



Oklahoma State Bureau of Investigation

# LEGAL EAGLE

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## Oklahoma Ct. of Crim. App.

### Failure to give 85% rule jury instruction is reversible error on sentencing

*Anderson v. State*, 2006 OK CR 6, Decided 2/22/06

Richard Lloyd Anderson was tried and convicted of First Degree Murder in Tulsa County. He was sentenced to life imprisonment without the possibility of parole. Anderson appealed his sentence.

In his appeal, Anderson claimed that the trial court erred in denying his request to instruct the jury that under Oklahoma law, he would be required to serve 85% of any sentence he received for a murder

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conviction before being eligible for parole (the 85% rule). He had requested such an instruction be included in the closing jury instructions, but his request was denied. During deliberations, the jury sent out a note asking how many years had to be served before a person was eligible for parole. The court again declined to give any further information regarding the 85% rule and informed the jury it had all the evidence necessary to render its decision. Anderson argued that if the jury knew he would have to serve at least 85% of any sentence before being eligible for parole, they might have given him a sentence less than life without the possibility of parole.

Oklahoma Courts had traditionally rejected all suggestions that jurors receive any instruction regarding parole eligibility. The Court of Criminal Appeals reversed this long standing tradition and held that jurors should be advised of the 85% rule, and reversed Anderson's sentence and remanded the case for a new trial on the issue of his sentence.

In changing the rules regarding advising a jury about parole eligibility, the court stated that jurors were likely to assume defendants would become parole eligible at a much earlier point in time, explaining the 85% rule avoided unnecessary and unfair prejudice to the defendant due to juries "rounding up" their sentences. The Court did not hold or argue that there was any evidence in Anderson's case indicating that the jury did, in fact, "round up" his sentence. The Court further noted that the jury's sentencing options in Anderson's case were life and life without parole. Neither of those sentences are limited on their face to a specific term of years to which the 85% rule can be applied to tell the jury exactly when the defendant would be eligible for parole. The Court held that the 85% rule jury instruction should reference the administrative policy of the Oklahoma Pardon and Parole Board that the 85% parole rule for a life sentence would be calculated based upon a sentence of 45 years. This procedure of treating a life sentence as a 45 year one for parole purposes is pursuant to an internal rule of the Pardon and Parole Board and isn't required or

called for by any Oklahoma statute.



## Errors in juror and witness rulings lead to new trial

*Rojem v. State*, 2006 OK CR 7, Decided 2/24/06

Richard Rojem was originally tried by jury in Washita County and convicted of Kidnapping, First Degree Rape, and First Degree Murder. He was sentenced to 1000 years for the kidnapping and rape convictions and sentenced to death for his murder conviction. Through several post-conviction applications, he received a new trial on the issue of sentencing. In July of 2003, the jury again sentenced Rojem to death. He appealed that sentence to the Court of Criminal Appeals.

Rojem's first claim for relief on appeal arose from a dispute concerning the discovery of "new" hairs by the parties involved. Rojem claimed that multiple delays by the OSBI and the prosecution in getting the hairs tested and the results to Rojem prejudiced his ability to provide a proper defense in his resentencing trial. The Court denied this claimed basis for relief. In doing so, the Court noted that both parties had long be aware of the evidence in question and had both been able to examine it. Therefore both parties were responsible for the delays and failure to obtain the new tests in

question. The Court also held that the hairs in question went more toward the issue of guilt or innocence (which was not being retried) than they did in reducing Rojem's moral culpability or blame (which would be at issue in a sentencing trial). Finally, the Court noted that whatever the results of such testing might reveal, it wouldn't necessarily be exculpatory and would add very little in the way of mitigation. The Court consequently held that the claim in question was simply too speculative to grant relief to Rojem.

The Court did grant relief and order a new sentencing trial on other grounds. Rojem claimed that the trial court committed reversible errors by denying his challenge for cause against several prospective jurors, thus forcing him to use peremptory challenges against the juror which resulted in the empanelling of other clearly objectionable jurors. The trial court refused to dismiss three jurors for cause as requested by the defendant. They included a juror with strong ties to law enforcement and significant experience as a jailer. His current job was supervising twelve inmates from the Hobart Work Center for the city of Cordell. A juror that knew Sheriff Joe Ferrero, a witness in the case, and had extensively discussed the case with a juror on the original case, was not dismissed for cause. Nor was a prospective juror that knew one of the prosecutors because her husband had been sent to prison in a case where her young daughter was the victim. The failure of the trial court to dismiss these jurors for cause led to Rojem's peremptory challenges being reduced by three by removing such jurors. The Court held that the loss of those challenges resulted in an unacceptable juror sitting on the jury which prejudiced the decision.

The Court also held that the trial court erred when it prohibited two defense witnesses from testifying because the defendant did not comply with a Court order that discovery statements including a list of all witnesses to be called at trial were to be exchanged thirty days before trial. The Oklahoma Criminal Discovery Code provided that all discovery will be completed at least ten days prior

to trial and gives the Court discretion in specifying the actual time, place and manner of making the discovery. The Court of Criminal Appeals commended the trial management skills of the trial judge in ordering the parties to trade discovery statements thirty days before trial. It noted that the Code gives the trial court discretion to specify such earlier deadlines. The Court of Criminal Appeals, however, held that the trial judge acted beyond his discretion when he completely excluded the witnesses as a sanction for noncompliance with that deadline because there was no evidence the violation was willful and motivated to obtain a tactical advantage.

The Court held that the errors in jury selection and the barring of defense evidence violated Rojem's constitutional rights under the U.S. Constitution and the Oklahoma Constitution, and prejudiced his ability to obtain a fair trial. Consequently, Rojem's death sentence was reversed and the matter was remanded to the District Court for yet another trial to determine his sentence.



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# 10th Circuit Ct. of App.

## Two murder confessions deemed involuntary- suppressed

*U.S. v. Lopez*, No. 04-1223, Decided February 21, 2006

Agents of the Federal Bureau of Indian Affairs and the FBI had arrested Leland Lopez for murder, and taken him into custody at approximately 12:30 pm. The agents gave him his *Miranda* warnings and immediately questioned him after he agreed to talk to them. During this interview, the suspect denied shooting the victim and told agents that he had been at his mother's home asleep when the shooting occurred. He agreed to a gunshot residue test, which was conducted.

After talking to other witnesses, the agents again interviewed Lopez at 9:00 pm the same day. He had slept and appeared to be more rested than he had during the first interview. He was, however, in pain from a beating that he had received two days earlier when he was not in custody. Lopez could not eat solid food because his jaw had been broken during that beating. At the start of the second interview, the agents gave the defendant his *Miranda* warnings again, and he agreed to talk to them again.

The agents then implied that the gun residue test they had conducted on Lopez had produced positive results even though they had not actually received the results. They further told the suspect that they had up to six witnesses who had identified him as the shooter, when they actually only had

two. Finally, the agents lied to Lopez by telling him that they had found his footprints at the crime scene. They had found footprints, but hadn't identified who they belonged to.

The agents also told the suspect that they would prove his mother a liar if she tried to corroborate his alibi of being asleep at her house at the time of the killing. Lopez interpreted this to mean that if his mother testified on his behalf, the Government "would make her a liar on the stand."

One of the agents then took two pieces of paper and wrote the words "mistake" and murder" on them. The agent then took two more pieces of paper and wrote the numbers six and sixty on them. The agent told him "if you cooperate, you know...you could be looking at six years. And if you don't cooperate and give us answers, you could be looking at 60 years." The agent also told him about a murder case in which the suspects had cooperated and gotten less time than the suspects who had not cooperated. According to the agent, the suspects in that other case were "treated leniently" because the crime had been a mistake.

About an hour into the second interview, a crying Lopez told the agents that he had shot the victim by mistake. He testified at a suppression hearing concerning the statements that he admitted to shooting Box in order to avoid spending sixty years in jail, as well as to prevent his mother from being prosecuted. For the next two hours following his confession, he gave the agents the details of the shooting. The second interview lasted almost four hours.

Law enforcement again interviewed Lopez the next day after he had eaten and slept before taking him to court for his initial appearance. The third interview lasted only about thirty minutes. He was again given his *Miranda* warnings, agreed to talk, and repeated his confession, reiterating the story he had told earlier.

Lopez moved to suppress all statements that he had made in the three interviews as involuntarily

made. The court denied suppression of the first statement, but granted suppression of the confessions given in the second and third interviews. The Government appealed the district court's decision suppressing those confessions to the 10<sup>th</sup> Circuit Court of Appeals.

The 10<sup>th</sup> Circuit reviewed the circumstances of the first confession and upheld its suppression. It stated that voluntariness is based upon a totality of the circumstances. The relevant circumstances embrace both the characteristics of the accused and the details of the interrogation. Such factors include (1) the age, intelligence, and education of the defendant; (2) the length of detention; (3) the length and nature of the questioning; (4) whether the defendant was advised of his constitutional rights; and (5) whether the defendant was subject to physical punishment.

The court didn't address the defendant's characteristics because it found the details of the interrogation itself sufficiently troubling to determine the first confession was not voluntary.

The 10<sup>th</sup> Circuit agreed with the District Court's finding that the agents use of the pieces of paper marked with the terms "murder", "mistake", "60", and "6" amounted to a promise of leniency which induced the confession so much as to make involuntary. The 10<sup>th</sup> Circuit stated that a vague and non-committal promise or a promise to make the cooperation of a suspect known to a prosecutor does not render a confession coerced. It held, however, that the agent's actions went well beyond such conduct. They held that the actions of the agent in question constituted a promise that Lopez would spend fifty-four fewer years in prison if he would confess to killing the victim by mistake. The Court held that such an explicit promise of leniency along with the other conduct mentioned was such that it made his first confession involuntary and coerced.

With regards to the second confession, the government argued that even if the first one was inadmissible, his second confession should be

admitted. The 10<sup>th</sup> Circuit did not agree.

The Court stated that the appropriate question to answer in determining the admissibility of the second statement was whether the "coercion surrounding the first [confession] had been sufficiently dissipated so as to make the second statement voluntary. The later confession is be admissible while the first is not only if such a distinction is justified by a sufficiently isolating break in the stream of the events between the two confessions.

The Court held that a night's sleep and a meal along with twelve hours elapsed between the confession was not enough to dissipate the coercion of the first confession. The Court pointed out that the same agent was the primary interrogator during the second confession, and that there was no indication that any officer made any statements to Lopez that would have dissipated the coercive nature of the promise of leniency or the other misrepresentations of evidence.

Consequently, both confessions were suppressed, and not available for use at Lopez's trial.



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## “Simunition” live fire training injury doesn’t give rise to civil rights claim

Tracy Moore, a police officer, was injured when a training bullet flew up beneath his “riot helmet” during an intense “live fire” training exercise with other police officers, causing him to lose fifty-seven percent of his vision in one eye. The exercise was part of the Moore’s department’s firearms training designed to replicate realistically scenarios that an officer might encounter on the street. The exercise used “Simunition”, a highly specialized live ammunition specifically designed to replace the standard live ammunition in police officer’s personal service weapons. It uses smokeless gunpowder as a propellant, and fires a plastic, liquid-filled, bullet shaped projectile which shatters on impact, marking the target with brightly-colored liquid. Basically, Simunition is high tech paint-ball projectiles fired from their own weapons.

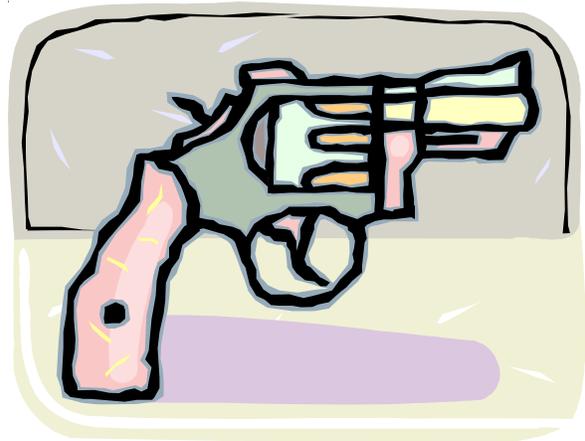
Simunition’s manufacturer has also developed a line of protective equipment to be worn when training with Simunition rounds. This equipment included face masks which provide complete head coverage and fits closely around the neck and chin along with for all other parts of the body. Three different firearms instructors, on three different occasions, told the Chief of the department that the manufacturer required its own face masks be worn during exercises with Simunition rounds. The Chief did not authorize purchase of any of the required safety equipment in favor of directing the officers to wear their “riot helmets”. The riot helmets do not protect the neck or throat of the wearer, and are positioned such that a gap of approximately three inches exists between the wearer’s face and the plastic shield protecting the face. During a training exercise, Moore was injured when a Simunition bullet flew up beneath his plastic shield and his him in his right eye.

He pursued two claims in federal court: (1) a civil rights claim against the city for violation of his 14<sup>th</sup> Amendment right to bodily integrity; and (2)

an identical claim against the Chief individually.

The district court dismissed Moore’s lawsuit for failure to state a claim for relief, specifically that he was unable to show a qualified immunity defense applied. The 10<sup>th</sup> Circuit Court of Appeals agreed.

It noted that the Supreme Court had recognized a liberty interest in bodily integrity in only very limited circumstances involving such things as abortions, end-of-life decisions, birth control decisions, and instances where individuals are subject to dangerous or invasive procedures where their personal liberty is being restrained. The Court noted further that the Supreme Court had specifically declined to extend due process/civil rights protection to safe working conditions. Therefore, it could not be said that it was clearly established that the Chief and the city violated Moore’s constitutional right to bodily integrity by requiring him to wear his riot helmet during training. Consequently, the lawsuit remained dismissed.



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