizenship. See *Ramos* at 14.

18. On this issue, the court cited *Dawkins*, 2011 OK CR 1, ¶11, 252 P.3d at 218, noting that in *Dawkins* the accused was not eligible for immunity because he used an illegal sawed-off shotgun, but that the legislative intent was to exclude persons from the benefit of the statute when they were actively committing a crime, not those who may have committed a crime in the past.

19. Judge Lewis delivered the opinion of the court, but each sitting judge on the Court of Criminal Appeals addressed the issues in separate opinions. Judge Smith concurred in the result and expressed the view that either party should be entitled to appellate review. Judge Lumpkin concurred in affirming the judgment but dissented "to the advisory dicta set forth in the Opinion" that addressed the unresolved procedural aspects of stand your ground immunity such as appellate review and the rules governing assertion of the right pre-trial. Judge Johnson specially concurred and emphasized the right of the accused to assert immunity pre-trial and to appeal.

Finally, Judge Hudson concurred in part and dissented in part, echoing Judge Lumpkin's concern about addressing issues not raised and creating an interlocutory appeals process in stand your ground cases.

20. No. F-2004-1279 (Ok.Cr., July 7, 2006) (unpublished).

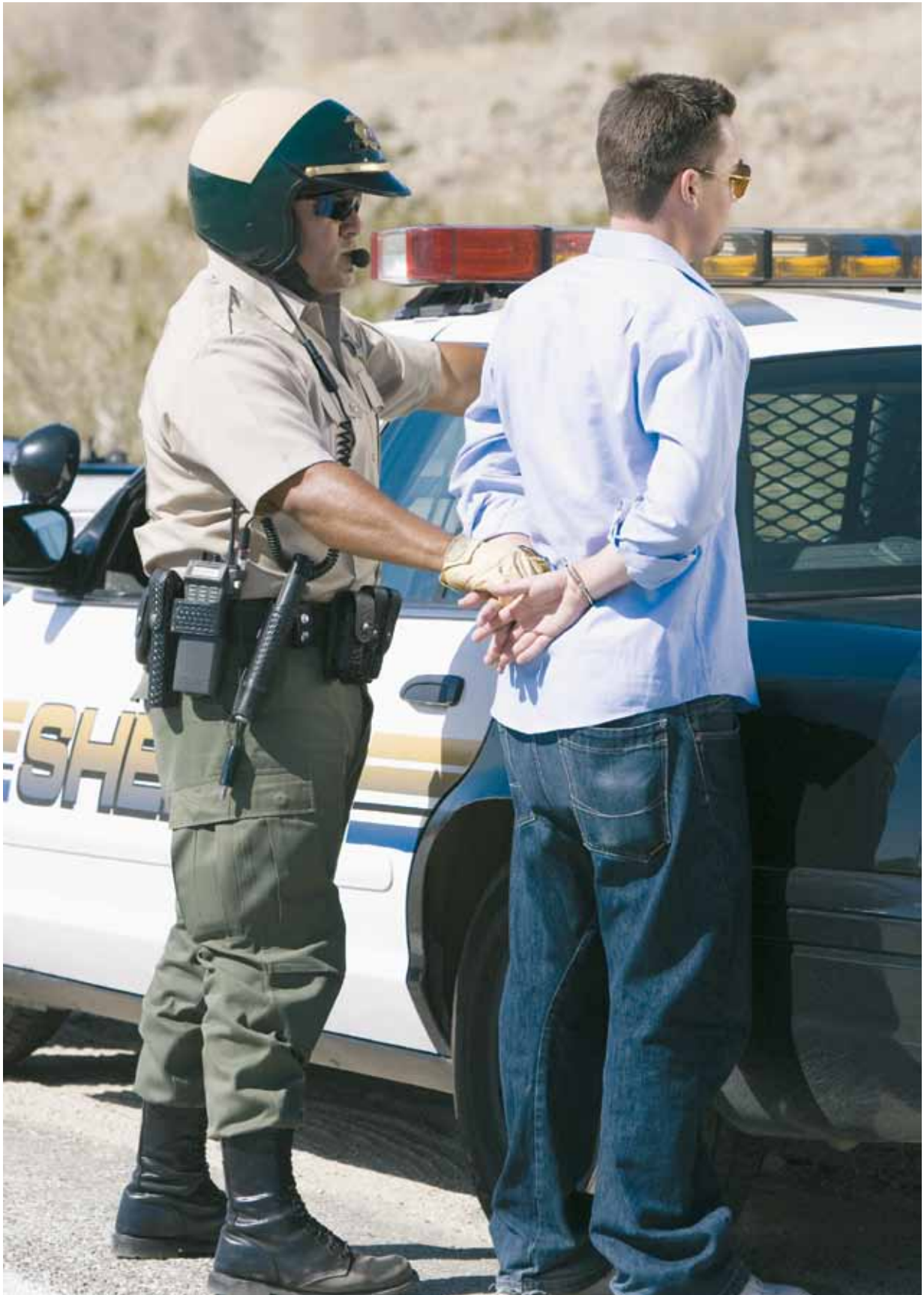
21. See *Ullery v. State*, 1999 OK CR 36, 988 P.2d 332, 346.

22. Rule 3.5(C)(3), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2015), provides: "In all instances, an unpublished decision is not binding on this Court. However, parties may cite and bring to the Court's attention the unpublished decisions of this Court provided counsel states that no published case would serve as well the purpose for which counsel cites it, and provided further that counsel shall provide opposing counsel and the Court with a copy of the unpublished decision."

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Investigative Detention The Warrantless Seizure of Citizens

By John P. Cannon

The concept of investigative detention is equally complex and confusing to legal scholars, the public and law enforcement. Additionally, it is an area of constitutional law that has puzzled the U.S. Supreme Court for nearly 100 years. The balancing of an individual's liberty from unlawful seizure and law enforcement's legitimate interest in protecting the public and stopping crime is ever-changing. The line, which the court and law enforcement must draw, is between mere investigative detention and arrest; however, the Fourth Amendment does not speak of arrest — it is a term originating in common law. The Fourth Amendment speaks to the seizure of persons, which adds an additional dimension of confusion.

Examining the history and dichotomy of balancing the police and the public's interest in this area of criminal law is informative. The principal Supreme Court case on investigative detention is as famous as it is infamous. *Terry v. Ohio*¹ was decided on June 10, 1968. The real story began nearly five years earlier in Cleveland, Ohio. On Oct. 31, 1963, at approximately 2:30 p.m., Detective Martin McFadden was patrolling downtown Cleveland in plain clothes. His attention was drawn to two men, Chilton and Terry, but Detective McFadden could not state what initially drew his attention to Chilton and Terry except for his 39 years in service, 30 of which were spent patrolling downtown looking for shoplifters and pickpockets.

As Detective McFadden watched the two men they separated and paced up and down the block peering into the windows of one store and repeated this ritual several times. At

one point, a third man approached the two men and engaged in a brief conversation and left. The original two men resumed their "pacing, peering and conferring." Officer McFadden then suspected them of "casing a job," he feared they might have a gun and he investigated further. Officer McFadden approached the men, identified himself as a police officer, and asked for their names. The men did not answer and Officer McFadden grabbed Terry, spun him around, patted down the outside of his clothing and discovered a revolver. Upon patting down the other two individuals an additional gun was found on Chilton and the three men were taken downtown, charged with carrying concealed weapons and eventually found guilty.

The Supreme Court began its analysis in *Terry* by citing *Union Pacific Railroad Company v. Botsford*,² wherein the court held the following in 1891:

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.³

The court went on to state not all interaction between police and citizens involves a seizure of the person. A seizure occurs when the officer, by means of physical force or show of authority, restrains the freedom or liberty of an individual. In *Terry*, the court held the defendant was seized when Officer McFadden took hold of him and patted down his outer clothing. The court stated the analysis lies with the reasonableness of the seizure based on two prongs: “whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference.”⁴

The court held that a balance must be struck between the constitutional rights of individuals and the legitimate law enforcement interest of ensuring public safety. The court stated the following legal maxim, which is the crux of investigative detention:

The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger... And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch’, but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.⁵

Applying this maxim to the facts in *Terry*, the court held the scope of the search presented no problem in light of the standards for the following reasons: only the outer clothing of the three individuals was patted down, he felt a firearm and simply reached for it and removed it, the individual without a weapon, Katz was not searched beyond the pat down once it was determined he was unarmed and finally Officer McFadden did not conduct any further search once he discovered the weapons.

THIRTY YEARS LATER

It has been 30 years since the United States Supreme Court published its most recent case

describing investigative detentions and the *Terry* Doctrine, *United States v. Sharpe*.⁶ In *Sharpe* the court was presented with the following facts: a DEA agent conducted an investigative stop of an apparently overloaded truck and a car in an area under surveillance of drug trafficking with the assistance of local law enforcement. The truck stopped by local law enforcement was detained for 15 minutes awaiting the arrival of the DEA agent. The agent confirmed his suspicion of the truck being overweight and upon searching the truck a large amount of marijuana was found.

The majority opinion drafted by Justice Burger held given the circumstances facing the DEA agent, he pursued the investigation in a diligent and reasonable manner and he proceeded expeditiously, “he requested (and was denied) permission to search the truck, stepped on the rear bumper and noted that the truck did not move, confirming his suspicion that it was probably overloaded. He then detected the odor of marijuana.”⁷ Citing to *Cady v. Dombrowski*,⁸ the court noted in *post hoc* evaluation of police conduct a judge may always be able to imagine a less invasive means of accomplishing police objectives; however, “the fact that the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, itself, render the search unreasonable.”⁹

The Supreme Court in *Sharpe* did not ease the analysis of the line between investigative detention and an arrest or seizure of a person; however, the court did create the following blueprint for analyzing whether the seizure of a person constitutes an arrest or merely an investigative stop or detention.

Admittedly, *Terry*, *Dunaway*,¹⁰ *Royer*,¹¹ and *Place*,¹² considered together, may in some instances create difficult line-drawing problems in distinguishing an investigative stop from a *de facto* arrest. Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop. But our cases impose no rigid time limitation on *Terry* stops. While it is clear that “the brevity of the invasion of the individual’s Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion,” *Id.* at 709, we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably

needed to effectuate those purposes... Much as a "bright line" rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria.¹³

APPLICATION IN OKLAHOMA

The Oklahoma Court of Criminal Appeals has dealt with the application of investigative detention in many cases, primarily with encounters between law enforcement and citizens in public places. In 1991, the Court of Criminal Appeals heard the case of *Loman v. State*.¹⁴ William Loman II was tried in Leflore County for first- and second-degree burglary and was convicted and received a sentence of 15 years and 10 years on his respective counts.

The facts are as follows: on Dec. 18, 1986, Hilda Goodwin returned to her home to find she was the victim of a burglary. Later the same evening her doorbell rang and she did not answer; she heard footsteps around the back of her home and she called police. The police discovered a broken window and found the defendant and his co-defendant roughly 100 yards from Mrs. Goodwin's home walking in the opposite direction of the home. The defendant was placed in "investigative detention" and questioned. During questioning, officers noticed a bulge in the defendant's pants' pocket and the officers, fearing a weapon, conducted a pat-down search. The officer searched the defendant's pockets and discovered Mrs. Goodwin's flashlight and jewelry, and he was placed under arrest.

In Loman's appeal he argued his detention and subsequent search were unreasonable and based on mere suspicion of criminal activity and the evidence obtained should have been suppressed at trial. Judge Lumpkin writing for the court began by stating:

The United States Constitution prohibits only unreasonable searches. Therefore, "the touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular government invasion of a citizen's personal security." *Pennsylvania v. Mims*, 434 U.S. 106 (1977)... The reason-

able will vary with the circumstances of each search.¹⁵

The court went on to state certain circumstances allow law enforcement officers in the course of their duties to approach and question suspicious individuals to determine their identity, without grounds for arrest. The court ruled the following circumstances in the present case warranted police detaining Mr. Loman: the defendant was 100 yards from the scene of a felony that occurred within the past hour, it was 10:30 p.m. and the defendant had a missing button from his jacket. The reasonableness test applied by the court in this case is extremely subjective and prone to wide interpretation.

The court held that once detained and the bulge in his clothing observed, the officer had reasonable cause to fear for his safety and con-

duct a pat-down search for weapons. The court held that most importantly the officer, although entitled to conduct a pat-down search, was not entitled to conduct a further search of the defendant under the protections of *Terry*. The issue would be simple were the analysis to end there with exclusion of the evidence; however, the court stated there are established situations where a war-

rantless search passes constitutional scrutiny and the court determined one of those situations existed in this case. The probable cause for the initial stop plus the exigency of the potential loss of evidence warranted the police to search the defendant without a warrant. Specifically the court held, "Considering the existence of probable cause, coupled with exigent circumstances and potentially easy disposition of the evidence, we cannot say this very limited intrusion violated the Fourth Amendment."

The Court of Criminal Appeals established a precedent in *Loman* where exigency of time and space in relation to a felony coupled with these facts amounting to "probable cause to stop" a potential suspect has nearly limitless application for investigative detention. Seven years after the Court of Criminal Appeals decided *Loman*, the court decided *Coffia v. State*.¹⁶ Loyd Coffia was tried in Creek County on charges of trafficking methamphetamine and other charges. Coffia was convicted at trial of all counts and sentenced to 15 years in pris-

“The United States Constitution prohibits only unreasonable searches.”

on on trafficking; however, no term of imprisonment was ordered on counts 2, 3 and 4.

The pertinent facts of the case are as follows: Oklahoma Highway Patrol Trooper Mike Yelton came into contact with two individuals standing near a parked car on Highway 33 at 2:30 a.m., under his community caretaking function. Coffia was standing next to the passenger side of the vehicle. Trooper Yelton pulled his car up behind their stopped vehicle and switched on his emergency lights. The defendant and his companion approached the trooper's car. Trooper Yelton had the defendant return and sit in the parked car, while he spoke to Coffia's companion. Trooper Yelton spoke to each separately and required they provide their driver's license and told them he would get them on their way quickly. Trooper Yelton checked their licenses through dispatch and discovered Coffia's companion's license was suspended, he would have to drive, and requested to search the vehicle. Coffia consented and the trooper found 430.6 grams of methamphetamine in the backseat of the car.

The court examined two issues on appeal; the first is relevant to our analysis: whether the officer unlawfully detained Coffia during a motorist assist call by demanding his driver's license and conducted a status check. This issue was a case of first impression for the court, which held "the public interest in asking for a license and conducting a status check outweighed the minimal intrusion involved and did not violate the Fourth Amendment."¹⁷

The court noted the lack of uniformity in deciding the issue of an officer requesting a motorist's license and registration on a welfare check of a stopped motorist without a motor vehicle offense or criminal act. Some courts have held a limited seizure occurs in this situation.¹⁸ Other courts have held no seizure occurs under these circumstances in a welfare check.¹⁹ However, at least one court has held this type of request to be an unjustified search.²⁰

The Court of Criminal Appeals considered an interesting precedent out of Wisconsin, *State v. Ellenbecker*,²¹ where that court held a seizure had occurred based on a display of police authority in a marked car with emergency lights, which may cause a motorist to feel they are not free to refuse an officer's request for information. The court cited to the community caretaker action from *Terry*, which does not have to be based on a reasonable suspicion of

criminal activity, because it is unrelated to investigation or acquiring evidence related to a criminal act. However, the line between the community caretaker function disconnected from investigation and an investigative detention are subject to interpretation and mere labeling of officers. The Wisconsin court concluded, the public interest in conducting a license status check outweighed the minimal intrusion and passes the Fourth Amendment reasonableness test. The Court of Criminal Appeals applied the reasoning of the Wisconsin court and found the intrusion minimal and reasonable under the Fourth Amendment and *Terry*.

Once the court determined the initial contact was constitutional it proceeded to analyze the constitutionality of the search of Coffia's car. The court hinged its analysis on whether the point the officer requested permission to search was a "consensual encounter." The court cited the 10th Circuit definition of a consensual encounter in *United States v. West*²² where the court defined it as "a voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement officer." The 10th Circuit in *West* ruled a traffic stop may revert to a "consensual encounter, requiring no reasonable suspicion, if the officer returns the license and registration and asks questions without further constraining the driver by an overbearing show of authority."²³

The Court of Criminal Appeals listed pleasant factors about Trooper Yelton's appearance to justify the assertion his presence was not an overbearing show of authority, thus validating the assertion that the encounter was consensual and Coffia should have felt free to leave. However, this assertion ignores the reality of coming into contact with an armed, uniformed, highway trooper in a marked vehicle with emergency lights at 2:30 a.m. after being separated from your companion and ordered to sit in your vehicle. The court affirmed the district court's ruling to not suppress the evidence and his conviction.

The Court of Criminal Appeals established a precedent in *Coffia* where a police officer's assertions at a later time: they were polite, did not assert intimidating body language, nor displayed a weapon creates a situation where a reasonable person would feel free to leave. This assertion ignores the reality of how an individual feels when coming into contact with police and blurs the lines between a consensual encounter and investigative detention.

OCCA'S MOST RECENT DECISION

On Jan. 16, 2015, the Court of Criminal Appeals decided *State v. Alba*.²⁴ Veronica Alba was tried in Rogers County on the charge of driving a motor vehicle while under the influence of alcohol. She filed a motion to suppress, which was granted by Judge Terrell Crosson. The prosecution appealed the suppression order, which was reserved and remanded on appeal.

The pertinent facts are as follows: on July 16, 2013, at 4 p.m. Claremore dispatch received a call of a possible intoxicated driver in a black SUV, who walked face first into a light pole prior to entering the vehicle. The concerned citizen followed the vehicle and pointed it out to the officer, who stopped the black SUV without observing a traffic violation.

The court began its analysis by citing the United States and Oklahoma constitutional guarantees to be free from unreasonable searches and seizures.²⁵ The court gave the following brief recitation of pertinent Supreme Court precedent:

Although Fourth Amendment protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest, *Terry v. Ohio*..., the police are allowed to conduct brief investigative stops if the officer possesses "reasonable suspicion to believe that criminal activity may be afoot." *United States v. Arvizu*.²⁶ Reasonable suspicion for an investigatory stop may be based on information supplied by another person, and not solely upon an officer's personal observation. *Adams v. Williams*.^{27, 28}

The Court of Criminal Appeals analyzed the facts in the traffic stop of *Alba* by applying the U.S. Supreme Court case of *Navarette*,²⁹ where a police officer conducted an investigatory stop of a vehicle based on an anonymous caller. The Supreme Court found the stop met the totality of the circumstances requirement of the Fourth Amendment, because the officer had reasonable suspicion to conclude the driver was intoxicated. Most importantly, the behavior reported by caller when viewed from the standpoint of an objectively reasonable police officer would be sufficient for reasonable suspicion to initiate contact with the driver. The court in *Navarette* stated the following:

Although a mere 'hunch' does not create reasonable suspicion, *Terry*, at 27, the level

of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause, *United States v. Sokolow*.^{30, 31}

Although the majority in *Navarette* lowered the standard for reasonable suspicion to allow for an anonymous tip of a drunk driver to warrant an investigative stop, the lifespan of this position may be short lived. The majority opinion written by Justice Thomas was written by a 5-4 court with the following language at the beginning of Justice Scalia's dissent:

Be not deceived. Law enforcement agencies follow closely our judgments on matters such as this, and they will identify at once our new rule: So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop. *This is not my concept, and I am sure would not be the Framers', of a people secure from unreasonable searches and seizures.*³² (emphasis added)

The Court of Criminal Appeals held the reasonable suspicion of criminal activity warranting the investigative stop in *Alba* even more compelling than the facts in the United States Supreme Court case of *Navarette*. Specifically, the individual providing the incriminating information was not anonymous; the timeline of information was contemporaneous with the observations, and the behavior reported constituted reasonable suspicion of criminal conduct, drunk driving. The court in *Alba* concluded by stating the circumstances of this case warranted the investigative stop based on two prongs: sufficient indicia of reliability and reasonable suspicion of criminal conduct.

CONCLUSION

Judges, attorneys and the public may desire a bright-line rule to minimize the massive discretion given to law enforcement in this area; however, the court since *Terry* has identified the myriad of circumstances in which the public and law enforcement come into contact with one another prohibits bright line rules; therefore, reasonableness and articulable suspicion from an independence perspective has been the rule and will continue for the foreseeable future to govern how and when an officer may seize an individual in public without sufficient information for an arrest.

1. *Terry v. Ohio*, 392 U.S. 1 (1968).
2. *Company v. Botsford*, 141 U.S. 250 (1981).
3. *Company v. Botsford*, 141 U.S. 250, 251 (1981).
4. *Terry v. Ohio*, 392 U.S. 1, 26 (1968).
5. *Terry v. Ohio*, 392 U.S. 1 27 (1968).
6. *United States v. Sharpe*, 470 U.S. 675 (1985).
7. *United States v. Sharpe*, 470 U.S. 675, 687 (1985).
8. *Cady v. Dombrowski*, 413 U.S. 433 (1973).
9. *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973).
10. *Dunaway v. New York*, 442 U.S. 200 (1979).
11. *Florida v. Royer*, 460 U.S. 491 (1983).
12. *United States v. Place*, 462 U.S. 696 (1983).
13. *United States v. Sharpe*, 470 U.S. 675, 685 (1985).
14. *Loman v. State*, 806 P.2d 663 (Ok. Crim. 1991).
15. *Loman v. State*, 806 P.2d 663, 666 (Ok. Crim. 1991).
16. *Coffia v. State*, 191 P.3d 594 (Ok. Crim. 2008).
17. *Coffia v. State*, 191 P.3d 594, 595 (Ok. Crim. 2008).
18. *State v. Brunelle*, 766 A.2d 272 (N.H. 2000) this type of conduct

is part of a limited community caretaker exception and such a request of information was reasonable. *State v. Godwin*, 826 .2d 452 (Idaho 1992) Police officer's running a status on an individual's license is entirely reasonable. *State v. Reynolds*, 890 P.2d 1315 (N.M. 1995) Officers who stop a motorist for safety concerns may detain the vehicle and its passengers to ask for identification, registration and proof of insurance.

19. *Commonwealth v. Evans*, 764 N.E.2d 841 (Mass. 2002) the trooper's request for the defendant's license and registration during a welfare check was not a seizure within the meaning of the Fourth Amendment.

20. *State v. DeArman*, 774 P.2d 1247 (Wash.Ct.App. 1989) once it was clear to the officer that the motorist's vehicle was not disabled and did not need officer assistance, the officer has no reason to proceed.

21. *State v. Ellenbecker*, 464 N.W.2d. 427 (Wisc.Ct.App.1990).
22. *United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000).
23. *United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000).
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25. U.S. Const. Amend. IV & Okla. Const. Art. 2, §30.
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27. *Adams v. Williams*, 407 U.S. 143, 147 (1972).
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29. *Navarette v. California*, ___ U.S. ___, 134 S.Ct. 1683 (2014).
30. *United States v. Sokolow*, 490 U.S. 1 (1989).
31. *Navarette v. California*, ___ U.S. ___, 134 S. Ct. 1683, 1687 (2014).
32. *Navarette v. California*, ___ U.S. ___, 134 S. Ct. 1683, 1692 (2014).

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The Death Penalty: *Baze*, *Glossip* and Beyond

By Doris J. “Dorie” Astle

Article 2 §9 of the Oklahoma Constitution and the Eighth Amendment to the Constitution of the United States provide that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The Eighth Amendment of the U.S. Constitution is applicable to the states by virtue of the 14th Amendment.¹

Capital punishment has been upheld by the U.S. Supreme Court as constitutional and not in violation of the Eighth Amendment,² and because states can enact laws providing for the death sentence “there must be a means of carrying it out” if such laws are enacted.³

Capital punishment is authorized in Oklahoma only if all elements of the crime, including one or more of the following eight aggravating circumstances, are proven beyond a reasonable doubt:⁴

- 1) The defendant was previously convicted of a felony involving the use or threat of violence to the person;
- 2) The defendant knowingly created a great risk of death to more than one person;
- 3) The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
- 4) The murder was especially heinous, atrocious or cruel;
- 5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

- 6) The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;
- 7) The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or
- 8) The victim of the murder was a peace officer as defined by Section 99 of this title, or correctional employee of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.

The U.S. Supreme Court has previously carved out two exceptions to capital punishment as a violation of the Eighth Amendment. First, *Atkins v. Virginia*⁵ barred execution of persons with intellectual disabilities under the Eighth and 14th Amendments. And, second, *Roper v. Simmons* barred the death penalty for an offender under 18 at the time of the crime.⁶

In reaching these holdings, the court took into consideration the worldview based on international opinion and law, their own judgment and evolving standards of decency. The *Roper* court found “objective indicia of consensus” in the survey of state statutes finding 30 states had abolished juvenile execution (12

with no death penalty and 18 expressly excluding juveniles from the death penalty).⁷

“The power of a State to pass laws means little if the State cannot enforce them.”⁸ Accordingly, if a state has adopted capital punishment, then there must be a means of carrying out executions.⁹

The methods established for execution have varied widely across time and between jurisdictions including hanging, firing squad, electrocution, gas chambers and lethal injection and the “Court has never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.”¹⁰

The court recognizes that changes in methods provided for execution resulted across time as jurisdictions have pursued more humane methods of execution.¹¹

Lethal injection was adopted by Oklahoma as a replacement for electrocution in 1977 making it the first state to adopt lethal injection, though it would not be the first to utilize this method. Oklahoma adopted a three-drug protocol with 1) sodium thiopental, 2) a paralytic agent and 3) potassium chloride.¹² Oklahoma’s adoption of lethal injection drew a great deal of attention as the majority of states “fell in line behind Oklahoma” to become the leading method of execution in the U.S.¹³ It is now the first-line method of execution by states and by the federal government.¹⁴

The pharmaceutical manufacturer of sodium thiopental was pressured to stop providing the drug for executions. As a result, with the lack of availability of sodium thiopental for executions, Oklahoma, in 2010, became the first state to carry out an execution with pentobarbital in substitution for sodium thiopental.¹⁵ It would not be long, however, before the manufacturer of pentobarbital also yielded to external pressures to not provide the drug for executions making it extremely difficult for it to be obtained for the lawful purpose of executions in the United States.

As a precautionary step and retaining its place in history for adoption of execution methods, Oklahoma has also now become the first state to adopt the execution alternative nitrogen hypoxia; although, a protocol has not yet been adopted by the Oklahoma Department of Corrections for executions by nitrogen hypoxia.¹⁶ No execution has been attempted by

nitrogen hypoxia. Accordingly, any guidance regarding the constitutionality of nitrogen hypoxia must be drawn from prior judicial challenges of execution methods. Consistent with prior U.S. Supreme Court rulings, there does not appear to be any reason to believe that nitrogen hypoxia would be held to be cruel and unusual punishment in violation of the Eighth Amendment assuming an appropriate protocol is adopted taking guidance from such rulings.

Lethal injection executions were carried out in the United States without significant complications before the pharmaceutical manufacturers began withdrawing and refusing to provide the drugs sodium thiopental and pentobarbital for the purpose of executions. As a result of the unavailability of sodium thiopental and pentobarbital many states sought yet another replacement drug. In 2014, Oklahoma adopted the sedative midazolam hydrochloride (midazolam) as the replacement drug for pentobarbital, as had several other states.¹⁷

Midazolam has been criticized as providing no protection against pain. For a thorough discussion of the pharmacological perspective on midazolam *see amicus brief* filed in *Glossip v. Gross* by 16 professors of pharmacology and the court’s discussion in *Glossip*.¹⁸

Prior to the general unavailability of sodium thiopental for executions, the lethal injection protocol of Kentucky utilizing the following three-drug sequence was challenged in *Baze v. Rees* as cruel and unusual punishment prohibited by the Eighth Amendment:¹⁹

- 1) Sodium thiopental
- 2) Pancuronium
- 3) Potassium chloride

And after the general unavailability of sodium thiopental and pentobarbital for executions, the lethal injection protocol of Oklahoma utilizing the following three-drug sequence was challenged in *Glossip* as cruel and unusual punishment prohibited by the Eighth Amendment:²⁰

- 1) Midazolam
- 2) Pancuronium
- 3) Potassium chloride

Both challenges failed.

BAZE V. REES

The issue before the court in *Baze v. Rees* was whether Kentucky’s lethal injection protocol satisfies the Eighth Amendment ban on cruel

and unusual punishment. Petitioners in *Baze* sought unsuccessfully to establish that the Eighth Amendment prohibits “unnecessary risk of pain” in carrying out executions.²¹

Some risk of pain is inherent in any method of execution — no matter how humane — if only from the prospect of error in following the required procedure. It is clear, then, that “the Constitution does not demand the avoidance of all risk of pain in carrying out executions.”²²

As noted herein above, no procedure for execution has ever been invalidated by the U.S. Supreme Court as inflicting cruel and unusual punishment.²³ The court cites *In re Kemler*:²⁴

Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there is something inhuman and barbarous, something more than the mere extinguishment of life.²⁵

The *Baze* court notes that proper administration of the first drug in Kentucky’s three-drug protocol eliminates “any meaningful risk that the prisoner would experience pain” from the second and third drugs.²⁶

Petitioners in *Baze* argued there is a significant risk the first drug will not be properly administered. The court stated, “Our cases recognize that subjecting individuals to a risk of future harm — not simply actually inflicting pain — can qualify as cruel and unusual punishment.”²⁷ The test established is one of “substantial risk of harm...objectively intolerable risk of harm.”²⁸ It must be shown that it is “sure or very likely to cause serious illness and needless suffering...sufficiently imminent dangers.”²⁹

The court acknowledged in *Resweber*³⁰ that a second attempt to execute a prisoner by electrocution after a mechanical malfunction was not cruel and unusual punishment. “Accidents happen for which no man is to blame.” *Resweber* noted that absent “malevolence” it is not an Eighth Amendment violation.³¹

However, the *Baze* court cites Justice Frankfurter’s concurring opinion in *Resweber* based on due process to the effect that:

...a hypothetical situation [involving] a series of abortive attempts at electrocution [would present a different case].³²

Justice Frankfurter’s concurring opinion in *Resweber* and the *Baze* court’s reference to it should raise a critical concern for any state carrying out executions demonstrating a continual pattern of malfunctions. While Justice Frankfurter’s concurring opinion, insofar as pattern[s] of malfunctions, is in the context of a specific execution, it is this writer’s opinion that his opinion should be taken as a cautionary sign that it too could be effectively argued to apply more broadly to a series of dysfunctional executions by a state involving multiple offenders.

While an isolated incident is not violative of the Eighth Amendment,³³ a “series of abortive attempts” would demonstrate an “objectively intolerable risk of harm” in violation of the Eighth Amendment.³⁴ Again, by the same analysis and in cognizance of Justice Frankfurter’s concurring opinion in *Resweber*, it should be expected that a series of problematic executions utilizing the same protocol would demonstrate an intolerable risk of harm in application of a state’s execution protocol.

Petitioners in *Baze* urged a different protocol for Kentucky involving only one drug; however, the court rejected the notion stating that:

Such an approach ... would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures — a role that by all accounts the states have fulfilled with an earnest desire to provide for a progressively more humane manner of death.³⁵

The *Baze* court states that for an alternative method to address a “substantial risk of harm:”

...the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an

“Petitioners in *Baze* argued there is a significant risk the first drug will not be properly administered.”

alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.³⁶

At the time of the *Baze* opinion, 30 states and the federal government used the same three-drug protocol as Kentucky although the dosage varied among the jurisdictions, and no state had used a one-drug protocol.³⁷

The *Baze* court, rejecting petitioners' argument that there was substantial or imminent risk to the prisoner, discussed safeguards in place by the state of Kentucky to assure adequate dosage and appropriate delivery to the inmate's system, including *inter alia* training level and expertise of the IV team, practice sessions, siting IV catheters in volunteers, establishing primary and backup lines, preparing two sets of execution drugs prior to commencement of delivery, a time limit on siting the IV lines, steps to reduce infiltration and the time frame in which a prisoner must lose consciousness or redirect the flow of drugs to the backup IV catheter.³⁸

The court states:

...the condemned prisoner [must establish] that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.³⁹

Further,

Our society has steadily...moved toward more humane methods of carrying out capital punishment...The broad framework of the Eighth Amendment has accommodated this progress ... and our approval of a particular method in the past has not precluded legislatures from taking steps they deem appropriate, in light of new developments, to ensure humane capital punishment.⁴⁰

OKLAHOMA'S USE OF MIDAZOLAM

As noted herein above, because sodium thiopental and pentobarbital are no longer available to the Oklahoma Department of Correc-

tions for lethal injections, the state modified its execution protocol to substitute midazolam for pentobarbital.⁴¹ That decision has been highly controversial with significant input by knowledgeable pharmaceutical experts who describe midazolam as a sedative having no pain blocking qualities.⁴² Four states have used midazolam as a part of their execution protocol⁴³ with varying degrees of complication.⁴⁴

LOCKETT

Executions in Oklahoma, Arizona and Ohio utilizing midazolam have experienced problems; however, those problems have not been attributable to the midazolam *per se*. The complications in Oklahoma's execution of Lockett in June 2014 resulted from failure of IV sitings. And, as confirmed by an independent post-execution study, the flawed Arizona execution of offender Wood was attributed to the multiple low doses of midazolam utilized and the two-drug protocol. Therefore, the experiences of Oklahoma and Arizona were not comparable in the eyes of the court, and those experiences also were not comparable to Ohio's experience.⁴⁵

The scope of controversy in the use of midazolam took aim on Oklahoma as a result of the execution of Clayton Lockett on April 29, 2014. Lockett was sentenced to death for the murder of a 19-year-old girl who was abducted after she found herself in a home invasion, shot twice and buried alive.⁴⁶ Lockett's execution was complicated by failed IV lines and infiltration of the lethal injection drugs into surrounding tissue resulting in a lowered absorption of the drugs and delaying death while the prisoner reflexively moved on the gurney and reportedly uttered sounds.⁴⁷

The U.S. Supreme Court has recognized that an execution does not have to be carried out perfectly.⁴⁸ The execution does have to be carried out, however, with the intent of doing *no intentional harm*.⁴⁹ Mistakes can happen in an execution without any malice or intended harm to the inmate, mistakes such as an ineffectively sited IV line as in the Lockett execution.

While Lockett's execution was flawed with a seeming confusion due to lack of applicable protocol for responding expeditiously to such an unexpected and complicated situation, it should not be considered a violation of Lockett's Eighth Amendment right against cruel and unusual punishment based on the language of *Baze*.⁵⁰ There was no indication of any intent on the part of any member of the execu-

tion team or the Oklahoma Department of Corrections to do harm to the prisoner. Steps, albeit controversial due to intentionally obstructing the view of execution witnesses by closing window blinds, were immediately taken to preserve the prisoner's dignity while seeking to correct the failed IV catheter sitings.

Following the Lockett execution, Oklahoma imposed a moratorium on executions to investigate the causes of those complications and the Oklahoma Department of Corrections responds, and to develop a better-suited protocol utilizing the same three drugs. A revised execution protocol was adopted and is accessible online.⁵¹

The Arizona Department of Corrections commissioned an independent study following the Wood execution, utilizing multiple small doses of midazolam, and it recommended that the Oklahoma three-drug protocol including a 500 mg dose of midazolam be adopted.⁵²

The court attributes the Lockett execution problems to failed IV sitings and not midazolam⁵³ — and attributes the Wood execution problems to the dosage of midazolam.⁵⁴ The court states that the “Lockett and Wood executions have little probative value for present purposes.”⁵⁵ This is, of course, because they represent aberrations which can be explained logically to the court.

GLOSSIP V. GROSS

Richard Glossip was convicted and sentenced to death in two trials based on the aggravating circumstance of “employ[ing] another to commit ... murder for remuneration or the promise of remuneration.” The jury found in each case that Glossip hired Justin Sneed, now serving life without parole, to murder the owner of the motel managed by Glossip. Sneed, who beat the victim to death with a bat, was sentenced on a plea in exchange for giving testimony against Glossip. To date, only 21 prisoners nationwide have been executed for murders that they did not themselves commit.⁵⁶ Eleven of those 21 were contract killings and ten were felony murder.⁵⁷

The issue before the court in *Glossip v. Gross* was whether the use of midazolam for executions violates the Eighth Amendment prohibition against cruel and unusual punishment.⁵⁸

It is necessary here to incorporate the *Baze* case with the *Glossip* case to look beyond the current rulings and respond to the issues arising in the Lockett execution in Oklahoma.

Glossip v. Gross is a challenge of the Oklahoma lethal injection protocol brought by prisoners sentenced to death in Oklahoma. The Oklahoma protocol utilizes the drug midazolam as the first drug administered in the three-drug procedure. The second and third drugs, set out herein above, utilized are the same drugs utilized in the majority of lethal injection protocols throughout the remaining three-drug protocol jurisdictions.

Baze established that “the Eighth Amendment requires a prisoner to plead and prove a known and available alternative.”⁵⁹ The *Glossip* court in reliance on *Baze* held that the Oklahoma protocol does not violate the prohibition against cruel and unusual punishment of the Eighth Amendment. The court, citing *Baze*, states that the prisoner has failed to prove that midazolam poses a substantial risk “when compared to known and available alternative methods of execution...and that they failed to establish that the District Court committed clear error when it found that the use of midazolam will not result in severe pain and suffering.”⁶⁰

The majority opinion declines to overrule decisions upholding the death penalty.⁶¹

INDEFINITE STAY ORDERED

The execution of Richard Glossip was halted on Sept. 16, 2015, as a result of a 14-day stay of execution by the Oklahoma Court of Criminal Appeals.⁶² The execution of Glossip thereafter was again halted on Sept. 30, 2015, by executive order when it was discovered prior to execution that an incorrect drug (potassium acetate instead of potassium chloride) had been delivered by the pharmacy responsible for providing the execution drugs.⁶³ Apparently, the drug acquired had remained sealed until shortly before the scheduled execution time. Following disclosure of that discovery to the governor and Oklahoma attorney general, the governor issued a 37-day stay. On Oct. 1, 2015, the Oklahoma Office of the Attorney General filed with the Court of Criminal Appeals of the state of Oklahoma its notice and request for stay of execution dates in all three cases of then scheduled executions including, *inter alia*, Glossip. The request asked that the scheduled executions be stayed for “an indefinite period of time.” On Oct. 2, 2015, the Court of Criminal Appeals ordered an indefinite stay requiring the state to file a status report every 30 days as long as the stay remains in effect.⁶⁴

The *Glossip* petitioners included a fourth offender, Warner, who was already executed

prior to the aforementioned indefinite stay. Disclosures by the governor now have confirmed that Warner was in fact executed utilizing potassium acetate and not the potassium chloride called for by Oklahoma's execution protocol. Since the drug potassium acetate is not included in the Oklahoma protocol and the required notices to the offender's counsel and the Oklahoma Court of Criminal Appeals were not correct, i.e. they did not identify the drug *actually* utilized, but erroneously represented that potassium chloride would be utilized. This of, course, brings into issue due process considerations. It should be noted that Warner reportedly uttered during his execution that his body was "on fire" after the first drug, midazolam. The interchangeability of potassium chloride and potassium acetate, as the third drug in his execution will, of course, have to be a part of the continuing investigation into Oklahoma's lethal injection protocol and compliance with that protocol.

Even though the Oklahoma three-drug protocol set out in the U.S. Supreme Court ruling in *Glossip v. Gross* has been held to *not* violate the Eighth Amendment, it is *not* mandated by the court that Oklahoma use that protocol. Changes can be made to the drug protocol or another means of execution can be adopted. The court has recognized the need for change in methods of execution; the need to adopt, when possible, more humane methods of execution.

The actions by the governor and attorney general of Oklahoma in halting the execution of Richard Glossip were, in this writer's opinion, the exercise of sound judgment and evidenced an unwillingness to risk any mistake or violation of the offender's due process and Eighth Amendment rights by using drugs other than those expressly called for in the Oklahoma execution protocol which was reviewed and blessed by the U.S. Supreme Court in *Glossip*.

CONCLUSION

Capital punishment continues to be a constitutionally upheld penalty by the United States Supreme Court. Lethal injection has been upheld in *Baze* and *Glossip* by the court as *not* in violation of the Eighth Amendment prohibition against cruel and unusual punishment. And, although lethal injection executions have in several cases been flawed and may result in some consequential pain, it should not be expected that these aberrations would alter the

opinion of the court. Should another execution procedure, however, such as nitrogen hypoxia, be shown to present a more humane method of execution, it should be expected that states would be expected to adopt that method and that the court would also, as long as the death penalty is upheld, find it to be a constitutionally sound method of execution.

1. *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam); *Robinson v. California*, 370 U.S. 660, 666-667 (1962); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality opinion).

2. *Gregg v. Georgia*, 428 U.S. 153, 177 (1976); *Baze v. Rees*, 553 U.S. 35, 47 (2008); *Glossip v. Gross*, 576 U.S. ____ (2015). Slip op.; *Francis v. Resweber*, 329 U.S. 459, 464 (1947) (plurality opinion); *In re Kemmler*, 136 U.S. 436, 447 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 134-135 (1878).

3. *Baze*, *supra*, at 47.

4. 21 Okla. Stat. 2001 §701.12.

5. *Atkins v. Virginia*, 536 U.S. 304 (2002).

6. *Roper v. Simmons*, 543 U.S. 551 (2005).

7. *Id.* For a discussion of *Roper* and the court's analysis see Astle, D. (2013). "Juvenile Justice: Life and Death," *Oklahoma Bar Journal*, 84, 21.

8. *Baze*, *supra* at 61 citing *McCleskey v. Zant*, 499 U.S. 467, 491 (1991).

9. *Baze*, *supra*.

10. *Glossip*, *supra*, at 3 citing *Baze*, *supra*, at 48.

11. *Glossip*, *supra*, at 3.

12. *Ibid.*

13. *Baze*, *supra*, at 75.

14. *Glossip*, *supra*, at 3.

15. *Id.*, at 5.

16. 2015 O.S.L. 75, ___, amending 22 O.S. 2011, Section 1014, eff. Nov 1, 2015, signed April 17, 2015 by Governor Fallin.

17. *Glossip*, *supra*, at 6.

18. *Glossip*, *supra*. Amicus Brief filed by sixteen pharmacology professors as Amici curiae. "Amici curiae respectfully submit this brief to provide a pharmacological perspective on the physiologic effect of midazolam hydrochloride (midazolam). Midazolam is a sedative in the benzodiazepine class of drugs that the state of Oklahoma decided to use in early 2014 as a substitute for sodium thiopental (thiopental) and pentobarbital as the first drug in the state's three drug lethal injection protocol. Amici curiae have no interest in any party to this litigation, nor any stake in the outcome of this case."¹⁸

19. *Baze*, *supra*.

20. *Glossip*, *supra*.

21. *Baze*, *supra*, at 47.

22. *Ibid.*

23. *Id.*, at 48.

24. *Id.*, at 48-49 citing *In re Kemler*.

25. *Baze*, *supra*, at 49 citing *In re Kemler*, *supra*, at 447.

26. *Id.*, at 49.

27. *Ibid.*

28. *Id.*, at 50.

29. *Ibid.*; *Helling v. Kinney*, 509 U.S. 25, 33 (1993).

30. *Baze*, *supra*, at 50 citing *Resweber*, *supra*, at 459.

31. *Id.*, at 50 quoting *Resweber*, *supra*, at 462-463.

32. *Id.*, at 50 quoting *Resweber*, *supra*, at 471.

33. *Baze*, at 50.

34. *Id.*, citing *Farmer v. Brennan*, 511 U.S. 825, 846 (1994).

35. *Baze*, at 52.

36. *Id.*, at 51 citing *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

37. *Baze*, at 53.

38. *Id.*, at 56.

39. *Id.*, at 61.

40. *Id.*, at 62.

41. *Glossip*, *supra*, at 8. The Oklahoma Department of Corrections operative procedures for planning and carrying out the execution of a person convicted of a capital offense and sentenced to death set out in OP-040391 effective 06/30/2015. Downloaded 09/14/2015 from the Oklahoma Department of Corrections website at www.ok.gov/doc.

42. *Glossip Amicus Brief*, *supra*. Also, see FN 3, *Glossip*, at 18, discussing the testimony of petitioners' key witnesses at the district court proceeding and their opinion that midazolam risks "paradoxical reactions."

43. *Glossip*, at 27.

44. *Id.*, at 28-29.

45. *Ibid.*

46. *State v. Clayton Darrell Lockett*, Noble County District Court, CF-1999-00053A.

47. *Glossip, supra*, at 28.

48. *Baze, supra*, at 48.

49. *Ibid.*

50. *Baze, supra*.

51. *Glossip, supra*, at 8. The Oklahoma Department of Corrections operative procedures for planning and carrying out the execution of a person convicted of a capital offense and sentenced to death set out in OP-040391 effective 06/30/2015. Downloaded 09/14/2015 from the Oklahoma Department of Corrections website at www.ok.gov/doc.

52. *Glossip, supra*, at 29.

53. *Id.*, at 28.

54. *Id.*, at 28-29.

55. *Id.*, at 29.

56. Death Penalty Information Center. <http://www.deathpenaltyinfo.org/those-executed-who-did-not-directly-kill-victim>, downloaded February 27, 2016.

57. *Ibid.*

58. *Glossip, supra*.

59. *Glossip, supra*, at 19, citing *Baze*. See *Baze, supra*, at 13-16.

60. *Glossip, supra*, at 14.

61. *Id.*, at 16.

62. *Glossip v. State of Oklahoma*, PCD 2015-820 (D-2005-310), Order Granting Emergency Request for Stay of Execution and Resetting Execution Date.

63. Executive Order 2015-42 issued by Oklahoma Governor Mary Fallin.

64. *Glossip, Grant, and Cole v. State of Oklahoma*, Cases D-2005-310 (*Glossip*), D-2000-653 (*Grant*), and D-2004-1260 (*Cole*). An indefinite Order Issuing Stay was entered by the Court of Criminal Appeals October 2, 2015, in the foregoing cases.

ABOUT THE AUTHOR



Doris J. "Dorie" Astle earned her B.S., M.S. and Ph.D. degrees from OSU and her J.D. from the TU College of Law. She is a former partner with the Tulsa firm of Hall Estill and is an associate professor of criminal justice and sociology at Southwestern Oklahoma State University in Weatherford.

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Search Warrants Frequent Problems With Substance and Execution

By Mark Yancey and Kate Holey

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”¹

The Constitutions of the United States and Oklahoma protect citizens’ rights to be free from unconstitutional searches by preferring search warrants before invading constitutionally protected areas. These warrants are meant to protect privacy by requiring review and issuance by a neutral magistrate² and probable cause that evidence of a crime will be found in the searched place. Despite these good intentions, however, errors are frequently made. When legal problems arise in either the creation of the search warrant or during the execution of the search warrant, these problems affect the validity of searches and the admissibility of evidence recovered. Such errors can have a profound influence on the outcome of a case, but are easily avoidable — if recognized.

To help criminal practitioners recognize and avoid such errors, this article briefly discusses a handful of common mistakes and execution errors: 1) the information provided as a basis for probable cause of criminal activity is stale; 2) the warrant contains incorrect, or improperly described information; 3) the scope of the parameters of the search are too broad in the warrant; 4) the connection between the criminal activity and place to be searched is too tenuous; and finally, 5) the execution of the search warrant goes beyond the parameters of the search warrant, rendering the search overbroad.

‘STALENESS:’ HOW OLD IS TOO OLD?

Frequently, the information serving as the basis for probable cause for the search is simply too old to support the inference that the items to be seized will be found at the place to be searched.³ The “staleness” of the information, however, is not determined by simply counting the number of days (or months) that have elapsed between the facts relied upon and the issuance of the warrant. Rather, the staleness determination depends on three factors: 1) the length of criminal activity; 2) the type of the crime being investigated; and 3) the nature of the property to be seized.⁴

The Length of the Criminal Activity

When the investigation is based on an isolated criminal incident, probable cause dwindles more quickly with the passage of time. On the other hand, investigations based on continuous criminal activity make the passage of time less critical because evidence of a long-standing pattern of criminal conduct means the activity may be ongoing and more likely that evidence remains.⁵ The Oklahoma Court of Criminal Appeals' decision in *Gregg v. State* is a perfect example of a case when the ongoing nature of the criminal activity prevented a finding of staleness. In *Gregg*, the court upheld a conviction that was based on the seizure of a videotape depicting the defendant molesting a minor. While much of the information relied upon to obtain the search warrant was old, the supporting affidavit outlined the defendant's multi-year pattern of videotaping and photographing nude young girls. In upholding the constitutionality of the warrant and finding that the supporting facts were not "impermissibly stale," the court stated "the allegations contained in the affidavit, when viewed as a whole, provided the magistrate with a substantial basis for concluding that criminal conduct of an ongoing nature existed at the time that the warrants were issued."⁶

Thus, if there is a significant period of delay between the triggering events that support probable cause and the execution of the warrant, practitioners should look for a pattern of illegal behavior that will support the inference that crime is ongoing and evidence of that crime will likely be present. Absent such a showing, the information may be unconstitutionally stale.

The Nature of the Crime Investigated

The type of crime being investigated is also highly relevant to the staleness inquiry. Certain crimes increase the probability that the place to be searched will evidence criminal activity long after the crime. For instance, courts have widely accepted that pedophiles and child pornography possessors maintain materials for significant periods of time.⁷ One rationale for this belief is that the initial collection of such materials is difficult because possession is *per se* illegal. Because such contraband is difficult to obtain, the possessor is unlikely to destroy the images. Rather, such images are likely to be kept secret in secure, private places — like residences.⁸

Likewise, child-pornography images are maintained on computers — the modern-day mechanism for receiving and storing illicit sexual materials. This means that the material remains on the computer for indefinite periods of time and may be forensically recovered even if deleted. In *United States v. Seiver*, the 7th Circuit Court of Appeals found that staleness is rarely relevant when searching computers because they contain evidence not susceptible to rapid dissipation or degradation. Consequently, the 7th Circuit rejected a staleness argument based on a seven-month delay between the date the defendant downloaded the images and the issuance of a search warrant. In upholding the constitutionality of the search, the 7th Circuit noted that many courts reviewing computer searches "appear to be laboring under the misapprehension that deleting a computer file destroys it." The 7th Circuit debunked this misapprehension, explaining in great detail how data is stored on computers, how data can remain in a computer's slack space even if deleted and how deleted files can be forensically recovered in whole or in part.⁹ While *Seiver* dealt specifically with child-pornography images, the rationale behind the 7th Circuit's position applies equally to any evidence that could be electronically stored.

The Nature of the Property to be Seized

Finally, the nature of the evidence sought affects the staleness analysis: Like evidence related to a single criminal event, evidence that is perishable or consumable, such as controlled substances, means probable cause dissipates more quickly.¹⁰ But, it is reasonable to conclude that items designed for long-term, legitimate use may be kept for extended periods of time. In *United States v. Brinklow*, for example, the 10th Circuit Court of Appeals found an eleven-month delay did not render the information stale when the warrant was for a CB radio, police scanner and notebook linked to a bombing. In so holding, the 10th Circuit noted these items were not *per se* illegal, but were functional in nature and designed for long-term use.¹¹ But legality is not determinative. As previously noted, courts have held that child pornography is a type of evidence that is maintained by its possessors for extended periods. The same is true for business records.¹² Staleness is but one of many potential pitfalls that can arise when drafting search warrants. Another common mistake arises when the search warrant contains incorrect information.

FLAWED DESCRIPTIONS

Flawed or vague descriptions of the search location or evidence subject to seizure are also common and can violate the Fourth Amendment's particularity requirement. As to real property searches, the listing of incorrect legal descriptions as well as street name and number errors occur all too frequently.¹³ When errors of this nature appear, "practical accuracy" controls over "technical precision."¹⁴ Accordingly, incorrect property descriptions do not automatically invalidate search warrants; courts often refuse to suppress evidence due to minor description defects.¹⁵ In determining the practical accuracy of the description, courts look to whether the flawed description is sufficient to enable the executing officer to locate and identify the search location with reasonable effort, and whether there is any reasonable probability that a wrong location might be mistakenly searched.¹⁶ In federal cases, the 10th Circuit has held that an officer's personal familiarity with the location to be searched can cure a technically inaccurate description as long as the officer's knowledge is not the sole basis of identifying the property.¹⁷

The Oklahoma Court of Criminal Appeals' position on the matter is less clear given a series of cases that are seemingly at odds.¹⁸ The time-honored rule in Oklahoma state court, as reiterated in *McCormick v. State*, is that the property description in the warrant must be so specific that an executing officer can find the place to be searched based solely on information contained in the four corners of the warrant.¹⁹ In two more recent cases, however, the court upheld searches based on warrants with faulty property descriptions, in part, because the executing officers were personally familiar with the locations being searched.²⁰ Even more recently, the court again cited *McCormick* as support for holding that a warrant's incorrect property description was fatal — even though it had "no doubt" that the officer knew which property he was referring to in the warrant based on his prior visit to the residence.²¹ In light of this contrary case law, some uncertainty remains as to whether an officer's prior knowledge will save an otherwise defective description in the execution of state search warrants.

“Flawed or vague descriptions of the items to be seized can also be fatal to the validity of a search warrant...”

Flawed or vague descriptions of the items to be seized can also be fatal to the validity of a search warrant and lead to the suppression of evidence obtained. One recurring error occurs when the affidavit or application supporting the warrant lists with sufficient particularity the items to be seized but that same information is missing from the search warrant itself. Although the Supreme Court has firmly held that the Fourth Amendment requires particularity in the warrant, not the accompanying documents, the court has also recognized that more specific descriptive language in the application or affidavit can cure a defective warrant if they are properly incorporated into the warrant. To be properly incorporated, the warrant must: 1) expressly refer to the application or affidavit and incorporate it by reference; and 2) be physically connected to the warrant so as to constitute one document.²² One interesting, and unanswered, question is whether a sealed affidavit that is never physically attached to the warrant could cure a faulty description in the warrant?

The Oklahoma Court of Criminal Appeals has allowed consideration of information provided in attachments to search warrants when the attachment was presented to the issuing judge prior to the decision to issue a search warrant.²³

OVERBROAD WARRANTS

An overbroad warrant is a warrant that authorizes the seizure of items for which there is no support in the probable cause affidavit. Facially overbroad warrants violate the Fourth Amendment's particularity clause, which "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit."²⁴ The test to determine whether a description is sufficiently particular is a practical one, heavily dependent on the facts of each case. A description is generally valid if it enables the searcher to reasonably ascertain and identify the things authorized to be seized.²⁵

Warrants to search businesses for records receive close scrutiny because of the potential privacy intrusion due to the vast amount of proprietary and customer information that

could be unveiled during the search process.²⁶ The same privacy concerns apply to computer searches because computers “store and intermingle a huge array of one’s personal papers in a single place [which] increases law enforcement’s ability to conduct a wide-ranging search into a person’s private affairs, and accordingly makes the particularity requirement that much more important.”²⁷

One practice of warrant drafters, in particular, has been soundly criticized as being overbroad: that is the practice of asking to search and seize “all” items related to an enumerated crime without further limitation. Federal courts have consistently determined that such catchall phrases are too broad in scope unless the warrant contains more narrowing language.²⁸ For example, a warrant to seize documents and records “[a]ll of which are evidence of violations of Title 18, United States Code, Section 371 [conspiracy]” lacked sufficient particularization of the items to be seized.²⁹ And, a warrant that authorized the seizure of “books, records and documents which are evidence, fruits, and instrumentalities of the violation of Title 18, United States Code Section 1341 [mail fraud]” was similarly deficient.³⁰ Consequently, close scrutiny should be given to search warrants to ensure they contain less sweeping and more pointed descriptions of the items to be seized.

Even if an item is seized pursuant to a warrant containing overbroad language, it does not automatically mandate suppression of all evidence. Instead, most federal courts permit severance of the overbroad portions of the warrant, suppressing only those items taken pursuant to the overbroad provisions.³¹ The Oklahoma Court of Criminal Appeals, however, has found overbroad language in a warrant “tainted all items seized without regard to whether or not the items were [properly] named in the warrant.”³²

Moreover, on at least two occasions, the 10th Circuit has applied the *United States v. Leon* “good-faith” exception to the exclusionary rule to save facially overbroad warrants when the officers consulted with prosecutors, reasonably believed the warrants were valid and only searched for and seized materials for which probable cause had been shown.³³ As the *Leon* court noted, “the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.”³⁴

Regarding the Oklahoma courts’ application of this doctrine, there are two points to keep in mind: first, the Oklahoma Court of Criminal Appeals initially appeared reluctant to apply the *Leon* “good-faith” exception and only did so for the first time in 2010;³⁵ and, second, the government bears the burden of establishing “good-faith” by showing that reliance on the invalid warrant was objectively reasonable. Because reviewing courts may even proceed directly to a “good-faith” analysis before addressing the underlying legality of the search,³⁶ it is important for the criminal law practitioner to be able to easily recognize this common error.

FAILURE TO LINK THE PLACE TO BE SEARCHED WITH THE SUSPECT OR CRIMINAL ACTIVITY

“Probable cause to search a person’s residence does not arise based solely upon probable cause that the person is guilty of a crime. Instead, there must be additional evidence linking the person’s home to the suspected criminal activity [or evidence of a crime].”³⁷ If this nexus is completely lacking from the affidavit, the 10th Circuit has found the warrant is unsupported by probable cause.³⁸ When determining whether there is the requisite nexus, courts look to the following: 1) the type of crime at issue, 2) the suspect’s opportunity to conceal evidence, 3) the nature of the evidence sought and 4) reasonable inferences as to where a criminal may keep such evidence. As to the latter factor, the issuing judge is permitted to rely on the law enforcement officer’s opinion concerning where contraband or evidence of a crime may be secreted.³⁹

Two 10th Circuit cases provide prime examples of search warrant affidavits that lacked a sufficient nexus to establish probable cause. In *United States v. Dutton*, the defendant challenged the search of a storage unit where explosives were found arguing that there was no reference in the affidavit about his relationship to the unit. The 10th Circuit found the warrant was fatally flawed because it failed to connect the place to be searched with the defendant: “We have no quarrel with the concept that Defendant could reasonably be expected to keep explosives-related materials in his storage unit. What is missing, however, is any evidence that the storage unit to be searched was the Defendant’s.”⁴⁰ Similarly, in *United States v. Gonzales*, the 10th Circuit affirmed the district court’s suppression of evidence found pursuant to a warrant to search a

residence for a firearm after the defendant was arrested in a vehicle that contained a loaded firearm magazine. The court noted: "the affidavit never specified that [the address to be searched] was Mr. Gonzales's residence or that there was any other connection between that location and Mr. Gonzales, the vehicle, or the suspected criminal activity. The affidavit also failed to specify who owned the vehicle."⁴¹

The approach taken by the Oklahoma Court of Criminal Appeals appears more forgiving and its cases, although dated, have consistently stated:

Where a search warrant is issued for the search of specifically described premises only and not for the search of a person, failure to name the owner or occupant of such property in the affidavit and search warrant does not invalidate them; and where the name of the owner of the premises sought to be searched is incorrectly inserted in the search warrant, it is not a fatal defect if the legal description of the premises to be searched is otherwise correct so that no discretion is left to the officer making the search as to the place to be searched.⁴²

Some panels of the 10th Circuit have even applied the *Leon* "good-faith" exception to the exclusionary rule when the link between the defendant and place to be searched was too tenuous to support the search pursuant to the warrant, but enough to find the officers acted in good-faith reliance on the warrant. Where such a connection was "wholly absent" from the affidavit, however, the court has refused to apply "good-faith."⁴³

OVERBROAD SEARCHES

Officers who seize property not authorized by the warrant violate the Fourth Amendment. Whether all evidence seized pursuant to an overbroad search will be suppressed is heavily dependent on the flagrancy of the violation. As a general rule, courts in the 10th Circuit only suppress the items not covered by the warrant.⁴⁴ When officers show a "flagrant disregard" for the terms of the warrant, however, blanket suppression of all evidence is the appropriate remedy to avoid rewarding "invasive and arbitrary general searches."⁴⁵ One case in particular illustrates a flagrant disregard for the contours of the warrant and turned the search into an impermissible "general search." In *United States v. Foster*, the warrant specifi-

cally authorized a search for marijuana and four firearms that were described by make, model, caliber and serial number. Instead of limiting their search to these items, officers grossly exceeded the scope of the warrant and seized "anything of value" including televisions, a lawn mower, coins, jewelry and a drill. Because the officers flagrantly disregarded the terms of the warrant, the court found "the particularity requirement [was] undermined and [the otherwise] valid warrant [was] transformed into a general warrant thereby requiring suppression of *all evidence* seized under that warrant."⁴⁶ The Oklahoma Court of Criminal Appeals takes the same approach, requiring specificity of the items listed in a search warrant to prevent a "general exploratory rummaging in a person's belongings."⁴⁷ Specificity must be interpreted in the context of the search: "A reviewing court is to interpret search warrants in a common sense and realistic fashion," including the nature of the items to be searched.⁴⁸ The nature of the items to be searched affects the specificity with which those items can be described in a warrant. Searches that include seemingly broad language such as "money, receipts, or records" have been upheld by the Oklahoma Court of Criminal Appeals because the search was affirmatively limited to records regarding specific crimes and types of materials.⁴⁹

Of course, this does not mean that officers must ignore unexpected contraband discovered during the search. State and federal officers are free to seize items in "plain view" whether or not covered by the warrant if it is readily apparent that the items are contraband or evidence of a crime.⁵⁰

CONCLUSION

While the potential errors in either drafting or executing search warrants are too great and varied to discuss here, the above-described common mistakes are easily avoidable if recognized early. Even if such errors are not recognized early enough to be prevented, suppression will frequently be avoided pursuant to the good-faith doctrine. When faced with such circumstances, a criminal law practitioner who understands the underlying policy, case law and purpose of the protections afforded by search warrants is better able to protect the interests of her client.

Authors Note: For brevity's sake, the author has included some, but not all, quotation parentheticals in the following citations.

1. U.S. Const. amend. IV. See also Okla. Const. art. II, §30.
2. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972) (recognizing that the judicial officer issuing the warrant must be neutral and detached); see also *United States v. Freerksen*, 457 F. App'x 769, 772 (10th Cir. 2012) (concluding that Oklahoma judge was neutral despite his previous prosecution of the defendant).
3. *United States v. Mathis*, 357 F.3d 1200, 1206–07 (10th Cir. 2004); *Gregg v. State*, 844 P.2d 867, 874–75 (Okla. Crim. App. 1992).
4. *Id.*
5. *United States v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972) (three-week delay in executing warrant was not fatal when facts showed continuing violation of law); *Gregg*, 844 P.2d at 874–75 (same).
6. *Gregg*, 844 P.2d at 874–75.
7. See *United States v. Perrine*, 518 F.3d 1196, 1205–06 (10th Cir. 2008) (finding information not stale when 111 days passed from viewing of child porn on computer and warrant) (collecting cases); *United States v. Burkhardt*, 602 F.3d 1202, 1206–07 (10th Cir. 2010) (holding that delay of two years and four months did not render information stored on a computer stale in child pornography case).
8. *Burkhardt*, 602 F.3d at 1207.
9. *United States v. Seiver*, 692 F.3d 774 (7th Cir. 2012).
10. See *id.* at 777.
11. *United States v. Brinklow*, 560 F.2d 1003, 1005–06 (10th Cir. 1977).
12. See *United States v. Williams*, 897 F.2d 1034, 1039 (10th Cir. 1990).
13. See, e.g., *United States v. Lora-Solano*, 330 F.3d 1288, 1293–94 (10th Cir. 2003) (wrong house number); *United States v. Williamson*, 1 F.3d 1134, 1136 (10th Cir. 1993) (wrong street); *McCormick v. State*, 388 P.2d 873, 875 (Okla. Crim. App. 1964) (wrong legal description).
14. *United States v. Dorrrough*, 927 F.2d 498, 500 (10th Cir. 1991) (citing *United States v. Ventresca*, 380 U.S. 102, 108 (1965)).
15. See, e.g., *Harman v. Pollock*, 446 F.3d 1069, 1082 (10th Cir. 2006) (finding no Fourth Amendment violation when warrant omitted actual address of separate garage residence); *United States v. Lora-Solano*, 330 F.3d 1288, 1293–94 (10th Cir. 2003) (incorrect house number did not render warrant invalid on particularity grounds); *United States v. DePugh*, 452 F.2d 915, 920 (10th Cir. 1971) (upholding warrant that was “quite specific” despite obvious error in land description).
16. *Lora-Solano*, 330 F.3d at 1293–94.
17. *United States v. Brakeman*, 475 F.3d 1206, 1211 (10th Cir. 2007) (collecting cases) (upholding warrant despite ambiguous property description and noting officer’s knowledge cannot be sole means of determining what property is to be searched but may provide additional reliability that correct premises would be searched).
18. Compare *Nottingham v. State*, 505 P.2d 1345, 1347 (Okla. Crim. App. 1973) (officer’s personal knowledge of location to be searched relevant in determining adequacy of description), and *Whitchurch v. State*, 572 P.2d 266, 269 (Okla. Crim. App. 1977) (Trooper’s prior visit to location allowed him to find it without relying on the unclear description in warrant), with *Anderson v. State*, 657 P.2d 659, 661 (Okla. Crim. App. 1983) (officer’s familiarity with property insufficient to cure inaccurate description in warrant); see also *Goble v. Saffle*, 188 F. App'x 723, 731–32 (10th Cir. 2006) (noting “there is a conflicting series of Oklahoma cases which we must also consider”).
19. *McCormick v. State*, 388 P.2d 873, 875 (Okla. Crim. App. 1964).
20. *Nottingham*, 505 P.2d at 1347; *Whitchurch*, 572 P.2d at 269–70.
21. *Anderson*, 657 P.2d at 661.
22. *Groh v. Ramirez*, 540 U.S. 551, 557–58 (2004) (collecting cases); see also *United States v. Williamson*, 1 F.3d 1134, 1136 n.1 (10th Cir. 1993).
23. *Terry v. State*, 666 P.2d 1305, 1305–06 (Okla. Crim. App. 1983) (“The failure to affix attachment 1. B to the affidavit does not render the search warrant invalid.”).
24. *United States v. Burke*, 633 F.3d 984, 991–92 (10th Cir. 2011) (quoting *Maryland v. Garrison*, 1. 480 U.S. 79, 84 (1987)).
25. *Id.* at 992.
26. See *United States v. Leary*, 846 F.2d 592, 600–02, 603 n.18 (10th Cir. 1988).
27. *United States v. Otero*, 563 F.3d 1127, 1132 (10th Cir. 2009).
28. See *Leary*, 846 F.2d at 600–02 (collecting cases).
29. *Voss v. Bergsgaard*, 774 F.2d 402, 405 (10th Cir. 1985).
30. *Leary*, 846 F.2d at 600–02.
31. *United States v. Brown*, 984 F.2d 1074, 1077–78 (10th Cir. 1993) (collecting cases).
32. *Kinsey v. State*, 602 P.2d 240, 242 (Okla. Crim. App. 1979).
33. *United States v. Leon*, 468 U.S. 897, 913 (1984) (establishing “good-faith” exception to exclusionary rule when officer relies on war-

rant issued by neutral magistrate); *United States v. Riccardi*, 405 F.3d 852, 863–64 (10th Cir. 2005); *Otero*, 563 F.3d at 1133–35.

34. *Leon*, 468 U.S. at 922.

35. See, e.g., *Solis-Avila v. State*, 830 P.2d 191, 192 (Okla. Crim. App. 1992) (“This Court, however, has never adopted the *United States v. Leon* ‘good faith’ exception to search warrants such as in this case and we see no reason to do so at this time.”); *State v. Thomas*, 334 P.3d 941, 945 (Okla. Crim. App. 2014) (explaining that in *State v. Sittingdown*, 240 P.3d 714, 718 (Okla. Crim. App. 2010), the court recognized the *Leon* “good faith” exception to warrant requirement for the first time).

36. See *Leon*, 468 U.S. at 924–25.

37. *United States v. Roach*, 582 F.3d 1192, 1202–03 (10th Cir. 2009) (quoting *United States v. Rowland*, 145 F.3d 1194, 1202 (10th Cir. 1998)).

38. See *United States v. Gonzales*, 399 F.3d 1225, 1230–31 (10th Cir. 2005) (upholding suppression of evidence and refusing to apply *Leon* “good faith” exception to exclusionary rule when affidavit never tied address to be searched with defendant); *United States v. Dutton*, 509 F. App'x 815, 816–18 (10th Cir. 2013) (holding that the “fatal flaw” of the warrant at issue was its inability to connect the defendant to the storage unit searched); see also *United States v. Cordova*, 792 F.3d 1220, 1224–25 (10th Cir. 2015) (holding that good-faith exception did not apply when warrant failed to provide a nexus between the criminal activity and the residence to be searched).

39. *United States v. Campbell*, 603 F.3d 1218, 1230–33 (10th Cir. 2010).

40. *Dutton*, 509 F. App'x at 817–18.

41. *Gonzales*, 399 F.3d at 1228; see also *Cordova*, 792 F.3d at 1224–25 (“In short, the nearly two year-old information implicating [another person] — but not [the defendant] or his home — is of little assistance to the government even under the deferential good faith analysis.”).

42. *Williams v. State*, 240 P.2d 1132, 1136–37 (Okla. Crim. App. 1952) (quoting *Cook v. State*, 1321. P.2d 349, 349–50 (Okla. Crim. App. 1942)).

43. See, e.g., *Gonzales*, 399 F.3d at 1231; *Dutton*, 509 F. App'x at 817–18.

44. *United States v. Le*, 173 F.3d 1258, 1269–70 (10th Cir. 1999).

45. *Id.* (citing *United States v. Foster*, 100 F.3d 846, 851 (10th Cir. 1996) (suppressing all evidence when officers exceeded the scope of the warrant by seizing over sixty items not covered by the warrant); *United States v. Medlin*, 842 F.2d 1194, 1199 (10th Cir. 1988) (same)).

46. *Foster*, 100 F.3d at 851 (quoting *Medlin*, 842 F.2d at 1199).

47. *Anderson v. State*, 658 P.2d 501, 503 (Okla. Crim. App. 1983) (quoting *Kinsey*, 602 P.2d at 242–43).

48. *Burgess*, 576 F.3d at 1091–92.

49. *Anderson*, 658 P.2d at 503.

50. *Le*, 173 F.3d at 1270–71 (citing *Horton v. California*, 496 U.S. 128, 137 (1990)); *Roney v. State*, 819 P.2d 286, 287–88 (Okla. Crim. App. 1991).

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Judge David Lewis, Presiding Judge, Oklahoma Court of Criminal Appeals
- 1:30 **Break**
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Gina Hendryx, OBA General Counsel
- 2:40 **Break**
- 2:50 **Equipping the Law Office**
Jim Calloway, Director, OBA Management Assistance Program
- 3:30 **Your Money: Accounting and Tax for Law Firms**
Ted Blodgett, CPA, CVA, JD, Gray, Blodgett and Company, CPA's
- 4:30 **Adjourn**

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Jury Sentencing in Oklahoma

By Bryan Lester Dupler

We know from the trial of Socrates in 399 B.C. that even the ancient Greeks had jury sentencing. In noncapital cases, this interesting practice has not prevailed in modern times.¹ Jury sentencing flourished in the early American republic, probably a democratic response to the heavy-handed colonial justice of the crown's judges.² In the late 19th and early 20th centuries, rehabilitative penology began to displace the sentencing jury with laws that vested broad discretion in trial judges and corrections officials.³ Since the 1950s, determinate sentencing laws, with narrow guidelines and mandatory minimums, steadily encroached on discretionary systems as retributive sentencing ideas regained popularity. Jury sentencing never captured a majority of American states; and today, Oklahoma is one of only six states allowing noncapital jury sentencing.⁴ Counsel, judges and jurors themselves still struggle with what Judge Kirksey Nix once reverently called the "sacred right" to jury sentencing, and the trial juror's "most grievous task."⁵ This article examines the origins, governing principles and potential merits of jury sentencing in Oklahoma.

DIVIDED TERRITORIES

Two approaches to sentencing prevailed in Indian and Oklahoma territories. In 1890, Congress subjected Indian Territory to the criminal procedure in Mansfield's *Digest of the Statutes of Arkansas*.⁶ Oklahoma Territory for a time followed the criminal procedure of Nebraska.⁷ Juries in Indian Territory assessed punishment in their verdicts, and the court rendered the judgment assessed by the jury. In Oklahoma Territory, the court fixed punishment. The Court of Criminal Appeals explained this pre-statehood duality in *Baker v. State*:

If this case was tried under the [Oklahoma territorial] procedure, the fixing of the punishment by the jury would have no binding effect upon the court. It might be considered as a recommendation to the court as to what the punishment should be . . . Under the Arkansas procedure the court must render the judgment in the amount fixed by the jury. Under the Oklahoma procedure, in force at that time, the court determines the amount of the fine.⁸

The first Oklahoma Legislature unambiguously opted for jury sentencing in H.B. 425,

approved May 12, 1908, and first codified in Snyder's compiled laws, as sections 2028-2030.⁹ The current jury sentencing statutes are almost identical to these early enactments, and are now codified in Oklahoma Statutes 2011, Title 22, sections 926.1-928.1:

§926.1. In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as herein after provided.

§927.1. Where the jury finds a verdict of guilty, and fails to agree on the punishment to be inflicted, or does not declare such punishment by their verdict, the court shall assess and declare the punishment and render the judgment accordingly.

§928.1. If the jury assesses a punishment, whether of imprisonment or fine, greater than the highest limit declared by law for the offense of which they convict the defendant, the court shall disregard the excess and pronounce sentence and render judgment according to the highest limit prescribed by law in the particular case.

ADIEU, PROCESS OF LAW?

Jury sentencing has no explicit constitutional foundation, and was unknown to English common law,¹⁰ but it remains the everyday norm for Oklahoma criminal trials.¹¹ In *Romano v. State*, the Court of Criminal Appeals held that "[o]ur state constitution does not address the role of the jury in sentencing."¹² In *Dew v. State* the court said the statutes granted the accused a "supplemental" right to jury sentencing only "where the defendant demands it," distinct from "the constitutional right" to jury trial.¹³

Oklahoma's jury sentencing statutes drew the attention of the U.S. Supreme Court in the 1980 case of *Hicks v. Oklahoma*.¹⁴ In *Hicks*, the Court of Criminal Appeals had found the defendant was sentenced under an unconstitutional enhancement statute, but denied relief because the sentence imposed was still within the unenhanced statutory range. Hicks petitioned the Supreme Court for *certiorari*, claiming the state court had denied him due process of law, mandated by the statutory right to jury sentencing.

The Supreme Court agreed, finding Oklahoma law created "a substantial and legitimate expectation that [petitioner] will be deprived of his liberty only to the extent determined by the jury, [which] the Fourteenth Amendment preserves against arbitrary deprivation by the State."¹⁵ The deprivation was arbitrary because it was premised on the state court's "frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision."¹⁶ On remand, the Court of Criminal Appeals modified Hicks's sentence to the minimum. The court's post-*Hicks* opinion in *Stuart v. State* recognized that a defendant "arbitrarily deprived" of jury sentencing is *also* denied due process of law.¹⁷ The due process of jury sentencing now co-extends with the statutory right.¹⁸

SENTENCING ON DEMAND

By their own terms, the jury sentencing statutes operate in all cases of a "verdict" of "conviction" by a "jury." Defendants who plead guilty to the court have no legal right to jury sentencing, but the use of a jury to pass sentence on a plea of guilty is not unknown. In *Borden v. State*,¹⁹ the trial court accepted guilty pleas and empaneled an "advisory jury" to recommend sentences. The defendant challenged the procedure on *certiorari*. The Court of Criminal Appeals denied relief, finding that while such juries "are unauthorized," the jury was, at worst, "superfluous" rather than reversible error.²⁰ Though a guilty plea forfeits jury sentencing, the Court of Criminal Appeals has also held that the trial court need not advise the defendant of this waiver before a guilty plea, even in a capital case.²¹

A long line of cases holds the trial court's denial of a *timely* demand for jury sentencing is a serious error. In *Fain v. State*,²² the Court of Criminal Appeals held a defendant's request for jury sentencing came too late, where the jury had already returned a verdict of guilty and stated it could not agree on punishment. But in *Dew v. State*, the court reversed the conviction and ordered a new trial, holding that "[a] refusal to instruct the jury of this right, when requested by the defendant, is prejudicial error, [and a] denial of a substantial right given to him under the statute."²³

The Court of Criminal Appeals was even more incensed in *McSpadden v. State*, a 1913 case where the trial judge sanctioned defense counsel's lawful demand for jury sentencing

with a contempt citation and a \$5 fine!²⁴ The court again reversed the conviction. In *Shaffer v. State*, the trial court “ignored altogether” the defendant’s request for jury sentencing and again suffered reversal.²⁵ Though these early violations of the jury sentencing statutes were reversed outright, current law prohibits reversing the conviction but authorizes remand for resentencing by the trial court, or by a jury, upon written request of either party.²⁶ The Court of Criminal Appeals may also modify the sentence to either the minimum or another sentence negating potential prejudice from denial of the statutory right.²⁷

The statutes give the trial jury sentencing authority “in *all* cases of a verdict of conviction.”²⁸ The defendant thus cannot “waive” jury sentencing *unilaterally* in favor of sentencing by the judge. In *Reddell v. State*, the defendant convicted of first-degree rape attempted to “waive the jury’s assessment of punishment.”²⁹ The trial court submitted the case to the jury for sentencing *over the defendant’s objection*. The Court of Criminal Appeals affirmed, finding the defendant’s attempted waiver was “fallaciously premised on the view that the defendant has a right to have *the trial court* assess the punishment.”³⁰ Because no right to *judge* sentencing exists, it simply was not error for the trial court to submit the question of punishment to the jury.

The jury sentencing right is also limited in other ways. The statutes contain no absolute command that the jury fix punishment, only that the jury must be given the opportunity to do so. In the 1949 case, *Ladd v. State*, the Court of Criminal Appeals explained:

We believe it was not the intention of the Legislature that a defendant should have the absolute right to require the jury to fix the punishment, but rather that they should have the opportunity to do so, and in the event of their failure or inability so to do, after using their very best efforts, the court should have the responsibility and duty of fixing the punishment. But it should be stated in the verdict that they are unable to agree on the punishment.³¹

“We believe it was not the intention of the Legislature that a defendant should have the absolute right to require the jury to fix the punishment...”

A few years later in the 1951 case of *Lyons v. State*, the court was critical of a jury instruction “so worded that it amounted to a suggestion to the jury that they find the defendant guilty and leave the punishment to the court.”³² Quoting the above passage from *Ladd*, the court held that “the punishment should not be left to the court unless the jury after due deliberation is unable to agree . . . and in that case it should be so stated in the verdict, and then the court shall assess and declare the punishment.”³³ Because of this and other errors, the court reversed.

By 1960, in *Shanahan v. State*, the court believed language in the uniform sentencing instruction was responsible for “an ever growing tendency for juries to leave the punishment to the court.”³⁴ The court reasoned that juries would too readily demur at sentencing, which was “undoubtedly . . . the jury’s most grievous task and one with which their conscience is most likely to sleep.”³⁵ Finding that the instruction “renders worthless defendant’s request that they shall assess the punishment” the court struck out the admonition that “should you be unable to agree on the punishment, so state in your verdict, and leave it to be assessed by the court.”³⁶

For a long time, the prosecution had no recognized right to jury sentencing at all. The Court of Criminal Appeals had long held “that the state as well as the defendant has the right to a trial by jury as to all controverted questions of fact,” but not to a trial of the sentence.³⁷ In *Crawford v. Brown*, the court again affirmed that a defendant’s waiver of trial by jury required the consent of the prosecutor and trial court.³⁸ Jury sentencing still seemed a separate matter. In *Dew* and many other cases besides, the court had consistently said jury sentencing was mandatory only when the *defendant* demands it.³⁹

The Court of Criminal Appeals held for the first time in *Case v. State*⁴⁰ that the prosecution’s constitutional right to trial by jury *included* the right to have the jury assess punishment. The court reasoned that the state has “a valid and legitimate interest in trying its cases before that body which history shows and the framers of our Constitutions knew produced the fairest end result — the jury.”⁴¹ As a result, any waiver

of jury sentencing by the defendant “must be joined by the prosecuting attorney and the judge of the trial court.”⁴² The court reaffirmed this holding as recently as 2009 in *Love v. State*.⁴³ Judge Lumpkin concurred only in the result, asserting the traditional view that jury sentencing “is strictly a statutory right” of the defendant, to which the state has no “standing to request or object.”⁴⁴

WEIGHTY RECOMMENDATIONS

We sometimes hear the jury’s assessment of punishment called a “recommendation,” but the statutes and cases strongly emphasize the trial court’s duty to pronounce judgment according to the sentencing verdict. In *White v. State*, the Court of Criminal Appeals remanded for correction of the judgment and sentence of 18 months, where the jury fixed punishment at two years imprisonment and a fine of \$500.⁴⁵ In *Bean v. State*,⁴⁶ the trial court erred by sentencing the defendant to four years imprisonment where the jury sentenced him to five years. The court held “there is no authority for a trial court to modify the verdict of a jury when pronouncing judgment. Only this court has a right to modify the sentence meted out to an accused.”⁴⁷

The trial court in *Luker v. State* “exceeded its authority” by modifying the jury’s sentence from five years to four years imprisonment.⁴⁸ In *Leeper v. State*, the “entry of a second judgment and sentence [fixing] the punishment at a term of five years’ imprisonment . . . was not in accordance with the [fifteen year sentence] of the jury . . . [and was] contrary to this Court’s holding in *Luker*.”⁴⁹ In *Fleming v. State*, the trial court properly considered a request for suspended sentence, but also “followed its statutory duty and imposed the sentence set by the jury.”⁵⁰ A jury’s sentence thus determines the judgment to be imposed by the trial court.

THE SURPLUS OF MERCY

Burdened with what Judge Nix once called the “grievous task” to assess punishment, trial juries sometimes temper their justice with directions for mercy. The trial court may follow, or disregard, jury recommendations for suspension of a sentence, which many cases have treated as “surplusage” in the verdict.⁵¹ The archetypal holding on this point is *Presnell v. State*,⁵² where the court said:

Where the jury returns a verdict of guilty and endorses on the verdict, ‘We recommend a suspended sentence,’ such recom-

mendation is not a part of the verdict, and is a matter addressed to the sound judicial discretion of the trial judge as to whether he should follow the recommendation of the jury.⁵³

The granting of a suspended sentence “is regulated by statute and is wholly within the discretion of the trial court.”⁵⁴ The jury also shares sentencing authority with the trial court by virtue of section 64 of Title 21, which generally authorizes the court to impose a fine in addition to the penalty assessed by the jury. Current statutes also vest trial courts with some discretion to modify a sentence within 24 months in the public interest.⁵⁵ The jury’s sentence thus remains subject to amendments, but experience teaches that courts and governors only rarely undo what the jury has done.⁵⁶

CLOSING ARGUMENTS

Since statehood, Oklahoma law has curtailed the common law sentencing authority of judges when defendants demand the jury assess the penalty. Case law has rarely advanced much theory in support of jury sentencing. But Judge Brett, writing for the court in *Mougell v. State*,⁵⁷ considered some of its salutary effects:

We can conceive of situations where the right of trial by jury . . . by an admittedly guilty defendant would be the only avenue of escape from the hostility, bias and prejudice of the judge, on the matter of punishment . . . But even under the statutes, if the jury cannot agree on the amount of punishment the accused could be compelled to submit to an injustice . . . at the hands of a hostile judge which, of course could be relieved against by appeal, but a defendant should not be put to costs of an unnecessary appeal, when to invoke his statutory and constitutional rights could avoid it.⁵⁸

Practitioners are acutely aware of the opposite case too — when a well-founded fear of the jury’s sentence leads to a negotiated or blind plea to the judge. If we suppose that jurors represent the conscience of the community, we may also suppose they roughly reflect both its rank prejudices and legitimate concerns. So the wisdom of demanding a jury’s judgment on the matter of punishment remains a fact-specific and uncertain matter to say the very least.

In the constitutional realm, the U.S. Supreme Court renewed interest in jury sentencing with its 2000 decision in *Apprendi v. New Jersey*,⁵⁹

holding that under the Sixth Amendment, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

“[I]t is unconstitutional,” Justice Scalia said, “for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”⁶⁰ *Apprendi* largely arrested a legislative trend toward aggravating sentences through post-trial factors decided by the court, often by a mere preponderance of the evidence.

Academics and judges have recently called for expansion of noncapital jury sentencing. Adriann Lanni’s 1999 article in the *Yale Law Journal* argued “the one task that jurors indisputably perform better than judges is to . . . express public outrage of community norms.”⁶¹ Colorado Trial Judge Morris Hoffman seconded Lanni in a 2003 article arguing that current neoretributive sentencing policy warrants the use of juries “as the best arbiters of that moral inquiry.”⁶² Both articles cite data indicating that indeterminate sentencing failed to reduce racial and other arbitrary disparities, while legislative mandatory minimums often ignore important individual differences in sentencing. Jury sentencing allegedly mitigates these opposing judicial and legislative vices, or at the least, is no worse.

Jenia Turner argues the diversity of American opinion on the purposes and functions of criminal punishment, and the measure of individualized discretion necessary to fair sentencing, make it “best to leave the sentencing decision with a deliberative democratic institution — the jury.”⁶³ Jury sentencing may also perform the important, if somewhat elusive function of moderating nonjury sentences toward an optimal mean. Educated guesses about probable jury sentences must inform the limits of plea bargaining and blind plea sentencing. If sentencing “prices” are too high for defendants to bear, the state pays by costly increases in trials of defendants who reject suboptimal plea bargaining and blind plea outcomes. When more than 90 percent of prosecutions terminate *without* the jury’s mediation of the sentence (even the guiltiest of defendants can demand jury trial, if only for the sentence), the exchange

prices of sentences for guilty pleas are arguably about right.

Our jury sentencing statutes reflect the faith of Oklahoma’s founding generation in the justice, wisdom and humanity of the trial jury. In criminal cases, all of the defendant’s options are pretty bad, and the jury’s opinion of the sentence is sometimes the only outcome the defendant can abide. Society is usually prepared to accept the jury’s judgment as well. Quite a few citizens have been there, confronting the “grievous task” of punishing a wrongdoer within the bounds of their collective conscience. Indeed, the cardinal virtue of jury sentencing may be the process itself, in which everyday people settle the hardest questions between those who wield the law and those who face its penalty.

1. Plato, *The Trial and Death of Socrates* (G.M.A. Grube trans., Hackett Publishing 2d ed. 1986).

2. Jenia I. Turner, “Jury Sentencing As Democratic Practice,” 89 *Virginia L. Rev.* 311, 316-318 (April 2003).

3. *Id.* at 325-27.

4. Richard A. Bierschbach, “Notice-and-Comment Sentencing,” 97 *Minn. L. Rev.* 1, 55 n.249 (Winter 2012). By contrast, every state that retains capital punishment uses some form of jury sentencing, absent a waiver by the defendant.

5. *Shanahan v. State*, 354 P.2d 780, 784-85 (Okla. Cr. 1960).

6. *Baker v. State*, 105 P. 379 (Okla. Cr. 1909).

7. *Id.*; *Ex parte Larkins*, 25 P. 745 (Okla. Terr. 1891).

8. *Baker*, 105 P. at 381.

9. These laws were codified by the same numbers in the Compiled Laws 1909; and at sections 5933-5935 in the Revised Laws 1910. They appear as sections 2750-2752 of the Compiled Statutes of 1921, sections 3107-3109 of the Statutes of 1931, and sections 926-928 of the Oklahoma Statutes 1941. In 1998, the Legislature repealed sections 926-928 but immediately re-enacted them as sections 926.1-928.1 of Title 22.

10. In English procedure, most felonies carried a mandatory death sentence, which was frequently remitted by benefit of clergy with burning in the hand, or the royal pardon. William Blackstone, 4 *Commentaries on the Laws of England* 358 (1769) (emphasis added); *Apprendi v. New Jersey*, 530 U.S. 466, 479 (“[T]he English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law . . . prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence (unless he thought in the circumstances . . . that he should invoke the pardon process to commute it.”).

11. *Malone v. State*, 58 P.3d 208, 213 (Okla. Cr. 2002) (Chapel, J., dissenting) (“Jury sentencing is the norm in Oklahoma.”).

12. 847 P.2d 368, 384 (Okla. Cr. 1993).

13. 126 P. 592, 593 (Okla. Cr. 1912).

14. 447 U.S. 343 (1980).

15. *Id.*, 447 U.S. at 346.

16. *Id.*

17. 720 P. 2d 1265, 1268 (Okla. Cr. 1986).

18. *Id.*, 720 P.2d at 1268 (quoting *Drennon v. Hess*, 642 F.2d 1204, 1205 (10th Cir.1981)); but see a contrary, if doubtful, view in *Malone v. State*, 58 P.3d at 213 (Chapel, J., dissenting), where Judge Chapel claims that “[t]he Oklahoma Constitution provides for unanimous jury sentencing in criminal felony cases.”

19. 710 P.2d 116 (Okla. Cr. 1985).

20. *Id.*, 710 P.2d at 118.

21. *Fields v. State*, 923 P.2d 624, 630 (Okla. Cr. 1996).

22. 174 P. 296, 297 (Okla. Cr. 1918); see also, *Adams v. State*, 314 P.2d 371 (Okla. Cr. 1957) (request for jury sentencing after jury returned guilty verdict was properly denied).

23. 126 P. at 593.

24. 129 P. 72 (Okla. Cr. 1913).

25. 283 P.2d 578 (Okla. Cr. 1955).

26. 22 O.S.2011, §929(A)-(C).

27. *Clopton v. State*, 742 P.2d 586 (Okla. Cr. 1989); *Livingston v. State*, 795 P.2d 1055 (Okla. Cr. 1990). In *Livingston*, the court rejected the suggestion that it must invariably modify a sentence to the minimum allowed by law; the sentence is "determined by . . . appellate review of all the facts and circumstances of the case, on the fundamental fairness of the trial and the appropriateness of the punishment. *Id.*, 759 P.2d at 1059.

28. 22 O.S.2011, § 26.1 (emphasis added).

29. 543 P.2d 574, 579 (Okla. Cr. 1975).

30. *Id.*, 543 P.2d at 581 (emphasis added).

31. 207 P.2d 350, 353 (Okla. Cr. 1949).

32. 234 P.2d 940, 943 (Okla. Cr. 1951).

33. *Id.*

34. 354 P. 2d 780, 785 (Okla. Cr. 1960).

35. *Id.*

36. *Id.*, 354 P. 2d at 784-85.

37. *State v. McDonald*, 137 P. 362, 363-64 (1914), *overruled on other grounds*, *State ex rel. Powell v. Shi*, 566 P.2d 1170 (Okla. Cr. 1977).

38. 536 P.2d 988 (1975).

39. 126 P. at 593 (emphasis added).

40. 555 P.2d 619 (Okla. Cr. 1976).

41. *Id.*, 555 P.2d at 625.

42. *Id.*

43. 217 P.3d 116 (Okla. Cr. 2009).

44. 217 P.3d at 119 (Lumpkin, J., concurring in result).

45. 275 P. 1067, 1069-1070 (Okla. Cr. 1929).

46. 138 P.2d 563, 564 (Okla. Cr. 1943).

47. *Id.*, 138 P.2d at 564, 568.

48. 552 P.2d 715, 716, 719-20 (Okla. Cr. 1976).

49. 554 P.2d 810, 814 (Okla. Cr. 1976).

50. 760 P.2d 208, 210 (Okla. Cr. 1988).

51. *Hughes v. State*, 346 P.2d 355, 358 (Okla. Cr. 1959) (collecting cases).

52. 109 P.2d 834, 835 (1941) (syllabus).

53. 109 P.2d at 835.

54. *Hughes*, 346 P.2d at 358; 22 O.S.Supp.2014, § 991a-991c (authorizing trial court in proper cases to suspend sentence of imprisonment or defer all or part of the punishment).

55. 22 O.S.Supp.2015, §982a. A request for modification filed more than 12 months after sentencing requires the prosecutor's approval.

56. 22 O.S.2011, §§64, 22 O.S.Supp.2015, §§982a, 991a (trial court may suspend all or part of sentence of imprisonment; order restitution, reimbursements, and other sanctions; modify an *initial* sentence on judicial review within 24 months; and impose fine not exceeding \$10,000, in addition to sentence imposed by jury); *Fite v. State*, 873 P.2d 293, 295 ("Of course, nothing in §64, or in this opinion, entitles the trial court to deviate [at sentencing] from the term of imprisonment actually imposed by the jury") (emphasis added).

57. 260 P.2d 447 (Okla. Cr. 1953).

58. *Id.* at 451.

59. 530 U.S. 466, 490 (2000).

60. *Apprendi*, 530 U.S. at 490.

61. Adriann Lanni, "Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?," 108 *Yale L.J.* 1775 (1998-1999).

62. Morris B. Hoffman, "The Case for Jury Sentencing," 52 *Duke L.J.* 951, 951 (March 2003).

63. Turner, "Jury Sentencing As Democratic Practice," 89 *Virginia L. Rev.* at 313.

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Brady v. Maryland — The Path to Truth and Fairness

By Jack Fisher

Earl Warren was sworn as the chief justice of the Supreme Court on Oct. 5, 1953. During his 15-year tenure he influenced fundamental changes in constitutional law that forever altered our adversarial system of criminal justice. Popularly called “the Warren court,” his term brought “civilized standards” to the trial of the accused¹ — including due process, fairness and concern for innocence.

The forerunner to *Brady v. Maryland* was *Mooney v. Holohan*.² The Supreme Court announced that a state violates the “rudimentary demands of justice” and the Due Process Clause of the 14th Amendment by “deliberate deception of court and jury by the presentation of testimony known to be perjured.” However, Mooney was denied relief because he failed to exhaust his state remedies. On Dec. 7, 1942, in *Pyle v. Kansas*,³ the court again held that perjured testimony and the deliberate suppression of favorable evidence violated the Due Process Clause of the 14th Amendment. The transformation of criminal justice was interrupted by World War II.

America emerged from World War II as the leader of the free world. President Dwight D. Eisenhower in his first formal address in April of 1953, spoke of American “devotion to the ideals of freedom and justice.”⁴ Later that year, he appointed Earl Warren to lead the Supreme Court through this new era of civilization. In 1959, the Warren court decided *Napue v. Illinois*,⁵ extending the *Mooney* ban on conviction by false testimony to circumstances where the state, although “not soliciting false evidence, allows it to go uncorrected when it appears.” In 1962, the year before *Brady* was decided, Chief Justice Warren remarked: “In performing

our legal duties, we are also satisfying our ethical obligations. While in an uncivilized society, enactments of tyranny or barbarism may motivate an obligation to obey the law, in a civilized society, the obligation to act ethically is not a result of this supposed obligation to obey alone, but a result of the binding ethical values that have informed the content of the law.”⁶ He viewed a lawyer’s moral values as a unique opportunity to inform the ethical content of the law.⁷

In 1958, John Brady and Donald Boblit decided to steal a car from William Brooks. Mr. Brooks was knocked unconscious and one of the men strangled him with a shirt. They carried his corpse into the woods. Both were implicated in first-degree murder but who actually killed Mr. Brooks — Brady or Boblit? Brady’s lawyer asked the prosecutor for Boblit’s confessions. He received the first four confessions but not the fifth — where Boblit admitted killing Brooks.⁸ In Brady’s separate trial, the jury only learned that Boblit gave four confessions and in each one claimed Brady did the killing. Brady testified and admitted everything except he denied killing Brooks. Both Brady and Boblit were sentenced to death.

Brady's appellate lawyer learned of the undisclosed fifth "exculpatory" statement and pursued a new trial based on newly discovered evidence. The trial court denied the motion, but the Maryland appellate court reversed and vacated the judgment — holding "the suppression or withholding by the state of material evidence exculpatory to an accused is a violation of due process." The court granted a new trial on punishment only. They reasoned the suppressed confession could not reduce Brady's offense below murder in the first degree but it could make a difference as to the punishment of life or death.⁹ The Supreme Court accepted *certiorari*.

On May 13, 1963, the Supreme Court decided *Brady v. Maryland*. Justice Douglas, relying on the Due Process Clause of the 14th Amendment, held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady was transferred from death row. Rather than retry him, the governor commuted his sentence to life and after 18 years Brady was paroled.¹⁰

At common law, the primary restriction on unfettered advocacy was the principle that lawyers could not mislead the tribunal. Short of lying, the prosecution and defense during a criminal trial were free to advance their own clients' interests. If a piece of evidence hurt the prosecutor's case, or weakened an argument, there was no obligation of disclosure. Discovery of the "favorable" evidence was the defense lawyer's task.¹¹ *Brady* instilled the prosecution's disclosure obligation as a matter of fairness to the accused. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."¹² *Brady v. Maryland* marked a departure from both the English and American system of traditionally unfettered adversarial combat¹³ — toward a system of fairness and concern for innocence. The Supreme Court has never retreated from this fundamental rule of law.

Over time the Supreme Court formulated a "two-part test" requiring disclosure: Is the suppressed evidence favorable to the defense and if so is it material? In *Kyles v. Whitley*,¹⁴ the court defined materiality: "The question is not whether the defendant would more likely than not have received a different verdict with the evi-

dence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

From the stream of *Brady* litigation, it became apparent *Brady's* mandate was unfulfilled. To this day, our legal profession continues to struggle with the constitutional and ethical requirement that the prosecution turn over "favorable" and "material" evidence to the defense — contrary to the common law adversarial model. In 1985, 22 years after *Brady*, the Supreme Court fully acknowledged the *Brady* disclosure requirement ran counter to common law tradition of adversarial justice. In *United States v. Bagley*,¹⁵ the court explained the purpose of *Brady* "is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *Brady* and its progeny are grounded in notions of fundamental fairness and embody a practical recognition of imbalances inherent in our adversarial system of criminal justice.¹⁶ In practice, the police have exclusive control of a crime scene where they gather and control evidence; they locate and interview witnesses and have constant access to experts to process evidence. To compensate for these imbalances, *Brady* presents a "limited departure from a pure adversary model" in the interest of promoting and enhancing the "search for truth." There is an obligation to ensure "not that it shall win a case, but that justice shall be done."¹⁷

Unfortunately, after 52 years of litigation the imbalances remain and the "search for truth" is not always fulfilled. Next to "ineffective assistance of counsel" under *Strickland v. Washington*,¹⁸ *Brady* violations remain one of the most litigated constitutional issues. *Brady* has emerged as a protector of the innocent as reflected by the work of the Innocence Project.¹⁹

The practice of law includes moral and ethical obligations beyond that of any profession. Although some fault may lie with the adversarial nature of our legal system,²⁰ the responsibility ends with the Oath of Attorney to "... support, protect and defend the Constitution of the United States, and the Constitution of the State of Oklahoma; that I will do no falsehood, or consent that any be done in court, and if I know of any I will give knowledge thereof to the judges of the court..."²¹ Both the defense and prosecution have the obligation to enforce *Brady* and its progeny. The Code of Professional Responsibility Rule 3.8(d) defines the

"Brady" obligation of prosecutors in Oklahoma: "A prosecutor shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense..."²² There is no "materiality" component in Rule 3.8(d).

In *Giglio v. United States*,²³ the court held that "[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice."

In *Kyles v. Whitley*,²⁴ the court defined materiality as "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." In *Kyles*, the physical evidence was lacking and the withheld evidence impeached the state's "best eye-witness" by his contemporaneous statement to police regarding the height of the perpetrator that differed from Kyles' height by more than eight inches. The court concluded that a prosecutor's decision on materiality should favor disclosure because "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence...This is as it should be."

Near the end of the millennium, law enforcement learned that any "favorable" information provided to the prosecutor could end up in the hands of the defense. The police and other law enforcement are not lawyers — so they have no ethical duty to provide exculpatory evidence to the prosecution or the defense. During this era, many prosecutors adopted an "open file" policy. Defense specific requests for certain evidence were met with "I don't have that but if I get it you will get it." This is not what the Supreme Court had in mind.

In 1999, in *Strickler v. Greene*,²⁵ the court again increased the prosecutor's duty by adding the caveat that the prosecutor's obligation to disclose exculpatory evidence to the defense includes evidence in the hands of the police. "In order to comply with *Brady* the individual prosecut[or] has a duty to learn of any favorable evidence known to the others acting on

the government's behalf." Moreover, the "open file policy" *does not* fulfill "the prosecution's duty to disclose such evidence" (*emphasis supplied*). *Strickler* teaches that the "duty to learn" of exculpatory evidence includes exploring specific requests from the defense with the police and law enforcement officers. This is due to the prosecutor's special role in the search for truth. He or she is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."²⁶ The 10th Circuit has strictly enforced this obligation. In *United States v. Muse*,²⁷ the court held the prosecutor has the obligation to seek the evidence from the investigating officers and produce *Brady* material in government agents files even if they are possessed by another agency. In *United States v. Velarde*,²⁸ the court noted the prosecutor is responsible for "any favorable evidence known to the others acting on the government's behalf in the case including the police."

The *Brady* constitutional and ethical burden is not for prosecutors to bear alone. A criminal trial lawyer breaches his obligation under the Sixth Amendment if he fails to enforce constitutional rights. In general, defense counsel has the duty to protect the rights of his client from infringement by government misconduct

or overreaching. Defense counsel has the obligation to make detailed requests for evidence or documents that are "favorable" to the defendant. In *Brady* litigation, no distinction is recognized between evidence that exculpates a defendant and "evidence that the defense might have used to impeach the [state's] witnesses by showing bias and interest."³⁰ Defense counsel should review the first discovery release and determine what undisclosed "favorable" discovery might be reasonably available. What is favorable depends on the state's evidence, witnesses and the "prosecution narrative" as described by Judge Matsch in *United States v. Timothy McVeigh*.³¹

“Near the end of the millennium, law enforcement learned that any “favorable” information provided to the prosecutor could end up in the hands of the defense.”

Judge Matsch defined “exculpatory information” as any information whether written or oral that tends to disprove any of the material elements of the indictment or disproves the government “narrative.” He refined “exculpatory” as any “report that contradicts another report;” impeachment under *Giglio*; something that may “diminish the government’s evidence” or “the credibility of its witnesses.” The government must disclose evidence which refutes or disproves the “prosecution narrative.”³²

In *McVeigh*, Judge Matsch strongly urged the prosecution to produce “favorable” evidence without considering “materiality.” He noted that “Brady violations first come before a court after the trial and the court may then consider the materiality of what was suppressed or omitted from disclosures made, in the context of the complete trial record... it is not possible to apply the materiality standard in *Kyles* before the outcome of the trial is known.” He is correct. The prosecutor’s decision regarding *Brady* disclosure is made well before the trial. There is the inherent danger that “favorable” evidence might not be disclosed because it does not change a prosecutor’s mind regarding guilt. Under this approach, prosecutors could decide that disclosure is never required unless it warrants dismissing the case.

For purposes of ethics and professional responsibility, there is no “materiality” component in the Oklahoma Code of Professional Responsibility Rule 3.8(d). From an ethical and legal standpoint, the best course is for a prosecutor to disclose any evidence that is arguably favorable. If the prosecution case evidence is strong, disclosure of favorable evidence will not prevent a conviction. If the evidence is questionable, conflicting or weak then disclosure is always mandatory.

Unfortunately, history teaches that the weaker the prosecution case, the more likely it is for “material” *Brady* evidence to be withheld. In some cases there is a complete absence of forensic evidence linking the defendant to the crime and many times a successful prosecution rests on the testimony and credibility of one or two witnesses. In *Kyles*,³³ the court noted the “effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others.” In these circumstances, the *Brady* obligation is increased. In *Banks v. Dretke*,³⁴ the Supreme Court rejected the state’s argument that a diligent defense counsel could have discovered the suppressed

impeachment evidence — “[t]he state nevertheless urges... the prosecution can lie and conceal and the prisoner still has the burden to... discover the evidence, so long as the ‘potential existence’ of a prosecutorial misconduct claim might have been detected.”³⁵

A good starting point for *Brady* requests is any evidence that a prosecution witness “has a motive to conceal the truth.” In *Nuckols v. Gibson*,³⁶ the prosecution failed to disclose facts which would have “provided the defense with the opportunity to call into question whether the Deputy Sheriff had a motive for his testimony... to goad Nuckols into waiving his right to counsel during the interrogation and confessing to the crime.”

The classic areas of impeachment include elements of competence: oath, perception, recollection and communication.³⁷ Evidence of impaired mental faculties of a key witness can be favorable and material — depending on the nature and extent of the disorder. In *Browning v. Trammell*,³⁸ the 10th Circuit affirmed the granting of *habeas* relief and a new trial in a Tulsa County capital murder conviction. Browning’s former girlfriend provided the sole testimony linking him to the murder. Her suppressed psychiatric evaluations evinced “memory deficits, magical thinking, blurring of reality and fantasy, and projection of blame onto others” — all classic impeachment evidence. “A witness’s credibility may always be attacked by showing that his or her capacity to observe, remember, or narrate is impaired. Consequently, the witness’s capacity at the time of the event, as well as at the time of trial, is significant.”³⁹ On the exculpatory side, the psychiatrist’s records described her “as hostile, assaultive, combative, and even potentially homicidal. Such evidence tends to show that a person with a motive to kill might even have a disposition to kill.”⁴⁰ The court concluded the withheld evidence was material “more than any other evidence that actually came out at trial.” The withheld mental health evidence would have given the jury “reason to consider seriously Browning’s theory of the case or at least to question Tackett’s credibility.”⁴¹ This placed “the witness’ testimony in a very different light, given the defense theory that she wanted to frame Browning.”

Even a casual observer would think *Brady* disclosure is a well-established and accepted rule. So what is the problem? It has many times been said that “history is the best teacher.” Many Oklahoma prosecutors have coura-

geously and ethically complied with their *Brady* obligations. It is a shame these cases are unreported. Unfortunately, Oklahoma jurisprudence includes dozens of reported cases where Oklahoma prosecutors have failed to comply with the *Brady* mandate. The late Robert Macy, former Oklahoma County chief prosecutor, left an indelible stain on criminal justice in Oklahoma. In 2002, a panel of the 10th Circuit denied relief in *Duckett v. Mullin*,⁴² due to “harmless error” but commented “the harmless-error doctrine [cannot] check the erosion, engendered by such misbehavior, in the public’s perception of the fairness of our nation’s death-penalty proceedings.” The court said that Macy’s “persistent misconduct... without a doubt harmed the reputation of Oklahoma’s criminal justice system and left the unenviable legacy of an indelibly tarnished legal career.”

In spite of his intentional violation of the ethical obligations under *Brady*, Mr. Macy still has his supporters, many of whom are respected members of this bar. They point out he was never disciplined by the general counsel or the Oklahoma Supreme Court. However, the reported cases establish his unparalleled legacy of intentionally violating the constitutional rights of defendants and counting on “harmless error” to save his conviction. Prior to *Duckett*, in *Bowen v. Maynard*,⁴³ a triple murder known as the “guest house murders,” U.S. District Judge Thomas R. Brett granted *habeas corpus* relief and determined Mr. Macy suppressed the identity of a suspect who fit the eyewitness description better than Bowen, was suspected by law enforcement as being a hit man, carried the same weapon and unusual ammunition used in the murders and manufactured a speculative “jet airplane theory” to rebut an alibi defense.

In *Paxton v. Ward*,⁴⁴ federal *habeas corpus* relief was granted where Mr. Macy outright lied to the jury and “deceitfully crossed the [constitutional] line between a hard blow and a foul one.” In *Mitchell v. Gibson*,⁴⁵ a new penalty trial was granted where testimony by Oklahoma City Police Department chemist Joyce Gilchrist was false and the prosecution engaged in egregious misconduct by capitalizing on this testimony the prosecutor “labored extensively at trial to obscure the true DNA test results and to highlight Gilchrist’s [contrary] test results.” In *Cargle v. Mullin*,⁴⁶ Mr. Macy presented false testimony by a homicide detective and vouched for the eyewitness’ testimony by concealing a

promise of immunity, resulting in the grant of federal *habeas corpus* and a new trial.

The best example of a bad example occurred in two severed Oklahoma County death penalty trials, Paris Powell and Yancy Douglas. Bob Macy’s assistant knowingly suborned perjury by bolstering the “lynchpin” witness’ testimony that he requested no “help” with his drug case, then lauded his honesty and bravery during closing argument knowing the witness requested and the prosecutor agreed to provide assistance with his criminal cases. The day after Douglas’ trial, and prior to Powell’s trial, the prosecutor wrote a letter recommending parole for the witness. A month before Powell’s trial, in response to his pretrial letter asking for at least a year off of his sentence for “helping Miller kill somebody,” Miller negotiated a sentence reduction for this “lynchpin” witness with the Department of Corrections.

In *Douglas and Powell v. Workman*, U.S. District Judge Robin Cauthron and the 10th Circuit found that “Miller took affirmative steps, after Mr. Douglas’s trial, to cover up the tacit agreement; the favorable evidence was suppressed and false testimony was solicited to conceal the truth.”⁴⁷ David Prater, the successor to Robert Macy, dismissed murder charges against Powell and Douglas on Oct. 2, 2009. Prater, who was not in office when the men were convicted, said he could not prove guilt beyond a reasonable doubt because the “federal court already determined [the “lynchpin witness”] to be not credible, ethically I had problems even calling him as a witness.”⁴⁸ Powell and Douglas were released from death row in 2009 after 16 years. The Oklahoma Bar Association filed a complaint charging five counts of professional misconduct. After a 14-day evidentiary hearing in June 2012, the Professional Responsibility Tribunal (PRT) generated a detailed, 68-page recitation of the facts and procedural history and recommended Miller receive a one-year suspension from the practice of law and pay the entire costs of the proceedings.

The Supreme Court, in its *de novo* review of the PRT’s recommendation, adopted and incorporated the PRT’s lengthy report and concluded that three of the five allegations of misconduct had been established by clear and convincing evidence. In *State of Oklahoma ex rel. Okla. Bar Ass’n v. Bradley Miller*,⁴⁹ the Supreme Court held Miller’s actions warranted a 180-day suspension rather than the one-year sus-

pension recommended by the PRT. The court explained that the 180-day suspension was justified because the “conduct that occurred at a time when it was punished lightly, if at all.” However, the court concluded “if this conduct were to happen today, the punishment would have been much more severe.” Justice Steven Taylor joined by Justice Joseph Watt dissented: “Whether it was ‘decades ago’ or today, no attorney should ever commit [this] ‘reprehensible’ conduct... The actions of the Respondent take us into the dark, unseen, ugly, shocking nightmare vision of a prosecutor who loves victory more than he loves justice. I agree with the recommendation of the Oklahoma Bar Association that the Respondent should be disbarred.”

What can we do now? A good first step would be to heed the steps taken by District Attorney Prater in the 2012 murder trial in *State v. Billy Thompson*. The prosecution “narrative” was that Thompson committed first-degree “malice aforethought” murder in the street in Oklahoma City. The defense claimed “self-defense,” that the stabbing occurred in the driveway of the defendant’s home implicating the Oklahoma “stand your ground” statute.⁵⁰ When the assistant district attorney interviewed the victim and “key witness,” less than a week prior to the trial, he told the prosecutors the stabbing “occurred in the driveway.” More than one prosecutor expressed concern this statement was “exculpatory” and should be disclosed. Rather than disclose the recent “favorable” oral statement of the victim, the trial prosecutor made the victim available to the defense for interview and then presented a written stipulation to defense counsel that the “stabbing occurred in the street” which defense counsel accepted and signed.

Obviously, defense counsel should have interviewed the witness but his failure did not relieve the prosecutions’ disclosure obligation. The prosecution cannot “hide” and depend on defense counsel “to seek” exculpatory evidence as the Supreme Court held in *Banks v. Dretke*, *supra*. After Thompson was convicted, District Attorney Prater learned of the nondisclosure and misrepresentation violation from two assistant district attorneys who were present during closing arguments. He notified Robert Ravitz, chief public defender, and joined in a joint motion to vacate the murder conviction. Both prosecutors were dismissed by Prater and the PRT recommended a public reprimand under Rule 8.4(c) of the Oklahoma Rules of

Professional Conduct, which prohibits a lawyer from engaging in conduct involving dishonesty, or misrepresentation.” The Supreme Court agreed that respondent Stephanie Miller intentionally misled the defense and made a closing argument she knew was untrue.⁵¹ Public censure was ordered and Justice Combs, V.C.J., joined by Justices Kauger, Watt and Taylor, JJ, dissented to the discipline: “Turning a blind eye to Respondents’ actions betrays those interests and sends a message that this Court is unconcerned by prosecutors who are more concerned with victory than the fair administration of justice... Accordingly, I would suspend both Respondents for a period of six months.”

The prosecutor’s duty to disclose favorable evidence has been the firmly established rule of law in criminal prosecutions for the past 52 years. There is no indication that any of the current nine Supreme Court justices disagree with the bedrock constitutional principles of *Brady v. Maryland* and its progeny. This is evident in *Smith v. Cain*,⁵² the Supreme Court’s most recent pronouncement. In an opinion by Chief Justice Roberts, all nine justices applied the *Kyles v. Whitley* materiality test to the withheld evidence. Eight of the nine justices agreed the sole witness’ undisclosed statements that he “could not identify anyone” directly contradicted his trial testimony that he had “[n]o doubt” Smith was the gunman because he stood “face to face” with him the night of the crime. The withheld statements were favorable and material. Justice Thomas, the lone dissenting justice, applied the *Kyles* materiality test in spite of his disagreement with the majority decision.

Since *Brady v. Maryland*, the prosecutor winning a guilty verdict is secondary to honesty, integrity and justice. The Supreme Court has never retreated from the prosecutor’s obligation to disclose exculpatory or favorable evidence. Win or lose, the Oath of Attorney requires enforcement of this fundamental rule of truth and fairness. I pray that as litigators we never forget the honor of serving this profession with honesty and integrity is greater than winning any one case. It should be our goal to do both.

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3. *Pyle v. Kansas*, 317 U.S. 213, 215-216, 63 S.Ct. 177, 178 (1942).

4. The Chance for Peace, by Dwight D. Eisenhower, April 16, 1953, Washington, D.C.

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11. *Id.*
12. *Brady*, 373 U.S. at 87.
13. Langbien, John, *The Origins of Adversary Criminal Trial* (2003).
14. *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995), citing *United States v. Bagley*, 473 U.S., at 678, 105 S.Ct., at 3381.
15. *United States v. Bagley*, 473 U.S. 667, 675, 105 S.Ct. 3375, 3380-81 (1985). The "adversarial exception" was recognized by the 10th Circuit in *Smith v. Secretary of New Mexico Dept. of Corrections*, 50 F.3d 801, 823 (10th Cir. 1995).
16. *Bagley*, 473 U.S. at 692-95, 105 S.Ct. at 3388-90 (Marshall, J., dissenting).
17. *Id.*
18. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).
19. According to the Innocence Project, evidence of fraud or misconduct by prosecutors, police, and forensic experts is common among the DNA exonerations. There have been 336 post-conviction DNA exonerations in United States history. Of these cases, 48 cases involved government misconduct. Four of those listed are from Oklahoma: Curtis McCarty, Robert Miller, Thomas Webb and Ron Williamson, www.innocenceproject.org.
20. Goodpasture, Gary, "On the Theory of American Adversary Criminal Trial," *The Journal of Criminal Law & Criminology* Vol. 78, No. 1. (1978).
21. Title 5. Attorneys and the State Bar — Chapter 1 - Attorneys and Counselors General Provisions, §Section 2.
22. A prosecutor shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." Rules of the Code of Professional Responsibility Rule 3.8(d).
23. *Giglio v. United States*, 405 U.S. 150, 153 (1972).
24. *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555 (1995).
25. *Strickler v. Greene*, 527 U.S. 263, 280-281 (1999).
26. *Strickler*, 527 U.S. at 280, (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).
27. *United States v. Muse*, 708 F.2d 513 (10th Cir. 1983).
28. *United States v. Velarde*, 485 F.3d 553 (10th Cir. 2007).
29. *Kimmelman v. Morrison*, 477 U.S. 365, 385, 387 (1986).
30. *United States v. Bagley*, 473 U.S. 667, 676 (1985).
31. *United States v. McVeigh*, 954 F.Supp. 1441 (U.S. Dist. Ct. Colo. 1997).
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33. *Kyles v. Whitley*, 115 S.Ct. 1555, 1571 (1995).
34. *Banks v. Dretke*, 540 U.S. 668, 691, 124 S.Ct. 1256 (2004).
35. *Id.*
36. *Nuckols v. Gibson*, 233 F.3d 1261, 1267 (10th Cir. 2000).
37. Professor Irving Younger, professor of trial techniques at Cornell Law School, American Bar Association 1975, "The Nine Modes of Impeachment," Younger, *The Art of Cross-Examination*, ABA Litigation Monograph Series No. 1 (1976).
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40. *Id.*
41. *Id.*
42. *Duckett v. Mullin*, 306 F.3d 982, 994 (10th Cir. 2002).
43. *Bowen v. Maynard*, 799 F.2d 593, 606 (10th Cir. 1986).
44. *Paxton v. Ward*, (10th Cir.1999).
45. *Mitchell v. Gibson*, 262 F.3d 1036, 1060 (10th Cir. 2001).
46. *Cargle v. Mullin*, 317 F.3d 1196, 1220 (10th Cir. 2003).
47. *Douglas and Powell v. Workman*, 560 F.3d 1156 (10th Cir. 2009).
48. Sean Murphy, Associated Press, "Two ex-death row inmates released from Okla. prison," *The Oklahoman*, NewsOk.com, Oct. 5, 2009.
49. *State of Oklahoma ex rel. Oklahoma Bar Association v. Robert Bradley Miller*, 309 P.3d 108, 120 (Ok. 2015).
50. Title 21 Okl. Stat. Section 1289.25 - Physical or Deadly Force Against Intruder.
51. *State of Oklahoma ex rel. Oklahoma Bar Association v. Stephanie Miller and Pamela Jean Kimbrough*, 360 P.3d 508 (Ok. 2015).
52. *Smith v. Cain*, 132 S.Ct. 627, 630 (2012).

ABOUT THE AUTHOR



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Hearsay and the Confrontation Clause

The Apostle Paul, the American Revolution and Today

By David T. McKenzie and Megan L. Simpson

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 be informed of the nature and cause of the accusations; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.”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 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 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 to trial, he shall be furnished with a list of witnesses that will be called in chief, to prove the allegations of the indictment or information, together with their post office addresses.”²

HISTORY OF THE RIGHT OF CONFRONTATION

“When a few days had passed, King Agrippa and Bernice arrived in Caesarea on a visit to Festus. Since they spent several days there, Festus referred Paul’s case to the King, saying, ‘There is a man here left in custody by Felix. When I was in Jerusalem the chief priests and elders of the Jews brought charges against him and demanded his condemnation. *I answered them that it was not Roman practice to hand over an accused person before he has faced his accusers and had the opportunity to defend himself against their charge.*’”³

The right of confrontation by the accused dates back to antiquity, and the privilege of confrontation has existed since man began recording history. Throughout the ages, it has taken various forms and procedures; however, the basic right of the accused to have his accusers brought before him, offer testimony, and to be cross-examined about that testimony is an ancient and cherished right. The origin of the

Confrontation Clause of the Sixth Amendment is found in both Roman law and English common law, which guaranteed the accused the right to look his accuser in the eye. In *Lilly v. Virginia*, 527 U. S. 116, 119 S.Ct. 1887, 144 L. Ed.2d 117 (1999), Justice Breyer discusses the Confrontation Clause from a historical perspective citing Shakespeare's *Richard II*, Blackstone's *Commentaries on the Laws of England*, and various state and federal statutes. Legal historians and scholars refer to legal systems without the right of confrontation, or periods of time when the right of confrontation was suspended or ignored, as the "dark ages" and those systems that used the "star chamber," "trial by ordeal" and "trial by battle" as primitive, unfair and cruel.

The theory of the ancient right of confrontation is one based in both common sense and psychology. That is, an accuser is far less likely to give false testimony if she is faced with the prospect of looking the accused in the eye and being subjected to cross-examination. "It is always more difficult to tell a lie about a person to his face than behind his back."⁴ Accordingly, for several centuries, government witnesses in criminal trials have offered their testimony under the oath against perjury, face to face with the defendant and subject to the sacred right of cross-examination. For a court to require anything less from the prosecution is a denial of due process of law under the protections of the United States Constitution. The Confrontation Clause is applied solely in criminal proceedings in both Oklahoma courts and federal courts. The Confrontation Clause of the Sixth Amendment is made applicable through the incorporation of the Due Process Clause of the 14th Amendment and the United States Supreme Court's holding in *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Before 2004, *Roberts v. Ohio*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), governed jurisprudence regarding the Confrontation Clause. The *Roberts* doctrine was not only problematic to the accused in defending himself, but almost completely eviscerated the meaning and purpose of the clause by supplanting the judicial test of reliability with an adulteration of the hearsay standards. While the *Roberts* court held that any hearsay statement made by a person who did not testify in court and offered against the accused was a potential Confrontation Clause issue, there were balancing test remedies which guaran-

teed reliability. The court opined that the hearsay statement could be used in the prosecution of a criminal matter if the statement satisfied certain conditions. The statement was deemed to be reliable if it was a "firmly rooted hearsay exception" or was supported by "particularized guarantees of trustworthiness." The primary condition was that the statement be reliable and that adversarial testing would add little, if anything, to the statement's reliability. Lastly, in some set of circumstances, the scope of which is unclear, the declarant had to be unavailable to testify at trial.

The *Roberts* doctrine is a direct affront to right to confront and cross-examine. The Confrontation Clause says nothing about hearsay, and many statements which fall within the classical definition of hearsay — an out-of-court statement offered to prove the matter asserted — threaten the freedom, or perhaps the life, of the defendant accused. The hearsay exceptions were not a satisfactory method of sorting reliable from unreliable evidence, thus leading to necessary alterations in the court's analysis.

CRAWFORD V. WASHINGTON: THE RADICAL TRANSFORMATION

"Cross-examination, beyond any doubt, is the greatest legal engine ever invented for the discovery of truth." — John Henry Wigmore

On March 8, 2004, the United States Supreme Court filed its opinion in *Crawford v. Washington*.⁵ Michael Crawford was convicted of stabbing Kenneth Lee. Crawford was angry with Lee because it was reported to him that Lee had made advances toward Crawford's wife, Sylvia. Both Michael and Sylvia Crawford went to Lee's apartment and a violent fight broke out. During the altercation between Michael Crawford and Lee, Crawford was cut on his hand and Lee was stabbed in the stomach. The police were summoned and both Michael and Sylvia Crawford offered voluntary statements. Both statements were tape-recorded. The statements were alike in many areas; however, Sylvia's statement tended to damage her husband's claim of self-defense. Sylvia refused to testify at trial against her husband. Over Michael's objection, the prosecution offered Sylvia's station-house statement. The trial court allowed the jury to hear Sylvia's statement and ruled that it was reliable because it was partially corroborated by Michael's statement. Michael Crawford was convicted. Crawford appealed his conviction and the

Washington Court of Appeals reversed, holding that the factors of the *Roberts* doctrine were not met. However, the Supreme Court of Washington reinstated Crawford's conviction, concluding Sylvia's statement was reliable under *Roberts* and therefore, admissible. The United States Supreme Court granted *certiorari*.

In a 9-0 decision, the Supreme Court reversed the conviction of Michael Crawford. The unanimous court held Washington's use of Sylvia's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation. That is to say the following: reliability cannot substitute for cross-examination.

Justice Scalia examined the historical justification for the Confrontation Clause, writing that the "principal evil" it sought to remedy was the "civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused ... The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one."⁶ As Justice Scalia explained, testimonial statements may only be admitted when the declarant is both unavailable and when the defendant has had a prior opportunity to cross-examine.

DAVIS V. WASHINGTON: DEFINING 'TESTIMONIAL'

Michelle McCottry called 911 and told the operator she had just been assaulted by her former boyfriend, Adrian Davis, and that Davis had just fled the scene. In the companion case consolidated for consideration of the court under the same citation, *Hammon v. Indiana*, the police entered the home of Amy and Hershel Hammon based upon a domestic disturbance call. Once inside the Hammon home, one officer questioned Amy and another officer took Hershel to a different room. There was no emergency in progress, as distinguished from the fact pattern in *Davis*. Amy signed a "battery affidavit."

In both *Davis* and *Hammon*, the alleged victims refused to testify. In the *Davis* trial, the 911

recording was played to the jury, and in the *Hammon* case the officer who took Amy's statement testified about that conversation. *Davis* and *Hammon* were both convicted. The U.S. Supreme Court granted *certiorari*.

Justice Scalia again wrote the opinion, and held that the victim's statements in *Hammon* were testimonial, but the victim's statement of identification in the 911 call in *Davis*' case was nontestimonial.

"Without attempting to produce an exhaustive classification of all conceivable statements — or even all conceivable statements in response to police interrogation — as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."⁸

The conviction of *Davis* was affirmed, but *Hammon*'s conviction was reversed based on the logic asserted in the court's majority opinion.

GILES V. CALIFORNIA: THE UNAVAILABLE WITNESS⁹

Dwayne Giles was accused of murdering his girlfriend. At trial, the prosecution introduced statements made by the victim to police regarding an incident between her and Giles. Giles was convicted and the California Supreme Court affirmed, reasoning that Giles had waived his right to confront her testimony by murdering her.

The U.S. Supreme Court granted *certiorari* and reversed the conviction. In the majority opinion, once again written by Justice Scalia, the court found that a defendant only forfeits his right of confrontation when he intended to procure the unavailability of the witness. The trial court in California did not consider Giles' intent when he killed his girlfriend. Accord-

“...a defendant
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confrontation
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unavailability of
the witness.”

ingly the court, on remand, invited the trial court to consider whether or not Giles killed her to prevent her testimony at trial. If that finding were made, there would be a forfeiture of the right of confrontation and the interviews would be admissible.

“The terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct designed to prevent the witness from testifying.”¹⁰

MELENDEZ-DIAZ V. MASSACHUSETTS: THE SWORN AFFIDAVIT AND ‘NOTICE AND DEMAND’¹¹

Luis Melendez-Diaz was accused of distributing cocaine and trafficking in cocaine. At trial, he was convicted. In 2001, Boston police received a tip that a K-Mart employee, Thomas Wright, was engaging in suspicious activity. The informant reported that Wright received calls at work, walked out of the store and was picked up by a blue sedan, returning a short time later. The police set up surveillance and witnessed just what the informant indicated. After Wright got out of the car, the police detained him and found four bags of a substance which looked like cocaine. The police then signaled the other officers to arrest the two men in the blue sedan. One of those men was Melendez-Diaz.

During the ride to the police station the police observed the men fidgeting and making furtive movements in the back of the car. In searching the back of the police cruiser they found a plastic bag containing 19 smaller bags with a white powdery substance. The police seized the evidence and submitted it to a state laboratory to conduct chemical analysis.

At trial, the prosecution placed into evidence the bags seized from Wright and from the police car. The Commonwealth also submitted, over Melendez-Diaz’s objection, three “certificates of analysis.” These reports set forth the analysis of the substance in the bags as cocaine and gave the weight. Counsel for Melendez-Diaz argued to the trial court that he should be given the opportunity to cross-examine the chemist who analyzed the substance, and the court’s failure to allow him to do so violated the holding in *Crawford v. Washington*.

Melendez-Diaz appealed his conviction. The Supreme Judicial Court of Massachusetts

denied review, and the U.S. Supreme Court granted *certiorari*.

Justice Scalia, joined by Justices Stevens, Souter, Thomas and Ginsburg, wrote the court’s opinion reversing the conviction of Luis Melendez-Diaz. Once again, the court found a violation of the Sixth Amendment’s guarantee of confrontation. The Sixth Amendment guarantees the defendant’s right to confront and cross-examine those who bear testimony against him. The court repeated the age-old position, stating that testimony is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity to cross-examine the witness.

“The certificates here are affidavits, which fall within the ‘core class of testimonial statements’ covered by the Confrontation Clause. They asserted that the substance found in petitioner’s possession was, as the prosecution claimed, cocaine of a certain weight — the precise testimony the analysts would be expected to provide if called at trial. Not only were the certificates made, as *Crawford* required for testimonial statements ‘under circumstances which would lead an objective witness reasonably to believe that statement would be available for use at a later trial,’ but under the relevant Massachusetts law their **sole purpose** was to provide *prima facie* evidence of the substance’s composition, quality and net weight. Petitioner was entitled to ‘be confronted with’ the persons giving this testimony at trial.”¹²

“The argument that the analysts should not be subject to confrontation because their statement’s result for neutral scientific testing is little more than an invitation to return to the since-overruled decision in *Roberts v. Ohio*, which held that evidence with ‘particularized guarantees of trustworthiness’ was admissible without confrontation. Petitioner’s power to subpoena the analysts is no substitute for the right of confrontation.”¹³

The court addressed Massachusetts’ concern that requiring analysts to appear at trial would place a substantial burden on the courts and the prosecution. The court held that the so-called “notice and demand” statutes requiring the state to provide the defendant with notice that it intends to present scientific evidence via affidavit and the defendant to then demand his right to confront and cross-examine a live witness to pass constitutional muster.

Here it is important to note that Oklahoma has a “notice and demand” statute for purpose of preliminary hearing, located at 22 O.S. §751. The constitutionality of this section was addressed by the court in *Randolph v. State*.¹⁴ In relevant part, defendant Randolph argued that the admission of a lab report at preliminary hearing over his objection establishing both that a seized substance was cocaine and the weight of that substance violated the Confrontation Clause.¹⁵

The *Randolph* court was not moved by his argument, stating, “We find that the current version of the statute includes an opportunity for confrontation — effectively forcing the proponent of the certified report to produce the witness for cross-examination — upon a timely motion and a proper showing.”¹⁶

MICHIGAN V. BRYANT: THE AFFIRMATION OF DAVIS...OR IS IT?¹⁷

Richard Perry Bryant was convicted of second-degree murder, felon in possession of a weapon and possession of a firearm during the commission of a felony, in Wayne County, Michigan. His conviction was reversed by the Michigan Supreme Court which held that Bryant’s right of confrontation was violated in light of the U.S. Supreme Court’s holding in *Crawford*. The U.S. Supreme Court granted *certiorari*.

The police were dispatched to a gas station parking lot and found Anthony Covington. Covington told the police he had been shot by Richard Bryant outside Bryant’s house and he had driven himself to the gas station before he succumbed to his wounds. At trial, the officers testified to the statements made to them by Covington.

In an opinion written by Justice Sotomayor, the court reversed the opinion of the Michigan Supreme Court.

“An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the ‘primary purpose of the interrogation.’ The circumstances in which an encounter occurs — *e.g.*, at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards — are clearly matters of objective fact.”¹⁸

The court found that looking objectively at what the victim said about the circumstances leading to his injuries, there was reason to

believe there was an ongoing emergency and, accordingly, the statements were not testimonial. Due to this finding, the court did not rule on the question of dying declaration.

BULLCOMING V. NEW MEXICO: THE SURROGATE WITNESS WILL NOT DO¹⁹

Donald Bullcoming was convicted in New Mexico of driving while intoxicated. His conviction occurred after *Crawford*, but before *Melendez-Diaz*. At trial, the principal evidence against Bullcoming was a forensic laboratory report certifying that his blood-alcohol concentration (BAC) was well above the threshold for aggravated DWI. Bullcoming’s blood sample had been tested by the New Mexico Department of Health — Scientific Laboratory Division by a forensic analyst named Curtis Caylor. Bullcoming’s BAC was .21. Caylor affirmed the chain of custody and certified the results of his testing.

Caylor, before trial, was suspended by the Department of Health for unknown reasons. The state proceeded to trial without Caylor, and introduced the report through Gerasimos Razatos, a laboratory scientist who had neither observed nor reviewed Caylor’s analysis. Bullcoming objected, but the trial court allowed the BAC evidence to be presented to the jury.

The New Mexico Court of Appeals upheld the conviction, holding the report was nontestimonial and prepared routinely with guarantees of trustworthiness.

The court held that surrogate testimony of the kind Razatos was giving could not convey what Caylor knew or observed about the events he certified, nor could it expose any lapses or lies by Caylor. Razatos did not know why Caylor was suspended, so that line of inquiry was truncated in violation of the Confrontation Clause. Nevertheless, the report itself was inherently unreliable because the individual who prepared it was not available for cross-examination.

WILLIAMS V. ILLINOIS: THE LAB REPORT SURVIVES²⁰

The question presented by the *Williams* case is whether a state rule of evidence allowing an expert to testify about the results of DNA testing performed by nontestifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause. Unfortunately, due to the fractured nature of the court’s ruling in the *Williams* mat-

ter, in which no single line of reasoning was able to tender a five-vote majority, no bright line conclusion can be drawn from the holdings in this case. Rather than further clarifying the holdings in *Melendez-Diaz* and *Bullcoming*, both discussed earlier in this article, all that results is more lack of clarity and confusion about the juxtaposition between the Confrontation Clause and forensic report admission at the trial court level.

Factually, the defendant Sandy Williams was charged with a number of crimes, among them sexual assault of the victim L.J. During the course of the investigation of the assault, L.J. was seen in the emergency room, where she was swabbed vaginally. The swabs, along with other evidence, were sent to the Illinois State Police (ISP) Crime Lab to be tested and analyzed. One forensic scientist at the ISP lab confirmed the presence of semen on those swabs.

Later, defendant Williams was arrested on unrelated charges and he was ordered to submit a blood sample to the same lab. A separate forensic analyst in the ISP lab extracted DNA from the submitted blood sample and entered it into the ISP Crime Lab database. In the meantime, L.J.'s swabs were returned to the ISP Crime Lab from Cellmark Diagnostic Laboratory, where they had been sent to extract a DNA profile for the semen contributor. Yet another ISP laboratory employee entered the DNA profile into the ISP database to attempt to find a match. A matching profile, that of Defendant Williams, was indicated, and later L.J. also identified him in a police lineup.

At the trial in this case, the state offered three forensic experts, all of whom were employed by the ISP Crime Lab. No one from Cellmark was subpoenaed or testified at the bench trial. At the conclusion of the last ISP lab witness' testimony, the defense moved to exclude her testimony as it related to the Cellmark analysis, arguing that its presentation violated the Confrontation Clause since the analysis was performed in another lab by another analyst, and therefore, the reliability of the Cellmark report upon which the ISP lab based its findings, could not be questioned. This objection was

overruled, and Williams was ultimately convicted of the sexual assault, based at least in part on this DNA evidence.

On appeal to the Illinois Supreme Court, Williams continued to assert that the testimony from the ISP laboratory employee violated the Confrontation Clause. The court disagreed, finding that the Cellmark report which was the basis for the ISP laboratory's opinion was not admitted for the trust of the matter asserted, making it not subject to the hearsay rule and therefore admissible without need for cross-examination.

Frankly, the *Williams* opinion could sustain an entire legal scholarly article on its own, and the scope of its incredibly fragmented decision is beyond that which can be addressed here. Suffice it to say that the justices presented a plurality position in which they point to two reasons that the Confrontation Clause was not violated. First, Justice Alito, joined by Justices Kennedy, Breyer and Chief Justice Roberts, echoed the conclusion reached by the Illinois Supreme Court and found that the Cellmark report lay outside the reach of the Confrontation Clause because it was not offered for the truth of the matter asserted, i.e., that Williams was in fact the donor of the DNA in question. Secondly, the report was nontestimonial, in that it could be distinguished from testimonial reports which are either produced for the primary purpose of accusing a specific individual of criminal misconduct or formalized statements like affidavits or confessions, for example.

The plurality opinion standing alone would prove to be incredibly illuminating. However, Justice Thomas concurred in conclusion only regarding the nontestimonial nature of the Cellmark report, and writes about his separate basis for his conclusion. Justices Ginsburg, Kagan, Scalia and Sotomayor all dissented under predictably diverse legal reasoning. Therefore, practitioners are left with little to no guidance about the manner in which to proceed, and an almost certain risk of error regardless of which trial strategy is employed to admit or object to this type of forensic report.

“On appeal to the Illinois Supreme Court, Williams continued to assert that the testimony from the ISP laboratory employee violated the Confrontation Clause.”

OHIO V. CLARK: THE CHILD'S STATEMENT IS NOT TESTIMONIAL²¹

Defendant Darius Clark was convicted of felony assault, domestic violence and child endangerment involving his girlfriend's two children, age 3 years and age 18 months. Clark appealed the convictions to the Ohio Court of Appeals on the grounds that the 3-year-old's out-of-court statements to teachers at his preschool were testimonial in nature and thereby violated the Confrontation Clause. The Ohio appellate court reversed and remanded the *Clark* case, and the Ohio Supreme Court affirmed that decision.

In his findings, Justice Alito held that the 3-year-old's statements to his teachers regarding the identification of the person who had caused his injuries were not testimonial. The finding focused primarily on the fact that the teachers were asking questions stemming purely from their concern regarding the child's physical state, and in line with their mandatory child abuse reporting requirements as teachers, not in a quasi-law enforcement capacity. He also found that the fact that Ohio law barred incompetent children from testifying did not create fundamental unfairness in admitting the child's testimony in this fact scenario.

The real issue with the *Clark* decision hinges not on the holdings of the case, but in the *dicta* created when Justice Alito confused a very simple fact pattern. Justice Scalia is highly critical of his brother justice, and rightfully so. In *Clark*, one of the victims made an "outcry" to teachers who noticed bruising on him. These "outcry" statements were introduced at Clark's trial without a prior opportunity to cross-examine.²² Following the wisdom of *Crawford* and its progeny, *Clark* is not even a close call. The statements made by the children are clearly not testimonial in nature and the court affirmed Clark's conviction 9-0. But as stated by Justice Scalia, "Dicta on legal points, however, can do harm, because though they are not binding they can mislead."²³

The *Clark* case is easily distinguishable from a 2006 decision of the Oklahoma Court of Criminal Appeals in the unpublished case of *Cheshire v. State*²⁴ in which the court addresses statements of a victim made during a child forensic interview, saying, "[W]hile neither witness was a police officer, their roles in this case were similar to the role of a police officer in the investigation of a criminal case."²⁵ In

reversing and remanding the *Cheshire* matter for a new trial, the court determined that admitting these statements at trial in violation of the Confrontation Clause was more than harmless error. The distinction is clear, as in *Cheshire* it is impossible to argue that the forensic interviewer has any purpose outside that of evidence gatherer on behalf of law enforcement for potential criminal charges against the alleged perpetrator.

CONCLUSION

What conclusion can practitioners draw from this latest in the long line of post-*Crawford* decisions by the U.S. Supreme Court? Are attorneys to infer that reliability still cannot substitute for the fundamental right to cross-examination guaranteed by both the U.S. Constitution and the Oklahoma Constitution? The answer seems to be a qualified yes. Over the past 11 years, every term of the U.S. Supreme Court has seen an opinion or two addressing the application of the Confrontation Clause in relation to specific fact patterns. However, the rule of law has remained static. Any testimonial statement offered as evidence in a court of law shall not be admitted without the opportunity for cross-examination. *Ohio v. Clark* does not stray from this position, and stands as an affirmation of *Crawford* and its progeny.

However, as poet Robert Frost admonishes us, the criminal justice system has miles to go before it sleeps when it comes to legal analysis of fact patterns involving out-of-court statements and their admissibility under the Confrontation Clause. Due to the conflict among the U.S. Supreme Court justices regarding this constitutional issue, as well as the changing composition of the highest court in the land, it is reasonable to assume that there will be more litigation and reconsideration of these matters in the years to come. This area of the law will be in near constant flux, and active litigators would do well for themselves to stay abreast of the current case law, both federally and from the Oklahoma appellate courts, to ensure the trial courts they serve remain educated.

Authors' note: The sudden death of Justice Antonin Scalia on Feb. 13, 2016, could create a major shift in the dynamics of the U.S. Supreme Court regarding both the hearing and analysis of cases dealing with the Confrontation Clause. Justice Scalia was focused on this constitutional issue with laser vision each term of the court, and held his fellow justices to an incredibly high standard in their

legal analysis. It is impossible to predict whether any other justice will continue this level of interest in such an important topic, but as practitioners, we can only hope that someone will, and with the same vigorous scrutiny and dogged determination as Justice Scalia.

1. The Constitution of the United States, Amendment VI.
2. The Constitution of the State of Oklahoma, Article II, Section 20.
3. *Bible*, Acts 25:13-17, New Revised Standard Version (emphasis added).
4. *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).
5. 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 157 (2004).
6. *Crawford* at 62.
7. 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).
8. *Davis*, 547 U.S. 813 (2006).
9. 554 U.S. 353, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008).
10. *Giles*, 554 U.S. 353 (2008).
11. 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).
12. *Melendez-Diaz*, 557 U.S. 305 (2009).
13. *Id.*
14. 2010 OK CR 2, 231 P.3d 672 (Okla. Crim. 2010).
15. Practitioners tackling a Confrontation Clause issue would be well served to review the unpublished opinion arising from the Creek County case of *State of Oklahoma v. Michael Ray Roley*, S-2005-72 Oklahoma Ct. of Criminal Appeals filed August 23, 2006. Although superfluous in its implication, this opinion provides significant insight into the appellate court's mindset regarding the importance of a criminal defendant's right of confrontation at the preliminary hearing stage, and reflects the state of Oklahoma statutory law regarding the same.
16. *Randolph*, 231 P.3d 672, 681 (2010).
17. 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011).
18. *Bryant*, 562 U.S. 344 (2011).
19. 564 U.S. 2, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011).
20. 567 U.S. ___, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012).
21. 576 U.S. 1, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015).
22. *Clark* at 1.
23. *Clark* at 4. (Scalia, J., concurring).
24. F-2004-1229, Oct. 11, 2006.
25. *Cheshire* at p.2. (Lumpkin, J.).

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And on the Go

OBA Watch List Decreases, Some Measures Make it Out of Committee

By Luke Abel

After reviewing approximately 1,130 bills and joint resolutions, the Legislative Monitoring Committee created a "watch list" of 680 bills and resolutions that need to be monitored. The committee's focus is to monitor legislation that will likely have an impact on the practice of law and the clients we represent.

The committee does not track any proposed legislation regarding appropriations or any legislation that does not significantly impact the practice of law.

The deadline to report bills and joint resolutions out of committee has passed, so we now have a better idea of the measures which may become law. The measures on the "watch list" have substantially decreased.

This article identifies a number of bills and resolutions, which are of significant interest to the committee and OBA members.

MEASURES WHICH PASSED OUT OF COMMITTEE

Here is a list of some of the measures that made it out of committee and are now on general order:

HB 2305 Authored by Rep. Kannady – Requires an affidavit of merit for a counterclaim or cross-claim where the claimant shall be required to present expert testimony; the Judiciary and



Civil Procedure Committee approved the bill by a vote of 7-0

HB 2349 Authored by Rep. Bennett – Excludes veterans' disability compensation payments from the gross household income related to the homestead exemption; the Appropriations and Budget Committee approved the bill with a vote of 25-0

HB 2936 Authored by Rep. McCullough – Revises the Landowner's Bill of Rights and mandates an award of costs and attorney fees; adds the right to demand a jury trial to appeal an assessment of damages in

condemnation proceedings; bill was approved by the Judiciary and Civil Procedure Committee by a vote of 7-0

HB 3162 Authored by Speaker Hickman – Modifies the appointing authority for attorneys who serve on the Judicial Nominating Committee and terminates the appointment of all attorney members currently serving on Jan. 1, 2017; vacated appointments will be replaced with appointments made by the president pro tempore and/or speaker of the House; assigned to Oversight and Accountability Committee where a committee substitute was introduced that would allow all applicants to be considered by the governor, replacing the current limit of three names and requires Senate confirmation of governor's appointee; the

bill as amended was approved by the committee by a vote of 4-2. Update: HB 3162, with a floor amendment from the bill's author, on March 3 passed out of the House of Representatives with a vote of 58 to 34, and now goes to the Senate. Rep. Randy Grau authored an amendment, which was tabled. More information on the actions that took place and a record of how representatives voted is available online at www.oklegislature.gov.

SJR 72 Authored by Sen. Standridge – Constitutional amendment to repeal Section 5 of Article II, Bill of Rights of the Oklahoma Constitution, which relates to use of public monies or property for sectarian or religious purposes; the title was stricken and the amended resolution was approved by the Rules Committee by a vote of 13-2

HJR 1037 Authored by Rep. Calvey – Constitutional amendment that changes the method of selection of Supreme Court justices and the judges of both the Court of Criminal Appeals and Court of Civil Appeals. The current version would abolish the Judicial Nominating Commission and in its stead require all appellate judges be chosen by statewide nonpartisan election. Every appellate judge in Oklahoma would face re-election in 2018. In its current form, which is the “floor version,” appellate judges in this state would be subject to staggered six-year terms. The procedures necessary to administer the change, such as candidate filing requirements and determining which candidates appear on the general election ballot, would be established by statute; this resolution was approved with an intact title by the Elections and Ethics Committee by a vote of 4-3.

MEASURES WHICH DID NOT PASS OUT OF COMMITTEE

Here are measures which did not make it out of committee. The language of these measures could reappear later in session, so we should be familiar with their provisions.

HB 2214 Authored by Rep. Calvey – Modifies the six attorney appointments for the Judicial Nominating Committee where those currently serving will be terminated and lieutenant governor, attorney general and bar association will make new appointments; there have been two amendments to the proposed bill and is assigned to the Rules Committee

HB 2296 Authored by Rep. Rousselot – Authorizes employees of a municipality to carry a firearm under certain circumstances; assigned to Public Safety Committee

HB 2339 Authored by Rep. Kannady – Modifies the Uniform Retirement System for justices and judges by establishing a mandatory retirement age of 75 for appellate judges who begin service on or after Nov. 1, 2016; the Appropriations and Budget Judiciary Subcommittee approved the bill by a vote of 6-3, but it did not make it out of the full committee

HB 2696 Authored by Rep. Enns – Creates the Rational Use of a Product Act; exempts a seller from liability when there is unreasonable misuse and reduces a claimant's damages to the extent the unreasonable misuse contributed to the injury; assigned to the Judiciary and Civil Procedure Committee

HB 2798 Authored by Rep. Grau – Requires any claim or challenge related to the constitutionality of a state statute to be considered and ruled upon by a panel of three district judges from the judicial district where the case is pending; assigned to the Judiciary and Civil Procedure Committee

HB 2857 Authored by Rep. Sean Roberts – Creates Code of Judicial Conduct; states statutory requirements for the code and penalties for noncompliance; assigned to the Judiciary and Civil Procedure Committee

HB 3030 Authored by Rep. Jordan – directs the court to a list of factors to consider in awarding support alimony; assigned to the Rules Committee

HB 3038 Authored by Rep. Jordan – Authorizes the state to recover attorney fees and costs from a plaintiff if the state prevails in an action against the state where a plaintiff is permitted to recover attorney fees and costs from the state; assigned to the Rules Committee

SJR 50 Authored by Sen. Loveless – Constitutional amendment to repeal the Judicial Nominating Committee, allows the governor to fill a judicial vacancy and provides for Senate confirmation of judicial appointments; assigned to the Rules Committee

SJR 60 Authored by Sen. Holt – Constitutional amendment to remove the one subject requirement for constitutional amendments; assigned to the Rules Committee

SJR 73 Authored by Sen. Brecheen – Constitutional amendment to repeal Section 5 of Article II, Bill of Rights of the Oklahoma Constitution, which relates to use of public monies or property for sectarian or religious purposes; assigned to the Rules Committee

HJR 1040 Authored by Rep. Murphey – Constitutional amendment to provide term limits to Supreme Court justices; assigned to the Rules Committee

HOW DO I RESEARCH OTHER BILLS?

To research the status of a current bill go to www.oklegislature.gov. You can also stay informed about bills the OBA is monitoring at www.okbar.org/members/Legislative.

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If you would like to write an article on these topics, contact the editor.



Reimagine Your Law Practice at the OBA Solo & Small Firm Conference 2016

By Jim Calloway

On June 23-25, 2016, the OBA Solo & Small Firm Conference returns to the Choctaw Casino Resort in Durant. If you haven't been to this venue since our last conference there, you may not recognize the place. They have remodeled with greatly improved meeting facilities, expanded spa facilities, four movie theaters showing first-run movies with stadium seating, a new bowling alley, a new laser tag venue and more.

The educational offerings at this year's conference will be world class, too. Plus, approved for 12 hours MCLE/1 Ethics, the programming will fulfill MCLE requirements for the entire year.

Our theme this year is Reimagine Your Law Practice, and we have more nationally known expert speakers than ever before to help you do just that. Our conference is held in conjunction with the Young Lawyers Division Midyear Meeting. This year we are also doing more programming than ever before for new lawyers who want to learn "the basics." For lawyers who have been OBA members for two years or less, we are offering a



steeply discounted registration rate. We hope this year we will have more young lawyers and more brand new lawyers than ever before.

Reimagine your law practice by paying more attention to the most important tool in your firm's toolbox — you! We welcome Hallie Love to this year's conference. She has been doing mind-body training for lawyers in New Mexico and for ABA conferences. She has received great reviews. Her presentations will be "Positive Psychology for Lawyers — A Tool for Superior Professionalism" and "Work Smarter and the Power of Recharge." She will also be leading some yoga sessions while at the conference. Her information about the connections between mind and body will be interesting and useful.

Reimagine your practice by learning more about automated document assembly. Use of automated document assembly allows solo and small firm lawyers to provide affordable services while being relieved from the drudgery of so much proofreading of manually prepared documents. We are excited to host R.W. "Bob" Christensen Jr., CEO of TheFormTool, to provide training with his session, "The Dirty Dozen: 12 Pervasive Document Errors Banished by Document Automation."


Reimagine your practice by learning the features of the new Fastcase 7. Fastcase CEO and co-founder Edward J. Walters will demonstrate the new features of your OBA-provided legal research member benefit. He will also have a short program you don't want to miss called "I Don't Have a Crystal Ball, But Here's My Hunch: Data Analysis in Law." This is a hot emerging topic in the legal profession.

Reimagine your practice with improved professionalism as Oklahoma Supreme Court Chief Justice John F. Reif opens our Saturday session with his talk on "Professionalism Issues for Solo and Small

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Firm Lawyers.” Hearing ethics and professionalism presentations from Justice Reif has become a much anticipated tradition of our conference.

Legal technologists Ben Schorr and Tom Mighell will return to the OBA Solo & Small Firm Conference. Many of you have heard them speak at prior conferences, and their sessions are always packed. Ben’s session on Microsoft Word was so popular at the last conference that we are bringing him back for another session titled “Who’s Afraid of the Big Bad Word?” (Last year, someone stopped me right after Ben’s program and said, “I’ve been hearing about styles in Microsoft Word for years, and now I finally understand how they really work!”) As the free upgrade period for Windows 10 comes to an end this summer, Ben will also present two sessions of “Windows 10: To Upgrade or Not?” Ben is a Microsoft MVP, who is a great resource on all Microsoft products.

Tom Mighell will give us his take on “Mobile: Can iOS and Android Be Friends?” As the title suggests, this will be a great session no matter what your current position is on the great mobile phone divide. The experts tell us that video is taking over the Internet, so many will be interested in Tom’s other session “Creating Compelling Content: Podcasts and Videos.” This will be a repeat of his program a few months earlier at ABA TECH-SHOW 2016. Tom and Ben will both join me for the conference’s traditional opening session, the fast-paced “60 Tips in 60 Minutes.”

Last year our practice management shootout was very popular, so we are offering more very short mini-presen-

tations we are calling Solo Quick Takes. These range from vendors quickly discussing some aspect of their products to me trying to give you a thumbnail sketch of HIPAA requirements in just a few short minutes.

Our new Practice Management Advisor Darla Jackson will be showing off some of the many things she has learned working in law libraries over the years with her presentation “Free or Low-Cost Sites for Online Research.”

Our basic training track includes noted trial lawyer John W. Coyle III discussing the basics of your first jury trial, as well as Alissa Hutter with the basics of your first divorce case and YLD Chairperson Bryon J. Will with the basics of probate and guardianship.

It is no secret that problems operating a lawyer’s trust account can get a lawyer into disciplinary hot water very quickly, so this year we will be including in our basics track “The Basics of Trust Accounting” with OBA Ethics Counsel Joe Balkenbush. OBA General Counsel Gina Hendryx will be giving a presentation titled “Be Proactive & Be Protective: How to Avoid and How to Prepare for the Most Common Bar Complaints.”

We have a special “CLE Power Lunch” this year on Saturday about a lawyer’s civic responsibility. This is not only a significant and important topic, but squeezing in a little CLE near the end of lunch will allow us to get everybody on the road home a little earlier at the end of the conference.

Everything kicks off with an evening social event Thursday.

Some plans are still being finalized so be sure and check the conference website at www.okbar.net/solo for more details. We have many great vendors sponsoring the conference this year with several first-time exhibitors.

The OBA Solo & Small Firm Conference combines fun, fellowship and cutting-edge information for the solo and small firm lawyer. Reserve your room and register now for this year's conference and prepare yourself for a great and memorable summer event.

HOTEL RESERVATIONS

Call 800-788-2464 for hotel reservations. Refer to OBA-Oklahoma Bar Association when reserving a room and/or block code 1606OBAOKL. Deadline for special rate reservations is June 9, 2016.

Mr. Calloway is OBA Management Assistance Program director. Need a quick answer to a tech problem or help resolving a management dilemma? Contact him at 405-416-7008, 800-522-8065 or jimc@okbar.org. It's a free member benefit!



2016 SOLO & SMALL FIRM CONFERENCE

Thursday, June 23

3 -
6:30 p.m.

Registration

7 p.m.

DINNER *(Included in Seminar Registration Fee)*

Friday, June 24

7:30 a.m.

Rx Mind-Body Techniques to Feel Better All the Time (No MCLE credit)

Hallie Love

8:25 a.m.

Welcome

OBA President Garvin A. Isaacs

8:30 –
9:30 a.m.

60 Tips in 60 Minutes

Jim Calloway, Ben Schorr & Tom Mighell

9:30 a.m.

Break

9:40 –
10:40 a.m.

**Positive Psychology for Lawyers -
A Tool for Superior Professionalism**

Hallie Love

**Basics - Advising the
Business Client**

TBD

10:40 a.m.

Break

10:50 –
11:50 a.m.

**Who's Afraid of the
Big Bad Word?**

Ben Schorr

**Fastcase 7: New
Powerful Tools**

Ed Walters

**Basics - Your First
Divorce Case**

Alissa Hutter

11:50 a.m. –
12:45 p.m.

LUNCH *(Included in Seminar Registration Fee)*

12:45 –
1:45 p.m.

**The Challenges of
Unbundled
Legal Services**

Jim Calloway

**Mobile: Can iOS &
Android be Friends?**

Tom Mighell

Solo Quick Takes

Cosmolex, University of
Tulsa Law Incubator, Citrix
ShareFile, Smokeball,
OAMIC, LawPay

**Basics - Your First
Jury Trial**

John W. Coyle III

1:45 p.m.

Break

2 –
3 p.m.

**Windows 10: To
Upgrade or Not?**

Ben Schorr

**New Laws,
New Challenges**

Noel Tucker

**Free or Low Cost Sites
for Online Research**

Darla Jackson

**Basics - Probate &
Guardianship**

Bryon J. Will

Approved for 12 Hours MCLE / 1 Hour Ethics

Saturday, June 25

7:30 a.m.	Introduction to Integrative Restoration (No MCLE credit) Hallie Love		
8:25 a.m.	Welcome OBA Executive Director John Morris Williams		
8:30 – 9:20 a.m.	Professionalism Issues for Solo & Small Firm Lawyers Oklahoma Supreme Court Chief Justice John F. Reif		
9:20 a.m.	Break		
9:30 – 10:20 a.m.	Plenary – Solo Quick Takes (20 minute sessions) The Transformation of Law: An Unintended Consequence – Bob Christensen I Don't Have a Crystal Ball, But Here's My Hunch: Data Analysis in Law – Ed Walters Getting Hip to HIPAA – Jim Calloway		
10:20 – 10:45 a.m.	Break (Hotel check out)		
10:45 – 11:35 a.m.	Basics - Trust Accounting Joe Balkenbush	Work Smarter and the Power of Recharge Hallie Love	The Dirty Dozen: 12 Pervasive Document Errors Banished by Document Automation Bob Christensen
11:35 a.m. – 12 p.m.	CLE POWER LUNCH <i>(Included in Seminar Registration Fee)</i>		
12 – 12:30 p.m.	A Lawyer's Civic Responsibility OBF Executive Director Renée DeMoss & OBA President Garvin A. Isaacs		
12:30 – 12:35 p.m.	Transition Break		
12:35 – 1:25 p.m.	Creating Compelling Content: Podcasts & Videos Tom Mighell	Windows 10: To Upgrade or Not? (Repeat of Friday) Ben Schorr	Be Proactive and Be Protective: How to Avoid and How to Prepare for the Most Common Bar Complaints Gina Hendryx
1:25 p.m.	Break		
1:35 – 2:30 p.m.	What's Hot & What's Not in Law Office Management & Technology Tom Mighell, Ben Schorr, Jim Calloway & Darla Jackson		



OKLAHOMA BAR ASSOCIATION

SOLO

& SMALL FIRM CONFERENCE | YLD MIDYEAR MEETING
JUNE 23-25, 2016 | CHOCTAW CASINO RESORT | DURANT

REGISTER NOW!



ONLINE FORM

Register online at www.okbar.org



MAIL FORM

CLE Registrar, P.O. Box 53036, Oklahoma City, OK 73152



FAX FORM

405-416-7092

POLICIES & INFORMATION

HOTEL RESERVATIONS

Call 800-788-2464 for hotel reservations. Refer to OBA-Oklahoma Bar Association when reserving room and/or block code 1606OBAOKL.

CANCELLATION POLICY

Cancellations will be accepted at any time on or before June 9, 2016, for a full refund; a \$50 fee will be charged for cancellations made on or after June 10, 2016. **No refunds after June 15, 2016.**

REGISTRATION, ETC.

No discounts. Registration fee includes 12 hours CLE credit, including one hour ethics. Includes all meals: evening buffet Thursday and Friday, breakfast buffet Friday and Saturday, lunch buffet Friday and Saturday.

FAX / MAIL FORM

Full Name: _____ OBA #: _____

Address: _____

City/State/Zip: _____

Phone: _____ Fax: _____

Email: _____

List name and city as it should appear on badge if different from above:

STANDARD RATES FOR OBA MEMBERS (admitted before Jan. 1, 2014)

CIRCLE ONE

Early Attorney Only Registration (on or before June 9, 2016)	\$200
Late Attorney Only Registration (June 10, 2016, or after)	\$250

Early Attorney & One Guest Registration (on or before June 9, 2016)	\$300
Late Attorney & One Guest Registration (June 10, 2016, or after)	\$350

Guest Name: _____

Early Family Registration (on or before June 9, 2016)	\$350
Late Family Registration (June 10, 2016, or after)	\$400

Guest Name: _____ Guest Name: _____

Guest Name: _____ Guest Name: _____

SPECIAL RATES FOR OBA MEMBERS OF TWO YEARS OR LESS* (admitted on or after Jan. 1, 2014)

CIRCLE ONE

Early Attorney Only Registration (on or before June 9, 2016)	\$125
Late Attorney Only Registration (June 10, 2016, or after)	\$150

Early Attorney & One Guest Registration (on or before June 9, 2016)	\$225
Late Attorney & One Guest Registration (June 10, 2016, or after)	\$250

Guest Name: _____

Early Family Registration (on or before June 9, 2016)	\$275
Late Family Registration (June 10, 2016, or after)	\$300

Guest Name: _____ Guest Name: _____

Guest Name: _____ Guest Name: _____

*** Special rate discount registrations must be submitted by mail.**

FAX/MAIL PAYMENT INFORMATION

Make check payable to the Oklahoma Bar Association and mail registration form to CLE REGISTRAR, P.O. Box 53036, Oklahoma City, OK 73152. Fax registration form to 405-416-7092.

For payment using: ☐ VISA ☐ Mastercard ☐ Discover ☐ American Express

Credit Card Number: _____

Expiration Date: _____ Authorized Signature: _____

INCLUDE BOTH PAGES IN FAX/POSTAL FORM



**Annual Report of the
Professional Responsibility Commission
as Compiled by the
Office of the General Counsel of the
Oklahoma Bar Association**

January 1, 2015 through December 31, 2015

SCBD No. 6366

INTRODUCTION

Pursuant to the provisions of Rule 14.1, Rules Governing Disciplinary Proceedings (RGDP), 5 O.S. 2011, ch. 1, app. 1-A, the following is the Annual Report of grievances and complaints received and processed for 2015 by the Professional Responsibility Commission and the Office of the General Counsel of the Oklahoma Bar Association.

THE PROFESSIONAL RESPONSIBILITY COMMISSION

The Commission is composed of seven persons — five lawyer and two non-lawyer members. The attorney members are nominated for rotating three-year terms by the President of the Association subject to the approval of the Board of Governors. The two non-lawyer members are appointed by the Speaker of the Oklahoma House of Representatives and the President Pro Tempore of the Oklahoma Senate, respectively. No member can serve more than two consecutive terms. Terms expire on December 31st at the conclusion of the three-year term.

Lawyer members serving on the Professional Responsibility Commission during 2015 were Angela Ailles Bahm, Oklahoma City; William R. Grimm, Tulsa; F. Douglas Shirley, Watonga; Linda S. Thomas, Bartlesville; and R. Richard Sitzman, Oklahoma City. Non-Lawyer mem-

bers were Tony R. Blasier, Oklahoma City and Burt Holmes, Tulsa. Angela Ailles Bahm served as Chairperson and Tony R. Blasier served as Vice-Chairperson. Commission members serve without compensation but are reimbursed for actual travel expenses.

RESPONSIBILITIES

The Professional Responsibility Commission considers and investigates any alleged ground for discipline, or alleged incapacity, of any lawyer called to its attention, or upon its own motion, and takes such action as deemed appropriate to effectuate the purposes of the Rules Governing Disciplinary Proceedings. Under the supervision of the Professional Responsibility Commission, the Office of the General Counsel investigates all matters involving alleged misconduct or incapacity of any lawyer called to the attention of the General Counsel by grievance or otherwise, and reports to the Professional Responsibility Commission the results of investigations made by or at the direction of the General Counsel. The Professional Responsibility Commission then determines the disposition of grievances or directs the instituting of a formal complaint for alleged misconduct or personal incapacity of an attorney. The attorneys in the Office of the General Counsel prosecute all proceedings under the Rules Governing Disciplinary Pro-

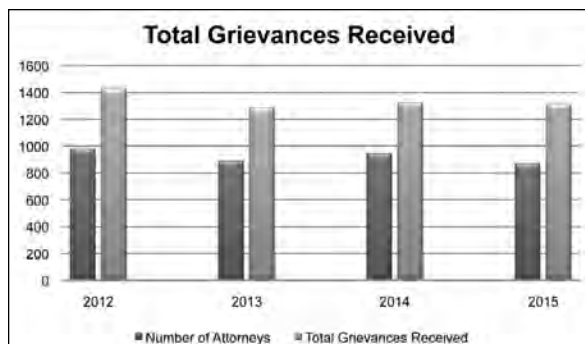
ceedings, supervise the investigative process, and represent the Oklahoma Bar Association at all reinstatement proceedings.

VOLUME OF GRIEVANCES

During 2015, the Office of the General Counsel received 288 formal grievances involving 180 attorneys and 1022 informal grievances involving 735 attorneys. In total, 1310 grievances were received against 871 attorneys. The total number of attorneys differs because some attorneys received both formal and informal grievances. In addition, the Office handled 301 items of general correspondence, which is mail not considered to be a grievance against an attorney.¹

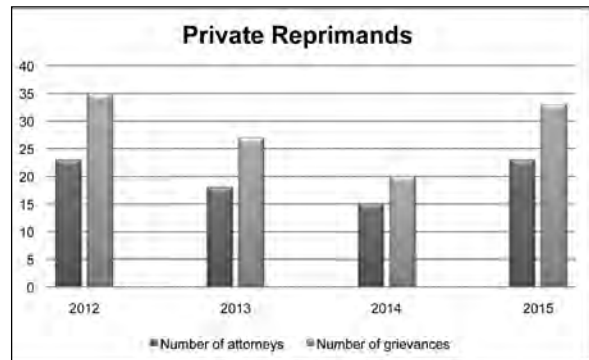
On January 1, 2015, 144 formal grievances were carried over from the previous year. During 2015, 288 new formal grievances were opened for investigation. The carryover accounted for a total caseload of 432 formal investigations pending throughout 2015. Of those grievances, 215 investigations were completed by the Office of the General Counsel and presented for review to the Professional Responsibility Commission. Therefore, 217 investigations were pending on December 31, 2015.

The time required for investigating and concluding each grievance varies depending on the seriousness and complexity of the allegations and the availability of witnesses and documents. The Professional Responsibility Commission requires the Office of the General Counsel to report monthly on all informal and formal grievances received and all investigations completed and ready for disposition by the Commission. In addition, the Commission receives a monthly statistical report on the pending caseload. The Board of Governors is advised statistically each month of the actions taken by the Professional Responsibility Commission.

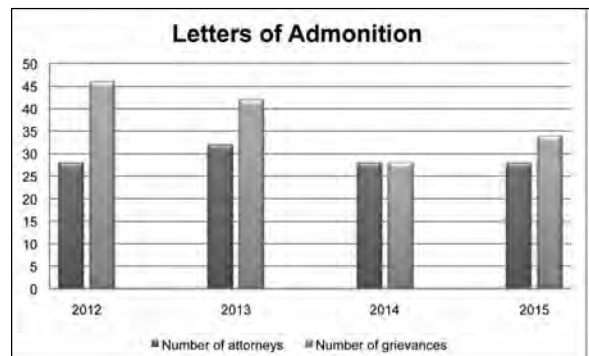


DISCIPLINE IMPOSED BY THE PROFESSIONAL RESPONSIBILITY COMMISSION

- Formal Charges.** During 2015, the Commission voted the filing of formal disciplinary charges against 13 lawyers involving 27 grievances. In addition, the Commission also oversaw the investigation of 18 Rule 7, RGDP matters filed with the Chief Justice of the Oklahoma Supreme Court.
- Private Reprimands.** Pursuant to Rule 5.3(c), RGDP, the Professional Responsibility Commission has the authority to impose private reprimands, with the consent of the attorney, in matters of less serious misconduct or if mitigating factors reduce the sanction to be imposed. During 2015, the Commission issued private reprimands to 23 attorneys involving 33 grievances.



- Letters of Admonition.** During 2015, the Commission issued letters of admonition to 28 attorneys involving 34 grievances cautioning that the conduct of the attorney was dangerously close to a violation of a disciplinary rule which the Commission believed warranted a warning rather than discipline.



4) **Dismissals.** The Commission dismissed 22 grievances due to the resignation of the attorney pending disciplinary proceedings, a continuing lengthy suspension or disbarment of the respondent attorney, or due to the attorney being stricken from membership for non-compliance with MCLE requirements or non-payment of membership dues. Furthermore, the Commission dismissed one grievance due to the death of an attorney and one grievance upon successful completion of a diversion program by the attorney. The remainder were dismissed where the investigation did not substantiate the allegations by clear and convincing evidence.

5) **Diversion Program.** The Commission may also refer respondent attorneys to the Discipline Diversion Program where remedial measures are taken to ensure that any deficiency in the representation of a client does not occur in the future. During 2015, the Commission referred 37 attorneys to be admitted into the Diversion Program for conduct involving 44 grievances.

The Discipline Diversion Program is tailored to the individual circumstances of the participating attorney and the misconduct alleged. Oversight of the program is by the OBA Ethics Counsel with the OBA Management Assistance Program Director involved in programming. Program options include: Trust Account School, Professional Responsibility/Ethics School, Law Office Management Training, Communication and Client Relationship Skills, and Professionalism in the Practice of Law class. In 2015, instructional courses were taught by former OBA Ethics Counsel Travis Pickens, current OBA Ethics Counsel Joe Balkenbush and OBA Management Assistance Program Director Jim Calloway.

As a result of the Trust Account Overdraft Reporting Notifications, the Office of the General Counsel is now able to monitor when attorneys encounter difficulty with management of their IOLTA accounts. Upon recommendation of the Office of the General Counsel, the Professional Responsibility Commission may place those individuals in a tailored program designed to instruct on basic trust accounting procedures.

2015 Attorney Participation in Diversion Program Curriculum

Law Office Management Training:	5 Attorneys
Communication and Client Relationship Skills:	16 Attorneys
Professionalism in the Practice of Law:	4 Attorneys
Professional Responsibility / Ethics School:	12 Attorneys
Client Trust Account School:	16 Attorneys
Law Office Consultations:	14 Attorneys

SURVEY OF GRIEVANCES

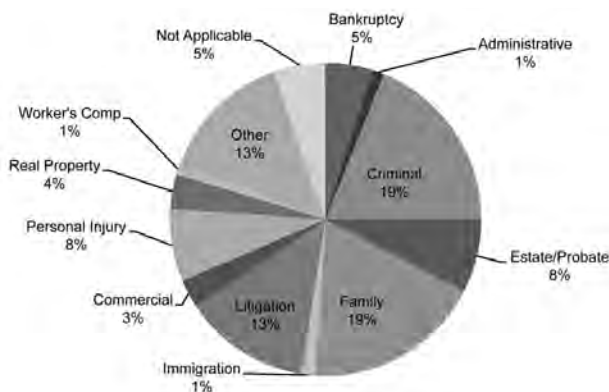
In order to better inform the Oklahoma Supreme Court, the bar, and the public of the nature of the grievances received, the numbers of attorneys complained against, and the areas of attorney misconduct involved, the following information is presented.

Total membership of the Oklahoma Bar Association as of December 31, 2015 was 18,108 attorneys. The total number of members include 12,274 males and 5,834 females. Formal and informal grievances were submitted against 871 attorneys. Therefore, fewer than five percent of the attorneys licensed to practice law in Oklahoma received a grievance in 2015.

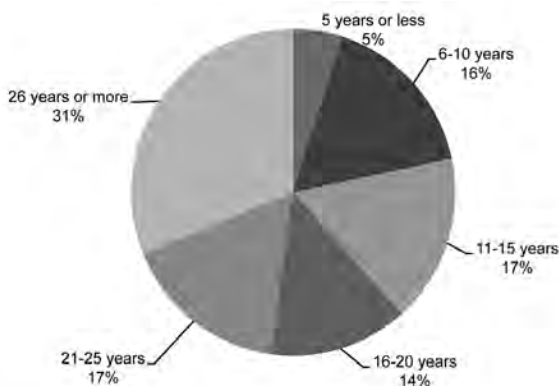
A breakdown of the type of attorney misconduct alleged in the 288 formal grievances received by the Office of the General Counsel in 2015 is as follows:



Of the 288 formal grievances, the area of practice is as follows:



The number of years in practice of the 180 attorneys receiving formal grievances is as follows:



The largest number of grievances received were against attorneys who have been in practice for 26 years or more. The age of attorneys involved in the disciplinary system is depicted below.

Type of Complaint Filed	Rule 6, RGDP	Rule 7, RGDP	Rule 10, RGDP	Rule 6.2a, RGDP	Rule 8, RGDP
Number of Attorneys Involved	10	18	2	1	2
Age of Attorney					
21-29 years old	0	0	0	0	0
30-49 years old	5	6	1	0	0
50-74 years old	5	11	1	1	2
75 or more years old	0	1	0	0	0

Type of Discipline Imposed	Private Reprimand	Public Censure	Disciplinary Suspension	Resignation Pending Disciplinary Proceedings	Non-Public Disciplinary Suspension	Disbarment
Number of Attorneys Involved	23	2	6	5	0	3
Age of Attorney						
21-29 years old	0	0	0	0	0	0
30-49 years old	0	1	1	2	0	1
50-74 years old	13	1	5	5	0	2
75 or more years old	1	0	0	0	0	0

DISCIPLINE IMPOSED BY THE OKLAHOMA SUPREME COURT

In 2015, 25 disciplinary cases were acted upon by the Oklahoma Supreme Court. The Court consolidated one case and the public sanctions are as follows:

Disbarment:

Respondent

Raynolds II, Wiliam F.
Kerr Jr., Ken Dale
Parker, Stephen

Order Date

3/30/15
6/8/15
10/13/15

Resignations Pending Disciplinary Proceedings Approved by Court:

Respondent

Elias, Jasen
Oliver, Jeremy (Rule 6)
Oliver, Jeremy (Rule 7)
Pitts-Cartwright, Betty
Nichols, Robert
Billings, Michael

Order Date

3/30/15
5/18/15
5/18/15
6/29/15
10/27/15
11/24/15

Disciplinary Suspensions:

Respondent

Length

Order Date

Givens, Blake	2 years + 1 day	2/24/15
Mansfield, Christopher	18 months	4/13/15
Wintory, Richard	2 years + 1 day	4/28/15
Friesen, Larry Douglas	From 10/13/14 until 5/26/15	5/26/15
Demopolos, James	1 year from 2/2/2015 + 1 year deferred until 2/3/2017	6/30/15
Knight, David	2 years + 1 day	9/29/15

Public Censure:

Respondent	Order Date
Kimbrough, Pamela	10/20/15
Miller, Stephanie	10/20/15

Dismissals:

Respondent		Order Date
Eischen, Anna	Rule 7, RGDP	2/24/15
Else, Jackie	Rule 7, RGDP	3/23/15
Ivy, Joel	Rule 7, RGDP	3/23/15
Starr, Rex Earl	Rule 6, RGDP	6/23/15
Ward, Farley	Rule 6, RGDP	6/23/15
Coleman, Walter	Rule 7, RGDP	4/6/15
Faulk, Robert	Rule 7, RGDP	9/14/15
Smith, Stacey	Rule 7, RGDP	10/5/15

There were thirteen discipline cases filed with the Supreme Court on January 1, 2015. During 2015, 13 new formal complaints, 18 Rule 7 Convictions, and 2 Resignations Pending Disciplinary Proceedings were filed for a total of 46 cases pending with the Supreme Court during 2015. On December 31, 2015, twenty cases remain filed and pending before the Oklahoma Supreme Court.

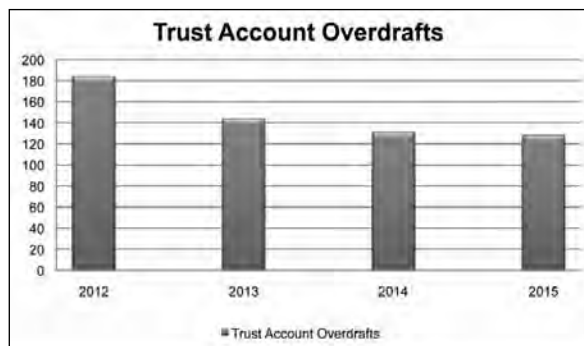
REINSTATEMENTS

There were five petitions for reinstatement pending before the Professional Responsibility Tribunal and one petition for reinstatement pending with the Supreme Court as of January 1, 2015. There were nine new petitions for reinstatement filed in 2015. In 2015, the Supreme Court granted four reinstatements, one was dismissed by the Court and two were withdrawn by the Petitioner. On December 31, 2015, there were eight petitions for reinstatements pending before the Oklahoma Supreme Court.

TRUST ACCOUNT OVERDRAFT REPORTING

The Office of the General Counsel, under the supervision of the Professional Responsibility Commission, has implemented the Trust Account Overdraft Reporting requirements of Rule 1.15(j), Oklahoma Rules of Professional Conduct, 5 O.S. 2011, ch. 1, app. 3-A. Trust Account Overdraft Reporting Agreements are submitted by depository institutions. In 2015, 128 notices of overdraft of a client trust account were received by the Office of the General Counsel. Notification triggers a general inquiry to the attorney requesting an explanation and supporting bank documents for the deficient account. Based upon the response, an

investigation may be commenced. Repeated overdrafts due to negligent accounting practices have resulted in referral to the Discipline Diversion Program for instruction in proper trust accounting procedures.



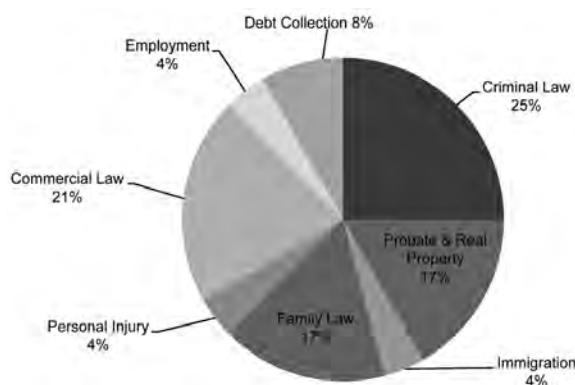
UNAUTHORIZED PRACTICE OF LAW

Rule 5.1(b), RGDP, authorizes the Office of the General Counsel to investigate allegations of the unauthorized practice of law (UPL) by non-lawyers.

1) Requests for Investigation. In 2015, the Office of the General Counsel received 24 complaints for investigation of the unauthorized practice of law. The Office of the General Counsel fielded many additional in-quiries regarding the unauthorized practice of law that are not reflected in this summary.

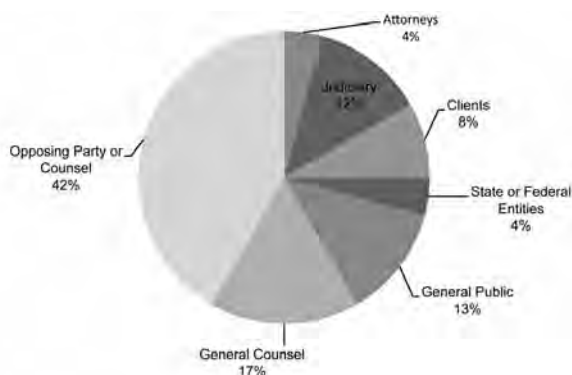
2) Practice Areas. Allegations of the unauthorized practice of law encompass various areas of law. In previous years, most unauthorized practice of law complaints involved non-lawyers or paralegals handling divorce and foreclosure matters, but those complaints have continued to steadily decline. In 2015, the complaints received reflect an increase of out of state attorneys practicing law in a variety of circumstances.

AREAS OF PRACTICE



3) Referral Sources. Requests for investigations of the unauthorized practice of law stem from multiple sources. In 2015, the Office of the General Counsel again received the most complaints from the opposing party or opposing counsel to the action in which the respondent was participating. A new source of referral for 2015 was complaints from the general public. Judicial referrals, requests from State and Federal agencies and clients also report alleged in-stances of individuals engaging in the unauthorized practice of law.

REQUESTS TO INVESTIGATE: REFERRAL SOURCES



4) Respondents. For 2015, most requests for investigation into allegations of the unauthorized practice of law concern out of state attorneys. A significant percentage of complaints filed by opposing party or counsel involved out of state attorneys in a variety of commercial activities.

For purposes of this summary, the category “paralegal” refers to an individual who advertises as a paralegal and performs various legal tasks for their customers, including legal document preparation. The category “non-lawyers” are individuals that do not perform a law-related service or operate as a paralegal. The “former lawyers” category includes lawyers who have been disbarred, stricken, resigned their law license pending disciplinary proceedings, or otherwise voluntarily surrendered their license to practice law in the State of Oklahoma. The “suspended lawyers” category includes lawyers who have been suspended but not disbarred or stricken.

RESPONDENTS ALLEGEDLY PARTICIPATING IN UPL



5) Enforcement.

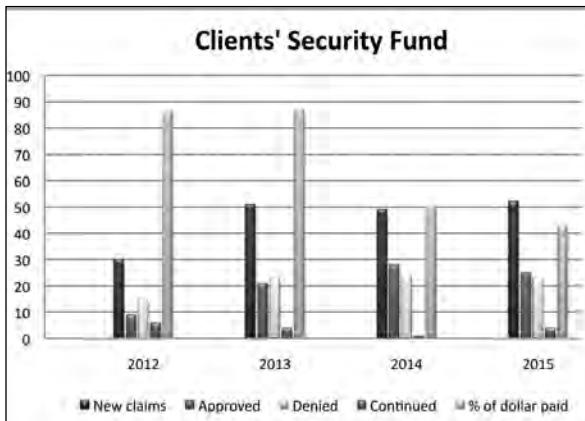
In 2015, of the 24 cases opened, the Office of the General Counsel took formal action in nine matters. Formal action includes issuing cease and desist letters, initiating formal investigations through the attorney discipline process, referring a case to an appropriate state and/or federal enforcement agency, or filing the appropriate district court action. Ten cases were closed for no finding of unauthorized practice of law.

The remainder of the cases is still pending.

CLIENTS’ SECURITY FUND

The Clients’ Security Fund was established in 1965 by Court Rules of the Oklahoma Supreme Court. The Fund is administered by the Clients’ Security Fund Committee which is comprised of 17 members, 14 lawyer members and 3 non-lawyers, who are appointed in staggered three-year terms by the OBA President with approval from the Board of Governors. In 2015, the Committee was chaired by lawyer member Micheal Salem, Norman. Chairman Salem has served as Chair for the Clients’ Security Fund Committee since 2006. The Fund furnishes a means of reimbursement to clients for financial losses occasioned by dishonest acts of lawyers. It is also intended to protect the reputation of lawyers in general from the consequences of dishonest acts of a very few. The Board of Governors budgets and appropriates \$100,000.00 each year to the Clients’ Security Fund for payment of approved claims. The appropriation has been increased by Supreme Court Order to \$175,000 for calendar year 2016.

In years when the approved amount exceeds the amount available, the amount approved for each claimant will be reduced in proportion on a prorata basis until the total amount paid for all claims in that year is \$100,000.00. The Office of the General Counsel provides staff services for the Committee. In 2015, the Office of the General Counsel investigated and presented to the Committee 52 new claims. The Committee approved 25 claims, denied 23 claims, and continued 4 claims into the following year for further investigation.



CIVIL ACTIONS (NON-DISCIPLINE) INVOLVING THE OBA

The Office of the General Counsel represented the Oklahoma Bar Association in several civil (non-discipline) matters during 2015. All matters were disposed of and no cases carried forward into 2016. The following is a summary of all 2015 civil actions against the Oklahoma Bar Association:

- 1) *Agrawal v. Oklahoma Bar Association, et al.*, Oklahoma Supreme Court Case No. MA 113666. The OBA was not served with process and was not ordered to respond to the petition to assume original jurisdiction. The application and requests for relief were denied on April 13, 2015.
- 2) *State of Illinois ex rel. Stephen Wallace v. State of Oklahoma, et al.*, Sixteenth Judicial Circuit Court Case 15-L-316 (Kane County, Illinois). The OBA received summons via certified mail, but was not named in the caption of this proceeding. The OBA was mentioned in a pleading entitled, "1st Amended/Supplement Complaint to Add John Does 1-10 AKA "OK KLAN HANDLERS" and Emergency Motion for Court Order Upon Lead Predicate Actor, Ronald

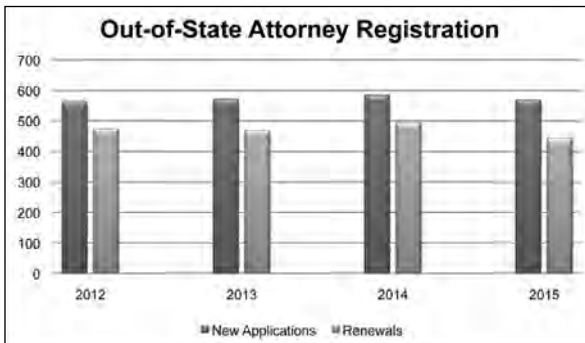
J. Saffa, to Turn-Over [\$347,000+] to Plaintiff to Retain Chicago-Kent College of Law Professor, Daniel T. Coyne as Counsel & For Forensic Audit" in reference to the disbarment of former OBA member, Joan Godlove. The OBA researched and prepared a Motion to Dismiss for local counsel to file on September 17, 2015. On September 24, 2015, the Court dismissed the lawsuit with prejudice, as to the OBA, and barred and enjoined the Plaintiff from further filings against the OBA in Kane County without first obtaining leave from the Court.

- 3) *Charles Fields v. Oklahoma Bar Association*, Oklahoma Supreme Court Case No. MA-114224, filed August 24, 2015. Fields filed a Petition for Writ of Mandamus requesting the Oklahoma Supreme Court to again review a bar complaint. The OBA was not served with this matter. On October 28, 2015, the Oklahoma Supreme Court ordered the OBA to respond to the Petition. The OBA filed its Response in opposition on November 17, 2015. The Oklahoma Supreme Court denied Petitioner's Application to Assume Original Jurisdiction on December 14, 2015.
- 4) *Lavern Berryhill v. Oklahoma Court of Criminal Appeals Judges, et al.*, Oklahoma Supreme Court Case No. 114,150. On July 27, 2015, Petitioner filed an "Original Jurisdiction Application for Writ of Mandamus and Injunctive Reliefs: Eminent Physical Danger..." In the caption of this 60-page document, the OBA General Counsel was named as a Respondent. The OBA was not served with this action. On September 21, 2015, the Supreme Court denied Petitioner's Application to Assume Original Jurisdiction. Petitioner subsequently filed multiple documents with the Court which were treated by the Court on October 1, 2015 as impermissible applications for rehearings. Petitioner continues to file documents in this case.

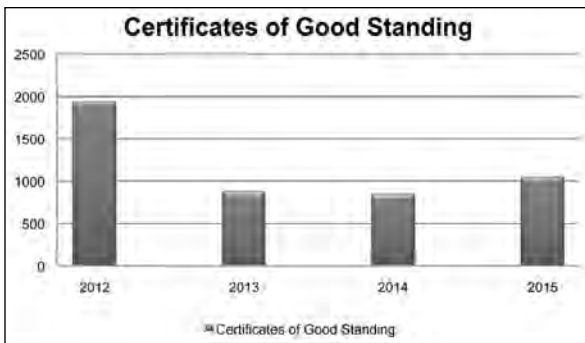
ATTORNEY SUPPORT SERVICES

1) Out-of-State Attorney Registration. In 2015, the Office of the General Counsel processed 568 new applications, 444 renewal applications and \$10,800.00 in renewal late fees submitted by out-of-state attorneys registering to participate in a proceeding before an Oklahoma Court or Tribunal. Out-of-State attorneys

appearing pro bono to represent criminal indigent defendants, or on behalf of persons who otherwise would qualify for representation under the guidelines of the Legal Services Corporation due to their incomes, may request a waiver of the application fee from the Oklahoma Bar Association. Certificates of Compliance are issued after confirmation of the application information, the applicant's good standing in his/her licensing jurisdiction and payment of applicable fees. All obtained and verified information is submitted to the Oklahoma Court or Tribunal as an exhibit to a "Motion to Admit Pro Hac Vice."



2) Certificates of Good Standing. In 2015, the Office of the General Counsel prepared 1,050 Certificates of Good Standing/Disciplinary History at the request of Oklahoma Bar Association members. There is no fee to the attorney for preparation of same.



ETHICS AND EDUCATION

During 2015, the General Counsel, Assistant General Counsels, and the Professional Responsibility Commission members presented more than 50 hours of continuing legal education programs to county bar association meetings, attorney practice groups, OBA programs, law school classes, and various legal organizations. In these sessions, disciplinary and investigative procedures, case law, and ethical standards within the profession were discussed. These efforts direct lawyers to a better understanding of their ethical requirements and the disciplinary process, and inform the public of the efforts of the Oklahoma Bar Association to regulate the conduct of its members. In addition, the General Counsel was a regular contributor to *The Oklahoma Bar Journal*.

The attorneys, investigators, and support staff for the General Counsel's office also attended continuing education programs in an effort to increase their own skills and training in attorney discipline. These included trainings by the Oklahoma Bar Association (OBA), National Organization of Bar Counsel (NOBC), Organization of Bar Investigators (OBI), and the America Bar Association (ABA.)

RESPECTFULLY SUBMITTED this 5th day of February, 2016, on behalf of the Professional Responsibility Commission and the Office of the General Counsel of the Oklahoma Bar Association.

Gina Hendryx, General Counsel
Oklahoma Bar Association

1. The initial submission of a trust account overdraft notification is classified as general correspondence. The classification may change to a formal grievance after investigation.



Professional Responsibility Tribunal Annual Report

January 1, 2015 — December 31, 2015

SCBD No. 6367

INTRODUCTION

The Professional Responsibility Tribunal (PRT) was established by order of the Supreme Court of Oklahoma in 1981, under the Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch. 1, app. 1-A (RGDP). The primary function of the PRT is to conduct hearings on complaints filed against lawyers in formal disciplinary and personal incapacity proceedings, and on petitioners for reinstatement to the practice of law. A formal disciplinary proceeding is initiated by written complaint which a specific is pleading filed with the Chief Justice of the Supreme Court. Petitioners for reinstatement are filed with the Clerk of the Supreme Court.

COMPOSITION AND APPOINTMENT

The PRT is a 21-member panel of Masters, 14 of whom are lawyers and 7 whom are non-lawyers. The lawyers on the PRT are active members in good standing of the OBA. Lawyer members are appointed by the OBA President, with the approval of the Board of Governors. Non-lawyer members are appointed by the Governor of the State of Oklahoma. Each member is appointed to serve a three-year term, and limited to two terms. Terms end on June 30th of the last year of a member's service.

Pursuant to Rule 4.2, RGDP, members are required to meet annually to address organizational and other matters touching upon the PRT's purpose and objective. They also elect a Chief Master and Vice-Chief Master, both of

whom serve for a one-year term. PRT members receive no compensation for their services, but they are entitled to be reimbursed for travel and other reasonable expenses incidental to the performance of their duties.

The lawyer members of the PRT who served during all or part of 2015 were: Jeremy J. Beaver, McAlester; M. Joe Crosthwait, Jr., Midwest City; Tom Gruber, Oklahoma City; John B. Heatly, Oklahoma City; Gerald L. Hilsher, Tulsa; William G. LaSorsa, Tulsa; Charles Last-er, Shawnee; Susan B. Loving, Edmond; Kelli M. Masters, Oklahoma City; Mary Quinn-Cooper, Tulsa; Michael E. Smith, Oklahoma City; Louis Don Smitherman, Oklahoma City; Neal E. Stauffer, Tulsa; Noel K. Tucker, Edmond; and Ken Williams, Jr., Tulsa.

The non-lawyer members who served during all or part of 2015 were: Steven W. Beebe, Duncan; Curtis Calvin, Oklahoma City; James W. Chappel, Norman; Christian C. Crawford, Stillwater; James Richard Daniel, Oklahoma City; Linda C. Haneborg, Oklahoma City; Donald Lehman, Tulsa; Kirk V. Pittman, Seiling; and Mary Lee Townsend, Tulsa.

The annual meeting was held on June 24, 2015, at the Oklahoma Bar Association offices. Agenda items included a presentation by Gina Hendryx, General Counsel¹ of the Oklahoma Bar Association, recognition of new members and members whose terms had ended, and discussions concerning the work of the PRT. Neal E. Stauffer was elected Chief Master and

Jeremy J. Beaver was elected Vice-Chief Master, each to serve a one-year term.

GOVERNANCE

All proceedings that come before the PRT are governed by the RGDP. However, proceedings and the reception of evidence are, by reference, governed generally by the rules in civil proceedings, except as otherwise provided by the RGDP.

The PRT is authorized to adopt appropriate procedural rules which govern the conduct of the proceedings before it. Such rules include, but are not limited to, provisions for requests for disqualification of members of the PRT assigned to hear a particular proceeding.

ACTION TAKEN AFTER NOTICE RECEIVED

After notice of the filing of a disciplinary complaint or reinstatement petition is received, the Chief Master (or Vice-Chief Master if the Chief Master is unavailable) selects three (3) PRT members (two lawyers and one non-lawyer) to serve as a Trial Panel. The Chief Master designates one of the two lawyer-members to serve as Presiding Master. Two of the three Masters constitute a quorum for purposes of conducting hearings, ruling on and receiving evidence, and rendering findings of fact and conclusions of law.

In disciplinary proceedings, after the respondent's time to answer expires, the complaint and the answer, if any, are then lodged with the Clerk of the Supreme Court. The complaint and all further filings and proceedings with respect to the case then become a matter of public record.

The Chief Master notifies the respondent or petitioner, as the case may be, and General Counsel of the appointment and membership of a Trial Panel and the time and place for hearing. In disciplinary proceedings, a hearing is to be held not less than 30 days nor more than 60 days from date of appointment of the Trial Panel. Hearings on reinstatement petitioners are to be held not less than 60 days nor more than 90 days after the petition has been filed. Extensions of these periods, however, may be granted by the Presiding Master for good cause shown.

After a proceeding is placed in the hands of a Trial Panel, it exercises general supervisory control over all pre-hearing and hearing issues.

Members of a Trial Panel function in the same manner as a court by maintaining their independence and impartiality in all proceedings. Except in purely ministerial, scheduling, or procedural matters, Trial Panel members do not engage in *ex parte* communications with the parties. Depending on the complexity of the proceeding, the Presiding Master may hold status conferences and issue scheduling orders as a means of narrowing the issues and streamlining the case for trial. Parties may conduct discovery in the same manner as in civil cases.

Hearings are open to the public and all proceedings before a Trial Panel are stenographically recorded and transcribed. Oaths or affirmations may be administered, and subpoenas may be issued, by the Presiding Master, or by any officer authorized by law to administer an oath or issue subpoenas. Hearings, which resemble bench trials, are directed by the Presiding Master.

TRIAL PANEL REPORTS

After the conclusion of a hearing, the Trial Panel prepares a written report to the Oklahoma Supreme Court. The report includes findings of facts on all pertinent issues, conclusions of law, and a recommendation as to the appropriate measure of discipline to be imposed or, in the case of a reinstatement petitioner, whether it should be granted. In all proceedings, any recommendation is based on a finding that the complainant or petitioner, as the case may be, has or has not satisfied the "clear and convincing" standard of proof. The Trial Panel report further includes a recommendation as to whether costs of investigation, the record, and proceedings should be imposed on the respondent or petitioner. Also filed in the case are all pleadings, transcript of proceeding, and exhibits offered at the hearing.

Trial Panel reports and recommendations are advisory. The Oklahoma Supreme Court has exclusive jurisdiction over all disciplinary and reinstatement matters. It has the constitutional and non-delegable power to regulate both the practice of law and legal practitioners. Accordingly, the Oklahoma Supreme Court is bound by neither the findings nor the recommendation of action, as its review of each proceeding is *de novo*.

ANNUAL REPORTS

Rule 14.1, RGDP, requires the PRT to report annually on its activities for the preceding year. As a function of its organization, the PRT oper-

ates from July 1 through June 30. However, annual reports are based on the calendar year. Therefore, this Annual Report covers the activities of the PRT for the preceding year, 2015.

ACTIVITY IN 2015

At the beginning of the calendar year, five disciplinary and six reinstatement proceedings were pending before the PRT as carry-over matters from a previous year. Generally, a matter is considered “pending” from the time the PRT receives notice of its filing until the Trial Panel report is filed. Certain events reduce or extend the pending status of a proceeding, such as the resignation of a respondent or the remand of a matter for additional hearing. In matters involving alleged personal incapacity, orders by the Supreme Court of interim suspension, or suspension until reinstated, operate to either postpone a hearing on discipline or remove the matter from the PRT docket.

In regard to new matters, the PRT received notice of the following: Two (2) Rule 10, RGDP matters; Ten (10) Rule 6, RGDP matters; One (1) Rule 6.2a, RGDP matter; Eighteen (18) Rule 7, RGDP matters; Two (2) Rule 8, RGDP matters; and Nine (9) Rule 11, RGDP reinstatement petitions. Trial Panels conducted a total of twenty-two (22) hearings; Thirteen (13) in disciplinary proceedings and nine (9) in reinstatement proceedings.

On December 31, 2015, a total of 15 matters, five (5) disciplinary and three (3) reinstatement proceedings, were pending before the PRT.

CONCLUSION

Members of the PRT demonstrated continued service to the Bar and the public of this State, as shown by the substantial time dedicated to each assigned proceeding. The members’ commitment to the purpose and responsibilities of the PRT is deserving of the appreciation of the Bar and all its members, and certainly is appreciated by this writer.

Dated this 5th day of February, 2016.

PROFESSIONAL RESPONSIBILITY TRIBUNAL



Neal E. Stauffer, Chief Master

1. The General Counsel of the Oklahoma Bar Association customarily makes an appearance at the annual meeting for the purpose of welcoming members and to answer any questions of PRT members. Given the independent nature of the PRT, all other business is conducted in the absence of the General Counsel.

Proceeding Type	Pending Jan. 1, 2015	New Matters In 2015	Hearings Held 2015	Trial Panel Reports Filed	Pending Dec. 31, 2015
Disciplinary	5	33**	13*	13	5
Reinstatement	6	9	9	10	3

* In 2015, thirteen (13) disciplinary hearings were held over for a total of fifteen (15) days

**Includes cases filed but dismissed by Supreme Court prior to PRT involvement

The Death of Atticus Finch?

By John Morris Williams

Harper Lee died recently. I mourn the passing of a person whom I never met. Her words profoundly impacted my life. The words about Atticus being a person born to handle life's unpleasant business gave me a mission in a world where I was without much direction. My early life was spent in rural Oklahoma far removed from affluence and centers of power. I was among what I know now as the working poor. We had plenty to eat and a roof over our head, and I thought we were doing well. My mother was a nurse and my father a pig farmer. I was fortunate that they instilled in me the need to get an education and to leave the world a better place than I found it. It was the fictional character Atticus Finch who supplied me with lofty purpose.

Often, I confess to missing the mark of my parents and Ms. Lee. However, it was this small town lawyer fighting for the unpopular in the midst of prejudice, anger and racial inequality that lead me to believe that someone as insignificant as me might make a difference. I must confess a tear still comes to my eye when I think about the scene in the movie when Scout is asked by the

minister to stand because her father was passing. Oh, to be the person who is still respected for doing the right thing regardless of outcome. In a world where winners and losers are only measured by outcome, I wonder if we have sometime ago lost Atticus Finch?

“ I must confess a tear still comes to my eye when I think about the scene in the movie when Scout is asked by the minister to stand because her father was passing. ”

I know of no other profession, except for our armed forces, where standing for high ideals and principles comes at such a great cost as being a lawyer and a judge. I am thankful for the members of our profession who regardless of being vilified in the public square still stand for high ideas and principles. I must con-

fess I do not always agree with their position, but I without reservation admire their courage.

I too have much admiration for lawyers who enter public life and sacrifice time and treasure to pursue the public good. I do not always agree with their positions. The OBA is blessed to have multiple members who serve the public good in positions other than a courtroom. Our members lead universities, head corporations, serve on school boards and city councils and a myriad of other public places. I have always said if you find something good going on in Oklahoma, you will find an Oklahoma lawyer involved. They also carry the spirit of Atticus Finch into the trenches of public life. The likes of Sen. Clark Jolley and Rep. Randy Grau and many others like them. I know them both well and every experience I have had with them exemplified the high ideas of public life. I am not endorsing or approving of everything they do; however, I admire them for stepping up to the high mantle of public service.

It is in this vein that I encourage each of us to be mindful of the high ideas and call to public service that each of us was filled with when we took our oaths as

attorneys. I am certain that no one put on his or her law school application that we wanted to further the cause of the advantaged and the privileged. We wanted to be Atticus Finch. I suspect we all aspired then to reach for the high ideas of furthering the public good for everyone, regardless of popularity or position.

I believe in all of us lives a bit of Atticus Finch. Each of us has a sworn duty to reach for those high ideas and to strive to pro-

tect and defend the Constitution of the state of Oklahoma and the United States of America. That duty does not start or stop at the courthouse door. That duty is upon us everywhere we go and with everything we do. I am in agreement with and inspired by the passion of OBA President Garvin Isaacs, who calls on us to protect and defend the third branch of government. In doing so we make it possible for the Atticus Finches among us to have a fair and impartial forum

to seek justice for the unpopular and the less privileged, as well as those who may be doing better in life.

Rest in peace, Harper Lee.



To contact Executive Director John Morris Williams, email him at johnmw@okbar.org.

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Attorney Discipline Activities Reflects in Reports

By Gina Hendryx

In this *Oklahoma Bar Journal* issue, you will find the 2015 annual reports of the Professional Responsibility Commission (PRC) and the Professional Responsibility Tribunal (PRT). The PRT is the panel of masters that conducts hearings on formal complaints filed against lawyers and on applications for reinstatement to the practice of law. The panel consists of 21 members, 14 of whom are active members in good standing of the Oklahoma Bar Association and seven members who are nonlawyers

The PRC considers and investigates any alleged ground for discipline or alleged incapacity of a lawyer. The commission consists of seven members, five of whom are active members in good standing of the OBA and two nonlawyers. Under the supervision of the PRC, the Office of the General Counsel investigates all matters involving alleged misconduct or incapacity of any lawyer called to the attention of the general counsel. The PRC determines the disposition of all formal grievances.

The Office of the General Counsel received 1,310 grievances involving 871 attorneys in 2015. This compares to 1,324

complaints involving 945 attorneys in 2014. Complaints must be in writing and signed by the complainant. At the end of 2015, the OBA membership was 18,108. Considering the total membership, fewer than 5 percent of the licensed attorneys in the state of Oklahoma received a complaint in 2015. Of the grievances reviewed in 2015, 288 were referred for formal investigation. While the overall number of grievances was down from the previous year, the number referred for formal investigation increased by 80.

“The primary complaint lodged against Oklahoma attorneys continues to be client/file neglect.”

In addition to the statistics on bar complaints and resolution of same, the PRC Annual Report details the participation of attorneys in the Discipline Diversion Program. The

2015



1,310 grievances involving 871 attorneys in 2015
This compares to 1,324 complaints involving 945 attorneys in 2014.

FEWER THAN 5%

Percentage of members who received a complaint

288 grievances referred for formal investigation
80 more than 2014



PRC may refer an attorney to this program in lieu of filing formal discipline charges. In diversion, remedial measures are taken to ensure that deficiencies in the representation of a client do not recur in the future. During 2015, 37 attorneys were referred to the program for conduct involving 44 grievances. Those attorneys participated in classes that included law office management, communication and

client relationship skills, professionalism, professional responsibility and trust accounting procedures. In addition to these classes, 14 attorneys had in-office consultations with a law office management assistance specialist.

The primary complaint lodged against Oklahoma attorneys continues to be client/file neglect. Forty percent of the grievances filed with the Office of the General Counsel alleged dissatisfaction due to the attorney's failure to

respond to client inquiries or the delay in moving the matter to conclusion.

In addition to attorney grievances and reinstatement proceedings, the Office of the General Counsel continued its 2015 investigations of allegations of the unauthorized practice of law. More than 24 requests to review these practices were acted upon in 2015. The majority of referrals came from lawyers and judges concerned about the increase in

nonlawyers engaging in the practice of law.

The reports set forth, in detail, the day-to-day workloads of the PRT, PRC and Office of the General Counsel. Whether investigating discipline matters, prosecuting the unauthorized practice of law or representing the OBA in nondiscipline matters, these entities work together to promote the practice of law while protecting the public.

Ms. Hendryx is OBA general counsel.

G 
GREEN

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Meeting Summary

The Oklahoma Bar Association Board of Governors met via telephone conference on Jan. 14, 2016.

REPORT OF THE PRESIDENT

President Isaacs reported he had meetings with Executive Director Williams, former OBA President Cathy Christensen and Judge Thad Balkman. He spoke to the Garfield County Bar Association.

REPORT OF THE PRESIDENT-ELECT

President-Elect Thomas reported she attended the OBA budget presentation to the Supreme Court, Professional Responsibility Commission holiday party, PRC December meeting, planning session with select bar leaders to plan for 2017 and Washington County Bar Association December meeting.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the OBA staff holiday luncheon, conferences on legislative session, Oklahoma Bar Foundation Executive Search Committee meeting, meeting with President Isaacs, conferences with Abila (association management software vendor), monthly staff celebration and directors meeting. He participated in the ABA pro bono teleconference and

also gave a presentation to the OBA Leadership Class.

BOARD MEMBER REPORTS

Governor Coyle reported he hosted the Christmas party for the Oklahoma County Criminal Defense Lawyers and attended the Oklahoma County Bar Association holiday party.

Governor Hicks reported he attended the Tulsa County Bar Foundation board meeting and Golf Committee meeting. He also assisted Tulsa County judges announcing new assignments effective Feb. 1, 2016, to TCBA membership via email.

Governor Hutter reported she attended the Cleveland County Bar Association Executive Committee meeting, county bar Bench and Bar Committee meeting and Cleveland County Justice is Sweet planning committee meeting for the annual charity event. **Governor Kinslow** reported he attended the Comanche County Bar Association luncheon meeting and worked to get the county bar to participate in the Rotary Club's appreciation dinner for local law enforcement officers in April 2016. **Governor Marshall** reported he attended the Board of Governors holiday party and Legal Intern Committee meeting. **Governor Tucker** reported he attended the Law Day Committee meeting.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Will reported he has been planning the delegates dinner at the ABA midyear meeting in San Diego.

BOARD LIAISON REPORTS

Governor Marshall reported the Legal Intern Committee discussed and approved additional clarification of Rule 6 (eligibility to continue as LLI after graduation). Suggested language for inclusion in the annual report was also approved. Governor Tucker reported the Law Day Committee has incorporated juror appreciation into the *Ask A Lawyer* TV show and a subcommittee has been formed to make recommendations on statewide juror appreciation activities. Governor Tucker has volunteered to serve on the subcommittee. He said the deadline to enter the Law Day contests was extended to Feb. 5. More promotion is taking place to boost the number of entries. Work continues on the TV show.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported no litigation is pending against the OBA. She said Oklahoma City attorney Angela Ailles Bahm was appointed to chair the Professional Responsibility Commission and nonlawyer Tony Blasier

has been appointed vice chair. A written report of PRC actions and OBA disciplinary matters for December was submitted to the board for its review.

AMENDED CLIENTS' SECURITY FUND FINAL CASE LIST REPORT

The board voted to ratify the electronic vote approving the CSF amended final case list report, replacing the report approved by the board at its Dec. 11, 2015, meeting.

NEXT MEETING

The Board of Governors met Feb. 19, 2016, and March 7, 2016, and a summary of those actions will be published after the minutes are approved. The next board meeting will be 10 a.m. Friday, April 22, 2016, at the Oklahoma Bar Center in Oklahoma City.

MEMBER BENEFIT

Go.



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2016 Grants and Awards Committee

The Oklahoma Bar Foundation is gearing up for its grants and awards season. Patrick O'Hara Jr. of Tisdale and O'Hara Law Firm is the 2016 Grants and Awards Committee chair. He is working with the committee members to oversee two grant cycles this year. The first, court grants, is for district and appellate courts to request funding for courtroom improvements and technology. The second is for law-related nonprofit organizations to apply for program funding.

"Since becoming a member of the OBF Grants and Awards Committee, I have been truly touched by the personal stories of our grantees and the difference they are making in communities across the state, says Patrick O'Hara. "Through its grants and awards, the OBF provides meaningful support to areas of our legal system that need it most." It is humbling to be a part of an organization that has such a positive impact in the lives of so many. I am honored to now serve as chairman of the committee and look forward to playing a role in the continuing efforts of the OBF to promote legal access, education and justice for all Oklahoma citizens."

The 2016 committee includes: chair Patrick O'Hara Jr. and members Kara Smith, Amber Peckio-Garrett, Deanna Hartley-Kelso, Molly Aspan, Martha Cordell, Mike Hogan,

Paul Kluver, Jack De McCarty, Gary Farabough, Rod Hunsinger, Jeff Trevillion and Mike Torrone.

Court grant applications are now available online and the application deadline is April 8. The Grants and Awards Committee will hold interviews on April 20 of judges and court



Patrick O'Hara Jr.
2016 Grants and Awards
Committee Chair

clerks in order to have a comprehensive understanding of courthouse needs of the applicants. The Board of Trustees will vote on committee recommendations at the board meeting May 13.

For more information or to download a court grant application, please visit www.okbarfoundation.org/grants or call 405-416-7070.

Grantee applications for nonprofit organizations will be available online in April.

2015 OBF COURT GRANT AWARDS

District Courts

Pittsburg County \$5,820
digital courtroom recording system

Stephens County \$12,640
video courtroom arraignment system

Roger Mills County \$14,110
*digital courtroom recording/
video system*

Tulsa County \$11,045
*netbook computers to be used in
automation of case management*

Seminole County \$6,470
digital courtroom sound system

Harper County \$21,145
*courtroom tools/furnishings
equipment*

Cotton County..... \$5,245
digital courtroom recording system

Muskogee County \$5,525
courtroom video system

Noble County \$4,250
courtroom digital audio system

Ellis County \$4,525
courtroom digital recording system

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including a trip to Sonoma.

*Please respond by March 18
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Three Reasons You Should Attend the YLD Midyear Meeting

By Bryon J. Will

It's March! Winter is almost over, spring is in the air, and yes, we will be filling out our NCAA brackets soon, if we have not already.

What's been happening in the YLD so far this year? On Jan. 30 we held our first YLD board meeting in Stillwater where we welcomed three new members to the board — Piper Bowers, member at large, Enid; John Hammons, District 7, Muskogee; and Clayton Baker, District 6, Grove. Our speaker for the meeting was Gary Clark, past OBA president and vice president of OSU. During the February meeting we appointed Grant Kincannon from Altus to represent District 9. We assembled the Bar Exam Survival Kits and subsequently passed them out to those who sat for the February bar exam.

Also in February, the Oklahoma delegation for the ABA YLD attended the ABA Midyear Meeting in San Diego. Our delegates attended the YLD Assembly and voted on matters affecting the practice of law for Oklahoma young lawyers and young lawyers across the nation. I was also honored to serve as an Oklahoma delegate in the ABA House of Delegates.



With several big events behind us, planning for our YLD Midyear Meeting has begun.

YLD MIDYEAR MEETING, JUNE 23-25

Have you made your summer plans yet? Do you and your family want to get away from the office and home for a couple of days in June? This is a personal invitation for those of you in the Young Lawyers Division (remember the YLD is made up of all attorneys practicing 10 years or less) to come to the YLD Midyear Meeting in conjunction with the OBA Solo & Small Firm Conference at the Choctaw Casino in Durant. Not able to go on the CLE cruises? Not able to make it to the CLE ski trips in Aspen? No problem.

Come spend a few days with us at the casino this summer. Bring the family, or better yet, leave the kids with grandma and you and your spouse can go on an outing and not even have to leave the state.

Here is what you can expect while there. The Choctaw Casino is a world class resort located in Southern Oklahoma. The amenities are amazing with beautiful rooms, great food, and oh yes, probably the most amazing pool and poolside in the state. For those of you who have joined us there in 2012 and 2013 a new tower and rooms have been added, not to mention the laser tag facility, stadium seating first-run movie theaters and a bowling alley.

Here are three reasons why you should attend.

- 1 Discount pricing:** What's the cost? Early bird pricing for the event is \$200 if you register on or before June 9, 2016. For those of you who have practiced two years or less you will receive a discount and pay only \$125. If you do not want to attend the CLE portion it is only \$80. See details in this issue of the *Oklahoma Bar Journal*. Reservations for rooms can

be made with the Choctaw Casino.

2 **Entry Level CLE:** Are you a young lawyer practicing as a sole practitioner or in a small law firm? This CLE track is for you! The CLE offering is targeted for young lawyers and for those entering into private practice. On Friday, there will be a “basics” track on the basics of divorce, jury trials, probate and guardianship cases. The focus is to help lawyers for their first time in any one of these areas.

3 **Networking:** Who do you know within the YLD? Better yet, who do you know within the OBA? We will have various activities for networking focusing on young lawyers including pool-



side networking, a YLD Midyear Meeting and laser tag. For laser tag we have already made reservations. As for the YLD Midyear Meeting, all young lawyers are invited to attend.

There will also be other opportunities for the young lawyers to network with others throughout the OBA. There you will be in the midst of other new attorneys and seasoned attorneys, all who are either solo practitioners or are part of a small law firm.

I hope you take this opportunity for you and your practice and come join us in Durant this summer.

Till next month.



ABOUT THE AUTHOR



Bryon Will practices in Oklahoma City and serves as the YLD chairperson. He may be contacted at bryon@bjwilllaw.com.



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March

- 15 OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judge David B. Lewis 405-556-9611 or David Swank 405-325-5254
- OBA Women in Law Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Ann E. Keele 918-592-1144 or Reign Grace Sikes 405-419-2657
- 16 OBA Indian Law Section meeting;** 10 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Deborah Reed 918-348-1789
- 17 OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Tiece Dempsey 405-609-5406
- 18 OBA Lawyers Helping Lawyers Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Jeanne M. Snider 405-366-5466 or Hugh E. Hood 918-747-4357
- 21 OBA Appellate Practice Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Mark Koss 405-720-6868
- 23 OBA Financial Institutions and Commercial Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Eric L. Johnson 405-602-3812
- 24 OBA Professionalism Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Patricia Podolec 405-760-3358
- 25 OBA Professional Responsibility Commission meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Gina Hendryx 405-416-7007
- OBA Access to Justice Committee meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Michael Speck 405-205-5840
- 30 OBA Communications Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact David A. Poarch Jr. 405-329-6600



April

- 1 OBA Alternative Dispute Resolution Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact John H. Graves 405-684-6735
- 5 OBA Government and Administrative Law Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Michael Mannes 405-473-0352
- 7 OBA Lawyers Helping Lawyers Discussion Group;** Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; Contact Jeanne M. Snider 405-366-5466 or Hugh E. Hood 918-747-4357
- 8 OBA Access to Justice Committee meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Michael Speck 405-205-5840
- OBA Law-related Education Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Professor Paul Clark 405-208-6303 or Brady Henderson 405-524-8511
- OBA Family Law Section meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Luke Barteaux 918-585-1107

- 18 OBA Appellate Practice Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Mark Koss 405-720-6868
- 19 OBA Bench and Bar Committee meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judge David B. Lewis 405-556-9611 or David Swank 405-325-5254
- OBA Women in Law Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Ann E. Keele 918-592-1144 or Reign Grace Sikes 405-419-2657
- 20 OBA Indian Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Deborah Reed 918-348-1789
- OBA Clients' Security Fund Committee meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Micheal Salem 405-366-1234
- 21 OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Tiece Dempsey 405-609-5406
- 22 OBA Board of Governors meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000
- 26 OBA Legal Intern Committee meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact H. Terrell Monks 405-733-8686
- 28 OBA Professionalism Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Patricia Podolec 405-760-3358
- 29 OBA Professional Responsibility Commission meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Gina Hendryx 405-416-7007
- 3 OBA Government and Administrative Law Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Michael Mannes 405-473-0352
- 5 OBA Master Lawyers Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Ronald Main 918-742-1990
- OBA Lawyers Helping Lawyers Discussion Group;** Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; Contact Jeanne M. Snider 405-366-5466 or Hugh E. Hood 918-747-4357

- 6 OBA Alternative Dispute Resolution Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact John H. Graves 405-684-6735
- 13 OBA Access to Justice Committee meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Michael Speck 405-205-5840
- OBA Law-related Education Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Professor Paul Clark 405-208-6303 or Brady Henderson 405-524-8511
- OBA Family Law Section meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Luke Barteaux 918-585-1107
- 16 OBA Appellate Practice Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Mark Koss 405-720-6868
- 17 OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judge David B. Lewis 405-556-9611 or David Swank 405-325-5254
- OBA Women in Law Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Ann E. Keele 918-592-1144 or Reign Grace Sikes 405-419-2657
- 18 OBA Indian Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Deborah Reed 918-348-1789
- 19 OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Tiece Dempsey 405-609-5406
- 20 OBA Board of Governors meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000
- OBA Lawyers Helping Lawyers Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Jeanne M. Snider 405-366-5466 or Hugh E. Hood 918-747-4357
- 26 OBA Professionalism Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Patricia Podolec 405-760-3358
- 27 OBA Professional Responsibility Commission meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Gina Hendryx 405-416-7007

Darla Jackson Joins OBA as Practice Management Advisor

Darla Jackson recently joined the OBA staff as the new OBA practice management advisor. She will work with the OBA Management Assistance Program to provide assistance to attorneys in using technology and other tools to efficiently manage their offices. Her focus will be increasing training opportunities for OBA members and their support staff as well as supporting access to justice initiatives.

Ms. Jackson is a legal research specialist, an experienced instructor, a veteran practitioner and a technology enthusiast. Prior to joining the OBA, she served as the director of the Law Library at the University of South Dakota and as the OCU School of Law Library associate director. Before entering academia, she was a judge advocate in the United States Air Force, serving in a number of posts.



Darla Jackson

She earned her J.D. from the OU College of Law and also holds a Masters of Library Science degree from OU, an LL.M. in international law from the University of Georgia School of Law and a Masters of Military Operational Art and Science from Air University. She co-authored the book *Oklahoma Legal Research*, has written articles for the *Oklahoma Bar Journal* and *Law Library Journal* and has presented programs on technology use and instruction at various conferences.

She may be reached at 405-416-7031 or darlaj@okbar.org.

Cleveland County Bar Association Raises \$2,000+ for the Center for Children and Families

The Cleveland County Bar Association hosted its fourth annual Justice is Sweet Charity Baking Contest Friday, Feb. 12 raising more than \$2,000 for the Center for Children and Families. The Center for Children and Families is a nonprofit organization dedicated to creating better and brighter futures for children and families in the community by focusing on healthy, supportive relationships that form the basis of every baby and child's development and success in life.



Ann Harcourt receives blue ribbon.

Ann Harcourt, a family law attorney from Norman, was this year's first-place winner, collecting more than \$1,700 for her entry which was an array of items ranging from peanut brittle, toffee, cookies and more. Second place went to Richard Stevens, a child support attorney from Norman, for his pecan pralines and third place went to Alissa Hutter, a family law attorney from Norman, for her haystacks. Other local attorneys who placed in the competition were Rebekah Taylor, Rooney Virgin, Tyson Stanak and Richard Vreeland.

"This competition is supposed to be fun for the participants," event organizer Alissa Hutter said. "Each year there is friendly banter and there are always huge bragging rights at stake. The winners are given ribbons and prizes and most importantly, it's all for a good cause."

This year the contest was dedicated to the memory of Cleveland County Bar Association Executive Committee member, Michael Johnson, who passed away last year.

Moore High School Wins Mock Trial Championship

Moore High School defeated Owasso High School in the final round of competition to claim the 2016 Oklahoma High School Mock Trial Championship for the second year in a row. The final round was held March 1 at the OU Law Center in Norman. Teams are paired with volunteer attorney coaches; Moore attorney coach is David Smith and Owasso attorney coaches are Judge Daman Cantrell, Rob Ridenour, Julie Linnen, John Andrews, Michon Huges, Clint Hastings and Ken Underwood.

The two teams argued a case focused on the civil prosecution of a computer company being accused of capturing a student's private messages and searches. Moore High School is now preparing to represent the state at the national competition to be held in Boise, Idaho, in May.

"Moore High School has again demonstrated its commitment not only to the Mock Trial competition but also its commitment to the education of our youth about the very cornerstones of our democracy," said OBA President Garvin A. Isaacs of Oklahoma City. "I am confident they will represent Oklahoma well at the national competition."

The Mock Trial Program is sponsored and funded by the Oklahoma Bar Foundation and the OBA Young Lawyers Division. Nearly 400 judges and attorneys volunteered their time to work with mock trial teams as coaches and to conduct the competitions.



OBA Mock Trial Committee chair, Marsha Chojnack presents Moore High School with their first-place trophy.

LHL Discussion Group Hosts April Meeting

"Compassion Fatigue" will be the topic of the April 7 meeting of the Lawyers Helping Lawyers monthly discussion group. Each meeting, always the first Thursday of the month, is facilitated by committee members and a licensed mental health professional. The group meets from 6 to 7:30 p.m. at the office of Tom Cummings, 701 N.W. 13th St. Oklahoma City. There is no cost to attend and snacks will be provided. RSVPs to Kim Reber, kimreber@cabainc.com, are encouraged to ensure there is food for all.



**LAWYERS HELPING LAWYERS
ASSISTANCE PROGRAM**

Call 24/7 — 800-364-7886



Aspiring Writers Take Note

We want to feature your work on "The Back Page." Submit articles related to the practice of law, or send us something humorous, transforming or intriguing. Poetry is an option too. Send submissions no more than two double-spaced pages (or 1 1/4 single-spaced pages) to OBA Communications Director Carol Manning, carolm@okbar.org.

OBA Member Resignations

The following members have resigned as members of the association and notice is hereby given of such resignation:

James Phillip Albert
OBA No. 30004
Issues Advisor, Public &
Gov't Affair
XTO Energy Inc.
810 Houston Street
Fort Worth, TX 76102

Kayle Lynne Allen
OBA No. 19881
P.O. Box 2428
Naples, FL 34106-2428

Lisa June Allen
OBA No. 18331
1024 Maryvale Drive
Buffalo, NY 14225

Chad Clayton Anderson
OBA No. 20452
165 N.E. 100 Road
Clinton, MO 64735

Dawn Michelle Attebury
OBA No. 19741
8512 Berend Court
Benbrook, TX 76116

Gary Bova
OBA No. 996
4800 N.W. 62nd Terrace
Oklahoma City, OK 73122

Rebecca Lyn Bush
OBA No. 30224
1510 N. 7th Street
Ponca City, OK 74601

Joe Alan Byrom
OBA No. 31291
629 Southwestern
Rockwall, TX 75087

Ronald Perrier Carter
OBA No. 1527
572 Trianon Street
Houston, TX 77024

Danielle Christine Davis
OBA No. 32380
8610 Richard Road
Denver, CO 80229-5066

Kathryn Isabell DuPree
OBA No. 30545
9213 Jacobia Avenue S.E.
Snoqualmie, WA 98065

Kevin J. Finan
OBA No. 2906
1540 Harmony
New Orleans, LA 70115

Russell Scott Fraley
OBA No. 20908
1114 S. University Parks Dr.
One Bear Place #97288
Waco, TX 76706-1223

Jennifer C. Gerrish
OBA No. 17227
3936 Cool Water Court
Winter Park, FL 32792

Hilary Bird Hamra
OBA No. 22066
104 Larkspur Lane
Sikeston, MO 63801

Rick D. Holtsclaw
OBA No. 20932
2029 Wyandotte, Suite 100
Kansas City, MO 64108

John Wesley Hunt
OBA No. 4491
722 Wanaao Road
Kailua, HI 96734

Warren E. Jones
OBA No. 4815
1129 Glenwood
Oklahoma City, OK 73116

Valerie Gay Lipic
OBA No. 16863
1125 N. Euclid
Oak Park, IL 60302

Jenny L. Martin
OBA No. 17943
2062 Strathmore Street
Louisville, CO 80027

Sabrina DeInise Merritt
OBA No. 19680
5623 Murdoch Avenue
St. Louis, MO 63109

Michael Francis Mertens
OBA No. 21297
2310 35th Street
Des Moines, IA 50310

Mary Erskine Pons
OBA No. 13050
703 Ponce de Leon Avenue
Montgomery, AL 36106

Jack Edwin Poston
OBA No. 10931
12536 S. 18th Circle
Jenks, OK 74037

Richard Henry Remmer
OBA No. 7497
464 Shore Drive
Oakdale, NY 11769-2300

Jeremiah Louise Streck
OBA No. 21373
4536 Windsor Road
Windsor, WI 53598

Srinivas Surapanani
OBA No. 21084
7970 Chase Cir., #85
Ravada, CO 80003

Sharon Ann Thompson
OBA No. 17152
2197 E. Spurwind Lane
Green Valley, AZ 85614

Rebecca Lynn Williams von
Groote
OBA No. 21867
3509 Colonnade Drive
Lexington, KY 40515

Connect With the OBA Through Social Media

Have you checked out the OBA Facebook page?
It's a great way to get updates and information
about upcoming events and the Oklahoma legal
community. Like our page at www.facebook.com/OklahomaBarAssociation and be sure to
follow @OklahomaBar on Twitter.



Kudos

The Senior Law Resource Center (SLRC), a nonprofit assisting qualifying seniors with legal issues and *pro se* litigants in probate and guardianship proceedings in Oklahoma County, announced the following OBA members were elected to the Board of Directors at its January board meeting: **Shannon Taylor**, president; **Isai Molina**, vice president/secretary; **Gail Meltzner**, treasurer and **Joe Crosthwait** and **Kevin Kelley**, board members.

Judge Joe Sam Vassar received the "Judge of the Year" Award from members of the American Board of Trial Advocates (ABOTA) during the annual meeting Jan. 23. Judge Vassar earned a law degree from the OU College of Law in 1963 and practiced in Oklahoma City before moving to Bristow in 1974, where he continued to practice law before becoming a district judge in 1999. He is a District 24 judge in charge of Creek, Okfuskee and Okmulgee County courts.

McAfee & Taft shareholders elected **Timothy J. Bomhoff** and **Jennifer H. Callahan** to its Board of Directors. Mr. Bomhoff is a trial lawyer who focuses on energy litigation, defense of mass torts and negligence

claims, environmental litigation and class actions. He is a 1988 graduate of the OU College of Law. Ms. Callahan is an employee benefits and tax attorney. She holds a master's degree in accounting from OCU and is a 1996 graduate of the OU College of Law.

The Friends of the Oklahoma History Center named new board officers, including **Jim Waldo**, president. Friends of the Oklahoma History Center provide advisory, planning and financial support for the exhibits, projects, education programs and initiatives undertaken by the state museum of history. Mr. Waldo graduated from the OU College of Law in 1974.

The Oklahoma Chapter of American Board of Trial Advocates announced the election of new officers for 2016 at the annual meeting and awards banquet held at the Mayo Hotel in Tulsa Jan. 23. The officers are **James Jennings**, president; **Bradley West**, vice president and **Michael Jones**, secretary.

Crowe & Dunlevy attorney **Ruth J. Addison** was recently named a recipient of the "30 Under 30 (30/30) NextGen Award" from *Ion Oklahoma Online*, a digital online magazine showcasing Oklahoma's lifestyle, culture and entertainment. The award recognizes the next generation of innovative, creative and inspiring individu-

als who push the boundaries in all areas: arts, entertainment, business, media, sports, technology and more. She received her J.D. from the OU College of Law in 2007.

Nancy Zerr has been admitted to the State Bar of Arkansas. She has 21 years of experience in government and private practice and is currently with Entergy Nuclear. She graduated from the University of Wyoming College of Law in 1964.

On The Move

Collins, Zorn & Wagner PC announced **Travis White** has joined the firm. Prior to joining the firm, he served as general counsel for the Oklahoma Bureau of Narcotics and Dangerous Drugs. Mr. White will focus on civil rights defense litigation. He received his J.D. from the OU College of Law in 2002.

Emily Pittman Smith announced the opening of her law office, Emily P. Smith PLLC. She received her J.D. from the OU College of Law in 2005. For the past nine years Ms. Smith worked in-house at a Fortune 500 oil and gas company. Her practice will continue to focus on oil and gas, specifically Oklaho-

ma Corporation Commission matters.

The law firm of Barber & Bartz announced that **Kurtis R. Eaton, Kelsey T. Pierce** and **William C. Searcy** have been named as shareholders of the firm. Mr. Eaton's practice will be concentrated in the areas of business organizations and transactions. He obtained his J.D. from the OCU School of Law in 2008. Mr. Pierce will focus his practice on business and commercial transactions, real estate transactions and development, construction law, corporate securities, business organizations and intellectual property law. He graduated from the TU College of Law in 2009. Mr. Searcy will practice in the areas of labor and employment law and human resources management. He received his J.D. from the OU College of Law in 1999.

GableGotwals welcomed **Philip A. Schovanec** as a shareholder in the Oklahoma City office and **Chris Thrutchley** as a shareholder in the Tulsa office. Mr. Schovanec's practice will focus on civil litigation and transaction law with an emphasis in energy and oil and gas law. He received his J.D. from the OU College of Law in 1994. Mr. Thrutchley will focus his practice on labor and employment law. He graduated from the TU College of Law in 1993.

Brett Behenna recently joined Blau Law Firm. Mr. Behenna is a former prosecutor with the Oklahoma County district attorney's office. He received his law degree from the OU College of Law in 2011.

Hall Estill is expanding its oil and gas practice with the addition of **Leah Rudnicki** to the firm's Oklahoma City office. Ms. Rudnicki received her J.D. from the OU College of Law in 2001. She previously worked as in-house litigation counsel for a Fortune 500 oil and gas services company.

Best & Sharp announced that **Benjamin Reed** has been elected as a shareholder with the firm and **Carrie McNeer** has been named a junior partner. Mr. Reed joined Best & Sharp after graduating with honors from the TU College of Law in 2009. He practices in the areas of medical malpractice defense, trucking litigation, personal injury litigation and complex civil litigation. Ms. McNeer joined Best & Sharp in December 2011 and has focused her practice in the areas of medical malpractice defense, municipal liability, civil rights and general insurance defense. She earned a J.D. in 2008 from the TU College of Law.

McAfee & Taft announced **Mc. Robert Stell** has joined its energy and oil and gas group and **Jeremy M. Black, Jodi C. Cole, Laura J. Long, Kristin M. Simpson, Joshua W. Solberg** and **J. Todd Woolery** have been named shareholders. Mr. Stell is a 1994 graduate of the OU College of Law and has more than 20 years of experience representing oil and gas companies. Mr. Black is a tax lawyer whose practice covers federal and local tax issues for businesses as well as individuals. He graduated from the OU College of Law in 2005. Ms. Cole is a trial lawyer whose practice is primarily

ly focused on matters affecting the energy industry. She received her J.D. from the OCU School of Law in 2008. Ms. Long is a trial lawyer whose practice encompasses energy litigation and complex business litigation. She earned her law degree from the OU College of Law in 2008. Ms. Simpson is a trial lawyer whose state and federal litigation practice is focused on labor and employment law and general civil and business litigation. She is a 2008 graduate of the OU College of Law. Mr. Solberg is a trial lawyer who counsels and represents businesses in all areas of labor and employment law. He earned his J.D. from the TU College of Law in 2008. Mr. Woolery is a lawyer whose broad-based practice is concentrated on litigation and transactional matters affecting the oil and gas, manufacturing and renewable energy industries. He graduated from the OU College of Law in 2000.

Kendall A. Sykes has joined the firm of Cathy Christensen and Associates PC as an associate attorney. Ms. Sykes' background is in family law, appellate advocacy and criminal defense matters. She also volunteers her time with Legal Aid Services and within her community. She is a 2007 graduate of the OCU School of Law.

Phillips Murrah announced **Bobby Dolatabadi, Melissa R. Gardner, Patrick L. Hullum** and **Clayton D. Ketter** have been named shareholders. Mr. Dolatabadi represents clients in commercial real estate and graduated from the OU College of Law in 2008. Ms. Gardner's practice focuses on oil and gas

transactions. She received her J.D. from the Georgetown University Law Center in 2007. Mr. Hullum specializes in complex litigation matters. He earned his J.D. from the OU College of Law in 2003. Mr. Ketter's practice has a strong emphasis on financial restructuring and he is a 2007 graduate of the Southern Methodist University Dedman School of Law.

How to place an announcement: The *Oklahoma Bar Journal* welcomes short articles or

news items about OBA members and upcoming meetings. If you are an OBA member and you've moved, become a partner, hired an associate, taken on a partner, received a promotion or an award, or given a talk or speech with statewide or national stature, we'd like to hear from you. Sections, committees and county bar associations are encouraged to submit short stories about upcoming or recent activities. Honors bestowed by other publications (e.g., *Super Lawyers*, *Best Lawyers*, etc.) will not

be accepted as announcements. (Oklahoma-based publications are the exception.) Information selected for publication is printed at no cost, subject to editing and printed as space permits.

Submit news items via email to:
Laura Stone
Communications Dept.
Oklahoma Bar Association
405-416-7018
barbriefs@okbar.org

Articles for the May 21 issue must be received by April 18.

IN MEMORIAM

Judge Charles Chadwick "Chad" Bledsoe of Greenville, South Carolina, died Sept. 10, 2015. He was born Sept. 27, 1935, in Lawton and attended Lawton High School, then graduated from OU in 1957. **He served as an Air Force fighter pilot** before earning a law degree from the OU College of Law in 1966. He went into practice and later served as Comanche County associate district judge for 22 years. The family requests that in lieu of flowers, please do something kind for your fellow man.

Glen Michael Burdick of Minco died Dec. 26, 2014. He was born Jan. 10, 1937, in Ponca City. He earned an undergraduate degree in chemistry and later his law degree from the OU College of Law, where he was Order of the Coif and editor-in-chief of the *Oklahoma Law Review*. **He served in the Army Reserves** in the 1950s and later as a patent attorney for Continental Oil Company, Milliken Chemical Company

and Dunlap Coddling. After retirement, he owned and operated 4B Ranch in Minco.

Wayne Paul Coffelt of Oklahoma City died Jan. 21. He was born July 16, 1941, in Davenport, Iowa, and graduated from Davenport High School. He earned his bachelor's degree from UT, where he served as treasurer and president for the Lamda Chi Alpha fraternity. **After serving as an officer with the Coast Guard during the Vietnam War**, he returned and attended the TU College of Law. He worked both as assistant state's attorney and in private practice in Illinois prior to moving back to Oklahoma, where he worked for both Farmers Insurance and the Oklahoma Department of Transportation. **He continued serving in the Coast Guard Reserve, rising to the rank of lieutenant commander.** Memorial contributions may be made in his name to the National Coast Guard Museum Association.

Michael "Mike" Joseph Edwards of Tulsa died Feb. 13. He was born Aug. 15, 1946, in Tulsa and graduated from Bishop Kelley High School in 1964. He earned an electrical engineering degree from OSU in 1969. **After serving in the United States Navy**, he returned to OSU and earned his MBA in marketing and finance and later obtained his J.D. from the OU College of Law in 1981. He will be remembered by his family and friends as being loyal, always willing to lend a helping hand and a wise businessman.

Raymond Guy Feldman of Tulsa died Jan. 30. He was born Jan. 10, 1922, and grew up in north Tulsa. He graduated from Central High School in 1938 and attended TU and OU. **After brief military service during World War II**, he completed his legal studies at the University of Chicago then returned to Tulsa in 1946. He began practicing law, and in 1953 helped start the firm originally

known as Feldman Franden Woodard Farris. He served on the board of the Oklahoma Civil Liberties Union, helped organize and then served on the OCLU's first Tulsa Legal Panel, was chairman of the Tulsa Human Rights Commission, vice chairman of the state's Human Rights Commission and served and volunteered with many other organizations. In 1997, he was inducted into the Tulsa Hall of Fame for his contributions to the city.

Joseph Kendall Heselton Jr. of Edmond died Oct. 4, 2015. He was born May 30, 1952, in Providence, Rhode Island, and attended West Genesee High School in Camillus, New York. He attended SUNY College at Plattsburgh, New York, and later State University of New York. He moved to Oklahoma City in 1974, earned a J.D. from the OCU School of Law in 1977. After having a private practice for several years, he was the general counsel for the Oklahoma Department of Consumer Credit and partner with McCraffrey and Heselton and later Phillips Murrah PC. He returned to private practice for the last years of his legal career.

Bradley Todd Hollar of Oklahoma City died Feb. 9. He was born Feb. 18, 1967, in Wichita, Kansas, and graduated from Southeast High School in Wichita. He went on to the University of Kansas where he was a member of Phi Kappa Theta. He graduated from the OCU School of Law in 1993 and had many business ventures, including Hollar Law Firm in Oklahoma City. He was a member of Chapel Hill United Methodist Church and Quail Creek Country Club. He was an avid

car enthusiast and enjoyed golfing, skiing, boating and traveling. Memorial contributions may be made in his name at crowdrise.com.

Michael W. Jackson died Feb. 5, in Boynton Beach, Florida. He was born Dec. 20, 1944, in Burlington, Iowa, but spent the majority of his life in Oklahoma City. His passion for helping others showed throughout his 40-year career as an attorney. He never met a stranger and will be missed by many friends and family members.

Janis Kay Noulles of Tulsa died May 5, 2015. She was born Dec. 27, 1935, in Olvey, Arkansas, grew up in Harrison, Arkansas, and graduated salutatorian from Valley Springs High in Arkansas. In 1965, she moved to Tulsa with her three children and worked two jobs to put herself through school, graduating with honors. She later attended the TU College of Law at the age of 50. Two of her greatest loves were her grandchildren and live performances. She left a memorable legacy not only with those in her family but with her friends as well.

Paul Henry Petersen of Tulsa died Feb. 7. He was born April 3, 1946, in Oklahoma City and graduated from U.S. Grant High School. He earned a bachelor's degree in business administration from OU in 1968, where he was student body president and president of Sigma Chi. He went on to earn his J.D. from the OU College of Law in 1972 and was Order of the Coif and editor-in-chief of the *Oklahoma Law Review*. He had a long-running, 44-year law practice in Tulsa. Memorial contributions may be made in his name to Woodlake Assembly

of God, 7100 E. 31st St., Tulsa, OK 74145.

George William "Bill" Rice of Owasso died Feb. 14. He was born Aug. 3, 1951, in Anadarko and graduated from Madill High School in 1969. He attended Phillips University in Enid, graduating with a B.A. in chemistry in 1973; Lowell Technological Institute in Massachusetts, graduating with a M.S. in radiological safety and control in 1975; OU College of Law, graduating with a J.D. in 1978, where he was editor of *The American Indian Law Review*. He was an attorney, TU law professor, author and widely hailed expert on American Indian legal matters who worked to further the rights of indigenous peoples worldwide. He enjoyed gardening and his grandchildren were his pride and joy.

Gordon David Ross of Tulsa died Jan. 22. He was born Jan. 16, 1954. He attended Tulsa Memorial High School followed by OSU, where he earned a degree in finance. He went on to graduate from the OU College of Law. **He was an attorney in the Judge Advocate General's Corps at Fort Riley, Kansas,** for the first four years of his 30-year law career. Most recently, he worked at Lytle, Soule and Curlee in downtown Oklahoma City. Memorial donations may be made in his name to the Oklahoma Medical Research Foundation at www.omrf.org/gifts.

Bob A. Smith of Blanchard died on Feb. 9. He was born Aug. 10, 1930, in Earlsboro and attended school in Coalgate. **He proudly served in the U.S. Army.** He was a graduate of OSU, Syracuse University and the OCU

School of Law. Bob retired from the Federal Aviation Administration in 1986 and began practicing law with his daughter at the firm of Smith and Smith. In 2008, he was selected to serve as chief judge of the Cheyenne Arapaho Tribal Court and served in that capacity until his retirement in 2015. He was McClain County Bar Association president, served on the first McClain County Drug Court and was a board member and interim director of the Oklahoma Indian Legal Services. He is survived by his daughter and OBA member Lesley Smith March.

David P. Zacker of Oklahoma City died Jan. 29. He was born July 16, 1947. He lived in Oklahoma City and was an oil and gas landman and title attorney. He graduated from Bishop McGuinness in 1965 before earning multiple degrees, including a J.D. from the OCU School of Law in 1991. **He spent six years in the Army Reserve.** He had a deep love for nature, history, cards, family and friends and will be remembered as a generous man who was quick with a joke and a smile.

Paul D. Trimble Joins Gungoll Jackson



Paul D. Trimble

From where we sit, the future of Oil & Gas is bright. Our Firm is committed to continue providing excellent service to this vital sector. The addition of Paul Trimble's ability and experience speaks to that commitment and enhances the energy that propels our belief in a robust industry.

Paul has provided a variety of legal services to oil and gas companies in both private practice and as in-house counsel. His experience extends to complex transactions and litigation. He has practiced law for over twenty-five years. A graduate of the University of Oklahoma and the OU College of Law, he has served as an adjunct professor at OU's Price Business College as well as the Mewbourne School of Petroleum and Geological Engineering where he became the inaugural recipient of the Dr. William H. Keown Distinguished Lectureship Award.

We hope you will join us in welcoming Paul Trimble to the Firm in anticipation of all that tomorrow will bring.



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POSITIONS AVAILABLE

Law firm seeks attorney with experience handling BILINGUAL SPANISH/ENGLISH IMMIGRATION MATTERS. Send résumé to "Box Z," Oklahoma Bar Association; P.O. Box 53036; Oklahoma City, OK 73152.

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OKLAHOMA CITY LAW FIRM SEEKS PART TIME LICENSED LEGAL INTERN. Must be available in afternoons. \$15.00 per hour send resume and cover letter to okcjobs@lawterlaw.com.

THE OKLAHOMA TAX COMMISSION, LEGAL DIVISION is seeking several attorneys for openings in its OKC office, Protests/Litigation Section. Applicants must be licensed to practice law in Oklahoma. Preference will be given to candidates with administrative hearing and/or litigation experience but all applicants will be considered. Submit resume and writing sample to Jorie Welch, Interim General Counsel, 100 N. Broadway Avenue, Suite 1500, Oklahoma City, OK 73102. The OTC is an equal opportunity employer.

THE OKLAHOMA CORPORATION COMMISSION HAS AN OPENING FOR AN ATTORNEY in the Office of General Counsel in the Oil and Gas section. This is an unclassified position with a salary of \$45,000 annually. Applicants must be admitted to the Oklahoma bar and have at least 1 year of practice in any of the following areas: administrative law, oil and gas or environmental law. Some litigation experience is preferred. Send resume and writing sample to: Oklahoma Corporation Commission, Human Resources Division, P.O. Box 52000, Oklahoma City, Oklahoma, 73152-2000. For inquiries, call 405-521-3596 or email hr3@occcmail.com. Deadline: March 22, 2016.

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FULL SERVICE, AV-RATED, DOWNTOWN TULSA LAW FIRM seeks associate attorney with 3 - 6 years' commercial litigation experience. Solid deposition and trial experience is a must. Our firm offers a competitive salary and benefits, with bonus opportunity. Submit résumé and references to "Box P," Oklahoma Bar Association; PO Box 53036; Oklahoma City, OK 73152.

THE OKLAHOMA BAR ASSOCIATION HEROES program is looking for several volunteer attorneys. The need for FAMILY LAW ATTORNEYS is critical, but attorneys from all practice areas are needed. All ages, all counties. Gain invaluable experience, or mentor a young attorney, while helping someone in need. For more information or to sign up, contact Gisele Perryman, 405-416-7086 or heroes@okbar.org.

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POSITIONS AVAILABLE

THE MUSCOGEE (CREEK) NATION NATIONAL COUNCIL IS SEEKING A LAW FIRM OR AN INDIVIDUAL ATTORNEY TO PROVIDE LEGAL COUNSEL SERVICES ON A CONTRACT BASIS. Law firms and attorneys are invited to submit qualifications and proposals for the provision of these services. In order to be considered, proposals must address each of the concerns requested in this document, including rates and fees. Legal Counsel will be required to provide general governmental counsel, basic legal services, and advice on special projects. The National Council requests accessibility to and a timely response from the selected law firm or attorney. Basic legal services include: reviewing/drafting ordinances and resolutions; providing guidance regarding government operations, open meetings, open records, routine matters, and personnel matters; reviewing agendas, materials and preparing legal advice/opinions for Committee and Full Council Sessions; attending Committee (upon request) and monthly Council Sessions of the National Council. Minimum qualifications include a Juris Doctorate from an accredited law school, a license to practice in the State of Oklahoma, a member in good standing of the Oklahoma Bar, 5+ years of legal experience, and be a member or become a member in good standing of the Muscogee (Creek) Nation Bar. Experience with a Tribal government and familiarity with Muscogee (Creek) Nation law is preferable. Interested parties please provide the following information: Firm or Individual name and contact information, including e-mail and website addresses and the year organized; Summary of qualifications, specializations, experience, professional affiliation, special training, availability, and contact information for key personnel and proposed lead and back-up attorneys; Information on any previous experience or services provided, including Tribal experience, such as Tribal attorney services, Tribal court cases, litigation experience and a list of past or present Tribal clients; List of clients that you currently represent that could cause a conflict of interest with your responsibilities of Legal Counsel of the National Council. Describe how you would be willing to resolve these or any future conflicts of interest; Other factors or special considerations you feel would influence your selection; List of three references and contact information; Proposed rates for the attorney assigned to the National Council or any alternative fee structure that you propose. The National Council retains the right to reject any or all responses and reserves the right to waive any variances from the original RFP specifications in cases where the variances are considered to be, in the sole discretion of the National Council, in the best interest of the National Council. A contract for the accepted proposal will be drafted based upon the factors described in this RFP. Please provide three unbound copies of the proposal, including one original with the signature of the authorized individual on a typed letter of submittal. Proposals shall be submitted in a sealed envelope, clearly marked on the outside of the envelope, "Legal Counsel – Muscogee (Creek) Nation National Council" and addressed to: Lucian Tiger III Speaker, Muscogee (Creek) Nation National Council, P.O. Box 158, Okmulgee, OK 74447; Facsimile: (918) 756-6812. All proposals must be received no later than 4:00 pm on Tuesday, April 12, 2016.

POSITIONS AVAILABLE

OKC AV RATED LAW FIRM seeking associate with excellent litigation, research, and writing skills, 1-5 years' experience for general civil/commercial defense practice, health care law. Must have solid litigation experience for all phases of Pretrial discovery and Trial experience with excellent research and writing skills. Submit a confidential résumé with references, writing sample and salary requirements to "Box E," OBA PO Box 53036, OKC 73152.

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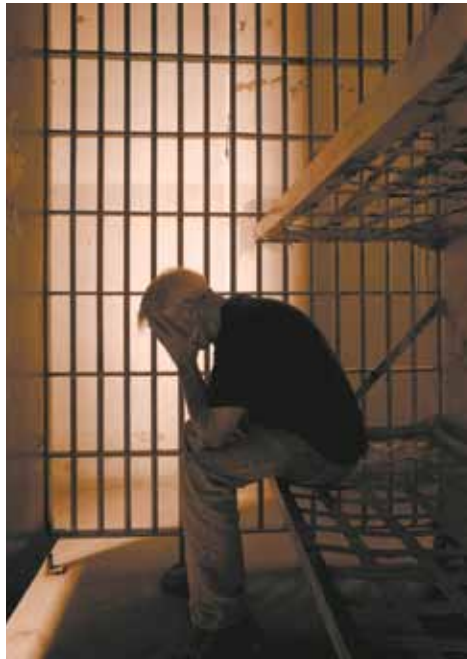
By Bryan Lester Dupler

We lawyers deal in past events. The sovereign facts. Every trial marshals evidence and inference, cause and effect, in search of a coherent, if imperfect, historico-legal truth. We do not doubt all events are caused by something, indeed, by a lot of things, some remote (i.e., the Big Bang), some more clearly in view.

Holmes said it more elegantly, "The postulate on which we think about the universe is that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents."² Causes can be blameless (the genetic defect), warranting pity or excuse, or blameworthy (the manufacturer's defect), warranting damages or punishment. The facts cannot be fully known, perhaps, but they certainly cannot be changed.

The more troubling and controversial logical implication is that from the beginning whatever happens was *always* going to happen. The mind revolts at this for good cause (pun intended). Fragile assumptions in law and life subsist through ignoring it. We experience the act of choosing its consequences and feelings (the *effects*, one might say), good and bad. We often imagine things might have turned out differently. Things never do.

The philosophical libertarians (not to be confused with political types) say the world is not determined. We are free to make it as we will. The determinists view the world as the sum of all causes and effects. The future on this



view is as fixed as the past. We just don't know the future.³

The implications for criminal responsibility are profound. Clarence Darrow famously argued that an invisible, abusive past had found expression in the horrific crime of his clients, Leopold and Loeb. He told the court:

Any one of an infinite number of causes reaching back to the beginning might be working out in these boys' minds, whom you are asked to hang in malice and in hatred and injustice, because someone in the past has sinned against them.⁴

Darrow saved his clients, even if he overplayed the hand of fate. He certainly believed the *judge* had a choice, and acted accordingly.

The system of laws and our professional lives rest uneasily

upon this grand assumption of rational choice. We are daily excusing some and punishing others for their choices which they freely earned the sanction usually goes without saying. And many cases present us with no difficulty, deterministic universe *or not*: Murderers must be locked away. Tortfeasors must pay. That is justice.

But what of those purposefully severe laws that punish drug possession, or nonviolent property crime and recidivism, with decades in prison, even life without parole? Holmes once pondered, "What have we better than a blind guess to show that the criminal law in its present form does more good than harm?"⁵

The causal origins in such crimes, their deep biological and social roots in poverty, addiction and despair, confront and confound the first premises of criminal law. Are these offenders really "free" to choose their awful fate? Are the dire penalties for their "bad choices" socially responsible or aimlessly callous and cruel?

Perhaps, for a moment, I've caused you to wonder, as I've often wondered myself.

Mr. Dupler practices in Norman.

1. *We lawyers and fate.*

2. O.W. Holmes Jr., "The Path of the Law," 10 *Harvard L. Rev.* 457 (1897). <http://www.gutenberg.org/files/2373/2373-h/2373-h.htm>.

3. See, Richard Taylor, "Fate," in *Metaphysics* 59 (4th ed. 1991).

4. Clarence Darrow, *Attorney for the Damned* 37 (1957).

5. "The Path of the Law," *id.*

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