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Criminal Procedure Survey

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CRIMINAL PROCEDURE SURVEY

INTRODUCTION

During the survey period, the Tenth Circuit gave continuing constitutional definition to the area of criminal procedure. While these changes were not drastic, the court offered further insight in the areas of excessive force, competency to stand trial, delay in appeal, search and seizure, and double jeopardy. Each of these changes is analyzed to provide the practitioner with an update on the developments in the circuit, and the impact of these changes on earlier case precedent.

I. EXCESSIVE FORCE

In 1991, the Tenth Circuit decided several cases on the issue of excessive force, most of which affirmed existing principles of constitutional law and criminal procedure. Prior to this year, there was no standard applicable to all excessive force claims[1] and defenses of qualified immunity. During the survey period, however, the Tenth Circuit set forth the standard applicable at each point while the defendant is in police custody.[2]

In *Austin v. Hamilton*,[3] plaintiffs brought a *Bivens* action[4] against federal agents claiming use of excessive force during their arrest and subsequent detention and lack of probable cause. Defendants urged qualified immunity. The district court, however, rejected the defense and denied defendants' motion for summary judgment. This case is significant to the Tenth Circuit because it explicitly identifies the constitutional stan-

1. Titran v. Ackman, 893 F.2d 145, 147 (7th Cir. 1990).

2. *See infra* note 17 and accompanying text.

3. 945 F.2d 1155 (10th Cir. 1991).

4. *Bivens* actions involve individual plaintiffs alleging that federal agents used unnecessary or excessive force to accomplish an unwarranted arrest or subsequent detention. This type of action was given impetus by Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), in which the Court awarded damages to plaintiff for a violation of his Fourth Amendment rights. In 1974, Congress responded to the *Bivens* decision by extending the Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1988), to claims arising out of acts or omissions of law enforcement officers of the United States, including claims of assault, battery, false imprisonment, false arrest and malicious prosecution. However, in 1980, the Supreme Court held that Congress did not intend to extinguish *Bivens* actions, which are based on constitutional violations. Carlson v. Green, 446 U.S. 14 (1980). In *Carlson*, the Court held that Congress intended the FTCA and *Bivens* to provide "parallel, complementary causes of action." *Id.* at 20. The Court concluded:

> After the date of the enactment of [the FTCA], innocent individuals who are subjected to raids [like that in *Bivens*] will have a cause of action against the individual federal agents and the Federal Government. Furthermore, this provision should be viewed as a counterpart to the *Bivens* case and its progenty [sic], in that it waives the defense of sovereign immunity so as to make the government independently liable in damages for the same type of conduct that is allegedly to have occurred in *Bivens*.

Id. (quoting S. Rep. No. 700, 100th Cong., 2d Sess., *reprinted in* U.S.C.C.A.N. 2789, 2791).

dards to be used in evaluating a qualified immunity defense.[5] Before *Austin*, the court "simply affirmed a district court's ruling on qualified immunity without explicitly identifying the constitutional standard by which the federal agent's actions should be measured."[6]

In connection with defendants' motion for summary judgment, both parties submitted affidavits containing widely differing accounts of defendants' search, seizure and detention of plaintiffs at a port of entry into the United States from Mexico.[7] Plaintiffs' affidavit told of a twelve-hour ordeal of unnecessary physical violence and inhumane treatment, ending in their release without charge. Plaintiffs alleged that after a small amount of marijuana was seized from their automobile, they were taken to the port of entry office, handcuffed despite their cooperation, and repeatedly assaulted without provocation; and, that on three occasions at least one of the plaintiffs was beaten and knocked to the floor unconscious. Plaintiffs also alleged that their handcuffs were tightened beyond the point of feeling and that they were denied the use of restroom facilities.[8] Defendants, on the other hand, stated that all measures were taken in response to "two unruly and abusive detainees."[9] Plaintiffs alleged two distinct claims pursuant to *Bivens*:[10] use of excessive force during arrest and subsequent detention and detention following a warrantless arrest for an unreasonable duration without a probable cause determination by a judicial officer. The district court disallowed defendants' qualified immunity defense, holding that such a defense would not lie considering the type of conduct alleged.

Reviewing the district court's denial of summary judgment de novo[11] and construing the affidavits in the light most favorable to the plaintiffs,[12] the court of appeals held that defendants' alleged conduct might have violated plaintiffs' substantive due process and Fourth Amendment rights.[13] Moreover, the court held, granting qualified immunity on summary judgment would be inappropriate because the factual conflicts were sufficiently material to require resolution at trial.[14] While concluding that the denial of qualified immunity on summary

5. *Austin*, 945 F.2d at 1158.

6. *Id.* at 1158 n.2. The court has rarely entertained a case which required a specific identification of the applicable constitutional standard. *See, e.g.*, Martin v. County Board of Commissioners, 909 F.2d 402, 407 n.5 (10th Cir. 1990) (qualified immunity rejected though controlling constitutional standard not specified because questioned conduct violated potentially applicable standard); Griess v. Colorado, 841 F.2d 1042, 1047 (10th Cir. 1988) (deciding the immunity question without setting forth the constitutional standard because of the "special nature of the violations asserted.").

7. *Austin*, 945 F.2d at 1158.

8. *Id.*

9. *Id.* at 1157.

10. *Id.*

11. The denial of qualified immunity was reviewed de novo as a final decision under 28 U.S.C. § 1291 (1988). *See, e.g.*, Snell v. Tunnell, 920 F.2d 673, 675 (10th Cir. 1990); Mitchell v. Forsyth, 472 U.S. 511, 530 (1985); McEvoy v. Shoemaker, 882 F.2d 463, 465 (10th Cir. 1989).

12. *See, e.g.*, Ewing v. Amoco Oil Co., 823 F.2d 1432, 1437 (10th Cir. 1987).

13. *Austin*, 945 F.2d at 1155.

14. *Id.* (citing Snell v. Tunnell, 920 F.2d 673, 701-02 (10th Cir. 1990)).

judgment was not enigmatic, the court noted an "analytical snarl" regarding whether the Fourth Amendment standard[15] or the substantive due process standard was the operative standard to apply in claims involving post-arrest excessive force and regarding which constitutional standard should govern qualified immunity under the circumstances of the *Austin* case.

The controlling constitutional standard for evaluating the defendants' conduct must be determined whenever qualified immunity is asserted.[16] Since there is no generic standard applicable to all excessive force claims,[17] a court must first place defendant's objectionable conduct somewhere along the custodial continuum to determine the applicable standard. The "custodial continuum" runs from initial arrest or seizure ("stage 1") to post-arrest but pre-charge or pre-hearing custody to pre-trial detention ("stage 2") to post conviction incarceration ("stage 3").[18] The court summarily dismissed the defendants' argument that all questioned conduct took place prior to arrest,[19] stating that it would be doubtful that the arrest took twelve hours to accomplish, "as for example might be the case in an extended chase of the sort encountered in cinema . . . ."[20] The court then concluded that at least some of defendants' conduct took place at the second stage on the custodial continuum and should be evaluated by the constitutional standard applicable at that point. The court also discussed whether the Fourth Amendment continues to protect individuals against the deliberate use of excessive force after the arrest and pretrial detention begin. The court of appeals observed the Supreme Court's purposeful avoidance of a direct ruling[21] on this same issue in *Graham v. Connor*,[22] but also noted the Court's recognition of the "broad applicability of fourth amendment standards . . . applicable to post-arrest police conduct."[23] Before the Supreme Court's decision in *Graham*, the lower federal courts had drastically divergent views with regard to the applicability of the Fourth Amendment after an initial arrest.[24] While the question is still open for

15. The Tenth Circuit stated that "[a]s a general matter, claims based on the use of excessive force during arrest are now governed by the objective reasonableness standard of the fourth amendment." *Id.* at 1158.

16. *Id.* at 1158 n.2 (citing Spielman v. Hildebrand, 873 F.2d 1377, 1385 (10th Cir. 1989)).

17. *See, e.g.*, Titran v. Ackman, 893 F.2d 145, 147 (7th Cir. 1990) ("[d]uring arrest force must be reasonable, between arrest and conviction government may not punish without due process of law, and after conviction government may not inflict cruel and unusual punishment"). *See also infra* note 24.

18. *See* Gonzales v. City of Espanola, 946 F.2d 901 (10th Cir. 1991); *Austin*, 945 F.2d 1155, 1158 (10th Cir. 1991).

19. *Austin*, 945 F.2d at 1159.

20. *Id.*

21. *Id.*

22. 490 U.S. 386, 395 n.10 (1989).

23. *Austin*, 945 F.2d at 1159.

24. *See, e.g.*, Wilkins v. May, 872 F.2d 190, 192-95 (7th Cir. 1989) (fourth amendment protection ends and substantive due process protection starts once the initial arrest or seizure has been completed); Justice v. Dennis, 834 F.2d 380, 382-83 and n.4 (4th Cir. 1987) (substantive due process standard is applicable to excessive force claims where the conduct is alleged to have occurred post-arrest), *vacated*, 490 U.S. 1087 (1989); Robin v.

debate,[25] many of the lower courts have applied the Fourth Amendment standard to claims of post-arrest use of force in consideration of *Graham*.[26] The *Austin* court recognized the Fourth Amendment's limitations on both duration of detention and judicial determination of probable cause[27] and concluded that the Fourth Amendment also protects the arrestee detained without a warrant.

The court also discussed whether the Fourth Amendment standard was "clearly established at the time of the alleged conduct"[28] and whether it should be used to assess defendants' qualified immunity defense. The court noted that before *Graham*, the Supreme Court announced the applicable standard for governing the situation that developed in this case: law enforcement officers must be objectively reasonable in their searches and seizures.[29] The court concluded that in post-*Graham* cases involving conduct that took place before the *Graham* decision was announced, the Fourth Amendment should be applied to assess qualified immunity only when the plaintiff's claim is based on the Fourth Amendment.[30] However, when Fourth Amendment claims have not been specifically asserted, the substantive due process standard will determine the viability of a qualified immunity defense. In *Austin*, the court's holding that Fourth Amendment protections continue post-arrest did not reflect law clearly established at the time of the alleged conduct.[31] As a result, the court held that the substantive due process standard was the "appropriate yardstick" for evaluating a qualified immunity claim for post-arrest conduct.[32] Before *Austin*, there were two distinct standards applied at various points along the custodial continuum to determine the existence of qualified immunity. The *Austin* case is significant because it clearly establishes that the constitutionality of any law enforcement agent's entire course of conduct, regardless of

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Harum, 773 F.2d 1004, 1009-10 (9th Cir. 1985) (notion of "continuing custody" makes Fourth Amendment standard applicable throughout the custodial continuum); McDowell v. Rogers, 863 F.2d 1302, 1303-04, 1306 (6th Cir. 1988) (applying Fourth Amendment standard to facts similar to those in *Austin*).

25. *Compare* Henson v. Thezan, 717 F. Supp. 1330, 1336-36 (N.D. Ill. 1989) (holding that Fourth Amendment applies to all stages of the custodial continuum prior to probable cause hearing) *with* Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989) (holding that Fourth Amendment standard applies until formal charge or arraignment).

The Ninth Circuit is in accord with the Second Circuit, and applies the Fourth Amendment standard to all claims of post-arrest use of excessive force. *See, e.g.*, Hammer v. Gross, 884 F.2d 1200, 1204 (9th Cir. 1989), *vacated en banc on other grounds*, 932 F.2d 842, 845 n.1 and 850-51 (1991).

26. *Id.*

27. The court concluded:

> [j]ust as the fourth amendment's strictures continue in effect to set the applicable constitutional limitations regarding both duration (reasonable period under the circumstances of arrest) and legal justification (judicial determination of probable cause), its protections also persist to impose restrictions on the *treatment* of the arrestee detained without a warrant.

Austin, 945 F.2d at 1160 (emphasis added).

28. *Id.*

29. *Id.*

30. *Id.*

31. *See supra* notes 22 and 23 and accompanying text.

32. *Austin*, 945 F.2d at 1162.

where along the custodial continuum the conduct occurs, is to be evaluated under the Fourth Amendment objective standard.

II. DELAY IN APPEAL

Several Tenth Circuit decisions in 1991 strongly invited the Oklahoma Attorney General, Oklahoma Public Defenders Office, and Oklahoma Court of Criminal Appeals to work together to solve the "systematic delays" encountered by indigent clients appealing lower court decisions through the Oklahoma Public Defender's Office.[33] The lengthy delay appellants face when enlisting the aid of the public defender's office was the subject of five separate actions in 1991, the most significant being *Harris v. Champion*.[34] In the *Harris* decision, the Tenth Circuit remanded three similar cases on the same issue for reconsideration in light of its decision and subsequently remanded another case appealed after the *Harris* decision.

In *Harris*, petitioner was sentenced to serve consecutively one fifteen-year term and one five-year term for assault and battery. Upon being sentenced on September 29, 1988, he invoked his right of appeal and requested that counsel be appointed. On May 18, 1989 the Oklahoma Public Defender's Office filed an Application for Late Appeal, which was granted. On April 16, 1990, over one year later, petitioner received a letter from the Defender's Office setting forth the approximate time frame for filing a brief in support of his appeal.[35] On May 22, 1990, while his state appeal was still pending, petitioner filed a habeas corpus petition in the United States District Court for the Northern District of Oklahoma alleging both constitutional deficiencies in his trial and violations of due process, equal protection and right to counsel related to the delays in getting the Public Defender's Office to prepare his appellate brief.[36] The State moved to dismiss the petition for failure to exhaust available state remedies.[37] The federal district court adopted the magistrate's recommendation and dismissed the petition without prejudice.

Before discussing the merits of petitioner's argument, the court first

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33. *Id.* at 1071.

34. 938 F.2d 1062 (10th Cir. 1991).

35. The letter read in pertinent part:

> You will receive a copy of anything this office files in the Court of Criminal Appeals in your behalf. So far there has been a petition and an extension filed. There will be nothing else filed except extensions until we are able to prepare your brief or the court issues a final extension. . . . It will be at least three years before we are able to file your brief with the court.

Id. at 1064.

36. *Id.*

37. Before filing a habeas corpus action, a petitioner must exhaust all viable state remedies. 28 U.S.C. § 2254(b) sets forth the circumstances under which a court may grant a habeas corpus petition:

> An application for a writ of habeas corpus . . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process, *or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.*

28 U.S.C. § 2254(b) (1988) (emphasis added).

addressed the exhaustion requirement and the established exceptions, noting the well-recognized view that a prisoner has no obligation to exhaust his state remedies wherever there has been an excessive and unjustified delay in his appeal or post-conviction proceeding.[38] Respondent asserted that the petitioner should not be excused from exhausting his state remedies because the delay was caused by "petitioner's counsel's present request for extensions which have been granted."[39] The court rejected respondent's syllogistic argument, and held that the inability of the public defender to handle Harris' case in a timely fashion could not be attributed to the indigent petitioner.[40] As the Supreme Court held in *Barker v. Wingo*,[41] "the ultimate responsibility . . . must rest with the government rather than the defendant."[42] While the court sympathized with the heavy demands on the Public Defender's Office,[43] it held that there was insufficient justification to withhold federal relief until the petitioner has exhausted his "inordinately-delayed state remedies."[44]

The exhaustion of state remedies requirement, set forth in 28 U.S.C. § 2254(b), is a matter of comity—not an absolute limitation on federal courts' jurisdiction.[45] The *Harris* court went further to say that even if the Public Defender's Office were now to accelerate the projected time-table for filing the brief, the pre-existing delay might, by itself, be sufficient to abate the exhaustion requirement. However, the court remained sensitive to the comity issue and expressed its desire to maintain

38. DONALD E. WILKES, FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF, §§ 8-19 (1987). The court also cited cases from seven circuits that are in full accord on this issue: Coe v. Thurman, 922 F.2d 528, 531 (9th Cir. 1990) ("[A] prisoner need not fully exhaust his state remedies if the root of his complaint is his inability to do so."); Elcock v. Henderson, 902 F.2d 219, 220 (2d Cir. 1990); Burkett v. Cunningham, 826 F.2d 1208, 1221 (3rd Cir. 1987); Okot v. Callahan, 788 F.2d 631, 633 (9th Cir. 1986) (If defendant receives inadequate redress in state court proceeding, he may file a habeas corpus action in federal court.); Cook v. Florida Parole and Probation Commission, 749 F.2d 678, 680 (11th Cir. 1985) ("State remedies will be found ineffective and a federal habeas corpus petitioner will be excused from exhausting them in the case of unreasonable, unexplained state delays in acting on the petitioner's motion for state relief."); Pool v. Wyrick, 703 F.2d 1064, 1066 (8th Cir. 1983); Shelton v. Heard, 696 F.2d 1127, 1128-29 (5th Cir. 1983); Dozie v. Cady, 430 F.2d 637, 638 (7th Cir. 1970).

39. *Harris*, 938 F.2d at 1065.

40. *Id.*

41. 407 U.S. 514, 531 (1972). Although the *Barker* case dealt with delay of an initial hearing, it has been applied uniformly to cases involving delays in sentencing and delays in appeals with facts similar to those in the *Harris* case.

42. *Id.*

43. *Harris*, 938 F.2d at 1066.

44. *Id.*

45. In Shelton v. Heard, 696 F.2d 1127 (5th Cir. 1983), the court held:

> [T]he requirement to exhaust state remedies is not a jurisdictional limitation on the federal courts. Rather it is a matter of comity between the federal and state courts. The forbearance of the federal courts is based upon the assumption that the state remedies available to the petitioner are adequate and effective to vindicate federal constitutional rights. When those state procedures become ineffective or inadequate, the foundation of the exhaustion requirement is undercut and the federal courts may take action.

Shelton, 696 F.2d at 1128 (citing Rose v. Lundy, 455 U.S. 509, 516 n.7 (1982) and Fay v. Noia, 372 U.S. 391, 433-34 (1963)).

an incentive for states to remedy unreasonable delays.[46]

The *Harris* court, without deciding the merits of petitioner's claims,[47] enumerated several constitutional concerns to guide the district court in determining whether a petitioner should be required to exhaust all available state remedies. First, the court should look at the absolute length of time required to complete the direct appeal process. In the *Harris* case, the court determined that it would take four and one-half years from the time Harris' appeal was docketed plus an indeterminate amount of time before his case would be set for argument.[48] Second, the court should look to the length of the appellate process relative to the length of the sentence in determining whether the habeas corpus petition should be granted.[49] This factor is not determinative since a prisoner serving a shorter sentence, subjected to even reasonable delay, might have completed his sentence by the time the appeal can be heard. This approach balances the potential conflict caused by a bypass of comity with the reduced effectiveness of habeas corpus actions caused by requiring petitioners to exhaust all state remedies.[50] Third, the court should address any equal protection ramifications of forcing indigent prisoners to suffer extraordinary delays solely because of their financial status: "There can be no equal justice where the kind of appeal a man enjoys 'depends on the amount of money he has.' "[51] While absolute equality is not required, the fact that an appeal is being delayed for the indigent and for no one else may implicate an equal protection issue.[52] Fourth, in considering whether to accept a habeas corpus request from a petitioner who has not yet fully exhausted state remedies, the court should look to the due process implications of an alleged delay. The *Harris* court noted that many courts analyze state appellate delay due process terms,[53] and have recognized that delay of the post-conviction process may be a denial of due process.[54] Fifth, the court turned to the effect a delay in appellate process might have on the right to effective counsel.[55] Again, this concern balances petitioner's constitutional

46. *Harris*, 938 F.2d at 1067 (citing Layne v. Gunter, 559 F.2d 850, 851-52 (1st Cir. 1977)) ("In this delicate area of comity, bright line rules are not the answer. The objective is not for one judicial system to score points against the other, but to assure expeditious justice to individuals and to retain all incentives for both the state and federal systems to labor toward that end.").

47. *Id.* at n.5.

48. *Id.*

49. *Id.*

50. The State argued that "in all likelihood the appeal will be decided during the time which petitioner is incarcerated," and that "the fact that petitioner may have finished serving his sentence when his appeal is denied does not render the appeal moot." *Id.* at n.4. The court rejected these arguments primarily because one of petitioner's claims was that he was sentenced under the wrong statute, and thus should have received a lesser sentence.

51. *Id.* at 1067 (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956)).

52. *Id.* at 1068. ("[A]n insistence upon further exhaustion of state remedies would inappropriately subjugate petitioner's constitutional rights to the concerns of comity.").

53. *Id.*

54. *Id.* (citing Kelly v. Crouse, 352 F.2d 506 (10th Cir. 1965)); Smith v. Kansas, 356 F.2d 654 (10th Cir. 1966), *cert. denied*, 389 U.S. 871 (1967)).

55. The right to effective counsel and the equal protection concerns expressed by the

rights[56] with comity concerns.

After suggesting these constitutional guideposts, the court of appeals turned to the matter of relief for independent claims stemming from the delay in process. When, as in *Harris*, the petitioner alleges trial error as well as an independent basis for relief, such as denial of due process, the federal district court should hear the independent claim without requiring an exhaustion of state remedies, because "[i]t would be meaningless to insist that petitioner exhaust his state remedies when the essence of his due process claim arises directly out of his inability to do so."[57] On the other hand, when a petitioner *only* alleges federal constitutional errors at his state trial, comity requires the petitioner to exhaust state court remedies unless he can show inordinate, excessive and unexcusable delay."[58] If such circumstances exist, a federal court may hear the merits of the constitutional trial error claim and any independent claim stemming from the delay.

When a federal court hears a habeas corpus action, either after exhaustion of state remedies or by waiving the requirement, the court may order a wide range of remedies. The court may order the prisoner's immediate release,[59] release if an appeal is not heard within a relatively short time,[60] or release on bail until the state appeal is heard.[61] Although in *Harris* the court of appeals left the selection of an appropriate remedy to the district court, the survey of available relief was no doubt aimed at convincing all involved state departments to cooperate with the court's determination.

The *Harris* court made five orders. First, it reversed the district court's dismissal of petitioner's habeas corpus action for failure to exhaust state court remedies.[62] Second, it ordered that two other cases, *Bunton v. Cowley*[63] and *Hacker v. Saffle*,[64] along with any other pending

court are interwoven. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963), in which Justice Douglas held that indigent defendants were denied equal protection where plaintiff's appeals were decided without the benefit of counsel.

56. In *Douglas*, the Supreme Court held that when there is a denial of effective counsel:

> [T]here is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors ares only the right to a meaningless ritual, while the rich man has a meaningful appeal.

Id. at 358-59.

57. *Harris*, 938 F.2d 1062, 1069 (10th Cir. 1991). *See also* Coe v. Thurman, 922 F.2d 528 (9th Cir. 1990) (holding that excessive delay in obtaining an appeal may constitute a due process violation and that a prisoner need not exhaust state court remedies before seeking redress for the independent due process claim).

58. *Harris*, 938 F.2d at 1069.

59. *See, e.g.*, Burkett v. Cunningham, 826 F.2d 1208 (3rd Cir. 1987).

60. *See Coe*, 922 F.2d at 533.

61. *See* Rivera v. Concepcion, 469 F.2d 17, 20 (1st Cir. 1972).

62. *Harris*, 938 F.2d at 1071.

63. 936 F.2d 582 (10th Cir. 1991).

64. 936 F.2d 583 (10th Cir. 1991).

habeas corpus actions, be consolidated for reconsideration in light of the *Harris* opinion.[65] Third, the court ordered that the district court conduct a full hearing into possible systematic delays of the Oklahoma Public Defender's Office in the preparation and filing of appeals for the indigent,[66] stating that all parties should work together to suggest solutions to correct any constitutional deficiencies caused by the appellate delay.[67] Fourth, the court ordered the district court to make detailed findings of fact and conclusions of law and to issue appropriate remedies for all constitutional violations.[68] Fifth, the court ordered that experienced counsel be appointed to represent the petitioners in the collectively remanded cases.[69]

The *Harris* case was recently extended to cover claims for declaratory and injunctive relief under 42 U.S.C. § 1983 in *Richards v. Bellmon*.[70] While a habeas corpus action, challenging the fact of conviction or the conditions or duration of the confinement, requires an exhaustion of state remedies, a § 1983 action has no such requirement.[71] The court emphasized that relief under 42 U.S.C. § 1983 is available to challenge the conditions of confinement or to seek declaratory judgment as a predicate to an award of monetary damages or injunctive relief.[72] Although the court refused to interfere with the petitioner's tactical choice to proceed under § 1983 as opposed to habeas corpus, the court instructed the district court to "be mindful of the statements contained in our order on rehearing in Harris,"[73] implying that the petitioner, if successful, could recover damages to compensate for the backlog in the Public Defender's Office that delayed his appeal.

III. Competency to Stand Trial

In *Lafferty v. Cook*,[74] the Tenth Circuit applied the Supreme Court's decision in *Dusky v. United States*[75] to determine a defendant's competence to stand trial. While the *Lafferty* case does not represent a new approach to competency determinations in the Tenth Circuit, the case is significant in that it represents the first time the court has addressed the constitutional implications of a defendant's refusal to raise the insanity defense despite strong evidence of insanity.

65. Due to venue considerations, this order was later vacated and the cases were consolidated and remanded to the correct district within Oklahoma. *Harris*, 938 F.2d at 1072-73.

66. *Id.* at 1071.

67. Although the Attorney General objected to this order because of her status as a party in the action, the court issued a sharply worded denial: "One would think that the Attorney General's Office would want to be represented at a hearing where such matters are under review." *Id.* at 1072.

68. *Id.* at 1071.

69. *Id.*

70. 941 F.2d 1015 (10th Cir. 1991).

71. *Id.* at 1018 (citing Preiser v. Rodriguez, 411 U.S. 475, 499-500 (1973)).

72. *Id.*

73. *Id.* at 1019.

74. 949 F.2d 1546 (10th Cir. 1991).

75. 362 U.S. 402 (1960) (per curiam).

Before committing the acts for which he was convicted, Ronald Lafferty was excommunicated from the Church of Jesus Christ of Latter-Day Saints because of his unorthodox religious views,[76] which eventually led to marital difficulties and a divorce from his wife.[77] Lafferty's sister-in-law, Brenda, apparently encouraged Lafferty's wife to take their infant daughter and leave Lafferty.

Lafferty, his brother, and two other men who shared Lafferty's religious views participated in prayer meetings, at which they discussed the "removal" of Brenda and her infant daughter.[78] While under the influence of a religious revelation, Lafferty, his brother and the two other men drove to Brenda's house, and Lafferty and his brother went inside and killed both Brenda and her infant daughter, while the other two men waited in the car.

After the state court initially determined that Lafferty was competent to stand trial, defendant's counsel filed notice that he planned to present an insanity defense.[79] Under Utah state law, a defendant must cooperate in a pre-trial mental evaluation to avail himself of the insanity defense.[80] Lafferty refused to cooperate because he did not consider himself insane and did not understand that he would not be allowed to use expert testimony at trial from an expert who had examined him during the initial competency proceeding.[81] Defendant's failure to cooperate with the requisite mental examination led the court to disallow the presentation of the insanity defense at trial. The court reserved ruling on whether the expert testimony would be admissible during trial on the defense of manslaughter due to diminished mental capacity.[82] Although the trial court eventually allowed the expert testimony for the manslaughter defense, defendant refused to let his counsel present the evidence because he contended that his mental capacity was not diminished when he committed the homicides.[83] Lafferty was convicted of capital

76. *Lafferty*, 949 F.2d at 1548.

77. *Id.*

78. *Id.*

79. *Id.* at 2. According to UTAH CODE ANN. § 77-14-3 (1) (1991):

> When a defendant proposes to offer evidence that he is not guilty as a result of insanity or that he had diminished mental capacity or any other testimony of mental health expert to establish mental state, he shall, at the time of arraignment or as soon afterward as practicable, but not fewer than 30 days before trial, file and serve the prosecuting attorney with written notice of his intention to claim the defense.

80. UTAH CODE ANN. § 77-14-4 (2) (1991) sets forth in relevant part:

> The defendant shall make himself available and fully cooperate in the examination by the department and any other independent examiners for the defense and the prosecuting attorney. If the defendant fails to make himself available and fully cooperate, and that failure is established to the satisfaction of the court at a hearing prior to trial, the defendant is barred from presenting expert testimony relating to his defense of mental illness at the trial of the case . . . .

81. Lafferty v. Cook, 949 F.2d 1546, 1549 (10th Cir. 1991).

82. *Id.*

83. *Id.* At this point in the trial, defense counsel attempted to file a motion to withdraw; however, defendant advised the court that if he represented himself, he would argue that the court had no jurisdiction because he had been commanded by God to commit the homicides. *Id.* at n.5.

murder and sentenced to death.[84]

After his conviction and sentencing were affirmed on direct appeal,[85] defendant filed a petition for habeas corpus in federal district court. During the habeas corpus action, the federal district court discovered that several of the transcripts of the state court proceedings were omitted from the record on appeal and suggested filing a petition for rehearing in state court.[86] The Utah Supreme Court held that the transcripts did not warrant a change in its prior ruling.[87] The federal district court subsequently denied Lafferty's habeas corpus petition, and Lafferty appealed.

When a federal court hears a habeas corpus action challenging a state court's determination, the federal court must presume the state court's factual findings correct, unless the federal court concludes that the fact determination is not supported by the record.[88] The court of appeals determined that competency is an issue of fact[89] and set out to determine whether the state court applied the correct legal standard, and if so, whether its determination was supported by the record.[90]

The court of appeals concluded that since competence to stand trial is an aspect of due process,[91] the Constitution requires one gauge against which to measure, because of his mental condition, a defendant's due process rights are violated by requiring him to stand trial."[92] The court of appeals observed that the correct standard to use in making a competency determination was set forth by the Supreme Court in *Dusky v. United States*:[93]

> [I]t is not enough for the district judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of events,' but that the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him.'[94]

After *Dusky*, the Tenth Circuit has used this "sufficient contact with reality test" as "the touchstone for ascertaining the existence of rational un-

84. *Id.*

85. State v. Lafferty, 749 P.2d 1239 (Utah 1988).

86. Lafferty v. Cook, 949 F.2d 1546, 1548 (10th Cir. 1991).

87. State v. Lafferty, 776 P.2d 631 (Utah 1989).

88. 28 U.S.C. § 2254(d)(8) (1988).

89. In Demosthenes v. Baal, 110 S. Ct. 2223, 2225 (1990), the Supreme Court held, "a state court's determination on the merits of a factual issue are entitled to a presumption of correctness on habeas corpus review. We have held that a state court's conclusion regarding a defendant's competency is entitled to such a presumption."

90. *Lafferty*, 949 F.2d at 1548.

91. Pate v. Robinson, 383 U.S. 375, 378 (1966); Coleman v. Saffle, 912 F.2d 1217, 1224 (10th Cir.), *cert. denied*, 111 S. Ct. 22 (1990).

92. *Lafferty*, 949 F.2d at 1550.

93. 362 U.S. 402 (1960) (*per curiam*).

94. *Id.* at 402. While *Dusky* was a federal prosecution, this test is equally applicable to habeas corpus determinations. *See, e.g.*, Drope v. Missouri, 420 U.S. 162 (1975); Coleman v. Saffle, 912 F.2d 1217, 1224 & n.8 (10th Cir. 1990).

derstanding."[95] The state court rejected the mental examiners' conclusion that Lafferty was incompetent to stand trial because their conclusions "rested almost entirely on the 1960 case of *Dusky v. United States*, and that they have misapplied the law enunciated in that case."[96] The state court went on to say that "*Dusky* is a very short per curiam opinion with no underlying facts stated therein, and it is not possible to ascertain from the opinion the context in which the words relied upon by the examiners were used."[97] The court of appeals commented that the state court's findings "reveal unambiguously that the state trial court's evaluation of Lafferty's competency was infected by a misperception of the legal requirements set out in Dusky. . . ."[98] The court of appeals concluded that the state court had failed to use the *Dusky* test, and thus that the state court's determination of competence was not supported by the record and that the presumption of correctness of the state court's factual findings set forth in 28 U.S.C. § 2254(d) did not apply.[99]

After rejecting the presumption of correctness, the court of appeals noted that all of the expert testimony and evidence presented at the pretrial competence proceedings were consistent in showing Lafferty "unable to make decisions on the basis of a realistic evaluation of his own best interests."[100] While a defendant operating under a paranoid delusional system may contend that he is not mentally ill and refuse to present an appropriate defense, "this result cannot be reconciled with the requirements of due process."[101] Accordingly, Lafferty's writ for habeas corpus was granted and his sentence and conviction were vacated.

The holding in *Lafferty* is significant to the Tenth Circuit because it requires a defendant to assert an insanity defense despite the defendant's persistent objections. The case holds that the Constitution requires the court to instruct the jury on the insanity defense independent of the defendant's wishes if evidence supports a finding that the defendant is insane.

IV. DOUBLE JEOPARDY

In 1991, the Tenth Circuit decided one case that impacted the law

95. *Lafferty*, 949 F.2d at 1551. While the majority in *Lafferty* cited several Tenth Circuit cases to establish the proposition that the defendant must have a sufficient contact with reality, the dissent contended that the cited cases were factually distinguishable, and did not require such a finding. *Id.* at n.3.

96. *Id.*

97. *Id.*

98. *Id.*

99. 28 U.S.C. § 2254(d) (1977) provides that in a federal habeas corpus proceeding, the state court's determinations of factual issues should, under most circumstances, be presumed correct if the findings were made by a court of competent jurisdiction after a full, fair and adequate hearing, and where the facts at issue were fully developed.

100. *Lafferty*, 949 F.2d at 1555.

101. *Id.* at 9.

of double jeopardy within the circuit.[102] This decision, discussed below, reflects the court's willingness to follow the United States Supreme Court in granting criminal defendants greater protection under the law. As this cases demonstrates, it is now more difficult for the state to prosecute a defendant twice when the alleged crimes stem from the same conduct.

In *United States v. Koonce*,[103] the Tenth Circuit addressed two significant double jeopardy issues: first, whether the Double Jeopardy Clause prohibits the conviction and sentencing for possession of an illegal substance where the same possession was used in an earlier proceeding to increase the sentence; and second, whether the Double Jeopardy Clause prohibits the conviction and sentencing of a felon in possession of a firearm, where the same possession was used in an earlier proceeding to increase the sentence.

Koonce distributed methamphetamine from his home in Monticello, Utah. In late 1987, one of Koonce's customers pled guilty to distribution charges and named Koonce as his supplier. Koonce was eventually charged in the United States District Court for the District of South Dakota with one count of distributing methamphetamine.[104] A jury found Koonce guilty of distributing 443 grams of methamphetamine within South Dakota.[105] At the sentencing proceeding, the prosecution introduced evidence of the methamphetamine and firearms found at Koonce's home in Utah.[106] Koonce's ultimate sentence was not based solely upon the 443 grams he mailed into South Dakota, but upon a total of 7,869 grams of methamphetamine he owned.[107] Koonce received a twenty-year sentence in a maximum se-

102. In another case, the Tenth Circuit held that felony counts listed in a second indictment stemmed from the same conduct that triggered a single-count conviction one year earlier, thereby violating the law of double jeopardy. *See* United States v. Felix, 926 F.2d 1522, 1524 (10th Cir. 1991), *rev'd*, 112 S.Ct. 1377 (1991); *see also* U.S. v. Felix, 867 F.2d 1068 (8th Cir. 1989). The Tenth Circuit showed a willingness to increase the protections afforded to criminal defendants in the area of double jeopardy by following *Grady v. Corbin*, 495 U.S. 508 (1990). Under the *Grady* analysis, a court asks whether the government must prove conduct in the second case that constitutes an offense for which the defendant was already tried. *Grady*, 495 U.S. at 511; *see also* Illinois v. Vitale, 447 U.S. 410 (1980) (distinguishing same conduct from actual evidence). The focus is upon the defendant's conduct, not the evidence used by the state to prove the defendant's conduct. Many of the circuit courts that have addressed *Grady* limited the case to its facts. *See, eg.* United States v. Calderone and Catalano, 917 F.2d 717 (2d Cir. 1990) (holding that "same conduct" test applies to double jeopardy claims occurring within successive prosecutions); *cf.* United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990) (holding that the *Grady* decision does not apply in the RICO context). Accordingly, the United States Supreme Court recently reversed the Tenth Circuit's decision in the *Felix* case, further limiting the *Grady* precedent to certain factual contexts. *See* United States v. Felix, 112 S. Ct. 1377 (1992) *on remand to* United States v. Felix, __ F.2d __-, 1992 WL 105467 (10th Cir., May 21, 1992) (No. 89-7058).

103. 945 F.2d 1145 (10th Cir. 1991).

104. *Id.* at 1146. Koonce was charged pursuant to 21 U.S.C. §§ 841(a)(1), 846 (1988). He was tried in South Dakota after mailing a quantity of methamphetamine into the state.

105. *Id.*

106. *Id.*

107. *Id.* The conviction was enhanced by two levels, reflecting the firearms Koonce possessed and his history as a criminal.

curity prison, five years of supervised release, and a fine of $50,000.[108]

Following the conviction in South Dakota, the United States charged Koonce in the United States District Court for the District of Utah with intent to distribute the methamphetamine found in Koonce's Utah residence and possession of a firearm by a felon.[109] The district court refused to dismiss the indictment on double jeopardy grounds, and the Tenth Circuit Court of Appeals affirmed this decision.[110] Koonce was ultimately found guilty of all charges and appealed his conviction to the Tenth Circuit. By the time his appeal was heard in the Tenth Circuit, the United States Supreme Court had decided *United States v. Grady*.[111]

The Tenth Circuit ultimately held that the Double Jeopardy Clause prohibits a subsequent prosecution, even when the earlier use of possession evidence was used only in a sentencing proceeding.[112] In reaching its decision, the court employed a three-step analysis. First, the court found that Koonce was punished for the first possession conviction,[113] and that both the Utah and South Dakota proceedings punished Koonce for the same conduct. Absent specific congressional design, this presents significant double jeopardy implications under *Grady*.[114] Second, the court determined that there was no congressional intent that a defendant like Koonce receive cumulative punishment for the same conduct and that Congress intended to have illicit drug charges combined into a single punishment, not broken into separate offenses.[115] Third, the court looked at whether the punishment imposed by the Utah district court constituted double punishment under the Double Jeopardy Clause, given the concurrent punishments.[116] Citing *Ball v. United States*,[117] the court held that concurrent punishment does not make double punishment constitutional under the Double Jeopardy Clause.[118]

The second issue, whether the Double Jeopardy Clause prohibits the conviction for possession of a firearm when the possession was used

108. Koonce's sentence was the maximum allowed under 21 U.S.C. § 841(b) (1988).

109. *Koonce*, 945 F.2d at 1147-48.

110. *See* United States v. Koonce, 885 F.2d 720, 722 (10th Cir. 1989). The Tenth Circuit remanded the case back to the district court for trial.

111. 495 U.2. 508 (1990).

112. *Koonce*, 945 F.2d at 1155.

113. *Id.* at 1149.

114. *Id.*

115. *Id.* at 1151. *See also* U.S.S.G. ch.1, pt. A, 4(a) (showing that the sentencing guidelines were constructed in an effort to eliminate charge/count manipulation). The sentencing and punishment components of the Double Jeopardy Clause are backed by legislative intent. The Constitution does not prohibit Congress from punishing each step leading to the full crime, where Congress possesses the authority to set punishment for the full crime. *See* Garrett v. United States, 471 U.S. 773, 779 (1985).

116. *Koonce*, 945 F.2d at 1151.

117. 470 U.S. 856, 861 (1985).

118. *Koonce*, 945 F.2d at 1153 (defining punishment under *Ball* to include all consequences of a conviction, not just incarceration times or fines and holding the absence of an additional prison term is in no way persuasive of the constitutionality of a second conviction).

to increase an earlier sentence, received only cursory treatment from the court. Applying the traditional *Blockburger*[119] test, the court found that in this case the firearm sentencing enhancement charge and possession charge each required proof of different elements.[120] The firearm sentencing enhancement requires that the accused be in possession of the firearm and that possession occur during the commission of the narcotics offense. The "possession by a felon" charge, in Utah, requires that the accused possessed a firearm and was a felon during possession. Accordingly, the court rejected the second contention of double jeopardy without further analysis.

This opinion establishes that there is no legitimate reason to bring a separate proceeding against a defendant when an enhanced punishment was given in an earlier proceeding.[121] Even though there is no direct ban against the prosecution under the Double Jeopardy Clause, there is such a ban against additional punishment in the second proceeding.

V. SEARCH AND SEIZURE

The Tenth Circuit heard several cases on the issue of search and seizure during 1991, most of which either affirmed the existing law or rejected search and seizure appeals on other grounds.[122] One decision, *United States v. Walker*,[123] is significant for its strong denunciation of random automobile stops by the police and for defining the appropriate standard of review in such cases.

Walker was stopped for speeding and asked to produce a valid driver's license and vehicle registration. Although his hands shook slightly when removing the license from his wallet, there was no reason for the police officer to believe that Walker had committed a crime.[124] Rather than issue a speeding citation, the officer questioned Walker about various crimes unrelated to the traffic stop and asked whether there were any controlled substances, weapons, open containers of alcohol, or large amounts of cash in the vehicle. Walker admitted only that he was carrying $1750 in cash. Upon the officer's request, Walker gave permission to search the vehicle. In the trunk, the officer found kilogram packages of cocaine.[125] After the defendant's arrest, the police obtained a search warrant and discovered 86 kilogram packages of co-

119. Blockburger v. United States, 284 U.S. 299 (1932). The *Blockburger* test examines the statutory elements of the charged offenses. If the elements of the offenses are the same, or if one is a lessor included offense of the other, the charges must be brought in one prosecution. A subsequent prosecution for an offense not charged in the first prosecution will result in a finding of double jeopardy under the *Blockburger* analysis.

120. *Koonce*, 945 F.2d at 1154.

121. *Id.* at 1154 n.10.

122. *See, e.g.*, United States v. Dodds, 946 F.2d 726 (10th Cir. 1991) (affirming defendant's conviction and holding that he had no standing to challenge the police officer's actions on search and seizure grounds).

123. 941 F.2d 1086 (10th Cir. 1991) [hereinafter *Walker I*].

124. United States v. Walker, 933 F.2d 812, 813 (10th Cir. 1991) [hereinafter *Walker II*].

125. *Id.* at 814.

caine in the automobile.[126] The United States District Court for the District of Utah suppressed all of the evidence of cocaine in accordance with the Tenth Circuit's 1988 decision in *United States v. Guzman*.[127] *Guzman* held that the defendant's apparent anxiety did not raise sufficient suspicion to justify the lengthy detention.[128] On appeal, the Tenth Circuit affirmed the district court's analysis but vacated and remanded the case to allow the district court to decide whether the search was justified by the "totality of the circumstances."[129] The district court found no justification for the search, and the State petitioned the Tenth Circuit for rehearing. The petition was denied. The denial of rehearing is significant, as it affirms the importance of the *Guzman* decision in analyzing when a stop of an automobile shifts from a simple *Terry*[130] stop to a formal seizure.

Guzman involved an automobile stop for failure to wear a seat belt.[131] Although the police officer had no reason to suspect further criminal activity, he continued to ask the defendants intrusive questions unrelated to the traffic stop. The Tenth Circuit held that the detention of the driver and passenger of the automobile was unreasonable, especially when the driver produced a valid driver's license and had valid registration for the vehicle.[132] *United States v. Walker* is almost factually identical to the *Guzman* case, and thus it does not present a change in search and seizure law within the Tenth Circuit. The *Walker* decision demonstrates the court's resolve to denounce random stops by police officers where the intrusiveness of the stop moves beyond the "ordinary."[133] The court held that when the intrusiveness of a police officer's questioning moves beyond "mere inconvenience," there is almost no justification for the seizure absent an objective reasonable suspicion.[134] The limited circumstances where seizure is permitted absent such reasonable suspicion were not present in *Walker*.[135]

The petition for rehearing contended that an individual driving a car on public roads or highways has less of an expectation of privacy

126. *Id.*

127. 864 F.2d 1512 (10th Cir. 1988); *see also* United States v. Walker, 751 F. Supp. 199 (D. Utah 1990) [hereinafter *Walker III*].

128. *Walker III*, 751 F. Supp. at 204.

129. *Walker II*, 933 F.2d at 817.

130. Terry v. Ohio, 392 U.S. 1 (1968) (scope of a search subsequent to the stop of an automobile limited to what was minimally necessary to determine whether the defendants were armed.).

131. *Guzman*, 864 F.2d at 1519.

132. *Id.*

133. *Walker I*, 941 F.2d at 1089. The court acknowledged that more leeway is allowed when the stop is a systematic checkpoint stop. The instant case focuses upon random stops or individual stops, which the Supreme Court denounced in United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

134. *Walker I*, 941 F.2d at 1089. The objective and reasonable suspicion standard was set forth by the Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968).

135. For examples of where such exceptions arise, see Treasury Employees v. Von Rabb, 489 U.S. 656, 668 (1989); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Michigan State Police v. Sitz, 496 U.S. 444 (1990); *see also* Delaware v. Prouse, 440 U.S. 648 (1979).

than does an individual in a private residence.[136] The Tenth Circuit, while recognizing the general validity of the argument, rejected its application in the instant case, citing *Delaware v. Prouse*.[137] *Prouse* held that motorists do not lose their reasonable expectations of privacy solely because they are in an automobile subject to heightened regulation.[138] The court reasoned that moving from a stop for a speeding violation to intrusive questioning about drug trafficking and large amounts of cash clearly implicates Fourth Amendment privacy interests.[139]

Finally, *United States v. Walker* is notable for defining the appropriate standard of review when an officer's reasonable suspicions are questioned. The reviewing court must accept the trial court's determination as to whether a reasonable and objective suspicion existed, unless "clearly erroneous."[140] The court found nothing erroneous in the district court's determination, and thus denied appellant's petition for rehearing.[141]

VI. CONCLUSION

During the survey period, the Tenth Circuit did not drastically change the law of criminal procedure. However, several cases decided during 1991 gave further insight into areas of criminal procedure that were previously unclear or undefined. While these cases did not seem to support any definitive trend in the circuit, it is certain that future decisions will continue to conservatively explore and clarify the constitutional limitations on the law of criminal procedure.

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136. *Walker I*, 941 F.2d at 1089.
137. 440 U.S. 648 (1979).
138. *Walker I*, 941 F.2d at 1089.
139. *Id.* at 1090.
140. *Id.* The court also noted that there is a split among the circuits on this issue. *See, e.g.*, United States v. Peoples, 925 F.2d 1082, 1085 (8th Cir. 1991) (clearly erroneous standard applied); United States v. Rose, 889 F.2d 1490, 1496 (6th Cir. 1989) (clearly erroneous standard applied); United States v. Mondello, 927 F.2d 1463, 1470 (9th Cir. 1991) (A police officer's reasonable suspicion, as a mixed question of law and fact, must be subject to de novo review by the appellate court.).
141. *Walker I*, 941 F.2d at 1090. The court also noted that given its recent decision in United States v. Turner, 928 F.2d 956 (10th Cir. 1991), establishing the clearly erroneous standard, it could not deviate from this precedent with only a three-judge panel.