



## February 2018 - Special Session University of Oklahoma

**Thursday, February 15, 2018**

**Norman, OK**

**Bell Courtroom<sup>1</sup>**

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**9:00 A.M.**

**Tymkovich, Baldock & Holmes**

### **Case Summaries**

**17-5054 NOK; *Parker, Appellant v. City of Tulsa***

#### **Summary of Facts**

Matthew Parker, Appellant, was convicted and imprisoned on March 6, 1997, for sexually abusing a minor child. He was released from custody in May 2014 after the Oklahoma Court of Criminal Appeals granted his petition for post-conviction relief.

Parker filed a complaint alleging claims under 42 U.S.C. § 1983 and claims under Oklahoma state law for intentional infliction of emotional distress, negligence, abuse of process, malicious prosecution, and false imprisonment. Parker alleged that he is innocent of the crime and that his wrongful arrest, detention, prosecution, conviction, and imprisonment resulted from investigatory misconduct under municipal policies and procedures of the City of Tulsa to use any means necessary to secure a conviction. Parker alleges that the police department's actions were part of the City's custom or policy of (1) deliberately failing to pursue lines of investigation that would prove a suspect innocent, (2) failing to adequately investigate other leads, and (3) failing to properly supervise, train, and discipline detectives and officers.



**Federal Bar  
Association**

**Oklahoma City Chapter**

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**Case Summaries prepared by University of Oklahoma Law Student Division  
members of the Oklahoma City Chapter of the Federal Bar Association:  
Kristen Fling and Julie Hunter.**

### **Procedural History**

Appellee, City of Tulsa, sought summary judgment, which the district court granted. Judge Eagan found Parker failed to present evidence giving rise to an inference of a custom of ignoring exculpatory evidence sufficient to establish municipal liability. Similarly, she found Plaintiff presented no evidence of tortious conduct that would support a finding of deliberate indifference. Parker appealed, arguing the district court erred in its findings.

### **17-2102 NM; *United States v. Hargrove, Appellant***

#### **Summary of Facts**

U.S. Border Patrol was surveying a group of men walking towards a pickup truck through infrared camera detecting heat signals. Agents approached the truck and arrested John Wayne Hargrove, Appellant, and his girlfriend, Janelle Richter, who were in the truck parked off Highway 80 near the Arizona/New Mexico border. Authorities also arrested the back-seat passenger of Mexican nationality. Agents found 297 pounds of marijuana and two firearms inside the truck. Richter pleaded guilty, while Hargrove claimed he did not know what was in his truck and that he thought they were going fishing. The jury found him guilty and he was convicted of possessing 100 kilograms and more of marijuana with the intent to distribute it and of a conspiracy to do the same in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), 846, and 18 U.S.C. § 2. He received a 60-month sentence.

### **Procedural History**

District Judge Robert Brack imposed a mandatory minimum 60-month sentence on each count, said counts to run concurrently. He also imposed four years supervised release on each count, concurrently. Hargrove argued he should not receive a firearm enhancement, and that he was eligible for the safety valve reduction under USSG 5C1.2. Judge Brack disagreed, finding him ineligible for the safety valve because of the proximity of the firearms and their potential to facilitate the offense.

On appeal, Hargrove argues the district court erred in failing to recognize his own conduct. Because he did not possess the firearms in connection with the offense, he argues, safety-valve relief is available. He also appeals the district court's denial of a mistrial relating to the alleged bad-faith questioning of a confidential informant, and the court's limiting instruction.

### **17-6001 WOK; *United States v. Green, Appellant***

#### **Summary of Facts**

Marconia Green, Appellant, pleaded guilty to three counts of using a communication facility to facilitate the acquisition of cocaine powder in 2011. The district court imposed a 130-month sentence, representing an upward variance from the guideline range of 92 to 115 months. The Tenth Circuit affirmed. In November 2015, Amendment 782 reduced the offense levels ascribed to many drug offenses by two. The Sentencing Commission also provided the amendment as a potential basis for a sentence reduction under 18 U.S.C. § 3582(c)(2).

### **Procedural History**

Citing to §3582(c)(2), Green moved for a reduced sentence based on the progress he made while incarcerated. The district court denied the motion, which the Tenth Circuit affirmed.

Fifteen months later, Green filed a second motion for sentence reduction under § 3582(c)(2) and invoked Amendment 782. The district court denied the motion. Green appealed.

The government argues the district court had lacked jurisdiction to consider Green's second motion for a sentence reduction, and, that even if the district court had jurisdiction, it properly denied the motion on the merits. After initial briefing (with Green appearing pro se), the Circuit court appointed counsel to file a supplemental brief on two issues: (1) whether the district court had jurisdiction to consider Mr. Green's second motion for a reduction of sentence under § 3582(c)(2), and (2) if so, whether the district court erred in denying relief.

On appeal, Green argues that the district court had jurisdiction to consider his second motion for a sentence reduction under § 3582(c)(2) because those circuits facing the issue both held district courts do have jurisdiction to consider more than one § 3582(c)(2) motion based on the same guideline amendment.. Green further argues that § 3582(c)(2)'s silence on the permissibility of more than one motion for sentencing reduction means it imposes no jurisdictional bar on considering such motions. Additionally, he argues that, at minimum, this Court should remand for the district court to consider whether his clean disciplinary record in prison warrants a reduced sentence, if not a reversal In response, the government argues that this Court should conclude that the district court lacked jurisdiction to consider Green's second motion to modify his sentence based on the language of § 3582(c), notwithstanding the holdings of the Fourth and Eleventh Circuits. The government argues that if this Court concludes jurisdiction existed, it should affirm the district court's decision on the merits.

### **17-6079 WOK; *United States v. Washington, Appellant* Summary of Facts**

Cory Washington, Appellant, pleaded guilty to being a felon in possession of a firearm and possessing an unregistered firearm. Ordinarily, the maximum sentence for a conviction of felon in possession of a firearm is ten years' imprisonment and three years of supervised released. The presentence report, indicated Washington qualified for an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), based on his prior Oklahoma convictions for pointing a firearm, assault and battery with a dangerous weapon, and second degree burglary. Washington objected to the ACCA's enhancement application, arguing that his prior juvenile adjudication for pointing a firearm did not qualify as a violent felony. The district court rejected Washington's arguments and sentenced him to the ACCA statutory minimum of 180-month imprisonment.

Under the ACCA, if a defendant convicted of felon in possession of a firearm "has three previous convictions . . . for a violent felony or a serious drug offense, or both," then the defendant must be "imprisoned not less than fifteen years," 18 U.S.C. § 924(e), and may be placed on supervised release for up to five years, 18 U.S.C. §§ 3559, 3583. There were previously three ways that a prior conviction could qualify as a violent felony, but the Supreme Court decision in *Johnson v. United States* held that the third clause of the ACCA, the residual clause, could not be applied consistent with due process and was unconstitutional, and therefore must be applied retroactively to cases on collateral review.

### **Procedural History**

After *Johnson* was decided, Washington filed a pro se 28 U.S.C. § 2255 motion asking the district court to vacate his illegal sentence due to the application of the enhancement under the ACCA. He argued that all of his prior convictions only qualified as "violent felonies" under the

catch-all definition contained in the residual clause. The government argued that Washington was not entitled to relief because he was making a claim that did not fall under *Johnson* and therefore, his motion was untimely and procedurally barred. The district court adopted this argument, dismissing Washington's motion and denying a certificate of appealability. Washington timely appealed.

On appeal, Washington requests that this Court grant a certificate of appealability, vacate his ACCA sentence, and remand for resentencing consistent with a non-ACCA sentence. Washington argues that the district court erred in dismissing his § 2255 motion as procedurally barred. In support, he argues that his claim is a *Johnson* claim because the residual clause potentially played a role in his sentencing, the outcome was not harmless error, and that his Oklahoma second-degree burglary conviction and pointing a firearm conviction were not ACCA predicate post-*Johnson*. In response, the government argues that Washington did not meet his burden of proving that his claims rely on the new rule of law announced in *Johnson*. They argue that the "gate-keeping requirements" have not all been met and these should not be "relaxed" for *Johnson*-based claims because of the government interests in finality of convictions. Additionally, the government argues that a *Johnson* claim's validity is determined from the sentencing record and the relevant background legal environment at the time of sentencing, making the cases that Washington relies on unpersuasive. For these reasons, the government asks this Court to affirm the judgement of the district court.

### **17-6149 WOK; *Smith, Appellant v. Aldridge***

#### **Summary of Facts:**

A jury found Smith (Appellant) of enabling child abuse following a jury trial. Smith moved for a new trial because she claimed that she had evidence that jurors received evidence outside of court through searching the internet and that at least one juror slept through the proceedings. After denial of the motion for new trial, Smith appealed the conviction to the Oklahoma Court of Criminal Appeals (OCCA). She also filed another motion for new trial and an evidentiary hearing. The OCCA remanded the case to the trial court for an evidentiary hearing. The trial court issued Findings of Fact and Conclusions of Law. The trial judge noted that he monitored the jury throughout the trial and noticed a juror appear to be sleeping and admonished the jury to stay alert throughout the trial. He stated he noticed no other instances of such conduct. The OCCA affirmed Smith's conviction.

#### **Procedural History:**

Smith filed a petition for habeas corpus under 28 U.S.C. § 2254 on April 27, 2012. She alleged she was deprived of her 14th Amendment right to due process and her 6th Amendment right to an impartial jury due to juror misconduct. Judge Cauthron denied relief but granted Smith's request for a Certificate of Appealability on these issues (1) whether her constitutional rights were denied by juror misconduct and (2) whether there was ineffective assistance of counsel when counsel failed to object to the sleeping juror. Smith submitted five juror affidavits, including one from the sleeping juror, to support her claim. Under the rigorous standard of review (whether the OCCA's holding was an unreasonable application of federal law or was it an unreasonable determination of the facts), these two issues are before the court on appeal.