Q & A

The Newsletter of the Criminal Law Section

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REPORT FROM THE CHAIRMAN

DENNIS SMITH

As of the last day of February, 2005, the Criminal Law Section continues to be growing stronger. We are still excited about the CLE that will be sponsored by the Criminal Law Section on Juvenile Law for both defense attorneys and prosecutors that is scheduled for May 20, 2005, at the Oklahoma Bar Center. Again, I would urge you to spread the word and make plans to attend, and tell others who may be involved in juvenile cases regardless of which side of the fence you are on. One of the things that will be discussed extensively is the Youthful Offender Law which I know anyone who has done juvenile law has many questions and concerns about.

I also want to mention House Bill 1224 which has been referred to as the "Preliminary Hearing Bill." The proposed Bill would have altered 22 O.S. § 258 as follows:

> Eighth: The purpose of the preliminary hearing is to establish probable cause that a crime was committed and probable cause that the defendant committed the crime. For purposes of determining such probable cause, the preliminary magistrate shall allow the testimony of at least one law enforcement officer relative to the actions and observations of other law enforcement officers concerning their investigation of the crime. No testimony allowed by this subparagraph shall be allowed unless such actions and observations are contained in any report provided or made available by the district attorney to the defendant no fewer than five (5) days prior to the hearing.

As of last week, the Bill died in the Senate Judiciary Committee. Because I firmly believe this Bill will resurface in a different form during the next legislative session, I am going to take a Chairman's license at this point and give you a perspective from the District Attorney's office. The purpose of amending 22 O.S. § 258 is

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Q&A is peer reviewed; however, the articles do not necessarily reflect member viewpoints, and should not be relied upon for litigation purposes.

to avoid having several officers tied up for a preliminary hearing. This is a great expense, especially for rural areas which may have only two or three officers available in that location. The District Attorneys believe it is imperative that they have a case officer at the preliminary hearing to intelligently discuss the case, not just someone who can read a report.

As a former defense attorney, I know the natural reaction of some defense attorneys was to oppose this Bill. However, I suggest you keep an open mind should this Bill surface in the future. Approximately thirty (30) states and the federal system already allow this type of testimony at preliminary hearings. In that it could shorten many preliminary hearings, such changes would be advantageous for both prosecutors and defense attorneys. The defendant should not be caught unprepared in that it is the duty of the District Attorney to provide the defendant with all reports of a potential officer's witness testimony at least five days prior to the preliminary hearing. The failure of the District Attorney's office to provide those reports would negate the ability of the District Attorney to use just one officer. I know that preliminary hearings vary from jurisdiction to jurisdiction and from court to court, but the advantages of allowing such testimony far outweighs any detriments.

I also want to emphasize that this Bill was not the same preliminary hearing bill that was offered last year. Last year's Bill allowed extensive hearsay by any witness. This year's version does not. Hopefully, any newly introduced legislation will fine tune any concerns that the defense bar might have.

If there are those among you who would like to write your opposition, I invite and encourage your input. We are a cohesive group of change agents. I firmly believe such revisions would benefit both the prosecution and the defense bar; however, if you differ, please feel free to respond with a "Letter to the Editor," Mike Wilds, via wilds@nsuok.edu. It is vital we have multiplicity and diversity of voices.

I would also reiterate what I stated in my former letter about needing balanced participation. Towards that end I have been visiting with DA's and Assistant DA's to encourage them to submit ideas and articles of interest to both sides. This is your section, and I encourage every member to speak up.

Please remember the CLE on May 20, 2005, and make plans to attend. The year is going quickly and it is never too late to have your input.

Respectfully Submitted,

Dennis A. Smith

Chairman, Criminal Law Section
Oklahoma Bar Association

p.s. REGISTER EARLY! The link for the Juvenile Justice Seminar to be held at the Oklahoma Bar Association on May 20th is www.okbar.org/cle/2005/2005-05-20seminarID414.htm

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If you would like to be considered for a position as an officer or be a member of a committee, please contact Mike Wilds via wilds@nsuok.eud. In particular, we would like to have individuals receive an "early edition" of the ***Q&A*** to proof read for formatting, grammar and spelling. We, also, would love to have some committee members to assist Ben Brown with future CLEs.

CRIMINAL LAW SECTION PLAYS A PROMINENT ROLE IN OBA LAW DAY FESTIVITIES

by

JIM DRUMMOND

Jim Drummond is Chief, Non-Capital Trial Division of the Oklahoma Indigent Defense System. He is past Chairman of the Criminal Law Section of the Oklahoma Bar Association and can be reached at 405-801-2655 or jimd@oids.state.ok.us.

Our Criminal Section will play a prominent role in this year's law day program! The format is changing this year, roughly modeling the popular television show 60 Minutes. We will spotlight three segments. As a preview, the segments will be as follows:

1. Tracy Rhone won the Courageous Lawyer award for representing Aryan Nation member Rick Cain. She was nominated by her client for this award. This segment will focus on the representation of unpopular clients.

2. Patrick Cipolla, Tulsa attorney, represented Kim Schrader in an employment case (which he lost at trial) all the way to the Tenth Circuit, and won. He took the case pro bono and his firm, Gable-Gotwals, footed the bill for all expenses. The focus will be on Ms. Schrader and how her life changed for the better as a result.

3. Several jurors in the Terry Nichols trial have agreed to talk about their experiences in the trial from the perspective of what it is like to be a juror. Justice Steven Taylor has agreed to be present at the filming and to participate on the panel that follows the juror interview segment.

Also, Suzanne Lister, of the Nichols prosecution team, will be on the panel. In addition, (hopefully) Creek Wallace, Nichols lawyer, will be available to participate. Yours truly, Jim Drummond, will ask the jurors questions and moderate the panel which follows, under the auspices of our Section.

If you are interested in more information on this most worthy project, please feel free to contact me.

Jim Drummond
Past Chairman
Criminal Law Section of the OBA

OKLAHOMA CRIMINAL LAW LEGISLATIVE UPDATE 2005 SESSION

by

Craig Sutter

Craig Sutter is Deputy Executive Director for the Oklahoma Indigent Defense System. He is also the Treasurer for the Criminal Law Section of the Oklahoma Bar Association. H e is the Assistant Executive Director for the Oklahoma Indigent Defense System and can be contacted at (405) 801-2601 or csutter@oids.state.ok.us.

The 50th First Regular Session (2005) of the Oklahoma Legislature has now passed the halfway point. While numerous bills have already fallen by the wayside during the legislative process, several require special attention. **House Bill 1224** would have amended the statute governing preliminary hearings to permit the introduction of testimony of at least one law enforcement officer "relative to the actions and observations of other law enforcement officers concerning their investigation of the crime." The Senate committee deadline passed without a hearing of the bill in the Senate Judiciary Committee. It is now dormant for the remainder of the session, although it could be considered again during the second session in 2006. **House Bill 1880** failed to pass in the Senate Appropriations Committee. This bill contained numerous changes to criminal law and procedure, including increased punishment for second convictions of certain sex offenses, changing the length of participation in drug court, increasing punishment for destruction of tombstones, etc. **House Bill 1325** would have increased the minimum punishment for DUI convictions (e.g. one to two years for the first felony offense, one to five years for the second felony, etc.). It did not receive a hearing in the Senate Appropriations Committee prior to the Senate committee deadline, and is now dormant.

THE FOLLOWING TWO BILLS HAVE ALREADY PASSED IN BOTH THE HOUSE AND THE SENATE AND WERE SIGNED BY THE GOVERNOR:

SB 513 **Reporting of child pornography by computer technician. Amends 21 O.S. 1021.4; effective April 5, 2005.**

-adds commercial computer technicians to list of persons who must report child pornography to law enforcement

-as discovered on any file, recording, CD-Rom, magnetic disk or tape memory,

picture, graphic or image intentionally saved, transmitted or organized on hardware or media, including CDs, DVDs and thumbdrives

-applies to person who repairs, installs or services computers, including components, or materials relating to operation and maintenance of a computer or computer network or system, for compensation

-does not require computer technician or commercial film and photographic print processor to act outside the scope of the person's professional capacity or employment to search for prohibited materials

SB 644 **Pump Pirates Act. Amends 21 O.S. § 1740; effective November 1, 2005.**

-increases fine from $100 to $500

SET FORTH BELOW ARE DETAILS FROM SEVERAL SELECTED BILLS WORKING THEIR WAY THROUGH THE LEGISLATIVE PROCESS. THE INFORMATION REGARDING THESE BILLS IS EFFECTIVE AS OF APRIL 12, 2005:

HB 1465 **Victim protective orders - expungement. New law codified at 22 O.S. § 60.18; Status: Do pass by Senate Judiciary Committee on March 30, 2005**

-grants authorization to file a motion for expungement of a VPO where:

-ex parte order terminated due to dismissal of petition before full hearing; denial of petition upon full hearing; or failure of plaintiff to appear for full hearing, and at least 90 days have passed since date set for hearing

-plaintiff failed to appear for full hearing and at least 90 days passed since date last set by the court for full hearing, including last date set for continuance, postponement or rescheduling

-plaintiff or defendant had order vacated and 3 years have passed since order vacating entered

-plaintiff or defendant deceased

-provides for procedure for petitioning court for expungement and sealing of court records

-does not prohibit introduction of evidence regarding sealed actions at any hearing or trial for purposes of impeaching credibility of a witness or as evidence of character testimony

HB 1807 **<u>Retention ballots for district and associate judges in districts 7, 14 and 26</u>. Amends 20 O.S. §§ 92.1, 92.8a, 92.15a and 92.27; Status: Do pass by Senate Judiciary Committee on April 5, 2005**

-beginning with 2006 elections, election of district and associate judges in Districts 7 (Oklahoma), 14 (Tulsa and Pawnee) and 26 (Canadian) shall be conducted using a retention election system

-beginning January 8, 2007, and every term thereafter, judges sworn in on or before January 13, 2003 elected by retention

-judges appointed after January 13, 2003 to fill vacancy shall serve remainder of term - upon expiration of term the office is open for election as though in a non-retention judicial election

-judges elected in open filing election in 2006 and open filing elections thereafter shall be eligible for further election by retention

SB 504 **<u>Drug courts - eligibility determination</u>. Amends 22 O.S. §§ 471.2, 471.3, 471.4 and 471.6; Status: Re-referred to House Appropriations and Budget Subcommittee on Health and Social Services on March 21, 2005**

-court, and not the district attorney, will determine and approve offender's eligibility for participation in drug court

-objection by district attorney would prompt court to determine whether the offense is one which would prohibit offender from drug court participation

-if district attorney and defense counsel cannot agree on written plea agreement, court can determine appropriate punishment, in addition to option of withdrawing case from drug court program

SB 627 **<u>Domestic abuse - court-ordered counseling and treatment</u>. Amends 21 O.S. § 644; Status: Do pass as amended from the House Corrections Committee on March 29, 2005**

-counseling or treatment for persons convicted of domestic abuse as condition of suspended sentence or probation changed from mandatory to discretionary on part of court (changes mandates of House Bill 2380 passed during 2004 Session with an effective date of July 1, 2005)

-court will have discretion to order defendant to participate in counseling or treatment as a condition of a suspended sentence or probation for domestic abuse

-if ordered to participate in domestic abuse counseling or treatment program, minimum program attendance of 52 weeks for a felony offense or 48 weeks for a

misdemeanor offense is required

-court may set review hearings no more than 120 days after defendant ordered to participate in treatment

SB 646 **DNA testing of all felons. Amends 22 O.S. § 991a; 57 O.S. § 530.1; 74 O.S. §§ 150.27 and 150.27a; Status: Passed by the House on April 6, 2005, with the enacting clause stricken**

-all felons will be required to submit to DNA testing

SB 807 **Rape and sodomy - expanded definitions regarding students and age of victims and defendants**.

-Amends 21 O.S. §§ 888 and 1111; Status: Meeting scheduled for House Corrections Committee on April 12, 2005

-forcible sodomy definition extended to sodomy committed by person 25 years or older on person under 18 years

-2nd forcible sodomy conviction, where victim is under 18 years and the defendant is 25 or older shall not be eligible for probation, suspended or deferred sentence (currently applies if victim under 16 years)

-3rd forcible sodomy conviction, where victim is under 18 years and the defendant is 25 or older shall be punished by life or LWOP (currently applies if victim under 16 years)

-forcible sodomy definition extended to sodomy committed by employee or agent of public, parochial or private elementary, junior high or high school, private or public vocation school, upon person who is student or person under supervision of school system not legally married to employee

-rape definition would include victim under 18 and perpetrator 25 years or older

-where victim is a student, definition of rape extends age of victim to less than 21 years (now at least 16 and less than 18)

THE FOLLOWING ARE VARIOUS BILLS AFFECTING CRIMINAL LAW AND PROCEDURE CURRENTLY PENDING IN THE LEGISLATIVE PROCESS (AS OF APRIL 12, 2005):

HB 1013 Modifies statute of limitations and limits prosecution of certain crimes

HB 1226 Court costs in criminal cases; sheriff's service fee increased

HB 1227 Requests for investigations regarding O.S.B.I.; allowing Bureau to reveal confidential information under certain circumstances

HB 1242 Pretrial Release Act - authorizes placement of a monitoring device; payment of supervision fee as a condition of pretrial release

HB 1243 Civil liability exemption for certain persons for the storage of firearms in locked vehicles

HB 1267 DOC authorized to respond to intermediate sanctions for technical violations of probation; requires preponderance of evidence for certain determinations

HB 1277 Domestic abuse; reports of criminally inflicted injuries; inspection and disclosure of juvenile court records

HB 1288 Adding substances to Schedule I drugs and removing substances from Schedule II; adding substances to Schedule III

HB 1294 Prohibits false report of missing child activating early alert warning system

HB 1304 Driving while license canceled, denied, suspended or revoked

HB 1318 Exception for O.S.B.I. criminal history records modified; electronic transmittal of fingerprint images

HB 1321 Exception from application of certain prohibitions on information release provided by the Uniform Tax Procedure Code

HB 1379 Injury to cemetery or tomb; penalty modification

HB 1395 Implied consent to breath and blood tests

HB 1405 Juvenile drug court added as option to juvenile adjudication proceedings; prohibiting certain treatment of juveniles

HB 1434 Appointment and revocation of undersheriffs and deputy sheriffs

HB 1450 Sex Offenders Registration Act; clarifying registration

HB 1461 Transporting intoxicating beverage or low-point beer

HB 1468 Permitting unauthorized minor to drive

HB 1475 Establishing the Oklahoma Crime Victims Justice Task Force

HB 1502 Penalty for transporting intoxicating beverage or low-point beer; issuance of yearly

decals for certain vessels and motors; payment exemption for certain registration fees

HB 1507 Standard of proof for rebuttable presumption regarding defendants discharged on bail; drivers license information obtained from purchaser to purchase certain items

HB 1524 Expands crime regarding harming, mistreating, or killing service dogs to include service animals

HB 1540 Removing authorization for governing body to appoint mayor as judge; clarifying judicial requirements for conducting certain trials; amends municipal court bonds

HB 1544 Oklahoma Self-Defense Act - modifies renewal requirements for concealed handguns; limits game warden authority to issue citation or arrest in certain circumstances

HB 1584 Sales activities on Sunday regarding motor vehicles; modification of conditions for holding certain off-premise event

HB 1598 Fine for certain speed restriction violation

HB 1613 Privilege for insurance compliance self-evaluative audit; prohibiting person performing audit from examination; in camera determination for civil or criminal proceedings

HB 1623 Limiting scope of appearance in which prisoner is witness or defending party; limiting use of writ of habeas corpus ad Testificandum; clarification of requirement of inmates exhausting administrative remedies prior to action

HB 1655 Restrictions on signatures for certain petitions

HB 1698 Prohibits dissemination of certain information on court-controlled website

HB 1722 Habitual wildlife violators pay reinstatement fees prior to applying for new hunting or fishing license

HB 1804 Scope of prohibited acts regarding obscene, threatening or harassing phone calls expanded

HB 1970 Modification of hazing penalties

HB 1971 Child pornography

HB 1985 Identity Theft Protection Act

HB 2005 Oklahoma Interpreter for the Deaf Act

HB 2058	Ethics - prohibition against receipt of contributions in certain places
SB 15	Anti-Crime Operation Program Act of 2005
SB 270	Ammonium nitrate storage to be secured against vandalism; authorizing retailers to refuse sale to certain persons
SB 296	Form of payments acceptable for certain fines; authorizing payment of certain costs from court fund
SB 327	Supervision fee; requires fee for person supervised by certain provider; court to waive fee under certain circumstances.
SB 329	Setting attorney fees in certain cases under specified circumstances
SB 430	Posting against trespass; requirements
SB 432	Exceptions for warrant searches of certain dwellings
SB 440	Copy of sex offender registry provided to State Superintendent of Public Instruction of Department of Education
SB 458	Assault and battery upon OJA employee
SB 487	Elections
SB 513	Disclosure of obscene materials
SB 518	Prohibiting certain acts regarding sale or serving of low-point beer
SB 546	List expanded of persons not required to register and may lawfully possess controlled dangerous substances
SB 627	Penalties for assault and battery
SB 629	Definition of electronic monitoring; fee increase
SB 631	Costs and fees for electronic monitoring; prohibiting certain persons from entering certain establishments
SB 636	Refusing to receive or fingerprinting prisoners
SB 651	Modifies certain prohibited acts regarding intoxicating liquor
SB 663	Prohibits alcohol inhalation devices

SB 666	Possession of intoxicating beverages by under age person
SB 682	Paint ball guns and taser weapons
SB 684	Notification and payment for outstanding misdemeanor warrants
SB 702	Prohibits participation in preparation, dissemination, or broadcast of certain material
SB 703	Negligent homicide; removes certain age limitation on offense
SB 715	Crime Victims Compensation Act
SB 725	Expands number of prisoners allowed to be supervised by jailer or certain other persons
SB 740	Creates the Juvenile Drug Court Act.
SB 759	Delayed Sentencing Program for Young Adults
SB 772	Bail bondsmen; modifying procedures for surrender
SB 777	Prohibits persons from wearing certain decorations or medals
SB 779	Creates State Board of Examiners of Certified Courtroom Interpreters
SB 806	Tattooing and penalty
SB 816	Prohibits false report of missing child activating early alert warning system
SB 819	Prohibition against storing firearms in locked vehicles
SB 846	Workers' compensation penalties
SB 867	Driving while license cancelled
SB 870	Registration of sex offenders
SB 901	Motor vehicles - parking areas for physically disables persons
SB 920	Authorizing appointment of court referees for certain purposes
SJR 5	Directing the Secretary of State to refer an amendment, providing that Legislators may not be paid or participate in state funded programs during incarceration

TRACKING PENDING LEGISLATION?

Copies of all pending legislation may be downloaded from the Legislative Services Bureau web site at http://www.lsb.state.ok.us or you may obtain a copy of the full text of the bill by calling the Senate Bill Distribution Office at (405) 521-5515.

NEED TO CONTACT YOUR LEGISLATOR?

You can locate your state and federal legislators by entering your address and zip code on the state site http://www.lsb.state.ok.us.

NEW MEXICO GOVERNOR SIGNS BILL MANDATING ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS

The New Mexico Legislature approved in their 2005 legislative session HB 382 that requires custodial interrogations to be recorded in felony cases. Additionally, the recording must include the Miranda warning. The newly approved law provides that the recordings must be made; however, it allows for a "good cause" exception to recording requirement. Similarly, it does not require recording when "the electronic recording equipment was not reasonably available."

Thirteen other states (13) states introduced bills during the 2005 legislative session that would require electronic recording of interrogations (if passed). The states are California, Connecticut, Florida, Maryland, Missouri, Nebraska, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Tennessee, and Texas.

CONNECTICUT LEGISLATURE CONSIDERS EQUALIZATION OF CRACK COCAINE PENALTIES

The Connecticut legislature, under HB 5076, is attempting to equalize the penalties for possession of “crack” cocaine and powder cocaine. Under HB 5076, the disparities for the poor man’s drug and the rich man’s drug would be eliminated. If passed, this would leave only 12 states with disparities that lead to de facto racial discrimination where more African Americans are arrested for possession of "crack" cocaine than powder cocaine, and thus receive longer sentences. *See* www.drugpolicy.org/news/040405ctbills.cfm

SCHOLARLY ARTICLE

ANKLE BRACELETS THAT TRANSDERMALLY DETECT ALCOHOL

by

TARA ROBERSON

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Tara Roberson is a graduate student at Northeastern State University majoring in Criminal Justice. She is also an editor for the Stillwater NewsPress. She can be contacted at troberson@stwnewspress.com.

Drinkers beware! If you are arrested for DUI in Payne County, you could get a new fashion accessory as part of your punishment – and it's not an orange jumpsuit. It's an ankle bracelet that can detect alcohol in your system.

It's called SCRAM (Secure Continuous Remote Alcohol Monitor) — the first and only automated alcohol-testing ankle bracelet — and it is now being used by the Payne County Drug Court and Payne County District Courts in an attempt to curb the current alcohol trends.

"We file about 20 to 25 DUI cases every week," Payne County District Attorney Robert L. Hudson said. "We would recommend jail time for every single one of those cases, but our jail situation does not permit that." Hudson said he was approached by Payne County Drug Court Director Brian D. Hendrix about adding the ankle bracelets to sentencing recommendations his office makes in DUI cases.

Hendrix said he is always looking for new ways to keep track of those people who have been ordered by the courts to complete the Drug Court Program. "Testing for alcohol has always been a challenge because it doesn't stay in someone's system for a long period of time like drugs do," he said. "We have increased home visits, but unless they have alcohol on the premises or are intoxicated when we happen to be there, we really have no way to monitor it."

SCRAM can test offenders at least 24 times per day, every day, regardless of their location. Each ankle bracelet has a wireless modem that the offender is required to plug into an analog phone jack in their residence. At certain times of the day, usually at bedtime, they are required to get within 200 feet of the modem, which then automatically sends a report to the monitoring center.

"We started out using them as sanctions for those in Drug Court who kept reoffending," Hendrix said. "Sanctions" are punishments for those who are already in the program, but break the rules. Those who continue to break the rules – even after being ordered to wear the ankle bracelets will eventually end up behind bars.

Hendrix said the ankle bracelets have been put on eight to ten people so far and seem to be working out very well. "They don't like wearing them," Hendrix said.

He said those who have been ordered to wear them because they have been caught drinking while in the Drug Court Program have learned the hard way that the ankle bracelets are essentially electronic tattletales. "If someone drinks while they are wearing one, the ankle bracelet detects the alcohol and sends an alert to the monitoring company," he said. "Then when I sign on to check out the reports, I receive an alert that tells me the person has been drinking and we go out and pick them up."

Not only do the ankle bracelets detect alcohol transdermally, or through the skin, they also can tell when someone is tampering with them or trying to remove them. According to the literature from the company that produces the ankle bracelets, Alcohol Monitoring Systems, Inc., SCRAM Programs are currently operational in over 200 jurisdictions in 20 states, including courts in Ohio, Texas, Indiana, Minnesota, Arizona, Utah, Washington and California.

Hudson said the preliminary use of the ankle bracelets have been encouraging enough to add the anklets to sentencing recommendations on misdemeanor and felony DUI cases. "We met with the Payne County judges and they were very supportive," Hudson said. "Having their support was crucial because there is no point to making this a possible punishment if the judges were not willing to sentence people to wear them."

Hendrix said the only bad thing about the anklets that caused any hesitation was the cost to the offenders ($10 a day) to wear the ankle bracelets. Those sentenced to Drug Court essentially have to pay for their punishment. Instead of going to jail or paying the enormous fines and court costs associated with misdemeanor and felony arrests, they instead pay for their treatment plan through Drug Court. "If someone is sentenced to wear the ankle bracelet for 60 days, that will cost them $600," Hudson said. "It's a lot cheaper than the fines associated with DUIs and a lot more appealing to some than spending time in jail."

Because SCRAM is not labor-intensive like breath, urine and blood testing, agencies like Drug Court can increase its caseload without having to hire more people or create burnout in existing employees.

Hudson said he knows people make bad decisions like drinking and driving and probably will not be recommending the ankle bracelets for first-time offenders, but those who get caught a second time will not be so fortunate. "A second time indicates a problem," he said. "These will allow us to address the serious problem of drinking and driving in our community."

For more information on SCRAM, see www.alcoholmonitoring.com.

AUTHORS NEEDED

Are you interested in authoring a column for the *Q&A*. We need individuals to write updates on case law, statutes or recent individual cases that affect your area of practice. If so, contact Mike Wilds, Editor *Q&A* via wilds@snuok.edu or 918-449-6532.

WHEN A PROSECUTOR ARGUES INCONSISTENT THEORIES OF GUILT, OR CULPABILITY, ARE THE RIGHTS OF THE ACCUSED EVER VIOLATED?

by

Vickie Werneke

Vicki Ruth Adams Werneke is Chief of the Capital Post Conviction Division of the Oklahoma Indigent Defense System. Ms. Werneke received her undergraduate degree from Oklahoma City University and her Juris Doctorate from the University of Oklahoma College of Law. Ms. Werneke began her legal career as a judicial assistant to the late Judge Tom Brett with the Oklahoma Court of Criminal Appeals. After Judge Brett's passing, Ms. Werneke was an attorney with the post conviction division. When the federal funding for the post conviction division was eliminated, Ms. Werneke went to the office of the Federal Public Defender for the Western District of Oklahoma in the Death Penalty Federal Habeas Corpus division where she represented death row inmates in federal court for over six years. In February 2002, she returned to the post conviction division as the Chief.

The basic answer to the question is when the argument is based on a false presentation and interpretation of the evidence.

A horrendous crime occurred in California in July 1988 when Viivi Piirisild, an Estonian-American, was murdered by Peter Sakarias and Tauno Waidla. Apparently, there is no doubt that the two men were both involved in the attack on Mrs. Piirisild where the cause of death was fatal blows to her head with a hatchet. At the first trial where Waidla was prosecuted, the prosecutor argued Waidla was the one who inflicted the mortal wounds. At the second trial where Sakarias was prosecuted, the same prosecutor argued Sakarias threw the fatal blows. Under the forensic facts of the case, both theories could not be correct. Apparently the prosecutor knew, or at least should have known, the theory that Sakarias threw the fatal blows was false. At the conclusion of separate trials, Waidla and Sakarias were sentenced to death.

On March 3, 2005, the California Supreme Court issued one opinion addressing these two capital cases that had raised a similar issue: **In re Sakarias**, __ P.3d __, 2005 WL 486783 (Calif. 2005). The main issue addressed by the court was whether the petitioners' rights to due process and fair sentencing determinations were violated when the prosecutor argued in the two separate trials the inconsistent theories of who was responsible for the fatal blows. The court found the prosecutor had argued inconsistently in the two trials without a good

faith justification. But the court found only Sakarias was entitled to relief.

The specific facts of the case are highly relevant to the issue. The medical examiner found the cause of death was the combination of blunt force impacts to the victim's head, stab wounds to her chest, and chopping wounds to her upper head. These wounds were inflicted right before or at the time of death. One of the chopping wounds was administered with such tremendous force that it penetrated the skull and removed a flap of the scalp. The medical examiner found this chopping wound was inflicted before death and the prosecutor argued it was the most fatal blow. The other chopping wounds to the head were administered with less force either at the time of death or shortly after.

The statements of the two petitioners conflicted on when, where, and by whom the blows to the head with the hatchet were administered. The statements were apparently consistent in that Waidla had the hatchet and Sakarias had the knife at the beginning of the attack in the living room of the house. Sakarias stated that after the body was dragged into the bedroom, he hit the body with the hatchet. Waidla admitted to only one blow with the back of the hatchet. At his trial, he recanted his statement and testified he left town three days before the murder.

At Waidla's trial, the prosecutor questioned the medical examiner about an abrasion on the victim's lower back. According to the medical examiner, the wound was post-mortem, i.e. after the time of death. The prosecutor's theory was this wound occurred when the body was dragged to a bedroom after death had occurred in the living room. Since the one chopping wound to the head that severed the skull was one of the main causes of death, the prosecutor argued it could have only occurred in the living room before the body was dragged to the bedroom. Because Sakarias's statement was not introduced at Waidla's trial, the prosecutor argued that Waidla alone administered all of the chopping wounds and that the initial attack in the living room was fatal.

At Sakarias's trial, the testimony elicited from the medical examiner was basically similar to that presented in Waidla's trial, centering around the multiple blows that were the cause of death, especially the hatchet wounds to the skull. However, the prosecutor did not ask the medical examiner about the abrasion wound to the lower back that was inflicted post-mortem. In his statement to police, Sakarias admitted that he twice hit the victim in the head with the hatchet after the body had been dragged into the bedroom. The prosecutor then argued to the jury that Sakarias was the only one who administered the blows to the skull and that those blows were the ultimate cause of death.

After the issue had been raised by both Waidla and Sakarias, the California Supreme Court consolidated the cases for review of this issue and remanded the case to a referee for a review of the factual questions. After hearing testimony, especially from the prosecutor, the referee made some significant findings that the parties and the California Supreme Court accepted as true.

1. There was substantial evidence to support the conclusion the prosecutor knew of the contrary evidence for each case, but chose to ignore it when it did not fit the theory he was advancing in each case.
2. There was substantial evidence the prosecutor knew, or at least had evidence that the victim was dead before she was dragged to the bedroom.

3. The prosecutor's testimony that he did not attempt to introduce Sakarias's confession at Waidla's trial was supported by relevant caselaw at that time.

4. However, the circumstantial evidence supported the conclusion that the prosecutor's failure to ask the medical examiner about the abrasion caused by the dragging in Sakarias's trial was deliberate because it was not consistent with his theory in that case.

After considering all of this information and discussing the relevant case from the United States Supreme Court and Circuit Court of Appeals, the California Supreme Court concluded "that fundamental fairness does not permit the People, without a good faith justification, to attribute to two defendants, in separate trials, a criminal act only one defendant could have committed." The court found that there was a deliberate manipulation of the evidence put before the jury, at least in Sakarias's case, that "impermissibly undermines the reliability of the convictions and sentences thereby obtained." The court found that because the evidence clearly established one theory of the case, as argued in Waidla's trial, and the falsity of the other, as in Sakarias's trial, that relief was only required on the latter. The court found Waidla was not able to demonstrate significant prejudice to warrant relief. The court found the prosecution's use of inconsistent theories of guilt or culpability "gives rise to a due process claim . . . similar to a claim of actual innocence."

The State in California can petition the United States Supreme Court for a review of the granting of relief in Sakarias's case. And Waidla's attorneys will probably request further review as well. The issue will probably be litigated further.

The Oklahoma Court of Criminal Appeals addressed this issue for the first time in **Littlejohn v. State**, 989 P.2d 904 (Okla. Crim. App. 1998). In that case, the prosecution argued in two separate trials of co-defendants that each was the actual shooter of the victim in the convenience store. Finding no error, the Court reasoned the prosecutor arguing the alternate theories of the murder was proper because of "the uncertainty of the evidence". "The issue of whether Littlejohn was the actual shooter was an appropriate question for the jury." 989 P.2d at 909. However, Mr. Littlejohn's death sentence was vacated and remanded for a new sentencing hearing on a separate issue.

I would hope that the prosecutors of this State would consider the **Sakarias** opinion carefully and be wary of following this prosecutor's example for "[the] State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth." *quoting* **Smith v. Groose**, 205 F.3d 1045, 1051 (8th Cir. 2000).

Juvenile Justice Seminar

Mark your calendar for May 20, 2005. The Juvenile Justice Seminar is sponsored by Criminal Law Section of the OBA. See page 35 for details! The OBA link for registration is www.okbar.org/cle/2005/2005-05-20seminarID414.htm

WAR STORIES

by

JACK HAGGARD

Under the delusion that having a law license equates to knowing how to practice law, Jack Haggard rented a building and hung a shingle 6 weeks after being sworn in as an attorney. Currently, he is on the OIDS contract, represents half of the children in Bryan county taken into DHS custody, and has an active family, bankruptcy, and civil practice. An admitted workaholic, Jack seeks short term rehab in the gym, teaching Kenpo Karate classes, learning Ninjutsu, and singing in the university's symphony chorus. Like most attorneys, he claims that the second most welcome sight in his life is the bottom of a beer mug just after winning an extremely difficulty case, and the first most welcome sight is the waitress headed his way with a full mug just after winning an extremely difficult case. He can be contacted via e-mail at pjhaggard@mac.com.

I have been asked to write about a few "War Stories" that are designed to "meld prosecutors and defense attorneys across the state." I'm not sure it's possible to accomplish that task without the use of mind altering substances, which we all work zealously in the courts to remove from the streets. Accordingly, I will take a few cases which are wins for each side, encapsulate them with a bit of humor, point out how the law was used effectively, and pass them along. Even though a limited license is granted to any reader to use this in their practice as needed, they should never be used against me or a client I am representing.

MOMMA'S DON'T LET YOUR BABIES PLEAD OUT TO RID.

Five boys with no money called the pizza guy, beat him up, took the pizza and drove off. The pizza guy (a reserve police officer) followed in a high speed chase and has returned to his possession a two liter bottle of coke via a hole in his windshield at 50+ mph. Unfortunately, the hole was created contemporaneously with the return of the bottle. All five boys were found after a several hour, multi agency search.

Four of the boys plead to RID. I read the Youthful offender statute and made a couple of objections, and state requested more time to respond to the objections. When we appeared 90+ days later, the judge dismissed the case because we were outside the 90 days under the Youthful Offender statute for the prelim.

The DA re-filed a delinquent petition and certification of my client as an adult. I actually wrote a brief (those who know me know how serious I am when I actually write a brief) saying why the state can't do this, and why it should be dismissed. The Judge sustains the motion, but my 17 year old client wore a shirt to his hearing that says, "save water, drink beer." The judge worked the

shirt into his lecture about why dismissing the case doesn't mean my client isn't guilty.

The mommas of each of the four other boys who are at RID, are at the courthouse, watch my client walk out of the courtroom without the shackles their sons had to wear, and begin demanding to know why their sons got RID and my guy gets off with nothing. I'll take a walk of any client any day of the week, (especially after they confessed), *but I'm running scared the mommas will come yell at me next!*

WHAT TRAINING AND EXPERIENCE?

A Police officer, conducting a Terry pat down during a traffic stop, feels a "soft, cylindrical, pliable bulge" near the Defendant's front jeans pocket, and asks, "what is this bulge?" The Defendant replies with a rude euphemism for male genitalia. In his report, the officer writes, "from my training and experience, I knew the bulge was not the suspect's genitalia, so I reached into his pocket to retrieve the item." Thank goodness, the officer found marijuana! But, the case plead long before anyone had to explain what training and experience CLEET gives for this particular issue.

BRAVE CONFESSION

In a non jury trial for *indecent exposure*, a pro se Defendant takes the stand to explain what he was doing, and why the state's witness did not see what he testified to seeing. The man looks at the judge and says, "Judge, it's too small for the officer to have seen it that far away." In dismissing the case, the judge says, "Any man who admits it's too small to be seen can't possibly be lying."

MEMORABLE SENTENCE

At the conclusion of closing arguments, an ADA recommends to the jury a sentence of 17 years. The verdict comes back guilty with the recommended sentence. A juror approaches the ADA and says, "17 years was so unusual, we figured you had a reason for requesting it. I sure would like to know why you chose 17 years." The ADA would never admit it on the record, but 17 was the first memorable number that popped into his head. Oklahoma leads the nation with the largest per capita incarceration of females. According to the Oklahoma Commission on Children and Youth, 2,351 women were in prison as of July 31, 2004. ***Nearly 49.9 percent of these women are in prison for drug offenses!***

NEWS FLASH:
WHAT'S UNCOMFORTABLE FOR THE GOOSE IS UNCOMFORTABLE FOR THE GANDER

A group of female employees at a downtown criminal law firm were complaining about being forced to wear apparel which required them to wear pantyhose. Over several months, they kept raising the issue with the male managing partner, who dismissed their concerns, and continued to demand "professional attire." After tiring of the constant badgering on the issue, he decided to secretly wear pantyhose under his suit for a full week. To this day, female employees in the firm are allowed to wear apparel which does not require pantyhose.

FLATTERY WILL GET YOU CONVICTED

During closing arguments, a young prosecutor set out a brilliant argument for conviction. The defense attorney, who knew his client didn't have a prayer of acquittal, stood up for his closing argument, and the first words spoken were, "Doesn't the DA have nice legs? She sure looks good in a dress." The flustered ADA objected, but the judge asked her, "Are you objecting to being told you have nice legs?" By this point, the judge, jury and defense attorney were all suppressing raucous laughter. The jury convicted, but the attorney still refuses to wear anything but pants to court.

TWELVE ANGRY, CONFUSED MEN

In a burglary jury trial, the ADA, in first closing, masterfully argues why each and every instructed element is present in the case. The seasoned defense attorney stands up, and without referencing a single jury instruction, argues why the facts of the case do not match each and every element of knowingly concealing stolen property. In overruling the state's objection, the judge says, "It's his argument, he can argue whatever he wants, and he hasn't misstated a single instruction." The jury was so befuddled by the confusing and wildly inconsistent arguments, a compromise verdict was reached.

SAY WHAT YOU MEAN

After conviction at jury trial on a multi count information, a defense attorney presents mitigating evidence at formal sentencing. In arguing how the judge should impose the numerous sentences, the defense attorney argues, "Justice demands you run these sentences consecutively." In zealous advocacy, the attorney makes the same argument over and over again: Run these sentences consecutively! The Defendant, realizing his attorney's mistake, is beside himself, but the attorney shushes him because he needs no help making his brilliant argument to the court. The defense attorney finished with his oration, the prosecutor stood up and simply said, "We concur with counsel for the defense. Justice demands you run these sentences consecutively."

EX PARTE COMMUNICATION ISN'T ALWAYS A BAD THING

A defendant on a daily letter writing campaign to get a PR bond, sent the judge a letter complaining that the jail refused to give him proper medical treatment for having a bloody stool. Tired of the letters, and not wanting to deal with it, the judge ordered the defendant's court appointed attorney to investigate and report back to the court. To avoid ex parte communication the attorney relayed the unpleasant and time consuming ordeal in an e-mail to the prosecutor. The following is the reply e-mail from the DA's office:

You've run into a total brick wall.
We specialize in litigation
Rather than anal examination,
You are all alone in matters fecal.

FOR EVERYTHING ELSE, THERE'S MASTERCARD

One Defendant. $500,000 in security costs. $4 million in attorney fees. Both sides of the aisle working together in an adversarial system that ensures justice for even the most heinous acts of terrorism: *Priceless.*

No matter the verdict, no matter the stakes, we are all guardians of the law: justice, liberty, security, and freedom. High and low profile cases alike, we should be adversarial, but not confrontational. We are members of the same team, we merely practice with each other on offense and defense.

SCHOLARLY ARTICLE

A LESSON IN VOIR DIRE

by

Charles L. Sifers

Charles Sifers offices in Oklahoma City and practices throughout Oklahoma. His practice is almost exclusively DUI defense and he lectures frequently on DUI courtroom techniques. He is a frequent contributor to the *Q&A* as well as the *Gauntlet.* He can be contacted at (405) 232-3388 or charles@siferslaw.com.

I have told this story more times than I can recall. And, it ALWAYS produces great laughs. However, it was only last week, while telling this story to Assistant Oklahoma County District Attorney, Jay Trenary, that I learned the **lesson** of this story. Here again is the story:

The story takes place somewhere near the January jury term of 1997. Of course, the case was a DUI misdemeanor case. The two (2) ADA's and I had argued various motions for most of the morning. I had won some and lost some.

Finally, the Judge placed twelve jurors in the juror box. The voir dire had gone on for about two (2) hours, during which each of us removed various jurors for cause. It had been kind of brutal. Neither side had resorted to peremptories. Finally, in mid afternoon, a woman replaced a removed juror and the Judge did the standard introductory questions. It was here that it got odd. In fact, it went off the charts. It went sort of like this:

"Mrs. Whatever, do your know the defendant, the lawyers, etc, etc?".
"No".
"It is likely that there will be the following witnesses . . . . . ., do you know any of them?"

"Yes, I know Corporal Billy Bob".
" How do you know him?"
" He's my ex-son-in-law."
"Well (he was already seeing a problem), how would you describe your relationship with Corporal Billy Bob?
"Sad" (showing a mixture of anger and resolve).
"Well,(where do I go with this?) could you listen to the testimony and be fair and neutral in evaluating his testimony if you were to be chosen to set on this jury?
"No. You can't believe a thing that son of a bitch tells you."

Needless to say, the ADA came off her chair like the seat had caught fire, requesting to approach the bench. She moved for a mistrial. Oh no, I responded. The court can simply give a cautionary instruction (of course, pointing it out once again) to ignore Mrs. Whatever's statements. No problem. The Judge - one of the very best before which I have ever practiced - decided to remove her (no kidding) and instructed us to continue. Let's see if anyone was affected by her statement.

The first juror asked said that he did not think that he could not ignore what she had said and was not sure that he could be fair. The next one, too. The other jurors quickly got the clue as to how to avoid sitting on this jury. It went on until it was almost five in the afternoon and we only had 11 jurors left. We had run out of subs in the venire.

When the Judge summoned us to the bench, the ADA re-urged the mistrial motion. The judge advised us to return the next day with support for both of our positions and he would rule on the motion. We did and he mistried the case, stating that he was concerned that the entire pool could have been poisoned back in the jury assembly room with the story. He reset the trial to the next term. He, frankly, did the right thing.

My client caved in and sent me back into the ADA to negotiate the case again. He told me that he could not go through this again. We ended up with a DWI conviction and a fine. Back then, a DWI conviction did not revoke the driver's license and I had won the implied consent hearing earlier. Not bad, really, since he had a prior and the ADA - before this attempt at trial - would only offer a conviction to the DUI.

None of us - not the ADA's or the Judge or I - had ever seen anything like what occurred in that trial that afternoon; not before or since. That Judge and I occasionally still laugh about it.

A good story to tell. But, it was on the thousandth telling of it that anyone hearing the story pointed out the glaringly obvious lesson of it. Jay Trenary - former Woods County DA and former assistant Attorney General and now Oklahoma County DA - did. What if she had said **wonderful** things about the Corporal?? Wait . . . . . .

The lesson here is that, while it is likely that this woman, under these circumstances, would not have anything good to say about this witness, she **might** have. She might have felt the divorce was all her daughter's fault and this guy had been a "prince" through it all. He helped the grandkids through a horrible time, etc. In either event, the emotion would have been strong and communicated

with this positive message just like it was with the negative one. And, was it as likely, Trenary pointed out, that a judge would have aborted the whole thing - though THIS one probably would have - and let me start over if the response had been, "Corporal Billy Bob is the most honest man since Christ and whatever he tells you - no matter how unbelievable - is the absolute gospel?" Probably not, in most courts in this State. Yeah, let's have a cautionary instruction on that. Point it out just ONE more time. That door can swing BOTH ways, huh?

The deeper lesson is you have **NO IDEA** what is waiting for you in that group who will eventually be asked to determine your client's case, and maybe his life. It could be extremely bad OR good. You do not know.

ANYTIME that some one in the jury group indicates that they might know ANYONE involved in your case, you should request that the voir dire continue with that juror, individually, in chambers to avoid this problem. In smaller towns/courts, this is even MORE important to keep in mind. I once tried a case in Beaver County and with the first 12 we put in the box, nine of them knew either the arresting officer or his wife who worked at the local bank.[1] Your judge is likely to allow it (Judge Riffe did). If the judge does not, you can make a record which can protect you AND your client. It might take longer, but will be far more safer - for BOTH SIDES - in trying to seat a jury to hear your case. Do not let what happened - or COULD have happened - above occur to you. As many of us know, you can not guess what that next potential juror might say.

Feel free to use my story to justify your request. It is still a good story . . . . ..

I PROMISE TO TELL THE TRUTH

Somewhere in a small Oklahoma town, the local prosecuting attorney called his first witness to the stand. She was sworn in, asked if she would tell the truth, the whole truth and nothing but the truth, so help her God.

Then, the prosecuting attorney approached the woman and asked, "Mrs. Jones, do you know me?" She responded, "Why, yes, I do know you, Mr. Ben. I've known you all my life and frankly, you've been a big disappointment to me. You lie, cheat on taxes and manipulate people for a living. You think you're a big shot, but your are nothing more than a two-bit shyster. Yes, I know you!"

Stunned, the lawyer backed away not looking at the jurors. Then, he asked, do you know the defense attorney?" She replied, "Why, yes, I do. I've known Mr. Bob for many years. He is lazy and a bigot. He has a drinking problem and cheats on his wife. I know him."

At this point, the judge called both counselors to the bench, and in a very quiet voice said, "If either of you morons asks her if she knows me, you're going to jail."

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[1] We did several in his chambers. However, I never once thought about Mrs. Whatever and what problems that we might have been avoiding by doing it.

SCHOLARLY ARTICLE

RETROGRADE EXTRAPOLATION IS NOT JUNK SCIENCE WHEN CORRELATED WITH THE "TOTALITY OF CIRCUMSTANCES"

by

PEGGY TOBIN

Peggy is a graduate student at Northeastern State University majoring in Criminal Justice. She is also a Special Agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives in Tulsa, Oklahoma. She can be contacted at peggy.tobin@atf.gov.

Retrograde extrapolation is not junk science when correlated with the "Totality of Circumstances Doctrine." Retrograde extrapolation is a mathematical calculation used to estimate a person's blood alcohol level. This estimate is taken from a particular point in time by working backward from the time the blood alcohol test was taken. It is also the term given to the assumption that blood alcohol levels drop after a citizen stops drinking. Accordingly, the presumed level of blood alcohol, at the time of the traffic stop or collision, is theoretically equal to the blood alcohol test result.

I support retrograde extrapolation when used with other supporting evidence of intoxication. Theoretically a test of the "Totality of Circumstances" should be adopted. Standardized Field Sobriety Tests, Breath Alcohol Concentration Testing (BAC), and the officer's opinion, should all be weighted equally when making a decision. There are several variations which can affect blood alcohol level. Time is one of the biggest factors. Several questions must be asked relevant to time such as, "When was the last drink consumed?" Another question would be, "How much time has elapsed between the time the individual got stopped by the police and the blood alcohol testing?" Generally, the blood alcohol content of an individual will be higher shortly after they have consumed their last alcoholic beverage.

The Court of Criminal Appeals of Texas in Dawn Stewart v. Texas, No. 324-03 supports my position. Stewart was convicted of driving while intoxicated by a jury in Bexar County, Texas. The trial judge sentenced Stewart to 120 days in jail, probated eight months, and fined her $500.00 plus court costs. The trial judge allowed the state to present the results of two breath tests administered to Stewart eighty minutes after she was pulled over by the police. The trial judge disallowed the state's retrograde extrapolation evidence.

The Fourth Court of Appeals in San Antonio reversed Stewarts's conviction. The Fourth Court's findings were that the test results were irrelevant without retrograde extrapolation. Further, the Fourth Court found that there was no evidence that Stewart was intoxicated when she drove.

On April 4, 1999, Stewart was stopped by Officer Rodriguez for weaving, making an improper lane change, and making an unsafe

lane change. Officer Rodriguez testified that Stewart's eyes were red and glassy and her breath smelled of alcohol. Stewart also admitted to officer Rodriguez that she had drank a couple of alcoholic drinks. Stewart proceeded to fail three of the seven field sobriety tests given to her. After one hour and twenty minutes Stewart consented to a breath test. The test results showed Stewart's blood alcohol concentration as 0.160 and 0.154. Both exceeded the legal limit of 0.10. The trial judge refused to admit retrograde extrapolation by an expert witness, who claimed that he did not have enough information to determine what Stewart's alcohol concentration would have been at the time she was driving, prior to her contact with Officer Rodriguez. The expert witness stated that the result could have been skewed, due to the absorption or elimination of alcohol at the time of the test.

The decision to make is whether Stewart was intoxicated at the time she drove. The breath test results indicated that Stewart had consumed alcohol. The breath tests along with the officer's testimony, and the videotape from Officer Rodriguez's vehicle of Stewart's field sobriety tests, should have been combined to produce probative evidence of Stewart's intoxication. The Bexar County Jury only needed to believe beyond a reasonable doubt that Stewart could not physically or mentally drive a vehicle due to the ingestion of alcohol.

Ultimately, several factors must be taken into consideration when using retrograde extrapolation. Most notably, the weight, age, and sex of the individual must be used to help determine blood alcohol concentration. Also, the amount of alcohol consumed, type of alcohol consumed and the method in which it was consumed, (ie. sipping, chugging, etc.), must be added into the calculus.

In summary, retrograde extrapolation should be utilized only in conjunction with other factors. One of the biggest factors that should always be used is the officer's perception and evaluations of the individual's level of intoxication. Therefore, when retrograde extrapolation is applied it should be used in conjunction with the officer's perceptions and evaluations of the individual's level of intoxication. Also, the utilization of secured video equipment on the police vehicles and any statements made by the individual should be factored in the calculus. All of these factors combined will make up the "Totality of Circumstances" and depict an accurate determination of blood alcohol concentration levels.

AUTHORS WANTED

Are you interested in writing a column for the *Q&A*? The *Q&A* is seeking individuals who are interested in writing specific columns (such as updates on caselaw, legislation or hot cases that might affect other practicing criminal law attorney. Or, if you are funny, we are looking for people to provide "jokes" or "humorous articles" of interest. For more information, contact Mike Wilds via wilds@nsuok.edu or 918-449-6532.

RESPONSE TO PEGGY TOBIN'S RETROGRADE EXTRAPOLATION ARTICLE

by

Charles Sifers

The following is a telephone interview with Charles Sifers. His response was candid and to the point. Thanks, Charles, for the input, especially considering that you were preparing for you presentation at a seminar in Dallas. *Charles Sifers* is a frequent contributor to the *Q&A* as well as the *Gauntlet.* He can be contacted at (405) 232-3388 or charles@siferslaw.com.

The world's most recognized researcher and expert on the topic of DUI and Retrograde Extrapolation is Professor Kurt M. Dubowski of the University of Oklahoma. In his article, "*Absorption, Distribution and Elimination of Alcohol*," Dubowski noted that there is good statistical correlation between the alcohol concentration between the different bodily tissues and fluids and the resulting alcohol concentration ratios for blood and breath, but continues to observe that it is often impossible to determine whether the postabsorptive state in a particular individual has been reached at any particular point in time. Accordingly, it is impossible or infeasible to convert the alcohol concentration of breath or urine with any degree of acceptable certainty, especially if any precision is expected to be achieved.[2] As such, retrograde extrapolation is not precise, is not reliable, and should not be a variable in calculating BAC for DUI purposes.

The science of retrograde extrapolation is inexact. It fails to take into consideration complex human variables such as weight, gender, time drinking began, time drinking ended, beverage consumed, food consumed, individual tolerance to alcohol or the person's physical or emotional condition at the time when the alcohol was consumed. Because everyone has a different metabolism, there is no way to precisely extrapolate when the postabsorption period began.[3] "If attempted, it must be based on *assumptions of uncertain validity*, or the answer must be given in terms of a range of possible values so wide that it is rarely of any use. If retrograde extrapolation of a blood concentration is based on a breath analysis the difficulty is compounded."[4] Therefore, retrograde extrapolation should never be used as any factor in considering whether to charge someone with the crime of DUI.

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[2] Kurt M. Dubowski, Ph.D., "*Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects,*" Journal on Studies of Alcohol, Supp. 10, July 1985.

[3] *Id.*

[4] Dubowski, Journal of Forensic Sciences 9 (Jan. 1976).

LETTERS TO THE EDITOR

"DEBTOR'S PRISON"

Please feel free to respond to any article with a "Letter to the Editor," Mike Wilds, via wilds@nsuok.edu. As stated by Dennis Smith, it is vital we have multiplicity and diversity of voices within our Section.

Response to the article on "*Debtor's Prison*" was overwhelming. Several district attorneys took the opportunity to explain "*the rest of the story*." Some of the best comments are included after a short reprint of the article itself.

THE DEBTOR'S PRISON: ARTICLE REPRINTED IN PART

Recently, I was surprised to find out that county jail inmates are entitled to only one dollar per day for being confined! Considering that they are subject to being charged $35.00 per day for room and board, this sounds absurd. . . . To me, it sounds like a rue for debtor's prison! As stated by Catt Burton, "it sounds like you could stay in jail for the rest of your life merely to work off your court fees because you could never pay off your jail fees!

STATUTES IN QUESTION

57 O.S. 20

Every county, city or town convict in this state, whether required to work upon the public highways of such county, city or town, in accordance with the laws of this state, or merely confined in the county, city or town prison, shall receive credit upon his or her fine and costs of One Dollar ($1.00) for each day so confined in prison, or worked upon the public highways, rock pile, or rock crusher, or public work; provided that those prisoners or convicts doing and performing the most efficient work and making the best prisoners, shall be entitled to an additional credit of one (1) day for every five (5) days of work, the guard or custodian of such prison to determine at the end of each five (5) days of such imprisonment whether or not such prisoner is entitled to such credit, and to make a record of such decision and notify the prisoner of the same.

57 O.S. 58.3

Prisoners employed as provided herein shall be given a credit of two (2) days on a jail sentence for each day worked, and a credit of Twenty-five Dollars ($25.00) per day upon the payment of a fine or court cost, if sentenced for nonpayment of a fine or court cost. The sheriff shall be authorized to order the credit be given to the prisoner on the records of the court where the conviction of the prisoner is filed.

DEBTOR'S PRISON: THE REST OF THE STORY

by

Larry D. Stuart

District Attorney Osage County

Larry D. Stuart is the District Attorney for District No. 10, Osage and Pawnee Counties, Ok. His earlier employment history includes a position as an Assistant District Attorney, Craig County, Ok. He graduated from the University of Oklahoma, College of Law and enjoys golf and hunting. He is a Board of Director and Past President for the Oklahoma District Attorney's Association, a Past President for the Osage County Bar Association and a member of National District Attorney's Association. He is a frequent contributor to *The Q&A*, having written the article entitled "*Creek County Saliva Case: The Rest of the Story*." He can be contacted at 918-287-1510 or via e-mail at larry.stuart@dac.state.ok.us.

Yes, it is true that Title 22 O.S. §979a requires a defendant to pay for the cost of his incarceration, not to exceed $3,000.00, both before and after his conviction, upon a conviction or upon receiving a deferred sentence for a criminal offense. This cost varies between counties but can be as much or more than $39.00 per day.

And again true, a defendant who fails to pay these costs may be incarcerated until these costs, as well as other court costs and fines, are paid or until the defendant "serves out" the fines and costs at the statutory rate.

Why were these provisions made, and do they cause an impossible situation for a defendant, creating a "debtors prison"?

Initially, in 1913, the legislature allowed prisoners sentenced to jail to earn $1.00 per day towards their fine and costs while serving their sentence (57 O.S. §20). Not much by today's standards, but quite a sum in 1913 for doing nothing. In truth, the provision required the public to pay a prisoner for work on the "chain gang," but today the provision requires the public to pay the defendant for merely serving the sentence he "earned" for committing a crime .

In 1955 the legislature provided that "trustys" (chain gangs at this date are now prohibited) could earn two (2) days credit for each day worked and the princely sum of $2.00 per day towards their fine and costs (57 O.S. §58.3).

With the proper and stricter requirements placed upon jails to provide Constitutional supervision, medical care and general care for prisoners, the costs of operating jails rose significantly. Municipalities and counties were having great difficulty maintaining jails and many were

being forced to close. The legislature in 1990, in an attempt to address this issue, first enacted 22 O.S. §979a, which required defendants to pay for the expenses of their incarceration. Initially, the charge was the actual amount of expenses not to exceed $25.00 per day. In 1994 the legislature increased the "pay earned" by trusty's to, you guessed it, $25.00 per day. Today the charge against a defendant is the actual amount of expenses not to exceed a total of $3,000.00 (22 O.S. §979a.).

While the above provisions do not adequately allow a defendant serving a sentence, even as a "trusty" to "earn" enough while in jail to pay for his costs of incarceration, fine and court costs, I find it somewhat inconsistent that the public should actually pay a defendant for merely serving his sentence.

Now let us look at those defendants who are given probation or who are released from jail with court costs, fines and costs of incarceration due and owing but are not able to pay.

Title 28 O.S. §101 provides that if a defendant refuses to pay the fine, fees and costs, including incarceration costs, the court shall enforce said payment by imprisonment in the county jail and the defendant given $5.00 credit for each day served. Since such imprisonment is not for an offense as stated in 22 O.S. §979a, no jail incarceration costs are incurred by the defendant.

The procedure for such enforcement is found in Rule 8 of the Rules of the Court of Criminal Appeals, Title 22, Chapter 18 Appendix, and it provides that the Court must determine the ability of the defendant to pay the fine, fees and costs or to make installment payments. If the Court finds that a defendant willfully refuses or neglects to pay the fine, fees and costs, or an installment without a satisfactory explanation, the Court may then incarcerate the defendant. Procedure for an appeal from that decision is also provided.

In general "real life" situations a defendant is given a probationary sentence. He is then given a payment schedule agreed to by him and the court costs administrator. Upon his failure to pay as agreed, he is arrested, brought before the court, given the opportunity to explain why he did not pay as agreed, verbally admonished by the Court and released to commence paying.

On the second or third time around, if the Court finds that the defendant had the ability to pay but willfully refused or neglected to pay, the Court orders the defendant incarcerated to "serve out" his fine, fees and costs at the statutory rate. Usually within a few days of his initial incarceration, the defendant "finds" the amount due or at least a substantial amount to pay towards his fines and costs and upon payment of a substantial amount, the Court releases the defendant with a new installment plan to pay the remainder, if any.

If the incarcerated defendant does not "find" a substantial amount to pay within a couple of weeks, the Court may bring the defendant back before the Court, and release him with a new installment plan after having been properly admonished.

Osage County's Court has adopted a procedure of releasing defendants incarcerated for failure to pay upon their personal recognizance bond, to appear every two weeks or every month at a "payment docket" at which they either pay the installment which they had agreed they could pay or they are immediately ordered back into incarceration.

I assure you that the Court is more

interested in having the fines and costs paid rather than allowing a defendant to "serve it out" at the public's expense. In my 26 years as a DA I can only remember a very few defendants who were required to "serve out" the entire amount of their fines and costs at $5.00 per day.

I also might add that, if the Court finds that a defendant is without means to pay the fine and costs, the defendant is not incarcerated, but the amount of fine and costs is entered as a judgment against the defendant to be collected as any other civil judgment.

Evaluating all of the legislation regarding this issue and the safeguards of hearings and appeal, I do not believe we have created "debtors prisons". On the other hand, I do believe that the legislature has properly attempted to alleviate part of the public's burden to pay for a particular individual's violation of the law.

LETTERS TO THE EDITOR

DEBTOR'S PRISON

22 O.S. 101

by

JOHN DUNN

LEGAL INTERN OSAGE COUNTY

John Dunn is a Legal Intern with Osage County and is in his final year as a law student at the University of Tulsa. Upon graduation he would like to be a litigator in the area of Criminal or Constitutional Law. He lives in Cleveland county and can be contacted at john-dunn@utulsa.edu.

May I suggest that you consult 22 O.S. 101. In this section you will find that the correct statutory rate, when one is incarcerated on a "pay or stay order," is $5.00 per day. A pay or stay order can only be levied for payment of fines and court costs. It can not be used to satisfy incarceration fees. The only method of collection of those fees is a remedy at civil law. The statute that you cite allows costs to be paid out at the rate of $1.00 per day for time served as a result of a sentence, not on the basis of "pay or stay" where no time has been assessed as part of the sentence.

Take the example where a criminal defendant owes the court $1500 in fines and costs. The defendant is ordered to "pay or stay." The defendant could serve out 300 days in the county jail. In that time incarceration fees of $10,500 could be charged against the defendant. However, under statute, the incarceration fees can not exceed $3,000. Therefore, upon release, a defendant could be on the receiving end of a $3,000 civil judgement, but can not be incarcerated in order to recover the judgement.

Forensic Backlog Requests Exceed 1/2 Million

According to the Department of Justice, the nation's public forensic crime lab requests were backlogged in 2002 with more than 500,000 cases, compared to 290,000 at the end of 2001 (a 70 percent increase). The labs received more than 2.7 million new requests during 2002. Furthermore, only about nine in ten labs can identify controlled substances, whereas only 6 in 10 can conduct biology screening, firearms and toolmarks analysis, crime scene evidence collection, latent print analysis or trace evidence assessments (such as paint chips or other non-biological materials). About half the labs can process DNA evidence and conduct toxicology analysis.

The most frequently requested forensic laboratory service, the identification of controlled substances, resulted in nearly 1.3 million requests during the year or about half of all requests. Toxicology samples (468,000) and latent print requests (274,000) were the next most common types of samples for which laboratory analyses were requested. Law enforcement agencies submitted about 61,000 requests for DNA analysis to publicly operated crime labs.

About 9 in 10 labs that handle fingerprint identifications reported that they have the capability to process fingerprints utilizing the automated fingerprint identification system (AFIS) that checks fingerprints in an electronic fingerprint database. This enables labs to search large local, state and national databases to determine the identity of prints collected from crime scenes.

Sixty-one percent of the labs were accredited by the American Society of Crime Laboratory Directors Lab Accreditation Board, and an additional ten percent were accredited by some other organization. *See* www.ojp.usdoj.gov/bjs/abstract/cpffcl02.htm

CRIME STATISTICS

Violent crime was down 2% during the first six months of 2004 compared with the same period in 2003, according to preliminary figures provided to the FBI. Murders in the United States were down by nearly 6%. Similarly, property crimes such as burglary, larceny and motor vehicle theft declined about 2% percent while arson was down nearly 7%. The only crime to increase was rape, up 1.4% nationwide

DEVENPECK V. ALFORD

125 S.CT. 588

AN ARRESTING OFFICER'S STATE OF MIND IS IRRELEVANT TO THE EXISTENCE OF PROBABLE CAUSE TO ARREST.

An arresting officer's state of mind is irrelevant to the existence of probable cause to arrest. *WHAT? THAT DOES NOT SOUND RIGHT.*

How could an arresting officer's state of mind not be relevant to the existence of probable cause at the time of arrest? The U.S. Supreme Court recently ruled that police have authority to arrest suspects on charges that don't hold up as long as officers had a second, valid reason for the detention. As stated by Justice Scalia, an arrest is lawful under the Fourth Amendment when the criminal offense for which there is probable cause to arrest is not "closely related" to the offense stated by the arresting officer at the time of arrest.

Facts: Two Washington State Patrol officers arrested Jerome Alford for tape recording their conversation during a traffic stop in November 1997. Although Alford told the officers he had case law showing the taping was legal, the police arrested him for a violation of the Washington Privacy Act, Wash. Rev.Code § 9.73.030 (1994). Alford protested that a state court-of-appeals decision, a copy of which he claimed was in his glove compartment, permitted him to record roadside conversations with police officers. The officer returned to his car, reviewed the language of the Privacy Act, and attempted unsuccessfully to reach a prosecutor to confirm that the arrest was lawful. Believing that the text of the Privacy Act confirmed that respondent's recording was unlawful, he took Alford to jail.

At booking, Alford was charged with violating the State Privacy Act, and was issued a ticket for operating a vehicle with red flashing headlights in violation of Wash. Rev.Code § 46.37.280(3) (1994), App. 24-25. Under the latter charge, Alford could be detained on the latter offense only for the period of time "reasonably necessary" to issue a citation. The state court subsequently dismissed both charges.

Alford filed a federal civil rights suit in Federal District Court alleging violation of Rev. Stat. § 1979, 42 U.S.C. § 1983 , and a state cause of action for unlawful arrest and imprisonment. His contention was that the officers arrested him without probable cause in violation of the Fourth and Fourteenth Amendments.

However, the officers contended that they did not arrest Alford for video recording the traffic stop. Rather, unknown to Alford, the officers thought Alford "appeared" to be impersonating a police officer (due to his use of wig-wag lights and other comments). At no time did the officers inform Alford of this

second reason for arrest.

***Holding*:** In an 8-0 decision, Justice Scalia opined that the Fourth Amendment holds an arrest to be lawful if it was "reasonable" given all the facts at the time the arrest was made. **The subjective intent of the arresting officer, determined by objective means, is simply no basis for invalidating an arrest.** "While it is assuredly good police practice to inform a person of the reason for his arrest at the time he is taken into custody, we have never held that to be constitutionally required. "Any ruling to the contrary would deter officers from providing reasons for their arrests.

AUTHORS WANTED

Are you interested in writing a column for the *Q&A*? The *Q&A* is seeking individuals who are interested in writing specific columns (such as updates on caselaw, legislation or hot cases that might affect other practicing criminal law attorney. Or, if you are funny, we are looking for people to provide "jokes" or "humorous articles" of interest. For more information, contact Mike Wilds via wilds@nsuok.edu or 918-449-6532.

JUVENILE JUSTICE SEMINAR

The Juvenile Justice Seminar, sponsored by the Criminal Law Section of the OBA, is scheduled for May 20th, 2005 at the OBA center. Registration forms and information can be found at www.okbar.org/cle/2005/2005-05-20seminarID414.htm See Page 35 for more details.

CRIMINAL LAW SECTION OF THE OBA

JUVENILE JUSTICE SEMINAR

FRIDAY, MAY 20, 2005/OKLAHOMA BAR CENTER

Moderators: Ben Brown & Richard Gray

8:15 to 8:50 **Registration**

8:50 to 9:00 **Welcome and Opening Remarks**

9:00 to 9:50 **The Nuts & Bolts of a Delinquent Case: From Arrest to Trial**
Jane Brown, Assistant District Attorney, Oklahoma City, Oklahoma
Dennis Gay, Assistant District Attorney, Waurika, Oklahoma

9:50 to 10:00 **Break**

10:00 to 11:45 **Understanding the Youthful Offender Statute from Different Perspectives: The Process Procedures, Responsibilities, Factors, Statutes, & Case Law**
Dennis N. Shook, Attorney at Law, Wagoner, Oklahoma
Richard L. Gray, District Attorney, Wagoner, Oklahoma
The Honorable Gary E. Miller, Associate District Judge, Canadian County District Court

11:45 to 12:05 **Legislative Update: What's "New" from the 2005 Legislative Session**
Craig Sutter, Deputy Executive Director, Oklahoma Indigent Defense System
Michael Wilds, Attorney at Law & Associate Professor-Northeastern State University

12:05 to 1:00 **Lunch (included with the registration cost of the seminar)**

1:00 to 1:50 **Youthful Offender Certification Studies & Psychological Evaluations: What Are They & What Do They Mean?**
Brett Fitzgerald, Juvenile Justice Specialist II, Office of Juvenile Affairs
Bill Sharp, Ph.D., Director of Behavioral Health Services, El Reno, Oklahoma

1:50 to 2:00 **Break**

2:00 to 2:50 **Placement Decisions & Treatment Options Within the Office of Juvenile Affairs: How Does it Work & What is Available?**
Jeff Gifford, Support Services Division Administrator, Office of Juvenile Affairs, Oklahoma City, Oklahoma
Dr. Stephen Grissom, Chief Psychologist, Office of Juvenile Affairs, Sand Springs, Oklahoma
Susan Sinn, Placement Officer, Office of Juvenile Affairs, Oklahoma City, Oklahoma

3:00 to 3:50 **Ethics: Representing a Child: Who Can Speak to the Child & To Whom Can The Attorney Speak?**
Sarah Evans, Attorney at Law, Norman, Oklahoma

CLE Credit This course is pre-approved by the Oklahoma MCLE Commission for six and one-half (6 ½) hours of CLE including one (1) hour of ethics. **To Register:** Call (405) 416-7000 or register online at www.okbar.org/cle/2005/2005-05-20seminarID414.htm.

CLE
JUVENILE JUSTICE SEMINAR
COSPONSORED WITH THE CRIMINAL LAW SECTION OF THE OBA

DATE & LOCATION: May 20, 2005
Oklahoma Bar Center
Oklahoma City

CLE CREDIT: This course has been approved by the Oklahoma Bar Association Mandatory Continuing Legal Education Commission for 6 hours of mandatory CLE credit, including 1 hour of ethics.

TUITION: $150 for early-bird registrations with payment received at least four full business days prior to the seminar date; $175 for registrations with payment received within four full business days of the seminar date.

CANCELLATION: Cancellations will be accepted at any time prior to the seminar date; however, a $25 fee will be charged for cancellations made within four full business days of the seminar date. Cancellations, refunds, or transfers will not be accepted on or after the seminar date.

REGISTRATION: Online: www.okbar.org/cle/2005/2005-05-20seminarID414.htm.
Telephone: (405) 416-7000

JUVENILE JUSTICE SEMINAR
Registration Form

First Name _____ Last Name _____

Address _____

City _____ State _____ Zip _____ Bar # _____

Telephone Number (____)_____ E-mail _____

Amount Paid if received four days prior to seminar ___ $150.00 or within four days ___ $175.00

Payment Method: _____ Check _____ MasterCard _____ Visa
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Remit to: **CLE Registrar, Oklahoma Bar Association, P.O. Box 960063, Oklahoma City, OK 73196-0063**

CRIMINAL LAW SECTION OF THE OBA
JUVENILE JUSTICE SEMINAR
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Dear Jenny Garcia,

[ ] Please enroll me as a **MEMBER OF THE OBA CRIMINAL LAW SECTION**. I understand dues for 2005 will be **$15** and have enclosed a check made to the OBA Criminal Law Section.

[ ] Please enroll me as An Honorary Judicial Member of the OBA Criminal Law Section, and add me to the e-mail list. I understand that all services are **complimentary** and that this membership is perpetual *as long as I am on the bench of any State, Federal, Municipal or Tribal Court.*

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Thank you for your assistance.

Sincerely,

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