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OKLAHOMA CRIMINAL DEFENSE WEEKLY

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[James L. Hankins,](#)
Publisher

(with special thanks to Mark Hoover, OIDS, for contributing regularly)

“I have lived my life, and I have fought my battles, not against the weak and the poor—anybody can do that—but against power, against injustice, against oppression, and I have asked no odds from them, and I never shall.”---Clarence S. Darrow, *Attorney for the Damned* 491, 497 (Arthur Weinberg ed. 1957).

No. 19: CREEK COUNTY: Named after the Creek Nation, the county seat is Sapulpa, which is part of the greater Tulsa metro. I have had a few cases there, and there is a general weirdness surrounding the place. Before it was remodeled a few years ago, I remember being on a docket call. I like looking at the historical photos and paintings in courthouses, and I noticed that in the back corner there was a painting of Gen. Robert E. Lee. As I looked at this painting, the inmates filed in, one black male after the other in jail orange and cuffs, filing into the courtroom and taking a seat in the jury box under the stern gaze of Gen. Lee. The presiding judge was the Hon. Donald Thompson, who would become infamous a short time later for being charged with, and convicted of, masturbating under his robe during court sessions. Like I said, weird. My county total is 13 out 19 so far.

OKLAHOMA

No new cases.

TENTH CIRCUIT

No new cases.

UNITED STATES SUPREME COURT

“Only Supreme Court justices and schoolchildren are expected to and do take the entire summer off.” –*Chief Justice John Roberts* (statement made while he served as a lawyer in the Reagan Administration).

No new cases.

OTHER CASES OF NOTE

[Paul L. Browning v. Renee Baker, Warden](#), No. 15-99002 (9th Cir., September 20, 2017): **Prosecutorial Misconduct (*Brady* Claims)**: In this federal habeas case, State court convictions for burglary, robbery and murder are vacated because of *Brady* and *Napue* claims relating to withheld evidence by the State of an officer’s shoeprint observation, the expected benefit of a witness for testifying, and the assailant’s hairstyle. NOTE: A dissenting judge would have applied the AEDPA deference provision to hold that the state court decision was not objectively unreasonable.

[Vance Haskell v. Superintendent Greene, SCI](#), No. 15-3427 (3rd Cir., August 1, 2017): **Habeas Corpus (Standard of Review (AEDPA)); Prosecutorial Misconduct (*Brady* Claims)**: In this habeas petition, Haskell showed that prosecutors withheld key information about an eyewitness in a murder case (that

the witness expected favorable treatment in her own criminal cases). The issue is whether Haskell must show that there is a reasonable probability that the error could have affected the judgment of the jury; or rather, the *Brecht* standard of actual prejudice applies. The panel held that when the State knowingly presented or failed to correct perjured testimony, the reasonable likelihood showing under *Giglio* and *Napue* apply, rather than the more stringent standard under *Brecht*.

[In re Rodrigo Zermeno-Gomez, et al.](#), No. 17-71867 (9th Cir., August 25, 2017):

Mandamus; Shackling: Petitions for writs of mandamus are granted to direct district courts in Arizona to make individualized decisions that a compelling government purpose is served by shackling defendants pursuant to a binding *en banc* opinion from the Ninth Circuit. **NOTE:** The Ninth Circuit stayed the mandate of the *en banc* court, which some district judges viewed as the decision being non-binding; however, the panel held that circuit precedent was binding, even when the mandate is stayed.

[William S. Price v. U.S. Department of Justice](#), No. 15-5314 (D.C. Cir., August 4,

2017): **FOIA; Waiver (Appellate Issues):** The issue was whether the Government can deny the request of a criminal defendant for information under FOIA related to his case on the ground that he waived his right to seek that information as part of a plea agreement. In this split opinion, the panel held the Government cannot deny such a request because it failed to identify any legitimate criminal-justice interest served by the waiver.

VICTORIES

LAWRENCE LORRALES, Lawton, walked a client last week charged in Comanche County with Burg 2 and a two day trial. Nice job, Lawrence!

BRET BURNS, Chickasha, secured a dismissal for his client, one of several jail personnel charged in Garfield County in the death of an inmate. Good job, Bret!

STEVEN MINKS and ROB COWAN, Poteau, appeared for a preliminary hearing before the Hon. Jennifer H. McBee, who proceeded to grant demurrers on several counts, including conspiracy, arson, and first degree robbery. Sounds like an interesting case. Nice work, Steven and Rob!

PHILLIP MORTON, Stratford, OIDS contractor, heard the magic words “not guilty” after an hour of jury deliberation. The accused testified, and had a prior

conviction and was facing 20-life. He was a man in his 40s dating a much younger woman who accused him of kidnapping. The jury did not believe it and acquitted. Oh yeah, this was apparently Phillip's first jury trial. Rock on, Phillip!

INDIAN COUNTRY JURISDICTION

If you are not familiar with it by now, it would behoove you to take a look at a sweeping opinion from the Tenth Circuit issued on August 8, 2017, in an Oklahoma capital case out of McIntosh County, styled [Patrick Dwayne Murphy v. Terry Royal, Warden](#), No. 07-7068 (10th Cir., August 8, 2017) (Published). It deals with jurisdiction of state courts in Indian Country, and constitutes a sea change in the jurisprudential landscape in this area.

Look at this [map](#). It is issued by the Oklahoma Department of Transportation, and depicts visually the extent to which Indian reservations operate within Oklahoma. About three-fourths of our State is covered by Indian Reservations. State district courts operate within these jurisdictions, and until now the jurisdiction of the State within these boundaries has not been tested. *Murphy* has changed that.

Basically, major crimes involving Indians, either as perpetrator or victim, that occur within Indian Country fall within the exclusive jurisdiction of the federal government. This [CHART](#) is a shorthand guide to state-federal jurisdiction in these cases.

Murphy involved the Muscogee (Creek) Nation, and the primary issue was whether those sweeping geographical boundaries of the original tribal reservation remain valid. The Circuit in *Murphy* held that they are. The analysis is complicated, and involves whether Congress has evidenced intent to disestablish or diminish Indian lands. The Creeks filed amicus briefs supporting Murphy's view, and the Tenth Circuit applied the test from the Supreme Court in concluding in *Murphy* that the boundaries of the Creeks has not been disestablished or diminished by Congress.

This is important because Tulsa County and the City of Tulsa are either Creek or Cherokee jurisdiction (the Osage have conceded that Congress has disestablished their boundaries), and most of our state would fall under federal jurisdiction in cases where an Indian is a perpetrator or victim in a criminal act. Although the Tenth Circuit in *Murphy* decided the issue in the case of the Muscogee (Creek) Nation, each tribal jurisdiction will have to be litigated on its own, although there is some substantial overlap, particularly among the original Five Civilized Tribes.

I have been researching the Cherokee and the Chickasaw for clients of mine. This issue is important because it involves subject-matter jurisdiction, which is not subject to waiver or procedural default, and can be raised at any time. Thus, if you have any clients who are Native American or your case involves a victim who is Native American, and the crime occurred in Indian Country, there is an argument to be made that the State had no jurisdiction.

The State is fighting hard to get *Murphy* overturned, taking the first step via a petition for rehearing or rehearing *en banc*, and it appears that the State will seek certiorari review in SCOTUS if the Tenth Circuit does not change *Murphy*. However, as of right now, *Murphy* is good law in this Circuit, and it would be advisable to get those post-conviction applications ready or those motions to dismiss filed in pending cases.

HEARSAY

SWAT TEAM: Interesting article on the evolution of the SWAT team of the Enid Police Department. Meanwhile, in Grady County, the use of the **Special Response Team** has increased.

TASERS: Interesting article about TASERS. They apparently fail about 15% of the time.

OVERCROWDING: DOC Director Joe Allbaugh explains his new community sentencing program and the requirements for it to ease prison overcrowding. Also, the program is explained **HERE**.

ALTERNATIVES: One alternative to incarceration is working at a poultry plant, but as one participant said, it's not drug rehab, it's "just pulling the guts out of chickens."

NEW ADMINISTRATOR: The new Administrator at the Tillman County Jail is Mike Logan.

INDICTED: The "Slint Tate Gang" has been indicted in federal court (N.D. Okla.).

FRIENDLY COMPETITION: After extended court battles, glass pipes have returned to store shelves in Norman.

ARRESTED: A 20-year-old female correctional officer was arrested in Tulsa County for sexual battery on an inmate.

APPOINTED: Gov. Fallin has appointed Jack Thorp as the District Attorney for District 27 (Adair, Cherokee, Sequoyah and Wagoner Counties), to replace Brian Kuester, who resigned to serve as the U.S. Attorney for the E.D. Okla.

ELECTRONIC TICKETS: The City of Nichols Hills is employing software to manage traffic tickets.

TRAINING: The Woodward Police Department has been revitalized by new leadership.

COACH FRAUD: The college basketball world was rocked last week when federal charges were filed against several coaches for bribing student-athletes, including assistant coach Lamont Evans at OSU.

HONORED: Former Edmond Police Chief Rob Ricks will be honored with the Salt & Light Award by the Christian Business Men's Connection.

WACKY CRIME

THE HERMIT: It is not wise to hunt feral hogs near the rural home of “a hermit.” He might decide to hunt YOU.

EQUALITY: Charges of taking up-skirt photos of women are common, but at the library at Oklahoma State University, a man was charged with pointing a cell phone at the junk of others in the restroom.

CANNOT BE TRUE: But, it apparently is. A Republican candidate for the state house, Jason Reese, submitted his itemized list of expenses to the Ethics Commission, which included an expense for his internet porn subscription to “Hot Wife Chloe Needs to be Punished.”

DOMESTIC: A man in Tulsa got into a domestic dispute with his wife, so he got into his truck and drove it...into his house.

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