

2000

Utah v. Richard Andrew Frausto : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff / Appellee

vs.

RICHARD ANDREW FRAUSTO,

Defendant / Appellant

Case No.: 20000520-CA

BRIEF OF APPELLANT

Priority no. 2

**COMES NOW THE DEFENDANT / APPELLANT AND APPEALS
Order dated December 18, 1992 and JUDGMENT, RESTITUTION AND
JUDGMENT, SENTENCE AND COMMITMENT DATED May 8, 2000.**

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JURISDICTIONAL STATEMENT

Jurisdiction to hear this appeal is conferred upon the above–entitled Court by Section 78–2a–3)2)(f), Utah Code Annotated, 1953, as amended.

NATURE OF PROCEEDINGS

This is an appeal from the Judgment of the Fifth District Court, in and for Washington County, State of Utah, the Honorable James L. Shumate, presiding, and sitting with a jury, wherein the Defendant was convicted of Murder, a first-degree felony.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

(PRESERVATION OF APPEAL ON THE RECORD)

ISSUE I

Did the trial court commit clear error by not instructing the jury as to the definition of duels, mutual combat, or consensual altercations? The appropriate standard of review for a trial court's response to a question of law is correction of error. *State v. James*, 819 P.2d 781, 796 (Utah 1991) (discussing the standard of review for interpretation of statutory law).

ISSUE II

Does Utah Code Annotated, 1953 as amended, Section 76-5-104 state that a duel, mutual combat, or consensual altercation, involving the use of a dangerous weapon, is not a defense, in and of itself, to a charge of criminal homicide; and, if not, i. e. it is a defense, does it deny a person his right to self defense when coupled with jury Instruction #13.c?

Did the trial court err in giving Instruction 13.c, because it was unnecessary, confusing, and misleading?

Did the Trial Court Judge commit clear error by allowing a jury verdict to be entered prior to a juror submitted question being answered?

Standard of review is found in *State v. Garcia*, 2001 UT App 19 (Utah App. 01/25/2001) ¶6 ... Because [Defendant] did not object on the record to the jury instructions at trial, he can only obtain relief by demonstrating plain error. See *State v. Parker*, 2000 UT 51, ¶6, 4 P.3d 778. Plain error requires a showing that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for [defendant]" *Id.* at ¶7 (quoting *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993)).

ISSUE III

Richard Andrew Frausto has been denied his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article 1

Section 12, of the Utah Constitution, and Rule 11 (d) (1) (g) and (h), of the Utah Rules of Appellate Procedure, to Due Process of Law, because of mistakes, delays, and inaction, by the Court System charged, by those same constitutional elements, with the processing of his case on direct appeal. Standard of Review: Plain error is a question of law, which we review for correctness *State v. Ostler*, 2000 UT App 28, ¶6, 996 P.2d 1065.

SUMMARY OF FACTS

A. On July 28, 1992, the police were called in response to a report of shots being fired at a residence in a trailer park in Ivins, Utah. Sergeant Pete Kuhlman testified that, upon arriving at the scene, he discovered the body of Larry Gilstrap inside of a pick-up truck. Upon checking vital signs, Sergeant Kuhlman confirmed that Mr. Gilstrap was dead.

B. The police alleged that, in the early morning hours, after a night of drinking, Mr. Frausto got into an argument with Mr. Gilstrap. The police also alleged that, during the course of this argument, Mr. Gilstrap was shot three times by Mr. Frausto.

C. Mr. Frausto testified that he shot Mr. Gilstrap twice, only after Mr. Gilstrap fell on him and after Gilstrap received a gunshot wound to the throat from someone else. Mr. Frausto also testified that he and Johnny Gourley put Mr. Gilstrap into Mr. Gilstrap's truck.

D. The Defendant was charged with criminal homicide, and was convicted after a jury trial. While the jury was deliberating, a note was passed,

from the jury, to the judge. The question was not answered before the jury came back with their verdict. The trial judge sentenced the Defendant to one term of imprisonment of not less than six years to life.

FACTS OF THE CASE

On July 27, 1992, Richard Andrew Frausto was feeling under attack.

About five months before, he had moved his family, from California, to Ivins, Utah, to give his children a saner environment in which to live, and himself, a cleaner environment in which to rehabilitate him into a drug free lifestyle. [R. 1162, ll. 2-13]

His efforts to “dry out,” to date, had yielded mixed results; by his own words, an on again, off again, sort of lifestyle, with alcohol and Valium to reduce the pain and stress of withdrawal. [R. 1172, ll. 2-19]

Other problems had followed him from California. That day, his wife and children had reported spotting a former California associate, Terry Buck, an ex-friend, with two strangers, all standing in front of the family home, in Ivins. [R. 1175, ll. 15-25, R. 1176, ll. 1-21] A week or two before, Frausto had heard from his “friend”, Johnny Gourley, that someone had been sent from California to “take care of him.” [R. 1173, ll. 17-25, R. 1174, ll. 1-9]

On July 27, Frausto and his friend, Ray Perez, from California, were working together, building a front porch on Frausto's home, in Ivins. They drank all through the day, through the heat, as they worked. [R. 1163, ll. 1-25, R. 1164, ll. 1-9]

Later, as the evening progressed, they went over to the residence of their neighbors, Johnny Gourley and Debbie Hern. They found those two present, along with Grant Arend, another neighbor. [R. 1164, ll. 10-25]

The group shared a few rounds of beer. A conversation transpired, during which Frausto informed Johnny Gourley that he did not trust Gourley, because Gourley worked for LeighAnn Reber. [R. 1168, ll. 6-8]

LeighAnn Reber was a source of frustration and anger for Frausto. LeighAnn had been the girlfriend of Frausto's friend, Tony Ambrose, who was now in jail in California. Since Tony's incarceration, LeighAnn had taken up with Larry Gilstrap, who had left his wife and moved in with LeighAnn. Frausto felt some kind of obligation, born out of a sense of loyalty to Tony Ambrose, to try to rectify the situation; but he did not know exactly how to go about that. He just knew he would want Tony, or someone, to do the same for him, were the tables reversed. [R. 1176, ll. 22-25, R. 1177, ll. 1-25, R. 1178, ll. 1-5, R. 1182, ll. 13-25, R. 1183, ll. 1-19]

Gourley took offense with Frausto's remarks about distrust. They went outside and went to blows. [R. 1168, ll. 8-10] They were clutched together, locked up, and rolling around on the ground, when Donald Turnbow showed up and broke up the fight. [R. 1168, ll. 15-18] The two brawlers agreed they would resume throwing blows when Frausto was sober. [R. 1168, ll. 19-25, R. 1169, ll. 1-8]

Later, Frausto, Turnbow, and Perez went over to nearby David Ice's house, in search of more beer. [R. 1165, ll. 10-22] From there, Frausto and Turnbow continued on over to another friend's, known only as "Ted", and stayed through a couple of more rounds. Then, Frausto and Turnbow returned to Frausto's home, where Perez had preceded them. [R. 1166, ll. 2-20]

Still later, Frausto and Turnbow returned to Johnny Gourley's and Debbie Hern's house to ask Debbie if she had any more beer. While there, Frausto reminded Gourley that they would take care of it later, would "throw blows" later, when Frausto was not drunk.

Gourley responded with, "All right."

This visit was brief, as Gourley and Hern did not have any more beer. [R. 1167, ll. 14-25, R. 1169, ll. 11-25, R. 1170, ll. 1-3, R. 1169, ll. 2-8]

Frausto and Turnbow returned to Frausto's residence. It was after midnight. Perez was there, and Frausto's wife and daughter-in-law were still out in the living room. [R. 1170, ll. 5-25]

Frausto drank "quite a bit" of tequila. [R. 1171, ll. 19-25]

At this point, it would be appropriate to note that Frausto's accounts, of the following events of July 28, 1992, are varied and conflicted. Some of these deviations he blames on the fact that he was "wasted." Other discrepancies, encountered upon cross-examination, he allows to the fact that certain statements and representations that he had made to authorities were not taken under oath, and that said authorities had lied to him. He also asserts that it took two days, after his arrest, for his head to clear and for an accurate recall of events to emerge from his memory. He cannot recall many statements he made to authorities prior to his testimony at trial.

At some point during the early morning, subsequent to the consumption of the tequila, Frausto took a gun from a drawer and told Turnbow and Perez that he was going to shoot himself. [R. 1179, ll. 9-22] He fired the gun into his living room wall to demonstrate that it was loaded. [R. 1172, ll. 20-25, R. 1173, ll. 1-3]

His fatigue from his fight with drugs was weighing heavily on him, causing him concern, as was his recently acquired knowledge that someone from

California was on their way to “take care of him.” [R. 1173, ll. 11–12, R. 1174, ll. 1–22] Then, there was the aforementioned sighting of Terry Buck, and two strangers, in front of the house, on the 27th of July. [R. 1177, ll. 1–25, R. 1178, ll. 1–3]

The others heard Frausto say that he wanted to talk to Larry Gilstrap. [R. 1179, ll. 24–25, R. 1180, 1–8] Frausto had other issues with Gilstrap, besides Gilstrap having left his wife to live with LeighAnn. Frausto had assured Reta Gilstrap that he would try to talk to Larry about returning home. He had learned, about a week before, that Gilstrap, known to carry a gun everywhere he went, had tried to pull his gun on Donald Turnbow. [R. 1178, ll. 1–20] ¹

Shortly, Johnny Gourley arrived at Frausto’s residence. Frausto met him at the front door, .357 in hand. [R. 1180, ll. 9–24]

When Gourley asked if the gun was loaded, Frausto answered that it was and fired it into the air to demonstrate. ² Leaving Gourley on the front porch, Frausto returned to his living room and sat down. [R. 1181, ll. 2–11]

¹ At trial, John Gourley says that he knew Gilstrap was known to carry a gun. [R. 856, ll. 10–11]

² Gourley says he saw Frausto fire his gun into the air on the night in question. [R. 859, ll. 4–10]

Gourley says that, witnessing from the porch, he saw Frausto shoot Gilstrap while holding the gun in his left hand. In contradictory testimony, he has stated that he, witnessing from a different location, saw Frausto shoot Gilstrap using his right hand. [R. 925, ll. 3–25, R. 926, ll. 1–23]

Minutes later, Gourley again appeared at the door to announce that Larry Gilstrap had arrived. Frausto put the gun in his pants, pulled his T-shirt down over it, and walked out front to meet Gilstrap, who had pulled up in his truck. [R. 1181, ll. 10–25] ³

According to Frausto, Johnny Gourley followed him off the porch and out the front yard gate toward Gilstrap's truck. [R. 1184, ll. 17–25] ⁴

When Frausto got within about five or six feet of the truck, Gilstrap was already out of the truck and to the middle, or the end part, of the truck bed. They exchanged words to the following effect.

Frausto asked Gilstrap, why was he having an affair with Frausto's friend's (Tony Ambrose) old lady, and why he didn't go back to his wife.

Gilstrap answered, that was none of Frausto's business.

According to Frausto, Gilstrap then drew his gun on Frausto.

³Gourley says Frausto had a gun in his hand when he went out front to meet Gilstrap, then reverses his statement. [R. 921, ll. 2-25, R. 922, ll. 1-2]

⁴ Gourley says that, witnessing from the porch, he saw Frausto shoot Gilstrap while holding the gun in his left hand. In contradictory testimony, he has stated that he, witnessing from a different location, saw Frausto shoot Gilstrap using his right hand. [R. 925, ll. 3-25, R. 926, ll. 1-23]

Frausto hit Gilstrap and a scuffle ensued, leading to a fight that brought them both, entangled, to the ground. [R. 1182, ll. 1–25, R. 1183, ll. 1–25, R. 1184, ll. 1–14, R. 1185, ll. 4–8]

According to Frausto, he heard gunshots at that point, but was uncertain as to the source. Gilstrap seemed to fall on Frausto. Frausto rolled away from him, pulled his own gun, and started shooting with the .357, firing twice into Gilstrap. [R. 1185, ll. 8–25, R. 1186, ll. 1–3]

Frausto then arose and asked Johnny Gourley to help him get Gilstrap into the truck, so he could get him to the hospital. At that point, Gilstrap was still breathing.⁵ Frausto looked through the truck for Gilstrap's keys. [R. 1186, 4–25, R. 1187, ll. 1–5]

The two men had difficulty getting Gilstrap into the truck. Frausto went into the house to enlist the help of his son. When he and his son returned, Johnny Gourley was gone. [R. 1187, ll. 6–25]

After getting Gilstrap into the truck, Frausto and his son went, on foot, to Reta Gilstrap's house, to inform her that Gilstrap had pulled a gun on Frausto and that Frausto had shot him. Frausto states his other purpose was to change

⁵ When Gourley discovered Gilstrap was still breathing, he says he called out for someone to get an ambulance, then told Frausto to "...just let him die." He says that he only feigned helping Frausto get Gilstrap into the truck, a task at which they were unsuccessful. [R. 870, ll. 4–25, R. 871, ll. 1–25, R. 872, ll. 1–25]

his bloodied pants, not wanting to appear at the hospital that way. [R. 1188, ll. 1-25]

Reta provided Gilstrap with a pair of pants. He changed in the back room and put the soiled clothing under a mattress. [R. 1190, ll. 7-17] ⁶

At this point, on direct examination, Frausto reveals that he had a second gun in his pocket, a .22, which he cannot recall whether having pulled out that evening.

His son detected police presence outside, at Frausto's residence. Frausto hid the .22 under Reta's porch; the .357, he hid in a trashcan. Frausto and son started back toward home. [R. 1190, ll. 18-25, R. 1191, R. 1192, ll. 1-20]

The pair were confronted by police and told to drop to the ground. Frausto refused, at first, until they ceased pointing a gun at his son. Then Frausto lay on the ground as his son knelt before them. Frausto denied any knowledge of the shooting and he and his son were released.

Frausto proceeded past his house, as the police were there, and went down to Tammy Howard's house, about a block down the street. [R. 1193, ll. 10-25, R. 1194, ll. 1-25, R. 1195, ll. 1-10]

⁶ Witness, LaReta Gilstrap, states that, when Frausto and his son visited her, just after the shooting, he told her that she would be next, if she talked to police. [R. 425, ll. 1-3]

He obtained a cigarette from Tammy Howard and remained in her living room, for about fifteen minutes, until someone came knocking at the door.

Frausto moved to a back room. [R. 1195, 2–25, R. 1196, ll. 1–15]

He was called out of the back room by a police officer. Frausto complied, unarmed, and without incident, after the third call.

Frausto denies having given any statement at the time of his arrest. He says the officer told him to say nothing. Upon seeing that the police had Donald Turnbow in one of their cars, he asked why, as Turnbow “...did not do it.” [R. 1196, ll. 16–25, R. 1197, ll. 1–25, R. 1198, ll. 1–15]

At trial, Frausto’s memory of that night, and his earlier statements to police, is sketchy. His complete memory, he says, returned to him only after a couple of days sleep in jail. [R. 1201, 21–25, R. 1202, ll. 1–9] Thereafter, he never had a doubt in his mind as to what happened.

Frausto believes there were other people around as the incident took place, but is not certain exactly who was present. His concern about someone on their way from California, “to take care of him”, contributed to his state of mind during the altercation. [R. 1204, ll. 11–25, R. 1205, ll. 1–5, R. 1201, ll. 5–25, R. 01202, ll. 1–9]

Frausto believes it is all right to lie to police, when not under oath. He also believes that it is self-defense to carry a gun to meet someone else who is also known to be carrying a gun. [R. 1242, ll. 4–25, R. 1243, ll. 1–24]

Frausto says, he had heard that Gilstrap routinely carried a gun on his person. [R. 1249, ll. 20–25, R. 1250, ll. 1–24]

Frausto says, he had heard that Gilstrap had pulled, or tried to pull, his gun on one of Frausto's friends. [R. 1177, l. 25, R. 1178, ll. 1–4]

In Frausto's first statements to authorities, he denies ever having shot his gun on the morning in question; upon cross-examination, he admits that he lied about that, and that he did fire his weapon. [R. 1225, ll. 19–25, R. 1226, ll. 1–15]

He also admits that, in his first story to authorities, Gilstrap only tried to point his weapon at Frausto's chest, without firing, before Frausto shot him. [R. 1236, ll. 22–25, R. 1237, ll. 1–13]

State's witness, John Gourley, also exhibited discrepancies, between testimony he gave at trial, and earlier statements made to authorities. Along with other points worthy of citation, some of these incidents, where conflicts in his testimony occurred, are cited below.

At trial, Gourley cannot remember if Frausto declared Gilstrap dead, after the shooting, contrary to Gourley's earlier statements. [R. 869, ll. 7–25, R. 867, ll. 1–16]

Gourley also states that he and Frausto “made up,” during Frausto’s second visit to his residence, earlier that evening. He says, Frausto “needed a hug,” and Gourley gave it to him. Gourley also says that he had a borrowed gun and had it with him at the time, unbeknownst to Frausto, and that they both agreed on a rematch for the brawl, at some unknown point in the future, when Frausto would be sober. [R. 849, ll. 2–9]

Gourley says, he warned Gilstrap not to bring a gun when he went to Frausto’s house. At that meeting with Gilstrap, his conflicted testimony creates confusion as to what his original motivation was for that visit: was it to tell Gilstrap that he no longer need Gilstrap’s “backup”, because he and Frausto had made up; or, was it to summon Gilstrap to Frausto’s residence, as Frausto had requested? [R. 856, ll. 5–25, R.857, ll. 1–16]

Gourley had great difficulty deciding, through his different testimonies, how many shots were fired. R. 900, ll. 11–22, R. 901, ll. 13–25, R. 902 through R. 912, R. 913, ll. 1–7]

Donald Turnbow, another witness to the shooting, did not see much, as he was hiding under the front porch of the Frausto residence. He does, however, report hearing just three shots fired at the time of the shooting. [R. 767, ll. 10–25, R. 768 through R. 773, R. 774, ll. 1–19]

Gourley states that Frausto, during a phone conversation with Gourley, while Frausto was in jail, asked Gourley to change his story. He also states that he never saw Gilstrap pull his gun. [R. 881 through R. 884, R. 885, ll. 1–19]

STATE OF THE CASE

1. On July 27, 1992, Richard Andrew Frausto was charged with the murder of Larry Gilstrap. He was subsequently tried before a jury, and found guilty, December 18, 1992. At his request he proceeded with sentencing on that date and received an enhanced jail sentence. [R. 1338, ll. 16–20] On December 23, 1992, at a hearing, the Judgment, Sentence, and Commitment were signed and placed in the court file, with the admonition to the Defendant / Appellant, “Mr. Frausto, your appeal time starts now.” [R. 1346 ll. 7–14]

2. January 25, 1993, the filing of the Notice of Appeal was acknowledged, with a filing date of January 26, 1993, as was the Notice of Transfer to the Utah Court of Appeals for Disposition, with a filing date of January 28, 1993.

3. On February 10, 1993, J. McArthur Wright filed notice of withdrawal as counsel and Michael Miller entered an appearance as new counsel.

4. Following that date, the record reflects five entries pertaining to receipt of the reporter's Hearing Transcripts for December 15–18, and 23, 1993; all of which occurred on March 8, 1993. That ends the original, three page Index of Record on Appeal.

We cite the following items, 5 through 13, in great detail due to the fact the documents they represent are missing from the record and effect the completeness of Defendant's / Appellant's appeal. These records were generated during and partially the direct result of Court of Appeals ORDER in Case No. 930357–CA, and is a remand to the Fifth Judicial District Court for consideration of appellant's pro se request for appointment of counsel and for proceedings pursuant to Rule 11 (f) or (g), Utah R. App. P. (see addendum)

These records were the subject of a Motion to Augment the record filed on May 29, 2001, which was subsequently denied by the Utah Court of Appeals.

5. A SUPPLEMENTAL RECORD, designated as page 4 of the INDEX, dated March 6th 1995, and with a starting date of 6/3/93, and that starting document was a letter from the Supreme Court, "re: Court of Appeals Court", and is assigned the index number [R. 1348]. (see addendum)

6. Number [R. 1349] concerns the case number, and is dated 6/16/93, Number [R. 1350], dated 10/8/93, an extension to file brief; both letters are from the Court of Appeals.

7. No further action is recorded in this file until May 3, 1994, which is seven months later, and that is a Notice of Hearing 5/25/94, and is designated as index numbers [R. 1351–1352].

8. May 19, 1994, a transportation order designated [R. 1344 and 1345].

9. The next two entries are on May 25, 1994, and are an “Ex Parte Motion to Continue”, designated index number [R. 1356], and an Order of Continuance, dated June 1, 1994, numbered [R. 1357].

10. June 6, 1994, there is another Transportation Order, indexed [R. 1358], followed by three “Minute Entry – Notice,” indexed as [R. 1359, 1360, and 1361], and dated June 6, 1994, June 8, 1994, and July 13, 1984.

11. There are no more entries until three months later; one which is dated October 14, 1994, and is an “Order Supplementing Record”, indexed as numbers [R. 1362, 1363, and 1364].

12. Following that index, and not numbered as part of the index, is a Mailing Certificate, signed by Tauna Hammer, Deputy Court Clerk, and bearing

a Washington County Seal, certifying that “supplemental pleadings in the file... was sent to the Court of Appeals on 6 March 1995”.(see addendum)

13. The paginated index is silent from October 14, 1994, until another Supplemental Index, covering the dates September 14, 1995, through October 19, 2000, and bearing a Washington County Seal, signed by a Deputy Court Clerk, and dated October 27, 2000.

14. A letter from Defendant / Appellant, Richard Frausto, dated Nov. 20, 1995, [R. 1367], addressed to Judge James L. Shumate, was received by the Fifth District Court on Nov. 28, 1995, requesting replacement of his attorney, Floyd Holmes.

15. This was followed by another letter, dated Dec. 29, 1995, and received by the Court on Jan 12, 1996, [R. 1368], requesting the results, if any, of his previous letter. This second request was entered into the Court Record on Jan. 12, 1996, combined with a Memorandum Decision, by Judge Shumate, of like date, stating that the Court did not have jurisdiction. A copy thereof was mailed to Defendant / Appellant.

16. On Jan. 2, 1996, Defendant / Appellant sent a letter to the Utah Court of Appeals, which they received on Jan 25, 1996, [R. 1373], and attached same to an Order Suspending the Briefing Schedule, pending determination as to legal representation and remand to the Fifth District Court, for an “expedited”

hearing, to enquire into Defendant's counsel's alleged conflict of interest and, if appropriate, to appoint replacement counsel, or to accept Defendant's waiver of counsel. That document was [R. 1371, 1372].

17. By Feb. 26, 1996, the Fifth District Court had held a hearing and subsequently replaced counsel for the Defendant with Thomas Blakely; records, reflecting same, were forwarded to the Utah Court of Appeals. [R. 1397]

18. Next is an Order of Dismissal, by the Court of Appeals, filed June 28, 1996, [R. 1399, 1400], followed by a remittitur, dated Aug. 12, 1996.

19. Dec. 30, 1996, Defendant / Appellant sent a letter, [R. 1405], received on Jan 14, 1997, by the Fifth District Court, requesting a copy of his commitment order, and stating that he had given his copy to his attorney, Tom Blakely, for duplication, and had not received them back, nor heard from Blakely in a long time.

20. Following that, in a letter dated, Thursday, April 10, 1997, [R. 1406, 1407], and received by the Court, April 17, 1997, Defendant / Appellant acknowledges receipt of the Court Docket and the Sentencing and Commitment Statement, requested in [R. 1405], the previous letter. In his letter, he takes exception to the wording of the commitment report. Ultimately, his exception was proved correct. Please note that this document bears, penciled in on the top, "File, No Action. 15 Apr 97", and signed by what appears to be Judge

Shumate's initials. This is a properly filed document with the Court, who has jurisdiction, since the remittitur of Aug. 12, 1996.

21. On Aug. 26, 1997, and received Sept. 2, 1997, by the Fifth District Court, a letter, with a Certified Motion of twenty-five pages, was sent by Defendant / Appellant, along with ten pages of attachments. The Motion has a yellow, gummed note attached, instructing, "Just file it then. No further Action Needed." Again, this was signed with what appears to be the initials of Judge Shumate. [R.1408-1452] This is a properly filed, certified Motion, with the Court, who has jurisdiction, since the remittitur of Aug. 12, 1996.

22. Oct. 5, 1997, Defendant / Appellant wrote a letter to the Fifth District Court requesting information regarding a Motion to Dismiss Count 2, and specifically requesting a copy of the Court Order be forwarded to him; and again, the notation on the face of the letter reads, written in, "File, No Action 13 Oct 97", over, what appears to be, Judge Shumate's initials. [R. 1453-1454]

23. Oct. 17, 1997, received by the Fifth District Court on 20 Oct. 1997, Defendant filed a petition for an Court Order Granting Re-sentencing. [R.1458] At that point, the record of the Fifth District Court falls silent until 1999.

24. At this juncture, we refer to the opinion of *Frausto v State of Utah*, 966 P.2d 849, 352 Utah Adv. Rep. 18 (Utah 09/25/1998) to determine what occurred during this period of time. In the opinion on that case, under the heading of Background, we find:

On February 22, 1996, a fourth attorney was appointed to handle Frausto's appeal. After some time had passed, with no communication from that attorney, Frausto requested a copy of his case from the Utah Court of Appeals *fn1 and discovered that on June 28, 1996, the court had executed an order dismissing his appeal for failure to file an appellant's brief.

The court granted a reinstatement of the appeal, provided an appellant's brief was filed within ten days of the order; however, no brief was filed.

On September 2, 1997, Frausto filed a "Motion to Withdraw Court Appointed Counsel", and on September 10, 1997, he filed a pro se petition for a writ of habeas corpus, claiming ineffective assistance of counsel both at trial and on appeal. The district court dismissed the petition pursuant to Utah Code Ann. § 78-35a-107, the one-year statute of limitations provision for post-conviction relief. Specifically, the court found that the limitations period began to run on June 28, 1996, the date on which the court of appeals dismissed his appeal, and that Frausto filed his petition on September 10, 1997, more than one year later. Therefore, the court ruled, "[By] the express terms of the statute, this fact precludes Mr. Frausto from seeking relief in a habeas petition." (emphasis added)

25. During the time between the three-page letter, which is entered in the index at 10-20-97 as [R. 1455-1458], and is captioned as a "Petition for Court Order Granting Re-Sentencing", and the next entry, at 8-17-99, which is a Minute Entry regarding an evidentiary hearing, ordering the re-sentencing of

defendant nun pro tunc, and stating that “Appeal time to run when judgment, sentence, commitment nun pro tunc is signed.”

26. This judgment was finally signed on May 8, 2000, and is on the record index as “Judgment, Restitution Judgment, Sentence (Second Amended Nunc Pro Tunc) and Commitment”. [R. 1482–1486]

27. The Notice of Appeal was filed with the Fifth District Court on June 5, 2000, and received by the Utah Supreme Court on June 15, 2000, and was transferred to the Utah Court of Appeals Oct. 3, 2000. [R.1488–1489]

28. A letter from the Court of Appeals, dated October 16, 2000, and entered into the Court record on Oct. 19, 2000, addressed to Odean Bowler, then Appellate Counsel of Record, advised him that the file had been transferred to that Court and the ten (10) day period for the transcript request. [R.1493]

29. A second Supplemental Index, in this case, starts with an Order, from the Utah Court of Appeals, for a temporary remand on a motion to withdraw and replace counsel. This Order is dated, by the Court, Oct. 26, 2000, and stamped, Received by the Fifth District Court, on Dec. 12, 2000. [R. 1494] The motion was scheduled for a hearing in January and resulted in appointment of present counsel.

30. Current counsel attempted to get a remand to complete the record and tried three requests of the Utah Court of Appeals for the two docketing statements, filed by the appellate attorneys following both sentencing orders.

31. Trial Counsel, J. MacArthur Wright raised questions concerning the effect that the jury question regarding 13.c may have had on the jury at the sentencing of the Defendant.

Mr. WRIGHT: [R. 1336, ll. 19–25, 1337, ll. 1–11] ...I think that there is substantial evidence in this case that suggests that there was a self-defense. While apparently the jury has neglected that, I'm concerned about some of the questions that the jury expressed to us. Questions that we were unable to respond to before the — before the jury came back. See addendum)

THE COURT: [R.1340, ll. 22–25, R. 1341, 1–8]
... for the purposes of the record — in response to what has been marked as Court's Exhibit No. 2, and Instruction No. 13-c, the Court has marked an inquiry from the jury as Court's Exhibit No. 2. That will go in the file.

The Court also, at the agreement of counsel, prepared what was going to be given as a supplemental instruction prior to the time that the jury came back with a verdict and before we could answer the question in Exhibit No. 2 — Court's Exhibit No. 2. Those will be placed in the file.

SUMMARY OF ARGUMENT ISSUE I

The wording of portion of Utah Code Annotated, 1953 as amended, Section 76–5–104, is confusing, and the Court's use of same in Instruction #13.c, confused the jury. The Court erred in delivering that instruction without instructing the jury as to the definition of duels, mutual combat, or consensual altercations.

SUMMARY OF ARGUMENT ISSUE II

The Trial court failed to answer a juror's note regarding an instruction prior to accepting a verdict, thereby impairing the integrity of the verdict. The jury asked a question of the Court while the jury was in deliberation. A note was prepared by the court but not delivered to the jury. This failure to respond to the juror's confusion allowed the juror to remain confused about the right of self-defense and about whose duty it was to prove self-defense, and whether or not, under Instruction 13.c self-defense was legal, all to the detriment of the Defendant / Appellant and this represented clear error.

Defendant / Appellant was deprived of effective assistance of counsel by his counsel's failure to object to the inclusion of Instruction #13.c, in its proposed form; his failure to argue for supplemental instructions being submitted to the jury, based on the juror's confusion, as expressed in the subject note; his failure to argue for supplemental instructions that would include definitions pertaining to duels, mutual combat, or consensual altercations involving dangerous weapons; and his failing to motion for a mistrial.

SUMMARY OF ARGUMENT ISSUE III

Frausto was convicted of murder in December 1992, sentenced to five years, to life, plus one year for firearms enhancement. He has had six attorneys, prior to his present counsel; all chosen because they were contract employees, in the Fifth Judicial District, of the Public Defenders Office. Few ever filed a

request for Enlargement of Time, and not one filed a brief on his direct appeal.

Frausto's valiant attempts to communicate, and to advocate his appeal, when he felt his rights jeopardized, were rejected by the Utah Court of Appeals, [R. 1436] and ignored by the Fifth District Court. [R. 1406, 1409] (see addendum)

At the filing of this brief, Frausto's effort toward due process remains frustrated due to the vacancies in the record. Efforts to supplement the record have been thwarted. The inability to find a record, or their replacement, from the findings of the Miller remand, makes arguing the due process claim, regarding the 13c jury instructions, speculative. Unable to find a record of September 10, 1997, Writ of Habeas Corpus, filed in the Fifth District Court, or any record of the hearing and findings by the Fifth District Court, referred to in *Frausto v State, Id.*, leaves a void as to what, if any, post conviction motions may have been made, denied, or refused consideration, per *State v Rawlings*, 829 P. 2d 150, (Utah Ct. App. 1992).

When resentencing takes place to allow a first right of appeal, as set forth in Johnson, this should not rule out the procedural possibility that post-conviction motions may be appropriately heard in the sentencing court. The court will then have an opportunity to rectify mistakes, if it is persuaded such occurred, at the trial level. Disposition of those matters can then be raised by direct appeal, avoiding later collateral attacks. This promotes judicial economy and is consistent with Utah law which favors raising issues on direct appeal rather than through post-conviction proceedings. Porter v.

Cook, 747 P.2d 1031, 1032 (Utah 1987); Codiana v. Morris, 660 P.2d 1101, 1104 (Utah 1983).

See *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994)

We may add to this list the requirement that the State afford the defendant a timely appeal, for an appeal that is inordinately delayed is as much a “meaningless ritual,” Douglas, 372 U.S. at 358, as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings. See *Burkett I*, 826 F.2d at 1221–22; *United States ex rel. Smith v. Twomey*, 486 F.2d 736, 739 (7th Cir. 1973), cert. denied, 416 U.S. 994, 40 L. Ed. 2d 773, 94 S. Ct. 2408 (1974); cf. *Coppedge v. United States*, 369 U.S. 438, 449, 8 L. Ed. 2d 21, 82 S. Ct. 917 (1962)

ARGUMENT ISSUE I

Had the trial court included the definitions of, or what constituted, duels, mutual combat, or consensual altercations, as referred to in Utah Code Annotated, 1953 as amended, Section 76–5–104 Consensual altercation, as cited above, the Court could have eliminated jury confusion. This was made evident by the juror’s note to the judge. That note, regarding Instruction #13.c, cited below, and designated as Court’s Exhibit #2, reads as follows:

Instruction #13.c Does the statement “it is no defense “to” the prosecution mean no help for the prosecution.

Though the Court did prepare a note, to the jury, in response, Court’s Exhibit #1, the jury returned before receiving the reply and was allowed to enter its verdict before its confusion was addressed. If the Court had insisted on addressing the issue, before allowing the verdict, the jury might have returned to further deliberation, to the benefit of the Defendant.

In *People State New York v. Jamar Smith*, 1996, NY., 637 N.Y.S.2d 279, 168 Misc. 2d 33, the matter of jury notes is dealt with as follows.

How a court responds to *jury notes* for information is governed by statute and case law. New York's statute clearly vests the trial court with discretion in the manner in which jury requests for information are answered: "Upon such a request, the court must direct that the jury be returned to the courtroom, and after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information as the court deems proper." (CPL 310.30.)

In Utah, this same method is used in addition to sending back a written response to the jury. In this instance the record does not reflect the jury being returned to the court room for the answer to the question.

The juror's motivation for the question is speculative; if, for instance, that it was not the juror's desire to avoid assisting the prosecution, and, based upon his confusion and, under the mistaken assumption that involvement in a duel did constitute self defense, would have urged his fellow jurymen toward entertaining a finding that both shooter, and victim, were actually involved in a consensual altercation; one including an agreement, or understanding, that deadly weapons would be used. Or, conversely, with the same motivation at heart, that the same juror might have argued, with fellow jurymen, that no such agreement had been reached, thereby allowing for an inadvertent use of said weapons, and therefore, possibly finding reason to endorse a self defense position.

The elements of an unspoken, or uncertain, agreement could certainly be construed to be present, on the part of both parties, by virtue of the fact that each held good reason to suspect the other's possession of firearms on his person ; Frausto, by his knowledge that the victim routinely carried a gun;

the victim, by his having heard Frausto firing his weapon earlier, along with the rest of the neighborhood. [R. 1249, ll. 20–25, R.1250, ll. 1–24]

By a layman's interpretation of a duel, based on a dose of Westerns, and a host of other historical traditions, it would not be implausible for a juror to conclude that a determination of self defense was achievable in this case.

However, such a possibility was greatly diminished because of the limitations and the ambiguity imposed by the given instruction, #13.c, as given, and the Court's failure to address the jury's ensuing confusion.

One could wonder, is 76-5-104 unconstitutional, when considering what the juror might have been thinking, because it could deprive one of the protection of self-defense, under all circumstances, in which one might carry a gun, and use it? What is the juror thinking? Is it, in fact, true that, by statute, if you have a gun, and use it, you are guilty of murder? Or, if you bring a gun to what becomes a fight, and wind up using it, to defend yourself, you are guilty of murder? Based on the choice of words in the jury note, this is the nature of the confusion likely posed by Instruction #13.c and left without clarification by the Trial Court. See *State v. Souza*, 846 P.2d 1313, (UT App 1993)

...the general rule is that an accurate instruction upon the basic elements of an offense is essential," failure to provide such an instruction is reversible error that can never be considered harmless. *State v. Jones*, 823 P.2d 1059, 1061 (Utah 1991) (quoting *State v. Roberts*, 711 P.2d 235, 239 (Utah 1985)).

In *State of Utah v. Nick Kozik*, 1984 UT 151, 688 P. 2d 459, reversible error, versus harmless error, are considered in the effect of mishandling jury notes, as follows:

The jury's note to the judge involved a point of law, which was resolved in the present of defendant and

both counsel, and which duly was recorded by the trial court. In any event, irrespective of the authority designated in the Rule, the decision in *Chapman v. California*, 386 U.S. 18, (1967), is dispositive. That decision articulates the “harmless error” rule. In our own recent decision in *State v. Urias*, Utah, 609 P. 2d 1326 (1980), we referred to Chapman and held as follows:

We do not upset the verdict of a jury merely because some error or irregularity may have occurred, but will do so only if it is something substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been a different result.

In the instant trial, the only debate in that jury room, and in our jury’s mind, was murder or self–defense. No other, lesser option than murder was considered. Did the confusion of the jury include the belief that the burden of proof of self defense fell upon the Defendant? See *State v. Garcia*, 2001 UT App 19 (Utah App. 01/25/2001)

¶6 *Garcia* asserts the jury was not adequately instructed about the burden of proof of self–defense. Because *Garcia* did not object on the record to the jury instructions at trial, he can only obtain relief by demonstrating plain error. See *State v. Parker*, 2000 UT 51, ¶6, 4 P.3d 778. Plain error requires a showing that “(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for [*Garcia*].” Id. at ¶7 (quoting *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993)). To show obviousness of the error, *Garcia* must show that the law was clear at the time of trial. See *State v. Ross*, 951 P.2d 236, 239 (Utah Ct. App. 1997) (stating “error is not plain where there was no settled appellate law to guide the trial court”).

Again at *State v. Garcia*, 2001 UT App 19 (Utah App. 01/25/2001)

¶20 The law in Utah requires a trial court to adequately instruct the jury about the burden of proof for self–defense when the defendant presents the quantum of evidence necessary to assert self–defense. See *State v. Torres*, 619 P.2d 694, 695 (Utah 1985); *State v. Knoll*, 712 P. 2d 211, 214–15 (Utah 1980).

Here the trial court erred by failing to do so. The error was obvious because the law was clear at the time of trial. Finally, the error was harmful because we cannot say that the jury did not mistakenly consider the burden of proof of self-defense to be on the defendant; thus, absent this error, there was a reasonable possibility of a more favorable outcome for *Garcia*.

In view of the vacillation of the eye-witness's testimony, one can see how the consideration of a self defense argument might have been a more serious undertaking had the jury been reminded, by the answer to the juror's question, that the burden of proof for self defense did not rest upon the Defendant. Failure to so instruct represented clear error. See *State v. Souza*, 846 P.2d 1313, (UT App 1993)

After the jury in this case had been sequestered for deliberation, it requested clarification of the words "supply or furnish" as used in the trial court's instruction pertaining to the offense of supplying alcohol to minors. *fn7 The trial court appropriately considered the common meaning of the words in evaluating what response would assist the jury. *fn8 This consideration was proper because Utah's statutes generally direct that "words and phrases are to be construed according to the context and the approved usage of the language." Utah Code Ann. § 68-3-11 78-35a-107 (1986). However, where the jury requests the definition of a "term critical to the meaning of a criminal statute," that requested definition becomes a "point of law." *State v. Couch*, 635 P.2d 89, 94 (Utah 1981). The appropriate standard of review for a trial court's response to a question of law is correction of error. *State v. James*, 819 P.2d 781, 796 (Utah 1991) (discussing the standard of review for interpretation of statutory law). Further, because "the general rule is that an accurate instruction upon the basic elements of an offense is essential," failure to provide such an instruction is reversible error that can never be considered harmless. *State v. Jones*, 823 P.2d 1059, 1061 (Utah 1991) (quoting *State v. Roberts*, 711 P.2d 235, 239 (Utah 1985)).

"And again in *Souza*, *supra*

Both defendant and the State correctly cite *Couch* as providing the controlling law in situations where the jury asks the trial court to define words used in jury instructions that normally are not considered to have unique legal meaning. According to the *Couch* decision, although the court usually need not volunteer the definitions of terms of common usage in jury instructions, where the jury requests the instruction, the trial court should provide it. *Couch*, 635 P.2d at 94–95. The *Couch* court reasoned that the rule requiring the trial court to define terms of art should apply equally to “non–technical words of common usage” if the jury signifies that it does not understand the meaning of a word that it must apply to arrive at a verdict. *Id.* at 95. Refusal to provide a definition was reversible error in *Couch*, because “jurors cannot be considered properly instructed on a criminal statute if they are demonstrably confused about the meaning of the words used in it.” *Id.* at 94.

ARGUMENT ISSUE II

Does Utah Code Annotated, 1953 as amended, Section 76–5–104, state that a duel, mutual combat, or consensual altercation, involving the use of a dangerous weapon, is not a defense, in and of itself, to a charge of criminal homicide?

As in the instant case, since the altercation did not transpire under conditions where both parties were necessarily in agreement to the use of deadly force, or weapons thereof, should not the implications of this telling difference have been addressed by the Court, and was not failure to do so injurious to the jury’s application of law and the cause of justice?

The Court’s instruction to the jury, instruction #13.c, is the direct cause the juror’s confusion, as it is the ambiguous wording thereof that was brought to the Court’s attention in the note, cited above as Court’s exhibit #2.

The question arises; did the Court err, first in delivering the instruction,

then in failing to deliver its remedy, another instruction, to clarify the juror's question, before the jury reached its verdict?

That question went unanswered, prior to the jury delivering its verdict, allowing whatever confusion to prevail, thus jeopardizing the integrity of the verdict, to the detriment of the Defendant.

This constituted clear error. See *State v. Souza*, 846 P.2d 1313, (UT App 1993) two paragraphs quoted in Argument Issue I.

Trial Counsel for the Defendant was ineffective because:

- a. he failed to object to Instruction #13.c in its proposed form; and,
- b. he failed to request supplemental instructions properly instructing the jury, as to the definition of a duel, mutual combat, or consensual altercation involving a dangerous weapon.
- c. failing to request a mistrial or motion for a verdict notwithstanding

The defendant was denied effective assistance of Counsel. See *State v. Souza*, 846 P.2d 1313, (UT App 1993) two paragraphs quoted in Argument Issue I.

Argument Issue No. III

We quote extensively from *HARRIS V CHAMPION* here after and, have used paragraph numbers from VersusLaw. In the interest of judicial economy a hardcopy of the entire case is included in the addendum bearing those same paragraph numbers to ensure clarity. See addendum

In *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 01/26/1994) the States Court of Appeals for the Tenth Circuit defined Appellate Delay

- [86] B.Substantive Claim That Appellate Delay
- [87] Violates Right To Due Process
- [88] 1. Elements of the claim
- [89] The Due Process Clause provides that “No person shall . . . be deprived of life, liberty, or property, without due process of law” U.S. Const. amend. V. Similarly, the Fourteenth Amendment provides “nor shall any State deprive any person of life, liberty, or property, without due process of law.” Id. amend. XIV, 1.
- [90] The right to a speedy trial, which is guaranteed an accused by the Sixth Amendment, is a fundamental right imposed on the states by the Due Process Clause of the Fourteenth Amendment. *Barker v. Wingo*, 407 U.S. at 515. Although the Constitution does not require the State to afford a criminal defendant a direct appeal to challenge alleged trial court errors, see *McKane v. Durston*, 153 U.S. 684, 687, 38 L. Ed. 867, 14 S. Ct. 913 (1894), the Supreme Court has held that
- [91] if a State has created appellate courts as “an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,” *Griffin v. Illinois*, 351 U.S. at 18, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.
- [92] *Evitts v. Lucey*, 469 U.S. 387, 393, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985)(alteration in original).
- [93] To ensure the defendant’s right to a “meaningful appeal,” *Douglas v. California*, 372 U.S. at 358, the Court has held that when the State affords a criminal defendant an appeal by right, the Fourteenth Amendment requires, among other things, that counsel be appointed to represent an indigent defendant, id. at 356–58, that the representation of counsel be effective, *Evitts*, 469 U.S. at 396, and that either an indigent defendant be provided a free transcript or some equivalent method of reporting the trial proceedings be employed, *Draper v. Washington*, 372 U.S. 487, 495, 9 L. Ed. 2d 899, 83 S. Ct. 774 (1963); *Griffin v. Illinois*, 351 U.S. at 19–20.
- [94] We may add to this list the requirement that the State afford the defendant a timely appeal, for an appeal that is inordinately delayed is as much a “meaningless ritual,” *Douglas*, 372 U.S. at 358, as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings. See *Burkett I*, 826 F.2d at 1221–22; *United States ex rel. Smith v. Twomey*, 486 F.2d 736, 739

(7th Cir. 1973), cert. denied, 416 U.S. 994, 40 L. Ed. 2d 773, 94 S. Ct. 2408 (1974); cf. *Coppedge v. United States*, 369 U.S. 438, 449, 8 L. Ed. 2d 21, 82 S. Ct. 917 (1962) (“No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. . . . Delay in the final judgment of conviction, including its appellate review, unquestionably erodes the efficacy of law enforcement.”); *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”).

- [95] When determining whether a criminal defendant has been deprived of his or her right to timely process at the trial level, the Supreme Court has established a balancing test to be applied on an ad hoc basis. *Barker*, 407 U.S. at 530. Four factors should be assessed and balanced: “(1) length of delay, (2) the reason for the delay, (3) the defendant’s assertion of his right, and (4) prejudice to the defendant.” *Id.* (numbers added). The fourth factor “should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect.” *Id.* at 532. The “Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.” *Id.*
- [96] Although *Barker* addressed only a defendant’s Sixth Amendment right to a speedy trial, the balancing test the Court enunciated provides an appropriate framework for evaluating whether a defendant’s due process right to a timely direct criminal appeal has been violated. See *Rheuark v. Shaw*, 628 F.2d at 303 (“The factors of *Barker* are preferred [over] the standard announced in *United States v. Lovasco*, 431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 . . . (1977)[concerning pre-indictment delay], since the reasons for constraining appellate delay are analogous to the motives underpinning the Sixth Amendment right to a speedy trial.”)(footnote omitted); *DeLancy v. Caldwell*, 741 F.2d 1246, 1248 (10th Cir. 1984) (“We agree with the Fifth Circuit that the right to avoid unreasonable delay in the appellate process is similar to the right to a speedy trial.”); *Burkett II*, 951 F.2d at 1445–46 (holding that delay in adjudicating an appeal, which infringes on due process rights, is effectively no different than delay in imposing a sentence, which infringes on Sixth Amendment speedy trial right).
- [97] We can apply the first three factors of the *Barker* test to claims of appellate delay without modification. We must modify the fourth factor of prejudice to the defendant, however, to reflect the interests sought to be protected by an appeal “unencumbered by excessive delay.” *Rheuark v. Shaw*, 628 F.2d at 303 n.8.
- [98] The Fifth Circuit has identified the following interests that should be

considered when assessing prejudice arising from appellate delay: “(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person’s grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired.” *Id.* In *DeLancy*, 741 F.2d at 1248, we adopted the Fifth Circuit’s modification of the Barker prejudice factor for purposes of appellate delay. We also heeded the Supreme Court’s admonition that the four factors of the balancing test are related and should be considered together with such other circumstances as may be relevant. *Barker*, 407 U.S. at 533; *DeLancy*, 741 F.2d at 1248.

[99] Nevertheless, as we discuss below, we view the first factor—length of delay—as a threshold that a petitioner must meet before the court need consider the other factors. Furthermore, we agree with the Ninth Circuit that, ordinarily, a petitioner must make some showing on the fourth factor—prejudice—to establish a due process violation. *United States v. Tucker*, 8 F.3d 673, 676 (9th Cir. 1993)(en banc).

[100] Therefore, in determining whether delay in adjudicating a petitioner’s direct criminal appeal violated the petitioner’s due process rights, we must balance the following factors:

[101] a. the length of the delay;

[102] b. the reason for the delay and whether that reason is justified;

[103] c. whether the petitioner asserted his right to a timely appeal; and

[104] d. whether the delay prejudiced the petitioner by

[105] i. causing the petitioner to suffer oppressive incarceration pending appeal; or

[106] ii. causing the petitioner to suffer constitutionally cognizable anxiety and concern awaiting the outcome of his or her appeal; or

[107] iii. impairing the petitioner’s grounds for appeal or his or her defenses in the event of a reversal and retrial.

[108] we will address each of these factors in turn.

[109] **a. THE LENGTH OF THE DELAY**

At all times since the Defendant's / Appellant's sentencing on September 23, 1992, he has been represented by State appointed counsel.

In excess of nine (9) years have passed since he was told, by The Honorable James L. Shumate, Judge of the Fifth District Court in Washington County, that "your appeal time starts now".

Quoting *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 01/26/1994)

[110] "Only passage of an inordinate amount of time triggers due process concerns." *Hill v. Reynolds*, 942 F.2d 1494 at 1497 (10th Cir. 08/23/1991)

Harris v. Champion, Id.,

[115] ...delay substantially beyond two years, at least in a case that does not warrant a lengthier appellate process, will reduce the burden of proof on the other three factors necessary to establish a due process violation. See *Doggett*, 112 S. Ct. at 2693 (holding that the more protracted the delay, the more prejudice may be presumed from the delay).

[110] The first factor in the balancing test is the length of the appellate delay. "Only passage of an inordinate amount of time triggers due process concerns." *Hill v. Reynolds*, 942 F.2d at 1497 (emphasis added). Therefore, if a petitioner cannot establish at least some degree of inordinate delay, the court need not inquire into the other factors. Cf.

Doggett v. United States, 120 L. Ed. 2d 520, 112 S. Ct. 2686, 2690–91 (1992)(holding that because no speedy trial violation occurs if the government prosecutes a defendant “with customary promptness,” “to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from ‘presumptively prejudicial’ delay”).

- [111] We cannot set an inflexible length of time that will constitute inordinate delay in every case. See *Barker*, 407 U.S. at 521 (“We cannot definitely say how long is too long in a system where Justice is supposed to be swift but deliberate.”); *Coe v. Thurman*, 922 F.2d at 531 (“There is no talismanic number of years or months, after which due process is automatically violated.”). Nonetheless, it seems appropriate to Judge appellate delay by the same two-year presumptive standard that we used earlier to excuse exhaustion. See *supra* (slip op.) at pp. 30–31. Therefore, a two-year delay in finally adjudicating a direct criminal appeal ordinarily will give rise to a presumption of inordinate delay that will satisfy this first factor in the balancing test.
- [112] Creating a presumption that a two-year delay in adjudicating an appeal is inordinate comports with the district court’s ruling that “a two-year period, from the notice of appeal or order permitting same, be established as the time period for resolution of a direct criminal appeal in Oklahoma beyond which any delay will be presumed to be unconstitutional, . . . absent a showing of good and sufficient cause or special circumstances.” R., Doc. 255 at 8 (footnote omitted).^{*m10} Respondents do not challenge the district court’s two-year presumptive period. Although petitioners argue for a shorter period, the only basis for their argument is that in 1991, the Tenth Circuit’s median time for deciding direct criminal appeals was 11.7 months. See Appellant’s Principal Br. (No.93–5123) at 57; Appellant’s Principal Br. (No.93–5209) at 18–19. We are not sufficiently persuaded by this single statistic to conclude that the district court erred in establishing a two-year presumptive period. See *United States v. Pratt*, 645 F.2d at 91 (declining to hold nine-month appellate delay unconstitutional in absence of exacerbating factors); *United States ex rel. Harris v. Reed*, 608 F. Supp. 1369, 1376 (N.D. Ill. 1985)(holding that a seven-and-one-half-month delay in adjudicating a motion for post-conviction relief was not so egregious as to violate petitioner’s due process rights); *Doescher v. Estelle*, 454 F. Supp. 943, 952 (N.D. Tex. 1978)(determining as a matter of law that a one-year delay in processing petitioner’s appeal was not unjustified), appeal dismissed, 597 F.2d 281 (5th Cir. 1979)(table).
- [113] The district court concluded that two years to adjudicate an appeal in Oklahoma is both customary and feasible.^{*m11} Furthermore, a two-year delay is within the time frame that other courts have found to raise due process concerns. For example, in *United States ex rel. Hankins*, 582

F. Supp. At 184–85, the court held that the pendency of an appeal for two years with no decision by the state appellate court, coupled with a nine-month delay by the trial court in ruling on post-trial motions, gave rise to a prima facie due process violation. See also *Dozie v. Cady*, 430 F.2d at 638 (holding that seventeen-month delay in filing opening brief warranted inquiry into possible due process violation); *Burkett II*, 951 F.2d at 1445–46 (holding that eighteen-month delay between sentencing and decision on appeal gave rise to due process violation); *United States v. Antoine*, 906 F.2d 1379, 1382–83 (9th Cir.) (holding that three-year delay in adjudicating federal appeal was “substantial” and remanding for further findings regarding prejudice), cert. denied, 498 U.S. 963, 112 L. Ed. 2d 407, 111 S. Ct. 398 (1990); *Snyder v. Kelly*, 769 F. Supp. 108, 111 (W.D.N.Y. 1991) (holding that three years is “an excessive amount of time to await the resolution of an appeal”), aff’d 972 F.2d 1328 (2d Cir. 1992) (table); cf. *Jones v. Crouse*, 360 F.2d at 158 (holding that delay of more than eighteen months in processing appeal of collateral attack warranted inquiry into possible due process violation).^{*fn12}

- [114] The passage of two years creates only a presumption of inordinate delay on appeal. The particular circumstances of a case may warrant a finding that the passage of less than two years constitutes inordinate delay or that the passage of more than two years does not. For example, although the length of the sentence cannot be a controlling factor in light of the time requirements inherent in processing an appeal, a case in which a very short sentence was imposed may warrant more expedited treatment. See *Wheeler v. Kelly*, 639 F. Supp. 1374, 1379 (E.D.N.Y. 1986) (holding that “the length of the sentence is a factor in determining whether post-conviction delay is excessive”), aff’d, 811 F.2d 133 (2d Cir. 1987). On the other hand, a particularly complex case may warrant a more lengthy appellate process. Cf. *Geames v. Henderson*, 725 F. Supp. 681, 685 (E.D.N.Y. 1989) (holding that delay of three-and-one-half years was excessive because issues on appeal were “no more complex than in most criminal appeals”).
- [115] Because it is a balancing test that we employ, however, delay substantially beyond two years, at least in a case that does not warrant a lengthier appellate process, will reduce the burden of proof on the other three factors necessary to establish a due process violation. See *Doggett*, 112 S. Ct. at 2693 (holding that the more protracted the delay, the more prejudice may be presumed from the delay).

[116] b. THE REASON FOR THE DELAY

Harris v. Champion, Id.,

[115] ...delay substantially beyond two years, at least in a case that does not warrant a lengthier appellate process, will reduce the burden of proof on the other three factors necessary to establish a due process violation. See *Doggett*, 112 S. Ct. at 2693 (holding that the more protracted the delay, the more prejudice may be presumed from the delay).

[117] ... In *Harris I*, we laid to rest any argument that delays by the Public Defender in filing briefs could be attributed to petitioners on the ground that the Public Defender requested the continuances on petitioners' behalf. 938 F.2d at 1065. The record indicated that "the delay in preparing petitioner's brief on appeal [was] caused by the inability of [the Public Defender] to address petitioner's case in a timely fashion." *Id.* Because this delay was "forced upon an unwilling petitioner by reason of his indigency," we held it should not be attributed to the petitioner. *Id.*

[117] The second part of the balancing test is the reason for the delay. In *Harris I*, we laid to rest any argument that delays by the Public Defender in filing briefs could be attributed to petitioners on the ground that the Public Defender requested the continuances on petitioners' behalf. 938 F.2d at 1065. The record indicated that "the delay in preparing petitioner's brief on appeal [was] caused by the inability of [the Public Defender] to address petitioner's case in a timely fashion." *Id.* Because this delay was "forced upon an unwilling petitioner by reason of his indigency," we held it should not be attributed to the petitioner. *Id.* The parties do not dispute that the delays in adjudicating petitioners' direct criminal appeals are attributable to the State of Oklahoma and not to petitioners.^{*fn13} See R.,

Doc. 29 at 9 (Attorney General); Addendum to Br. Of OIDS Defs. At 17 (Public Defender); R., Doc. 27, Ex. 3I, Attachment 1 (Oklahoma Court of Criminal Appeals); see also *Hankins v. Fulcomer*, 941 F.2d at 252 (holding that court had numerous opportunities to rule on pending matters and its delay in doing so was not attributable to petitioner); *Wojtczak v. Fulcomer*, 800 F.2d at 356 (holding that delay in adjudicating motion for post-conviction relief was not attributable to petitioner, but to “disinterest on the part of court appointed counsel and to a failure on the part of the court to require them to provide minimally effective representation”).

[119] c. PETITIONER’S ASSERTION OF HIS OR HER RIGHT TO A TIMELY APPEAL

[120] ... The Supreme Court rejected in *Barker* “the rule that a defendant who fails to demand a speedy trial forever waives his right.” 407 U.S. at 528. Instead, the Court held that whether and how strongly a defendant asserts his or her right to a speedy trial should be balanced with the other factors. *Id.* at 528–29.

At all times, throughout the past nine (9) years Defendant / Appellant, Richard Andrew Frausto, has pursued his appeal. This began with his request for immediate sentencing following the jurors verdict.

The first evidence is a letter from J. MacArthur Wright [R.1434] (see addendum) advising contract attorneys, Freestone and Angerhoffer, engaged by Defendant / Appellant, [R.1434] that the

notice of appeal, and the request for transcript, had been filed.

Secondary evidence resides in a letter to Defendant / Appellant, over the signature of Janice Hill, Deputy Clerk of the Utah Court of Appeals, dated February 1, 1994. He had personally corresponded with the Court and was advised in part:

The Court will only consider documents on your behalf if they are filed by your attorney. ... You must communicate through him regarding your appeal.

Defendant / Appellant pursued the replacement of his first appointed appellate attorney, Michael Miller, for Ineffective Assistance of Counsel and he was replaced by Mr. Floyd Holmes, who filed his notice of entry on June 22, 1994.

November 28, 1995, Defendant / Appellant filed a letter with the Fifth District Court requesting the dismissal of attorney, Holmes, due to his ineffective assistance on his appeal. By February 6, 1996, this resulted in a remand by the Court of Appeals to the Fifth District Court, and the replacement of Holmes with Thomas Blakeley, which officially occurred February 22, 1996.

At this point we refer to: *Frausto v State of Utah*, 966 P.2d 849, 352 Utah Adv. Rep. 18 (Utah 09/25/1998) that reflects more of his

efforts.

... After some time had passed, with no communication from that attorney, Frausto requested a copy of his case from the Utah Court of Appeals *fn1 and discovered that on June 28, 1996, the court had executed an order dismissing his appeal for failure to file an Appellant's Brief. ...

... On September 2, 1997, Frausto filed a "Motion to Withdraw Court Appointed Counsel", and on September 10, 1997, he filed a pro se petition for a writ of habeas corpus, claiming ineffective assistance of counsel both, at trial, and on appeal. We ... remand for further proceedings... .

Thus, due to the efforts of the Defendant / Appellant a judgment was finally signed on May 8, 2000, and is on the record as "Judgment, Restitution Judgment, Sentence (Second Amended Nunc Pro Tunc) and Commitment". [R. 1482–1486]

The Notice of Appeal was filed with the Fifth District Court on June 5, 2000, and received by the Utah Supreme Court on June 15, 2000, and the case was transferred to the Utah Court of Appeals on October 3, 2000. [R.1488–1489]

A second Supplemental Index, in this case, starts with an Order, from the Utah Court of Appeals, for a Temporary Remand on a Motion to Withdraw and Replace Counsel. This Order is dated, by the Court, Oct. 26, 2000, and stamped, "Received by the Fifth District

Court, on Dec. 12, 2000.” [R. 1494] The Motion was scheduled for a hearing in January and resulted in appointment of present counsel who has filed this brief.

- [120] The third factor we must balance in determining whether a due process violation has occurred is the petitioner’s assertion of his or her right to a timely appeal. The Supreme Court rejected in *Barker* “the rule that a defendant who fails to demand a speedy trial forever waives his right.” 407 U.S. at 528. Instead, the Court held that whether and how strongly a defendant asserts his or her right to a speedy trial should be balanced with the other factors. *Id.* at 528–29.
- [121] We will not require petitioners to have made an affirmative assertion of their right to a timely appeal in state court for this factor to weigh in their favor. Under the circumstances, the filing of these federal habeas petitions constitutes a sufficient assertion of petitioners’ respective rights to a timely appeal. See *Snyder*, 769 F. Supp. At 111.
- [122] Unlike a criminal defendant who stands accused and may not wish to have any trial, much less a speedy one, e.g., *Barker*, 407 U.S. at 535, a criminal defendant who has already been convicted usually wants a speedy appeal and has little or no incentive to delay the outcome. *Cody v. Henderson*, 936 F.2d at 719; cf. *Rose v. Lundy*, 455 U.S. at 520 (“The prisoner’s principal interest, of course, is in obtaining speedy federal relief on his claims.”). Therefore, we presume every petitioner desired a timely appeal.
- [123] Furthermore, petitioners were hampered by the fact that they had to speak through their counsel in the state court appellate process and, in most instances, it was that very counsel who was responsible for the delay. Under these circumstances, we cannot fairly expect petitioners to have raised the issue of delay in state court. See *Gaines v. Manson*, 194 Conn. 510, 481 A.2d 1084, 1093 (Conn. 1984) (“The petitioners have been handicapped in asserting rights through their counsel when it is the counsel itself that has been the source of the challenged delays.”).
- [124] Moreover, because the Public Defender had a policy of briefing cases on a “first in, first out” basis and the Oklahoma Court of Criminal Appeals was unwilling to expedite the briefing of one Public Defender’s case over another, see *Manous v. State*, 797 P.2d at 1005–06, even if petitioners had complained vigorously about delays in prosecuting their appeals, those complaints probably would have been unavailing. See *Gaines*, 481 A.2d at 1093. Therefore, absent evidence that a petitioner affirmatively sought or caused delay in the

adjudication of his or her appeal, this third factor should weigh in favor of finding a due process violation.

[125] d. PREJUDICE TO THE PETITIONER AS A RESULT OF DELAY

d. iii. whether the delay prejudiced the petitioner by impairing the petitioner's grounds for appeal or his or her defenses in the event of a reversal and retrial.

One need only consider the trial transcript to see the impairment to justice that elapsed time can create. That transcript is replete with examples of inconsistency, throughout the testimony of numerous individuals, and especially that of eyewitness, Johnny Gourley. Many contradictions in witnesses testimony are reflected in the footnotes recited in the FACTS OF THE CASE of this brief.

For that small neighborhood in Ivins, Utah, the evening in question, and for some, the day preceding it, started early with copious imbibing of intoxicants by most, if not all, concerned. Whether it was the amount of alcohol consumed, and whatever may have accompanied same, or the amount of time between initial statements to authorities and later trial testimony, or a mixture of all of the above, the ensuing common was one of confusion, uncertain recollection,

outright denial, or a combination of all three.

In considering a retrial, one would have to factor in the damage to the collective memory by the dominating element of ten years. It would be too much to expect the cause of justice to prevail.

[129] Barker, 407 U.S. at 532.

[130] Impairment of one's grounds for defense in the event of a retrial is "the most difficult form of . . . prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" *Doggett*, 112 S. Ct. at 2692-93 (quoting *Barker*, 407 U.S. at 532). The Supreme Court has recognized that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify," *id.* at 2693, and the likelihood of injury "increases with the length of the delay," *id.* To support such a finding of prejudice, unjustified delay "unaccompanied by particularized trial prejudice must have lasted longer than [unjustified delay] demonstrably causing such prejudice." *Id.* at 2694.

[126] The fourth factor we must consider when determining whether a petitioner's due process rights have been violated is whether the petitioner has suffered any prejudice due to delay in adjudicating his or her appeal. As we stated earlier, prejudice may result from any of the following: (i) oppressive incarceration pending appeal; or (ii) constitutionally cognizable anxiety awaiting resolution of the appeal; or (iii) impairment of a defendant's grounds for appeal or a defendant's defenses in the event of a retrial. *DeLancy*, 741 F.2d at 1248; *Rheuark v. Shaw*, 628 F.2d at 303 n.8.

- [127] We have not previously had occasion to discuss the meaning of prejudice in the context of appellate delay. We take this opportunity to do so, beginning with the last and most serious form of prejudice: impairment of the grounds for appeal or the grounds for defense in the event of a retrial.*fn15
- [128] The most serious [form of prejudice] is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past.
- [129] See above.
- [130] See above.
- [131] That delay has impaired a petitioner's ability to mount a defense on retrial is irrelevant, however, if a petitioner has no credible grounds for reversal and retrial. See Tucker, 8 F.3d at 676. Therefore, in addition to establishing that excessive delay has impaired his or her defense on retrial, a petitioner also must assert a colorable state or federal claim that would warrant reversal of his or her conviction.*fn16 See id. But see Harris v. Kuhlman, 601 F. Supp. 987, 994 (E.D.N.Y. 1985)(finding that seven-year delay might impair petitioner's defense if he were retried, even though review of petitioner's claims suggested "very little chance of reversal"). Thus, if a petitioner's conviction has been affirmed by the time the petitioner's claims are heard in the federal habeas proceeding, the petitioner will not be able to show prejudice on retrial because the state appellate court has finally decided there will be no retrial.
- [132] Likewise, because the only prejudice with which we are concerned is that which arises from excessive delay, for a petitioner to make a particularized showing of prejudice, the prejudicial event, such as the death of a key witness, must have occurred, or have been exacerbated, during the period of delay that is found to be excessive. Therefore, in most cases, particularized prejudice that occurs during the first two years that an appeal is pending will not support a due process violation because the prejudice would have occurred even in the absence of any excessive delay in adjudicating the appeal.
- [133] We turn then to the second type of prejudice: constitutionally cognizable anxiety awaiting resolution of the appeal. Once again, we are concerned only with anxiety arising out of excessive delay. Therefore, that a petitioner is anxious about the outcome of the appeal from the day the notice of appeal is filed is of no consequence; the anxiety must relate to the period of time that the appeal was excessively delayed.

[134] The courts appear split on the showing of anxiety that a petitioner must make. The Ninth Circuit, for example, requires a showing of “particular anxiety” distinguishable from that “of any other prisoner awaiting the outcome of an appeal.” Antoine, 906 F.2d at 1383; see also Tucker, 8 F.3d at 676; Coe, 922 F.2d at 532. In Burkett II, the Third Circuit concluded that the petitioner had established prejudice in part because he was able “to detail anxiety related to the processing of his case post-conviction.” 951 F.2d at 1447. The Second Circuit, on the other hand, has affirmed findings of prejudice based solely on the district court’s assumption that the delay of four or more years worried the petitioner, who awaited hopefully the outcome of the appeal. Yourdon v. Kelly, 969 F.2d 1042 (2d Cir. 1992)(table), aff’g, 769 F. Supp. 112, 115 (W.D.N.Y. 1991); Snyder v. Kelly, 972 F.2d 1328 (2d Cir. 1992)(table), aff’g 769 F. Supp. 108, 111 (W.D.N.Y. 1991). We think the better approach is to require the petitioner to make some particularized and substantial showing of anxiety and concern, absent a delay so excessive as to trigger the Doggett presumption of prejudice.

CONCLUSION

The issues regarding the jury note or notes inquiring about a jury instruction that referred to self-defense, and the confusion of the jury regarding the law as it pertained to self-defense, could have defeated the defendant’s argument of self-defense. Confidence in the verdict is undermined by the lack of a full record on the issue.

Not one page of the indexed items, [R. 1346 through 1364], covering critical dates and information pertaining to the Defendant’s / Appellant’s Appeal, are currently in the paginated record. Utah Rules of Appellate Procedure Rule 11 (d) Papers on appeal. (1) Criminal cases. All of the papers in a criminal case shall be included by the clerk of the trial court as part of the record on appeal. (See addendum)

March 16, 1994, Michael L. Miller, then attorney for Defendant / Appellant, filed a “Motion to Supplement Record” regarding a missing /

unreported record of a conversation between Trial Counsel, Defense Counsel, and the Court relating to jury instruction 13.c. [R. 1442–1444] April 24, 1994,

The Utah Court of Appeals issued an ORDER temporarily remanding the case to the Fifth District Court for consideration of a Request for a New Attorney by the Defendant / Appellant and for proceedings under rule 11 pertaining to Attorney Miller’s Request to Supplement the Record. [R.1437] (see addendum pg. A)

According to the Docket record of the Fifth District Court, consisting of 6 pages, [R. 1446-1451] (see addendum) the above dates are the period in which the appointment of new counsel and proceedings, regarding Rule 11, occurred or should have occurred.

Page 3 and 4 [R. 1448) [R. 1449] of the Docket reflect the transactions, for the time period covered by page 4, of the Supplemental Index.

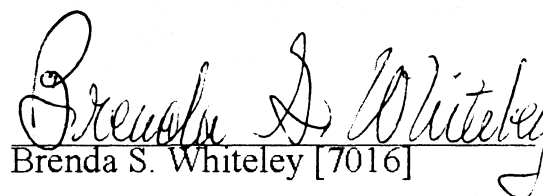
According to that Docket, on 7-13-94, a hearing was held with neither the Attorney for the Defendant or the Defendant present. The State was represented by Brent W. Langston, with the stated results:

“Mr. Langston informs the Court that a stipulation has been reached between counsel as to Motion to Supplement the Record; Court instructs Mr. Langston to submit written stipulation which has been signed by counsel and defendant.”

That undoubtedly is the stipulation that Attorney Miller was seeking, but it is not in the file or listed on the Supplemental Index.

Defendant feels the missing information has required him to proceed without a complete record contrary to Due Process as guaranteed by, the Fifth and Fourteenth Amendments to the U. S. Constitution, and, Article I, Section 7, of the Utah Constitution. Defendant prays this court will reverse this judgment and in view of the elapsed time and the probable lack of witnesses with sufficient recollection of the events to retry the case, release defendant and grant such other relief as the court deems proper.

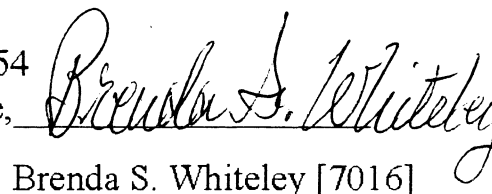
Respectfully submitted this 19th day of November 2001.


Brenda S. Whiteley [7016]

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing BRIEF were mailed, first class postage prepaid, this 19th day of November, 2001, to:

Mark Shurtleff, Utah Attorney General
Laura Dupaix, Assistant Attorney General
160 East 300 South – 6th Floor
Salt Lake City, Utah 84114-0854
Attorney for Plaintiff/Appellee,


Brenda S. Whiteley [7016]

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff / Appellee

vs.

RICHARD ANDREW FRAUSTO,

Defendant / Appellant

Case No.: 20000520-CA
ADDENDUM TO
BRIEF OF APPELLANT

Priority no. 2

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- [1] UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

- [2] Nos. 93-5123, 93-5209

- [3] 1994.C10.41422 <<http://www.versuslaw.com>>; 15 F.3d 1538

- [4] Filed: January 26, 1994; As Corrected February 2, 1994.

- [5] **ANTHONY JEROME HARRIS, GARY MIDDAUGH, THEODORE FORD, DOYLE KING, RANDY MEYER, TERRY CRISP, MICHAEL FARMER, JOHN HONEYCUTT, COY HILL, TROY BROWN, DEEMS ROWELL, GORDON BUNTON, ADAM WRIGHT, ROBERT MANOUS, KIMBALL FOREMAN, JOE HEADRICK, TERRY STEWARD, ARTHUR BLACKMON, JAMES SMITH, STEPHEN ROSS, JOHNNY SMITH, LARRY BROWN, WALTER ROBINSON, ROGER WILLIAMS, KENNETH OWENS, MARSHALL GEE, KELLY CRAIG, GILBERT PAYNE, DANNY GREEN, CALVIN ESLICK, PAUL ROGERS, MICHAEL SMITH, NATHANIEL JACKSON, JOHNNY ROMO, JEFFERY LEA, JOHNNY DAVIS, CHESTER WATKINS, RICKY WYATT, ARON COX, NERO TECUMSEH, JOSEPH OSBORNE, JOSEPH DICESARE, WILLIAM KNITTEL, JAMES MCCLAIN, EDDIE COATS, WALTER BOWERS, HUEY HALL, RONNIE MOORE, SHANE BOGGS, WILLIE TAYLOR, CLARENCE BRAMLETT, BRUCE HILL, LARRY IVES, DONALD MYLES, KEVIN COLE, LARRY CRAWLEY, EDWARD TEICHMAN, KEITH LARKINS, LEONARD GOUDEAU, JOEL VANSCHOY, ROBERT RICHARDS, MICHAEL BROADNAX, RUFUS MCGEE, KYLE CHEADLE, STEVE SEITZ, TIMOTHY WHIPKEY, ADRIAN COLLINS, WILLIAM SEVERE, ROBERT BRIKEY, KEVIN PARKER, LLOYD HARJO,**

KENNETH BURRELL, LOUIS WASHINGTON, DAVID COPPLE, FRED COOK, ROBERT SCHNEIDER, JOEL ALLEN, BOYCE VANDENBURG, JERRY STILES, TONY ABNEY, JACKIE L. ADAIR, ROBERT ANDERSON, ASCENSION ARMENDARIZ, LARRY BAILEY, CHARLES BARNETT, ROGELIO BEGE, J.C. BERRY, LAVERN BERRYHILL, PERRY BIFFLE, JACKIE BLANTON, DOUGLAS BREEDEN, GREGORY BRIANS, ARTHUR BROWN, BOBBY BRUCE, DEREK BURGER, LARRY BUTCHER, JOHN BYRD, JAMES CAGLE, CLIFFORD CAMPBELL, DOUGLAS CAPPS, GERALD CARROLL, TORIANO CHANDLER, JOE CHASE, CLYDE CHUCULATE, JOSEPH CLOUD, JOHNNY COLE, PAM COLLEY, RONALD D. COPPER, DENNIS CORNELL, CYNDI CORNELL, GERMAINE CRAWFORD, RICKIE CRISP, JAMES CROW, GERALD DANIELS, BRIAN DANIELS, RICHARD DEMES, RONNIE DIAL, ALFONSO DURAN, LARRY EDWARDS, ANDREW EPHRIAM, JAMES L. EVANS, J.W. FATHERREE, LANCE FOSTER, DONNIE JOE FRYE, DENNIS GAINES, LOUIS GIBSON, RONNIE GILMORE, JAMES GODBEY, FOREST GOLBEK, JERRY GRAHAM, LANTZE GREEN, BRYAN GRIFFIN, JAMES HAMILTON, DAVID P. HAMMER, LAUREN HANKINS, EUAL HARDT, MICHAEL HAYES, RANDY HENDERSON, ELDON HENDERSON, ANDREA HESTER, ARCHIE HILL, DEWAYNE HOLLAND, HAROLD HOLMAN, THOMAS HONEYCUTT, MICHAEL HOUSTON, C. HUFFSTUTLER, KEITH HUNT, DORRIS JACKSON, NAPOLEON JAMES, WILLIE JEMISON, ALLEN JONES, ALLEN KAULAITY, JEFFERY KING, ROBERT KLUVER, FRED KNISLEY, MILLARD KNOX, CLARENCE LANDRETH, BERNARD LAWSON, ODIS LAWSON, JR., QUNION LEIGH, FRANK LOGAN, LAURA LONG, JOSEPH LYDA, BRIAN MAFFEE, MCKINLEY MAHAN, PATRICK MARTIN, ELIJAH MARTIN, LEOBARDO MARTINEZ, BARRY MCCLURE, GLENN MCGUIRE, PATRICK MEADOWS, JUAN MERCADO, WALTER MILLER, JACKIE MILLER, LARRY MILLS, GARY MINARD, WILLIAM MOORE, ABDULLAH MUHAMMAD, DARPHUS MURRAY, STEVEN NESS, GEORGE NICHOLS, MICHAEL NORMAN, JAMES NORTHCROSS, RICHARD OLSEN, CARMEN PATTON, DIXIE PEBWORTH, ROGER PETERMAN, RICK PETRICK, GREGORY POE,

WILLIAM P. POTTS, MICHAEL PRATER, JAMES PRICE, STEVEN PYLES, NILLSON RAMIREZ, CHRISTOPHER RANSOM, HAZEN RAY, TERRY REEVES, KENNETH REYNOLDS, TERRANCE RICHARDS, EDDIE RICHIE, MICHAEL RIGGS, T.J. ROBY, ARTHUR RODRIGUEZ, VICTOR ROSE, KENNETH L. RUSSELL, DAVID RUSSELL, DAVID SADLER, SAMUEL SANNER, WILLIAM SHERBURN, MONTY SHOCKEY, MARY SHOFFNER, WAYNE SHULL, DONALD SIBIT, CANOVA SINGLETON, JOHN SMITH, DANNY SMITH, TERRY SMITH, MICHAEL S. SMITH, ANTHONY STEELE, RICHARD STONE, THOMAS STROTHER, JAMIE STRUBLE, H. STUMBLINGBEAR, SHERMAN SURFACE, STACEY SUTTON, STEPHEN THOMAS, DAVID THOMAS, JON TIBET, JOHNNY TILLEY, ROSCOE TILLEY, LYMAN TOMLIN, FLOYD R. TURNER, CHERYL WAGNER, LARRY WALKER, MICHAEL WALLING, WALTER WALTERS, WARREN WARD, LESLIE WARLEDO, JOHNNY WASHINGTON, ORLAND WASSON, JOSEPH WATKINS, THOMAS WEAVER, ANDREW WEST, JACK WHITLOCK, ROBERT WHITTIER, BILLY D. WILKINS, TYRONE WILLIAMS, MARTY WILLIAMS, JACK WILLIAMS, THURMAN WILSON, DONALD WILSON, WILLIE WILSON, RANDY WOOD, KEVIN WOOD SR., ROBERT WOODS, BILLIE WOOLSEY, CHARLES WOOTEN, GALEN WOOTEN, SHARLENE WORKMAN, COY YOCHAM, FLOYD ZEIGLER, FLOYD HARRIS, ROOSEVELT MCCOY, GREGORY MUNDINE, DONALD O'SHIELDS, GERALD THOMPSON, TERRY P. CROW, BRIAN LEROY JORDAN, TERRY LYNN RHINE, LERON ROBINSON, CAROL ANN PIERCE, RICHARD LEE JOHNSON, ROBERT M. ESTRADA, DAVID RICHARD, PETITIONERS-PLAINTIFFS-APPELLANTS,

v.

RON CHAMPION, STEVE HARGETT, STEPHEN KAISER, BOBBY BOONE, DAN REYNOLDS, JOY HADWIGER, R. MICHAEL CODY, EDWARD EVANS, R. JACK COWLEY, NEVILLE MASSIE, H.N. SCOTT, SUE FRANK, DENISE SPEARS, EARL ALLEN, JIM SORRELS, WARDENS, AND ALL OTHER WARDENS OF CORRECTIONAL FACILITIES OF THE STATE OF OKLAHOMA HAVING CUSTODY OF ANY OF THE PLAINTIFFS; THE OKLAHOMA DEPARTMENT OF

CORRECTIONS; GARY MAYNARD, THE DIRECTOR OF THE OKLAHOMA DEPARTMENT OF CORRECTIONS; THE OKLAHOMA COURT OF CRIMINAL APPEALS; THE JUDGES OF THE OKLAHOMA COURT OF CRIMINAL APPEALS, TO-WIT, HONORABLE JAMES F. LANE, HONORABLE GARY L. LUMPKIN, HONORABLE TOM BRETT, HONORABLE ED H. PARKS, AND HONORABLE CHARLES A. JOHNSON; THE STATE OF OKLAHOMA; THE OKLAHOMA INDIGENT DEFENSE SYSTEM; HENRY A. (HANK) MEYER, III, CHAIRMAN, RICHARD REEH, DOUG PARR, RICHARD JAMES, AND BECKY PFEFFERBAUM, M.D., INDIVIDUALLY AND AS MEMBERS OF THE OKLAHOMA INDIGENT DEFENSE SYSTEM BOARD; PATTI PALMER, INDIVIDUALLY AND AS EXECUTIVE DIRECTOR OF THE OKLAHOMA INDIGENT DEFENSE SYSTEM; AND, E. ALVIN SCHAY, INDIVIDUALLY AND AS APPELLATE INDIGENT DEFENDER, I.E., CHIEF ADMINISTRATIVE OFFICER OF THE OKLAHOMA APPELLATE INDIGENT DEFENDER DIVISION, RESPONDENTS-DEFENDANTS-APPELLEES.

- [6] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA. D.C. No. 90-C-448-B.
- [7] David Booth of R. Thomas Seymour, Attorneys, Tulsa, Oklahoma, for Petitioners-Plaintiffs-Appellants.
- [8] Diane L. Slayton, Assistant Attorney General (Susan B. Loving, Attorney General of Oklahoma, with her on the brief), Oklahoma City, Oklahoma, for Warden Respondents-Defendants-Appellees.
- [9] J. Warren Jackman (William A. Caldwell, with him on the brief), of Pray, Walker, Jackman, Williamson & Marlar, Tulsa, Oklahoma (and Gary Peterson, with him on the brief, Oklahoma City, Oklahoma), for Oklahoma Indigent Defense System Respondents-Defendants-Appellees.
- [10] John M. Imel (John E. Rooney, Jr., with him on the brief), of Moyers,

Martin, Santee, Imel & Tetrick, Tulsa, Oklahoma (and Gail L. Wettstein, with him on the brief, Oklahoma City, Oklahoma), for Oklahoma Court of Criminal Appeals Respondents-Defendants-Appellees.

[11] Before Logan, Brorby, and Ebel, Circuit Judges

[12] Ebel

[13] EBEL, Circuit Judge

[14] These consolidated habeas appeals, which come to us after our remand in *Harris v. Champion*, 938 F.2d 1062 (10th Cir. 1991) (Harris I), require us to revisit the problem of appellate delay in the Oklahoma criminal Justice system. In Harris I, we ruled that the United States District Court for the Northern District of Oklahoma should have excused an Oklahoma prisoner's failure to exhaust his state remedies before seeking federal habeas relief in light of extensive delay by the state public defender in filing an opening brief in the prisoner's direct criminal appeal. 938 F.2d at 1065-66, 1071. We remanded the action to the district court and directed it to investigate the possibility of systemic delay in the filing of briefs by the Oklahoma Appellate Public Defender System (Public Defender).^{*fn1} Id. at 1071. In a subsequent opinion, we expanded the scope of inquiry on remand to include a consideration of the entire criminal appellate process in Oklahoma insofar as it contributes to delay in deciding direct criminal appeals of indigent defendants. *Hill v. Reynolds*, 942 F.2d 1494, 1496-97 (10th Cir. 1991). We now consider the results of the district court's rulings on remand.

[15] In this opinion we are called upon to address several issues arising out of the delay in processing petitioners' direct criminal appeals, including whether petitioners must exhaust their state remedies before seeking habeas relief in federal court and whether the delays in the state appellate process have violated petitioners' rights to due process, equal protection, or effective assistance of counsel. The record before us shows that many of these petitioners, all of whom are indigent and were represented by the Public Defender in their direct criminal appeals, had to wait three or

more years before a brief was filed on their behalf in their respective direct criminal appeals. Some petitioners also experienced delays elsewhere in the appellate process.

- [16] The following is a brief synopsis of our opinion, which begins with the issue of exhaustion. We conclude that there is a rebuttable presumption that the State's process is not effective and, therefore, need not be exhausted, if a direct criminal appeal has been pending for more than two years without final action by the State. This two-year presumptive period is not inflexible: the particular circumstances of a case may warrant excusing exhaustion after a delay of less than two years as, for example, when the length of the sentence is considered or when there is an obvious and massive breakdown in the procedural development of the appeal; alternatively, circumstances may warrant refusing to excuse exhaustion even after a delay of more than two years.
- [17] Next, we consider whether appellate delays also gave rise to independent due process violations. We apply the four-part balancing test of *Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972), and examine the length of the delay, the reason for the delay, whether the petitioner asserted his or her right to a timely appeal, and whether the petitioner experienced any prejudice as a result of excessive delay.
- [18] First, we agree with the district court's Conclusion that delay in finally adjudicating a direct criminal appeal beyond two years is presumptively excessive. Again, this two-year presumptive period is not inflexible; delay of less than two years may be excessive in some cases and delay of more than two years may not be excessive in other cases. Generally, however, the longer delay in the appellate process extends beyond two years, the less showing a petitioner must make on the other parts of the balancing test, including prejudice resulting from the delay.
- [19] Second, we conclude that the reasons the State has offered for the delays experienced by petitioners--underfunding and, possibly, mismanagement of resources--are not constitutionally sufficient to justify excessive delay. Third, we conclude that absent a showing that a petitioner affirmatively sought or caused delay in adjudicating his or her appeal, a petitioner

sufficiently asserted his or her right to a timely appeal by filing a federal habeas petition seeking relief from appellate delay by the State.

[20] Finally, we conclude that although prejudice may be presumed if appellate delay is sufficiently excessive, ordinarily a petitioner must make some particularized showing of prejudice to establish a due process violation. Prejudice arising from excessive appellate delay may take any of three forms: oppressive incarceration pending resolution of the appeal; anxiety and concern pending resolution of the appeal; and impairment of the grounds for appeal or the grounds for a retrial in the event the petitioner's conviction is reversed. Because we are concerned only with prejudice arising from excessive delay, the particularized showing must relate to events that occurred during the period of delay that was excessive.

[21] The most significant form of prejudice, and often the most difficult to prove, is prejudice to the grounds for appeal or to the grounds for defense in the event of a retrial. As a precondition to establishing the latter, a petitioner must assert a colorable state or federal claim that would warrant a reversal and retrial. Likewise, as a precondition to establishing either oppressive incarceration or anxiety and concern pending resolution of the appeal, a petitioner generally must assert a colorable claim that would warrant a reversal of his or her conviction or a reduction in sentence that would entitle the petitioner to immediate release. Because the district court has not yet conducted the individualized factual inquiry necessary to apply the Barker balancing test to each petitioner, we remand the due process claims to the district court for further development.

[22] Likewise, although we recognize that the Equal Protection Clause may be implicated if indigent petitioners face substantial delays in adjudicating their direct criminal appeals that petitioners who can afford to retain counsel do not face, we cannot review petitioners' equal protection claims on the factual record before us. Therefore, we must remand these claims to the district court, as well.

[23] Turning to petitioners' claims for ineffective assistance of counsel, we

conclude that excessive delay in filing an appellate brief may violate a petitioner's right to effective counsel. The violation ends, however, once the brief is filed, and unless the delay affected the outcome of the appeal itself, the past violation is not redressable through a habeas action. Therefore, only when a brief has yet to be filed can a petitioner obtain habeas relief for ineffective assistance of counsel resulting from excessive delay in filing an appellate brief.

[24] Finally, we address two issues that do not relate to delay in the state appellate process. The first concerns the refusal of Judge Brett, one of the members of the district court panel that issued the rulings subject to appeal, to recuse himself from the habeas claims despite his uncle's presence on the Oklahoma Court of Criminal Appeals until the uncle's death in early 1993. We conclude that Judge Brett abused his discretion in failing to recuse himself and that he should not participate in any further proceedings relating to petitioners' claims. We further conclude, nonetheless, that Judge Brett's failure to recuse himself was harmless error under the particular circumstances presented here and, therefore, we may review the merits of the district court's rulings. Lastly, we conclude that the district court did not abuse its discretion in refusing to award petitioners interim attorney fees on the ground that the fee request was premature.

[25] I. HISTORICAL & PROCEDURAL BACKGROUND

[26] In 1981, following a two-year pilot project, Oklahoma instituted its first statewide system of public defenders. Before that time, in all but Tulsa and Oklahoma Counties, indigent criminal defendants were represented solely by appointed members of the private bar. The Oklahoma Appellate Public Defender System was given responsibility for appeals by all indigent defendants except those in Tulsa and Oklahoma Counties, who continued to be represented by county public defenders. Except for cases involving conflicts of interest, the Public Defender had no authority to refuse cases assigned to it by the courts.

[27] Beginning in the mid-1980s, the Public Defender was assigned a steadily increasing number of felony appeals. This increase in caseload was not

met with a corresponding increase in funding and staffing, however, and a backlog of unbrieffed cases began to develop. With only five attorneys briefing noncapital cases, the Public Defender fell further and further behind. At the end of fiscal year (FY) 1986, the Public Defender had a total of 367 unbrieffed cases.^{*fn2} By the end of FY 1989, that number had risen to 705.

[28] In an effort to maximize the use of its limited resources, the Public Defender implemented a "first-in, first-out" policy, pursuant to which the oldest cases were briefed first. The Public Defender also began seeking lengthy extensions from the Oklahoma Court of Criminal Appeals on a routine basis. The Public Defender would ask for an initial extension of 360 days to be followed, if necessary, by subsequent requests for extensions of 180 days or less. The Oklahoma Court of Criminal Appeals ordinarily granted these extensions.^{*fn3}

[29] Although the Oklahoma Court of Criminal Appeals was distressed by the Public Defender's inability to handle the number of cases assigned to it, the court felt it had no power to remedy the situation directly.^{*fn4} In response to a mandamus petition by an indigent criminal defendant who sought an order directing the Public Defender to file appellate briefs in his two cases with no further delays, the Oklahoma Court of Criminal Appeals regrettably commented:

[30] It is obvious that the office is understaffed to handle the number of appeals that are presently being handled by the office but due to the lack of funding by the State, the office is apparently doing the best that they can under the circumstances. We are powerless to cure this problem. It can only be cured by the legislature through the use of its budgetary powers. Petitioner is not entitled to have his appeal handled prior to others who are in similar circumstances and have been delayed even longer.

[31] *Manous v. State*, 797 P.2d 1005, 1005-06 (Okla. Crim. App. 1990). Enter Anthony Jerome Harris.

- [32] Harris was sentenced on September 29, 1988, and the Public Defender was appointed to represent him on appeal. On April 16, 1990, in response to his inquiry, the Public Defender sent Harris a letter stating: "It will be at least 3 years before we are able to file your brief with the court." Harris I, 938 F.2d at 1064 (quoting Letter from Public Defender to Harris of 4/16/90). Believing that he should not have to wait that long to obtain a review of his conviction and sentence, Harris filed a habeas petition in federal district court and argued that the anticipated delay in adjudicating his direct criminal appeal should excuse his failure to exhaust his state remedies.
- [33] By the time we issued our opinion in Harris I on June 17, 1991, almost three years had passed since Harris' sentencing and the Public Defender had yet to file a brief on his behalf. We concluded that the briefing delay, which was authorized by the numerous extensions granted by the Oklahoma Court of Criminal Appeals, was attributable to the State and was not justified. Therefore, we excused Harris from exhausting his state remedies before proceeding in federal court. We also noted that the delay raised potential independent violations of Harris' constitutional rights, namely the right to equal protection, the right to due process, and the right to effective assistance of counsel.
- [34] We reversed the district court's dismissal of the habeas petition for failure to exhaust and, in light of the problems encountered by Harris and other Oklahoma habeas petitioners who had raised the issue of delay to this court, we directed the district court on remand
- [35] to consider this petitioner's claims within the context of the systemic operations of the [Public Defender]. Once the constitutional scope of the problem is known, the district court should consider what relief is appropriate for this petitioner as well as such systemic relief, if any, as may be needed to prevent any ongoing constitutional violations that may be occurring as a result of the inability of the [Public Defender] timely to prepare appeals for [its] indigent clients.
- [36] Harris I, 938 F.2d at 1071 (footnote omitted). Further, we instructed the district court (1) to consolidate, to the extent possible, any other habeas

cases pending in the Northern District of Oklahoma that raised a constitutional challenge to the delay by the Public Defender in filing briefs in direct criminal appeals and to coordinate its review of those petitions with the review of similar petitions by the courts in the Western and Eastern Districts of Oklahoma; (2) to "conduct a full hearing, as expeditiously as possible, into possible systemic delays of the [Public Defender] in preparing and filing appellate briefs for [its] indigent clients;" (3) to make "detailed findings of fact and Conclusions of law and . . . enter orders specifically addressing and remedying any constitutional violations that may be found;" and (4) "to appoint experienced counsel to represent the petitioners" in the collective cases. *Id.* at 1071, 1073.

[37] Two months later, we considered an appeal by another state habeas petitioner who was represented by the Public Defender in his direct criminal appeal. The opening brief there was not filed until two years and nine months after the notice of appeal. *Hill*, 942 F.2d at 1495. At the time we issued our decision, *Hill*'s appeal had been pending three years and four months with no decision by the Oklahoma Court of Criminal Appeals. *Hill* contended that the delay in adjudicating his appeal excused his failure to exhaust state remedies and violated his right to due process.

[38] Based on our decision in *Harris I*, we reversed the district court's dismissal of *Hill*'s habeas petition for failure to exhaust. On remand, we instructed the district court to consolidate *Hill*'s habeas action with that of *Harris* for hearing. We further instructed the district court to consider the period both before and after the Public Defender filed its brief and to determine "what part of the whole period of delay caused by the state may have violated *Hill*'s right to due process." *Id.* at 1496-97. We thereby expanded the scope of inquiry on remand to excessive delay in the entire Oklahoma criminal appellate system.

[39] During this time, sweeping changes were taking place in Oklahoma's public defender system. In June 1990, the Oklahoma Supreme Court ruled that Oklahoma's system for appointing and compensating trial counsel for indigent defendants was unconstitutional. *State v. Lynch*, 796

P.2d 1150, 1159 (Okla. 1990).

- [40] In its 1991 session, the Oklahoma legislature responded to the Lynch decision by overhauling the entire indigent defense system, both at the trial and appellate levels. The Oklahoma Indigent Defense Act, Okla. Stat. tit. 22, 1355-68, which took effect on July 1, 1991, created the Oklahoma Indigent Defense System, and assigned it the responsibility of providing both trial and appellate counsel, as well as counsel on capital post-conviction matters, for indigent defendants in all but Tulsa and Oklahoma Counties. The legislature also authorized the Public Defender to hire two more attorneys to handle noncapital felony appeals.
- [41] Pursuant to our remand order in Harris I, in July 1991, Judges in the three federal districts in Oklahoma began identifying pending habeas cases that raised the issue of delay by the Public Defender and transferring them for hearing to the then-Chief Judge of the Northern District of Oklahoma, who was designated to sit in all three judicial districts. In January 1992, the district court appointed counsel to represent the petitioners in these cases (the Harris group), which at that time numbered sixteen.
- [42] On February 28, 1992, the petitioners in the Harris group, which then consisted of thirty habeas cases, presented the court with reams of statistical and other data gathered from the Public Defender, the Oklahoma Court of Criminal Appeals, and the Attorney General. This evidence showed that for noncapital felony appeals filed in 1989, the Public Defender filed only three percent of its briefs within six months of the date they were due; fifty-six percent of its briefs were at least three years late; and thirty-one percent of its briefs had yet to be filed by the beginning of 1992. Almost all the Public Defender briefs due in noncapital felony appeals filed in 1990 and 1991 had yet to be filed by the beginning of 1992. During much of the operative period, therefore, an indigent appellant could expect a delay of two to four years before his or her appellate brief would be filed.
- [43] The Public Defender was not the only entity having problems managing its caseload, however. The Oklahoma Court of Criminal Appeals also had a steadily growing backlog of cases.^{*fn5} Each year the court was

struggling to dispose of the cases pending from the previous year and was making virtually no progress on the new cases filed that year. At the end of FY1989, there were 1,148 undecided cases pending before the Oklahoma Court of Criminal Appeals; a year later, there were 1,407 undecided cases pending.^{*fn6} Even the Attorney General was beginning to slip. Data collected from the Oklahoma Court of Criminal Appeals showed that although the Attorney General filed almost all her briefs within six months of the due date, starting in 1987, there was "a clear trend of a decreasing number of briefs timely filed." R., Doc. 27, Ex.3(b) at 12. It was clear from the evidence presented that the appellate criminal Justice system in Oklahoma was in a crisis.

[44] In the spring of 1992, the Oklahoma legislature began taking steps to alleviate the crisis. It appropriated \$400,000 for the Public Defender to use to contract with private attorneys to handle noncapital felony appeals on which the Public Defender had been appointed. As a result, the Public Defender contracted out approximately 176 of its cases that spring. In the fall, the Oklahoma Court of Criminal Appeals also took steps to speed up the appellate process. The court adopted a summary opinion format to be used in all cases that would not be published. By reducing the amount of legal analysis and Discussion set forth in its unpublished opinions, the court eliminated lengthy conferences concerning the precise wording of the opinion, as well as the need for separate opinions when Judges concurred in the outcome but not in the analysis.

[45] Meanwhile, the petitioners in the Harris group, which by then had grown to 108 habeas cases, increased their pressure on the State by filing a supplemental and amended complaint that named as defendants the State of Oklahoma, the Oklahoma Court of Criminal Appeals and its individual members, the Public Defender and its board members and administrative officers, as well as all the Oklahoma wardens, among others. The complaint, filed in July 1992, asserted against all the named defendants both habeas claims and claims for damages under 42 U.S.C. 1983.^{*fn7} The Harris petitioners also filed a motion for a preliminary injunction, seeking to enjoin the Oklahoma Court of Criminal Appeals from granting any further extensions of time to the Public Defender, and a motion for partial summary judgment, seeking the release of those petitioners who had been, or reasonably could be expected to be, in custody for 11.7

months or longer without receiving a final adjudication of their appeal.^{*fn8}

- [46] The district court held a hearing on the pending motions on October 15, 1992, by which time the Harris group had grown to 193 habeas cases. The court noted at the outset that all the parties appeared to agree that delays in the Oklahoma criminal appellate system had risen to the level of constitutional violations, and it informed the parties that it rejected the Attorney General's position that only the Oklahoma legislature could provide a remedy for those constitutional violations. The court said it, too, could provide a remedy.
- [47] The Public Defender recommended that the court stay its hand because the legislature had appropriated more money for the Public Defender to contract out its cases, and the Public Defender intended to award contracts in an additional 354-400 cases the next morning. The contracts would require all opening briefs to be filed on or before April 30, 1993. The Public Defender stated that once these cases were contracted out to private counsel, the Public Defender could "maintain brief filings on a current basis within the statutorily allotted periods." Tr. 10/15/92 at 37. Counsel for the Oklahoma Court of Criminal Appeals also suggested that the court wait six months to see if the clog in the system would resolve itself. When questioned about appropriate remedies, counsel argued that while release of petitioners during the period of excessive appellate delay might be an appropriate remedy, it would have to be considered on a case-by-case basis. The Attorney General, in turn, also argued that the propriety of any remedy depended on the individual circumstances of each petitioner.
- [48] At the Conclusion of the hearing, the court noted that, although in the usual situation it would approach petitioners' claims on an individual basis, in light of the unusual circumstances presented, it proposed the following possible remedy: to release any petitioner whose appeal had not been fully briefed and submitted to the Oklahoma Court of Criminal Appeals for decision within fourteen months of the date of conviction. Each petitioner would be released on his or her personal recognizance until the Oklahoma Court of Criminal Appeals issued its opinion; the State could apply for special terms and conditions of release in individual

cases. The court gave the parties until October 23 to comment on the proposal and indicated it would issue a ruling shortly thereafter. Unfortunately, no ruling ever appeared.

- [49] Beginning in January 1993, various Harris group petitioners, who were anticipating release, began filing mandamus petitions with us seeking a ruling by the district court. By the end of February, there were seven such mandamus petitions pending, including one filed by counsel on behalf of all the Harris group petitioners.
- [50] On February 18, 1993, on motion of the Chief Judge of the United States District Court for the Northern District of Oklahoma, approved by the Chief Judges of the Western and Eastern Districts, the Chief Judge of this court entered an order designating a three-Judge district court panel to adjudicate common issues of law and fact in all the habeas cases alleging delay in the adjudication of direct criminal appeals in Oklahoma. The panel, which was composed of one Judge from each of the three federal districts in Oklahoma, was formed in an effort to resolve uniformly and expeditiously the common issues arising in the approximately 275 habeas cases that by then made up the Harris group.
- [51] By order entered March 26, 1993 in the mandamus proceedings, we directed the district court panel to show cause why it should not be ordered, among other things, "to enter findings of fact and Conclusions of law in the Harris cases insofar as those cases seek habeas relief because of delays by the [Public Defender] in preparing and filing briefs in petitioners' direct criminal appeals" no later than May 10, 1993; and "to enter findings of fact and Conclusions of law in the Harris cases insofar as those cases seek habeas relief because of delays by the [Attorney General] or the [Oklahoma Court of Criminal Appeals]" no later than September 10, 1993. *Harris v. United States Dist. Ct.*, (slip op.) at 7-8 (10th Cir. 1993)(unpublished order). We also suggested that the district court certify those rulings for immediate appeal pursuant to Fed.R.Civ.P. 54(b).
- [52] In its response to the show cause order, the district court indicated that it had no objection to meeting the deadlines set forth in the show cause

order. Therefore, on April 22, 1993, we entered a mandamus order directing the district court to enter the findings and Conclusions requested in our show cause order and we also instructed the court to consider the issue of cumulative delay in its ruling due September 10.

- [53] On April 1, 1993, the Harris group petitioners filed a motion to disqualify two of the three members of the district court panel. Both motions were orally denied at a status conference on April 6, with the exception that Judge Thomas R. Brett, whose uncle was a member of the Oklahoma Court of Criminal Appeals until his death three months earlier, agreed to recuse on any claims for damages.
- [54] At an evidentiary hearing on April 9, the district court said it would grant respondents' motion to sever from the Harris group twenty-six habeas cases by petitioners who were not represented by the Public Defender in their direct criminal appeals. The court also said that it would close the Harris group as of that date and any subsequent habeas petitions raising the issue of appellate delay would be considered on an individual basis. As of April 9, 284 habeas petitions that raised the issue of appellate delay in the Oklahoma criminal Justice system had been filed by criminal defendants represented by the Public Defender.
- [55] On May 6, 1993, the district court entered its findings of fact and Conclusions of law concerning delay by the Public Defender and certified its ruling as final for purposes of appeal pursuant to Rule 54(b). Based on the Rules of the Oklahoma Court of Criminal Appeals, the district court concluded that an appellate process that took up to sixteen months from the filing of the notice of appeal through the filing of appellate briefs "would satisfy constitutional concerns." R., Doc. 143 at 21-22. In light of this standard, the court concluded that "there has been inordinate delay attributable to [the Public Defender] in the filing of most of the appellant briefs herein. This delay has thus been systemic." Id. at 22. The court determined, however, that to decide whether the inordinate delay by the Public Defender gave rise to any independent due process violations, it would have to balance the factors set forth in *Barker v. Wingo*, 407 U.S. at 530, which would require the court to consider each habeas petitioner's case individually. The court said it would defer this

individual inquiry until after it had entered all the rulings required by our mandamus order of April 22. The court also deferred any rulings on the equal protection and ineffective assistance of counsel issues until it conducts the individual inquiries on due process.

[56] The court further held that any habeas petitioner whose direct criminal appeal had been either affirmed or reversed with prejudice to retrial was not entitled to habeas relief as a result of delay in the appellate process. Finally, the court held that in the future, habeas petitioners would have to exhaust the issue of delay in the Oklahoma Court of Criminal Appeals before raising it in federal court. Petitioners filed their notice of appeal from the district court's order on May 28.

[57] In August, the parties submitted documentary and testimonial evidence to the court concerning delays by the Attorney General and the Oklahoma Court of Criminal Appeals, as well as cumulative delays in the system. Among other things, the court was advised that two pieces of legislation went into effect on July 1 that would speed the appellate process.

[58] The first act established an Emergency Appellate Division of the Oklahoma Court of Criminal Appeals that can be activated whenever more than 100 noncapital felony appeals are at issue and pending in the Office of the Clerk of the Oklahoma Court of Criminal Appeals. Act of June 3, 1993, ch. 292, secs. 2-6, 1993 Okla. Sess. Laws Serv. 1548, 1549-51 (West)(codified at Okla. Stat. tit. 20, 60.1-.5). Each emergency appellate panel consists of three trial Judges, two of whom must concur in any decision. Okla. Stat. tit. 20, 60.3. Each panel must dispose of any cases assigned to it or return the cases to the Oklahoma Court of Criminal Appeals for resolution within ninety days. Decisions of the panels are final unless the Oklahoma Court of Criminal Appeals grants a petition for review. Id. at 60.1. Judge Johnson of the Oklahoma Court of Criminal Appeals testified that sixty-six cases had been assigned to emergency appellate panels since the legislation went into effect, and three of the cases had already been decided.

[59] The second act cut in half the time allowed for perfecting appeals in misdemeanor and felony cases (i.e., filing the record with transcripts); an

appeal must be perfected in 90, rather than 180, days from the date the judgment and sentence are pronounced. Act of June 7, 1993, ch. 298, sec. 5, 1993 Okla. Sess. Laws Serv. 1562, 1564 (West)(codified at Okla. Stat. tit. 22, 1054). Because the briefing schedule does not begin to run until the appeal has been perfected, reducing the time permitted for perfecting the appeal effectively reduces delay on appeal by ninety days.

[60] The district court entered its findings of fact and Conclusions of law concerning delay by the Attorney General and the Oklahoma Court of Criminal Appeals, as well as cumulative delay throughout the appellate system, on September 8, 1993. The court found that pursuant to data provided by the parties, "there are approximately 302 matters now considered Harris cases as of August 13, 1993." R., Doc. 255 at 4. An appellate brief had been filed on behalf of the appellant in at least 301 of the cases and the Attorney General had filed a brief on behalf of the appellee in all but three cases. The Attorney General's briefs were filed within the statutory period in 130 cases and were filed more than sixty days after the statutory period in only sixty-seven cases. The Oklahoma Court of Criminal Appeals had issued opinions in eighty-five of the cases, and 217 cases remained pending before the court. Of those, six were not yet at issue, 125 were at issue and ready to be assigned to a Judge, and eighty-six were at issue and had already been assigned to a Judge.

[61] The district court found no evidence of systemic delay in filing briefs by the Attorney General and also determined that although delay by the Oklahoma Court of Criminal Appeals may have been inordinate in individual cases, it had not been systemic. The court further concluded that there was no cumulative inordinate systemic delay at present. The court held that a delay in adjudicating an appeal of more than two years from the notice of appeal or order permitting an appeal out of time to issuance of an opinion would be presumed to be unconstitutional "absent a showing of good and sufficient cause or special circumstances." *Id.* at 8. The court again ruled that before a habeas petitioner could assert unconstitutional delay in federal court, he or she first had to raise the issue to the Oklahoma Court of Criminal Appeals and permit it to take appropriate action.

[62] On September 28, petitioners filed their notice of appeal from the court's September 9 order, which the court certified as final pursuant to Rule 54(b). The two appeals were consolidated by our order of October 14, and we heard oral argument in the appeals on November 8, 1993.

[63] On appeal, petitioners assert that the district court's findings and Conclusions concerning their due process, equal protection, and ineffective assistance of counsel claims are incomplete and, in certain instances, erroneous. Petitioners also contend that Judge Brett, who was a member of the three-Judge district court panel, should have recused himself on the habeas claims pursuant to 28 U.S.C. 455. Finally, petitioners maintain that the district court erred in not awarding interim attorney fees against the State for work performed by counsel on behalf of petitioners. We will discuss each of these issues below.

[64] II. ISSUES ON APPEAL RELATING TO DELAY

[65] A. Exhaustion of State Remedies

[66] A threshold question that must be addressed in every habeas case is that of exhaustion. Federal habeas relief is not available to a state prisoner "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).

[67] The exhaustion doctrine, which was codified in 1948, began as "a judicially crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement.'" *Braden v. 30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484, 490, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (1973)(quoting *Secretary of State for Home Affairs v. O'Brien*, [1923] A.C. 603, 609 (H.L.)). Although the doctrine advances several interests, see *Deters v. Collins*, 985 F.2d 789, 794 (5th Cir. 1993), it "is principally designed to protect

the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose v. Lundy*, 455 U.S. 509, 518, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982).

- [68] Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."
- [69] *Id.* (quoting *Darr v. Burford*, 339 U.S. 200, 204, 94 L. Ed. 761, 70 S. Ct. 587 (1950)).
- [70] Exhaustion is, therefore, based on principles of comity; exhaustion is not jurisdictional. *Patterson v. Leeke*, 556 F.2d 1168, 1170 (4th Cir.), cert. denied, 434 U.S. 929, 54 L. Ed. 2d 289, 98 S. Ct. 414 (1977). "Although there is a strong presumption in favor of requiring the prisoner to pursue his available state remedies, his failure to do so is not an absolute bar to appellate consideration of his claims." *Granberry v. Greer*, 481 U.S. 129, 131, 95 L. Ed. 2d 119, 107 S. Ct. 1671 (1987). The State may waive a prisoner's failure to exhaust by failing to raise the defense in federal district court. *Id.* at 135. Likewise, some cases may present special circumstances that make it "appropriate for an appellate court to address the merits of a habeas corpus petition notwithstanding the lack of complete exhaustion." *Id.* at 131; *Frisbie v. Collins*, 342 U.S. 519, 521, 96 L. Ed. 541, 72 S. Ct. 509 (1952). One such circumstance is when the State's process is inadequate to protect a prisoner's rights. See 28 U.S.C. 2254(b); *Darr*, 339 U.S. at 210.
- [71] "Where state procedural snarls or obstacles preclude an effective state remedy against unconstitutional convictions, federal courts have no other choice but to grant relief in the collateral proceeding." *Bartone v. United States*, 375 U.S. 52, 54, 11 L. Ed. 2d 11, 84 S. Ct. 21 (1963); see also *Hankins v. Fulcomer*, 941 F.2d 246, 250 (3d Cir. 1991)("The principle of

comity weighs less heavily [when] the state has had an ample opportunity to pass upon the matter and has failed to sufficiently explain its . . . delay."); *United States ex rel. Hankins v. Wicker*, 582 F. Supp. 180, 182 (W.D. Pa. 1984)("If an appropriate remedy does not exist or its utilization is frustrated in the state system, . . . the deference accorded the state judicial process must give way to the primary role of the federal courts to redress constitutional deprivations."), *aff'd*, 782 F.2d 1028 (3d Cir.)(table), *cert. denied*, 479 U.S. 831, 93 L. Ed. 2d 64, 107 S. Ct. 118 (1986).

[72] Thus, "inexcusable or inordinate delay by the state in processing claims for relief" may make the state process ineffective to protect the petitioner's rights and excuse exhaustion. *Wojteczak v. Fulcomer*, 800 F.2d 353, 354 (3d Cir. 1986); accord *Hill v. Reynolds*, 942 F.2d at 1496 ("The delay [petitioner] faced in having a direct appeal filed proves his state remedies ineffective.").

[73] In *Way v. Crouse*, 421 F.2d 145, 146-47 (10th Cir. 1970), we concluded that it was proper for a habeas petitioner who had experienced an eighteen-month delay in the adjudication of his direct criminal appeal to "seek vindication of his asserted constitutional grievance" in the federal, rather than the state, courts. Noting that "'the concept of federal-state comity involves mutuality of responsibilities, and an unacted upon responsibility can relieve one comity partner from continuous deference,'" we vacated the order dismissing the habeas petition for failure to exhaust. *Id.* at 147 (quoting *Dixon v. Florida*, 388 F.2d 424, 426 (5th Cir. 1968)).

[74] Later, in *Harris I*, we set forth the standard that when "a habeas petitioner makes colorable and sufficient allegations of an unconstitutional delay in obtaining direct state appellate review of his criminal conviction, . . . the federal district court should consider that claim on the merits without requiring that he exhaust his direct state appeal first." 938 F.2d at 1068-69. Because exhaustion is a threshold issue, it often can be addressed on the pleadings without the need for an evidentiary hearing. However, an evidentiary hearing was deemed necessary in *Harris I* to investigate the

reasons for delay in light of the allegations of systemic delay.

- [75] We turn now to the question: At what point does delay in the state process become so inordinate that exhaustion should be excused? In addressing this question, we must keep in mind that "it is the legal issues that are to be exhausted, not the petitioner," *Park v. Thompson*, 356 F. Supp. 783, 788 (D. Haw. 1973). We cannot, of course, announce a bright line rule. As we noted in *Way*, 421 F.2d at 146-47, and *Jones v. Crouse*, 360 F.2d 157, 158 (10th Cir. 1966), it is necessary to know the facts and circumstances surrounding the delay in order to determine whether the State is providing the petitioner an effective appeal.
- [76] In *Way*, we concluded that an eighteen-month delay in docketing a direct appeal before the state supreme court was enough to excuse exhaustion in the absence of facts and circumstances justifying that delay. 421 F.2d at 146-47. Based on other facts and circumstances, courts have found other periods of delay sufficient to conclude that the state process was ineffective and exhaustion should be excused. See *Simmons v. Reynolds*, 898 F.2d 865, 870 (2d Cir. 1990)(suggesting that "the doctrine of exhaustion of state remedies does not require a prisoner to wait . . . three or four years before enlisting federal aid to expedite an appeal"); *Rheuark v. Wade*, 540 F.2d 1282, 1283 (5th Cir. 1976) (remanding for district court to excuse exhaustion if fifteen-month delay in preparing transcript could not be justified); *Dozie v. Cady*, 430 F.2d 637, 638 (7th Cir. 1970)(remanding for district court to excuse exhaustion if seventeen-month delay in briefing direct criminal appeal could not be justified); *United States ex rel. Hankins*, 582 F. Supp. at 182 (finding "the twenty four month delay in the Disposition of [petitioner's] direct appeal, to which is added the nine month period between his conviction and the filing of a notice of appeal, sufficient to question the adequacy of the state remedy" and to excuse exhaustion); cf. *Smith v. Kansas*, 356 F.2d 654, 657 (10th Cir. 1966)(remanding for district court "to take such steps as it deems necessary to secure petitioner's right to a prompt hearing on his claim of unconstitutional restraint" where more than one year passed between filing of motion for post-conviction relief and entry of appealable order), cert. denied, 389 U.S. 871, 19 L. Ed. 2d 151, 88 S. Ct. 154 (1967); *Breazeale v. Bradley*, 582 F.2d 5, 6 (5th Cir. 1978) (excusing exhaustion because state habeas petition had been completely dormant

for over one year and the State had offered "no reason for its torpor"); *St. Jules v. Beto*, 462 F.2d 1365, 1366-67 (5th Cir. 1972)(remanding for district court to excuse exhaustion and address merits if seventeen-month delay in state trial court ruling on motion for post-conviction relief could not be justified); *Jones*, 360 F.2d at 158 (remanding for district court to excuse exhaustion if eighteen-month delay in adjudicating appeal from denial of post-conviction relief could not be justified); *Dixon*, 388 F.2d at 426 (remanding for district court to excuse exhaustion and address merits if eighteen-month delay in state trial court ruling on post-sentencing motion could not be justified); *Seemiller v. Wyrick*, 663 F.2d 805, 807-08 (8th Cir. 1981)(remanding for district court to excuse exhaustion and address claims if state court had not ruled within sixty days on motion for post-conviction relief that had been pending for two years); *Wojtczak*, 800 F.2d at 355-56 (excusing exhaustion because motion for post-conviction relief had been pending for more than two and one-half years); *Moore v. Deputy Comm'r's of SCI-Huntingdon*, 946 F.2d 236, 242 (3d Cir. 1991)(excusing exhaustion because petition for post-conviction relief had been pending for three years), cert. denied, 117 L. Ed. 2d 647, 112 S. Ct. 1509 (1992).

[77] Although we cannot establish a bright line, we think it would be helpful to articulate a time period beyond which there is at least a presumption that the state process has become ineffective because of delay. Based upon the record before us, as well as our review of the case law in this and other circuits, we conclude that delay in adjudicating a direct criminal appeal beyond two years from the filing of the notice of appeal gives rise to a presumption that the state appellate process is ineffective.^{*fn9}

[78] We recognize that cases may arise in which exhaustion should be excused even though an appeal has been pending for less than two years. Conversely, we also recognize that, in particular cases, the State may show that a delay of more than two years is justified and, therefore, good cause exists for not excusing exhaustion. Thus, we hold only that the state appellate process should be presumed to be ineffective and, therefore, exhaustion should presumptively be excused, when a petitioner's direct criminal appeal has been pending for two years without resolution absent a constitutionally sufficient justification by the State.

See *Burkett v. Cunningham*, 826 F.2d 1208, 1218 (3d Cir. 1987)(Burkett I)("Where a petitioner has demonstrated inordinate delay, we have placed the burden on respondents to demonstrate why further resort to the state courts should be required.").

[79] Although 2254 requires a habeas petitioner to exhaust his or her underlying claims before coming to federal court, it does not require a petitioner to exhaust the issue of exhaustion, itself. Because exhaustion functions as a federal court gatekeeper, the federal, not the state, courts decide when the state process has been exhausted or should be deemed ineffective because of delay. Moreover, requiring a petitioner to raise the issue of exhaustion first in state court would unnecessarily frustrate a petitioner's right to a speedy adjudication of his or her claims. See *Way*, 421 F.2d at 146-47 (conditionally excusing petitioner from having to raise issue of delay to "the very courts which are responsible, on the face of the pleadings, for the very delay of which he complains"); *Brooks v. Jones*, 875 F.2d 30, 31 (2d Cir. 1989)("When the petitioner can substantiate his complaint that his right to appeal is being violated by inattention and time-consuming procedures, to require one more technical step would be to tolerate the frustration of the petitioner's due process rights."); *United States ex rel. Hankins*, 582 F. Supp. at 182 ("Where the state process is itself the basis for the claimed denial of due process the issue has properly been presented [to the state judiciary]"). But see *Schandelmeier v. Cunningham*, 819 F.2d 52, 54-55 (3d Cir. 1986) (holding that because petitioner had not pursued procedures for presenting his claims based on sentencing delay to the state court, he had not exhausted his remedies and could not seek federal relief), cert. denied, 480 U.S. 938, 94 L. Ed. 2d 774, 107 S. Ct. 1584 (1987).

[80] Once exhaustion is excused, a federal court has the power to review the merits of a petitioner's habeas petition to the extent that it raises federal issues. See, e.g., *Jones*, 360 F.2d at 158. In many (indeed, most) instances, however, proceeding directly to the merits of a petitioner's claims after excusing exhaustion may not be the preferred course of action, or even an effective one.

[81] If exhaustion is excused due to delay in adjudicating a petitioner's direct

criminal appeal, the federal habeas review will, in some regards, serve as a surrogate for a direct state appeal. This raises several concerns. First, because the petitioner would be entitled to appointed counsel on direct appeal, *Douglas v. California*, 372 U.S. 353, 356-58, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963), it may be appropriate to appoint counsel to represent the petitioner on habeas review. Likewise, the federal court may need to ensure that an indigent petitioner has a free copy of the trial transcript if it is necessary to evaluate his or her habeas petition. See *Griffin v. Illinois*, 351 U.S. 12, 19-20, 100 L. Ed. 891, 76 S. Ct. 585 (1956).

[82] Furthermore, to the extent the petitioner's underlying claims of error are state claims, the federal court cannot review them even if exhaustion is excused, because federal habeas review is limited to alleged "violations of the Constitution or laws or treaties of the United States." 28 U.S.C. 2254; see also *Estelle v. McGuire*, 116 L. Ed. 2d 385, 112 S. Ct. 475, 480 (1991)("It is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.").

[83] Finally, federal courts should not be required as a routine matter to fulfill the State's obligation to provide an "adequate and effective" direct criminal appeal to its indigent criminal defendants, *Griffin*, 351 U.S. at 20. Requiring the federal courts to do so on a regular basis just because the State does not fulfill its own constitutional obligations would unnecessarily tax federal resources and inject the federal courts into the State's process.

[84] Thus, we consider an alternative. We start by noting that delay in adjudicating a state prisoner's direct criminal appeal may do more than simply excuse exhaustion. It also may give rise to an independent due process claim. *Harris I*, 938 F.2d at 1068; accord *United States v. Pratt*, 645 F.2d 89, 91 (1st Cir.), cert. denied, 454 U.S. 881, 70 L. Ed. 2d 195, 102 S. Ct. 369 (1981); *Cody v. Henderson*, 936 F.2d 715, 719 (2d Cir. 1991); *Burkett v. Fulcomer*, 951 F.2d 1431, 1446 (3d Cir. 1991), cert. denied, 120 L. Ed. 2d 921, 112 S. Ct. 3055 (1992)(*Burkett II*); *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir. 1980), cert. denied, 450 U.S. 931,

67 L. Ed. 2d 365, 101 S. Ct. 1392 (1981); *Coe v. Thurman*, 922 F.2d 528, 530-31 (9th Cir. 1990). Thus, a habeas petition may be predicated on a due process violation arising from the State's delay in adjudicating a petitioner's direct criminal appeal even if the petitioner's allegations of error at the trial level are based on state law and, therefore, not proper for federal habeas review.

- [85] Once appellate delay rises to the level of an independent due process violation, a wide range of remedies is available with which the federal district court can redress the constitutional violation. These remedies often will be more effective in redressing state appellate delay than will merely excusing exhaustion and considering the petitioner's underlying claims on the merits. We turn, therefore, to the requirements for establishing an independent due process claim based on the State's delay in processing a direct criminal appeal.
- [86] B.Substantive Claim That Appellate Delay
- [87] Violates Right To Due Process
- [88] 1.Elements of the claim
- [89] The Due Process Clause provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law" U.S. Const. amend. V. Similarly, the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law." Id. amend. XIV, 1.
- [90] The right to a speedy trial, which is guaranteed an accused by the Sixth Amendment, is a fundamental right imposed on the states by the Due Process Clause of the Fourteenth Amendment. *Barker v. Wingo*, 407 U.S. at 515. Although the Constitution does not require the State to afford a criminal defendant a direct appeal to challenge alleged trial court errors, see *McKane v. Durston*, 153 U.S. 684, 687, 38 L. Ed. 867, 14 S. Ct. 913 (1894), the Supreme Court has held that

- [91] if a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S. at 18, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.
- [92] *Evitts v. Lucey*, 469 U.S. 387, 393, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985)(alteration in original).
- [93] To ensure the defendant's right to a "meaningful appeal," *Douglas v. California*, 372 U.S. at 358, the Court has held that when the State affords a criminal defendant an appeal by right, the Fourteenth Amendment requires, among other things, that counsel be appointed to represent an indigent defendant, *id.* at 356-58, that the representation of counsel be effective, *Evitts*, 469 U.S. at 396, and that either an indigent defendant be provided a free transcript or some equivalent method of reporting the trial proceedings be employed, *Draper v. Washington*, 372 U.S. 487, 495, 9 L. Ed. 2d 899, 83 S. Ct. 774 (1963); *Griffin v. Illinois*, 351 U.S. at 19-20.
- [94] We may add to this list the requirement that the State afford the defendant a timely appeal, for an appeal that is inordinately delayed is as much a "meaningless ritual," *Douglas*, 372 U.S. at 358, as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings. See *Burkett I*, 826 F.2d at 1221-22; *United States ex rel. Smith v. Twomey*, 486 F.2d 736, 739 (7th Cir. 1973), cert. denied, 416 U.S. 994, 40 L. Ed. 2d 773, 94 S. Ct. 2408 (1974); cf. *Coppedge v. United States*, 369 U.S. 438, 449, 8 L. Ed. 2d 21, 82 S. Ct. 917 (1962) ("No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. . . . Delay in the final judgment of conviction, including its appellate review, unquestionably erodes the efficacy of law enforcement."); *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'").

[95] When determining whether a criminal defendant has been deprived of his or her right to timely process at the trial level, the Supreme Court has established a balancing test to be applied on an ad hoc basis. *Barker*, 407 U.S. at 530. Four factors should be assessed and balanced: "(1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant." *Id.* (numbers added). The fourth factor "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Id.* at 532. The "Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.*

[96] Although *Barker* addressed only a defendant's Sixth Amendment right to a speedy trial, the balancing test the Court enunciated provides an appropriate framework for evaluating whether a defendant's due process right to a timely direct criminal appeal has been violated. See *Rheuark v. Shaw*, 628 F.2d at 303 ("The factors of *Barker* are preferred [over] the standard announced in *United States v. Lovasco*, 431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 . . . (1977)[concerning pre-indictment delay], since the reasons for constraining appellate delay are analogous to the motives underpinning the Sixth Amendment right to a speedy trial.")(footnote omitted); *DeLancy v. Caldwell*, 741 F.2d 1246, 1248 (10th Cir. 1984)("We agree with the Fifth Circuit that the right to avoid unreasonable delay in the appellate process is similar to the right to a speedy trial."); *Burkett II*, 951 F.2d at 1445-46 (holding that delay in adjudicating an appeal, which infringes on due process rights, is effectively no different than delay in imposing a sentence, which infringes on Sixth Amendment speedy trial right).

[97] We can apply the first three factors of the *Barker* test to claims of appellate delay without modification. We must modify the fourth factor of prejudice to the defendant, however, to reflect the interests sought to be protected by an appeal "unencumbered by excessive delay." *Rheuark v. Shaw*, 628 F.2d at 303 n.8.

[98] The Fifth Circuit has identified the following interests that should be

considered when assessing prejudice arising from appellate delay: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Id.* In *DeLancy*, 741 F.2d at 1248, we adopted the Fifth Circuit's modification of the Barker prejudice factor for purposes of appellate delay. We also heeded the Supreme Court's admonition that the four factors of the balancing test are related and should be considered together with such other circumstances as may be relevant. *Barker*, 407 U.S. at 533; *DeLancy*, 741 F.2d at 1248.

- [99] Nevertheless, as we discuss below, we view the first factor--length of delay--as a threshold that a petitioner must meet before the court need consider the other factors. Furthermore, we agree with the Ninth Circuit that, ordinarily, a petitioner must make some showing on the fourth factor--prejudice--to establish a due process violation. *United States v. Tucker*, 8 F.3d 673, 676 (9th Cir. 1993)(en banc).
- [100] Therefore, in determining whether delay in adjudicating a petitioner's direct criminal appeal violated the petitioner's due process rights, we must balance the following factors:
- [101] a. the length of the delay;
- [102] b. the reason for the delay and whether that reason is justified;
- [103] c. whether the petitioner asserted his right to a timely appeal; and
- [104] d. whether the delay prejudiced the petitioner by
- [105] i. causing the petitioner to suffer oppressive incarceration pending appeal; or

- [106] ii. causing the petitioner to suffer constitutionally cognizable anxiety and concern awaiting the outcome of his or her appeal; or
- [107] iii. impairing the petitioner's grounds for appeal or his or her defenses in the event of a reversal and retrial.
- [108] We will address each of these factors in turn.
- [109] a. The length of the delay
- [110] The first factor in the balancing test is the length of the appellate delay. "Only passage of an inordinate amount of time triggers due process concerns." *Hill v. Reynolds*, 942 F.2d at 1497 (emphasis added). Therefore, if a petitioner cannot establish at least some degree of inordinate delay, the court need not inquire into the other factors. Cf. *Doggett v. United States*, 120 L. Ed. 2d 520, 112 S. Ct. 2686, 2690-91 (1992)(holding that because no speedy trial violation occurs if the government prosecutes a defendant "with customary promptness," "to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay").
- [111] We cannot set an inflexible length of time that will constitute inordinate delay in every case. See *Barker*, 407 U.S. at 521 ("We cannot definitely say how long is too long in a system where Justice is supposed to be swift but deliberate."); *Coe v. Thurman*, 922 F.2d at 531 ("There is no talismanic number of years or months, after which due process is automatically violated."). Nonetheless, it seems appropriate to Judge appellate delay by the same two-year presumptive standard that we used earlier to excuse exhaustion. See *supra* (slip op.) at pp. 30-31. Therefore, a two-year delay in finally adjudicating a direct criminal appeal ordinarily will give rise to a presumption of inordinate delay that will satisfy this first factor in the balancing test.
- [112] Creating a presumption that a two-year delay in adjudicating an appeal is

inordinate comports with the district court's ruling that "a two-year period, from the notice of appeal or order permitting same, be established as the time period for resolution of a direct criminal appeal in Oklahoma beyond which any delay will be presumed to be unconstitutional, . . . absent a showing of good and sufficient cause or special circumstances." R., Doc. 255 at 8 (footnote omitted).^{*fn10} Respondents do not challenge the district court's two-year presumptive period. Although petitioners argue for a shorter period, the only basis for their argument is that in 1991, the Tenth Circuit's median time for deciding direct criminal appeals was 11.7 months. See Appellant's Principal Br. (No.93-5123) at 57; Appellant's Principal Br. (No.93-5209) at 18-19. We are not sufficiently persuaded by this single statistic to conclude that the district court erred in establishing a two-year presumptive period. See *United States v. Pratt*, 645 F.2d at 91 (declining to hold nine-month appellate delay unconstitutional in absence of exacerbating factors); *United States ex rel. Harris v. Reed*, 608 F. Supp. 1369, 1376 (N.D. Ill. 1985)(holding that a seven-and-one-half-month delay in adjudicating a motion for post-conviction relief was not so egregious as to violate petitioner's due process rights); *Doescher v. Estelle*, 454 F. Supp. 943, 952 (N.D. Tex. 1978)(determining as a matter of law that a one-year delay in processing petitioner's appeal was not unjustified), appeal dismissed, 597 F.2d 281 (5th Cir. 1979)(table).

- [113] The district court concluded that two years to adjudicate an appeal in Oklahoma is both customary and feasible.^{*fn11} Furthermore, a two-year delay is within the time frame that other courts have found to raise due process concerns. For example, in *United States ex rel. Hankins*, 582 F. Supp. at 184-85, the court held that the pendency of an appeal for two years with no decision by the state appellate court, coupled with a nine-month delay by the trial court in ruling on post-trial motions, gave rise to a prima facie due process violation. See also *Dozie v. Cady*, 430 F.2d at 638 (holding that seventeen-month delay in filing opening brief warranted inquiry into possible due process violation); *Burkett II*, 951 F.2d at 1445-46 (holding that eighteen-month delay between sentencing and decision on appeal gave rise to due process violation); *United States v. Antoine*, 906 F.2d 1379, 1382-83 (9th Cir.)(holding that three-year delay in adjudicating federal appeal was "substantial" and remanding for further findings regarding prejudice), cert. denied, 498 U.S. 963, 112 L.

Ed. 2d 407, 111 S. Ct. 398 (1990); *Snyder v. Kelly*, 769 F. Supp. 108, 111 (W.D.N.Y. 1991)(holding that three years is "an excessive amount of time to await the resolution of an appeal"), *aff'd* 972 F.2d 1328 (2d Cir. 1992)(table); cf. *Jones v. Crouse*, 360 F.2d at 158 (holding that delay of more than eighteen months in processing appeal of collateral attack warranted inquiry into possible due process violation).^{*fm12}

[114] The passage of two years creates only a presumption of inordinate delay on appeal. The particular circumstances of a case may warrant a finding that the passage of less than two years constitutes inordinate delay or that the passage of more than two years does not. For example, although the length of the sentence cannot be a controlling factor in light of the time requirements inherent in processing an appeal, a case in which a very short sentence was imposed may warrant more expedited treatment. See *Wheeler v. Kelly*, 639 F. Supp. 1374, 1379 (E.D.N.Y. 1986)(holding that "the length of the sentence is a factor in determining whether post-conviction delay is excessive"), *aff'd*, 811 F.2d 133 (2d Cir. 1987). On the other hand, a particularly complex case may warrant a more lengthy appellate process. Cf. *Geames v. Henderson*, 725 F. Supp. 681, 685 (E.D.N.Y. 1989)(holding that delay of three-and-one-half years was excessive because issues on appeal were "no more complex than in most criminal appeals").

[115] Because it is a balancing test that we employ, however, delay substantially beyond two years, at least in a case that does not warrant a lengthier appellate process, will reduce the burden of proof on the other three factors necessary to establish a due process violation. See *Doggett*, 112 S. Ct. at 2693 (holding that the more protracted the delay, the more prejudice may be presumed from the delay).

[116] b. The reason for the delay

[117] The second part of the balancing test is the reason for the delay. In *Harris I*, we laid to rest any argument that delays by the Public Defender in filing briefs could be attributed to petitioners on the ground that the Public Defender requested the continuances on petitioners' behalf. 938 F.2d at 1065. The record indicated that "the delay in preparing

petitioner's brief on appeal [was] caused by the inability of [the Public Defender] to address petitioner's case in a timely fashion." *Id.* Because this delay was "forced upon an unwilling petitioner by reason of his indigency," we held it should not be attributed to the petitioner. *Id.* The parties do not dispute that the delays in adjudicating petitioners' direct criminal appeals are attributable to the State of Oklahoma and not to petitioners.^{*fn13} See R., Doc. 29 at 9 (Attorney General); Addendum to Br. of OIDS Defs. at 17 (Public Defender); R., Doc. 27, Ex. 3(c), Attachment 1 (Oklahoma Court of Criminal Appeals); see also *Hankins v. Fulcomer*, 941 F.2d at 252 (holding that court had numerous opportunities to rule on pending matters and its delay in doing so was not attributable to petitioner); *Wojtczak v. Fulcomer*, 800 F.2d at 356 (holding that delay in adjudicating motion for post-conviction relief was not attributable to petitioner, but to "disinterest on the part of court appointed counsel and to a failure on the part of the court to require them to provide minimally effective representation").

- [118] The State has offered no constitutionally sufficient justification for the delays, such as that the cases are unusually complex or that they involve the death penalty. The only reasons offered by the State were the lack of funding and, possibly, the mismanagement of resources by the Public Defender. See R., Doc. 29 at 9; Addendum to Br. of OIDS Defs. at 17; R., Doc. 27, Ex.3(c), Attachment 1.^{*fn14} Neither of these reasons constitutes an acceptable excuse for delay. See *United States ex rel. Smith*, 486 F.2d at 739 ("The rights announced in *Griffin v. Illinois* and *Douglas v. California* cannot be allowed to become meaningless through understaffing of the state offices responsible for assuring those rights.")(citations omitted); *Snyder*, 769 F. Supp. at 111 (holding that the "brobdingnagian case load of assigned counsel" is not an acceptable reason for delay); *Rheuark v. Shaw*, 477 F. Supp. 897, 912 n.17 (N.D. Tex. 1979)("The constitutional requirements of due process on appeal may not be abridged by failing to fund substitute court reporters."), *aff'd in part, rev'd in part*, 628 F.2d 297 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981); *cf. Bounds v. Smith*, 430 U.S. 817, 825, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977) ("The cost of protecting a constitutional right cannot justify its total denial."); *Todaro v. Ward*, 565 F.2d 48, 54 n.8 (2d Cir. 1977)("Inadequate resources no longer can excuse the denial of constitutional rights.").

[119] c. Petitioner's assertion of his or her right to a timely appeal

[120] The third factor we must balance in determining whether a due process violation has occurred is the petitioner's assertion of his or her right to a timely appeal. The Supreme Court rejected in *Barker* "the rule that a defendant who fails to demand a speedy trial forever waives his right." 407 U.S. at 528. Instead, the Court held that whether and how strongly a defendant asserts his or her right to a speedy trial should be balanced with the other factors. *Id.* at 528-29.

[121] We will not require petitioners to have made an affirmative assertion of their right to a timely appeal in state court for this factor to weigh in their favor. Under the circumstances, the filing of these federal habeas petitions constitutes a sufficient assertion of petitioners' respective rights to a timely appeal. See *Snyder*, 769 F. Supp. at 111.

[122] Unlike a criminal defendant who stands accused and may not wish to have any trial, much less a speedy one, e.g., *Barker*, 407 U.S. at 535, a criminal defendant who has already been convicted usually wants a speedy appeal and has little or no incentive to delay the outcome. *Cody v. Henderson*, 936 F.2d at 719; cf. *Rose v. Lundy*, 455 U.S. at 520 ("The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims."). Therefore, we presume every petitioner desired a timely appeal.

[123] Furthermore, petitioners were hampered by the fact that they had to speak through their counsel in the state court appellate process and, in most instances, it was that very counsel who was responsible for the delay. Under these circumstances, we cannot fairly expect petitioners to have raised the issue of delay in state court. See *Gaines v. Manson*, 194 Conn. 510, 481 A.2d 1084, 1093 (Conn. 1984) ("The petitioners have been handicapped in asserting rights through their counsel when it is the counsel itself that has been the source of the challenged delays.").

[124] Moreover, because the Public Defender had a policy of briefing cases on a "first in, first out" basis and the Oklahoma Court of Criminal Appeals

was unwilling to expedite the briefing of one Public Defender's case over another, see *Manous v. State*, 797 P.2d at 1005-06, even if petitioners had complained vigorously about delays in prosecuting their appeals, those complaints probably would have been unavailing. See *Gaines*, 481 A.2d at 1093. Therefore, absent evidence that a petitioner affirmatively sought or caused delay in the adjudication of his or her appeal, this third factor should weigh in favor of finding a due process violation.

[125] d. Prejudice to the petitioner as a result of delay

[126] The fourth factor we must consider when determining whether a petitioner's due process rights have been violated is whether the petitioner has suffered any prejudice due to delay in adjudicating his or her appeal. As we stated earlier, prejudice may result from any of the following: (i) oppressive incarceration pending appeal; or (ii) constitutionally cognizable anxiety awaiting resolution of the appeal; or (iii) impairment of a defendant's grounds for appeal or a defendant's defenses in the event of a retrial. *DeLancy*, 741 F.2d at 1248; *Rheuark v. Shaw*, 628 F.2d at 303 n.8.

[127] We have not previously had occasion to discuss the meaning of prejudice in the context of appellate delay. We take this opportunity to do so, beginning with the last and most serious form of prejudice: impairment of the grounds for appeal or the grounds for defense in the event of a retrial.^{*fn15}

[128] The most serious [form of prejudice] is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past.

[129] *Barker*, 407 U.S. at 532.

[130] Impairment of one's grounds for defense in the event of a retrial is "the

most difficult form of . . . prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" *Doggett*, 112 S. Ct. at 2692-93 (quoting *Barker*, 407 U.S. at 532). The Supreme Court has recognized that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify," *id.* at 2693, and the likelihood of injury "increases with the length of the delay," *id.* To support such a finding of prejudice, unjustified delay "unaccompanied by particularized trial prejudice must have lasted longer than [unjustified delay] demonstrably causing such prejudice." *Id.* at 2694.

- [131] That delay has impaired a petitioner's ability to mount a defense on retrial is irrelevant, however, if a petitioner has no credible grounds for reversal and retrial. See *Tucker*, 8 F.3d at 676. Therefore, in addition to establishing that excessive delay has impaired his or her defense on retrial, a petitioner also must assert a colorable state or federal claim that would warrant reversal of his or her conviction.^{*fn16} See *id.* But see *Harris v. Kuhlman*, 601 F. Supp. 987, 994 (E.D.N.Y. 1985)(finding that seven-year delay might impair petitioner's defense if he were retried, even though review of petitioner's claims suggested "very little chance of reversal"). Thus, if a petitioner's conviction has been affirmed by the time the petitioner's claims are heard in the federal habeas proceeding, the petitioner will not be able to show prejudice on retrial because the state appellate court has finally decided there will be no retrial.
- [132] Likewise, because the only prejudice with which we are concerned is that which arises from excessive delay, for a petitioner to make a particularized showing of prejudice, the prejudicial event, such as the death of a key witness, must have occurred, or have been exacerbated, during the period of delay that is found to be excessive. Therefore, in most cases, particularized prejudice that occurs during the first two years that an appeal is pending will not support a due process violation because the prejudice would have occurred even in the absence of any excessive delay in adjudicating the appeal.
- [133] We turn then to the second type of prejudice: constitutionally cognizable anxiety awaiting resolution of the appeal. Once again, we are concerned

only with anxiety arising out of excessive delay. Therefore, that a petitioner is anxious about the outcome of the appeal from the day the notice of appeal is filed is of no consequence; the anxiety must relate to the period of time that the appeal was excessively delayed.

[134] The courts appear split on the showing of anxiety that a petitioner must make. The Ninth Circuit, for example, requires a showing of "particular anxiety" distinguishable from that "of any other prisoner awaiting the outcome of an appeal." *Antoine*, 906 F.2d at 1383; see also *Tucker*, 8 F.3d at 676; *Coe*, 922 F.2d at 532. In *Burkett II*, the Third Circuit concluded that the petitioner had established prejudice in part because he was able "to detail anxiety related to the processing of his case post-conviction." 951 F.2d at 1447. The Second Circuit, on the other hand, has affirmed findings of prejudice based solely on the district court's assumption that the delay of four or more years worried the petitioner, who awaited hopefully the outcome of the appeal. *Yourdon v. Kelly*, 969 F.2d 1042 (2d Cir. 1992)(table), *aff'g*, 769 F. Supp. 112, 115 (W.D.N.Y. 1991); *Snyder v. Kelly*, 972 F.2d 1328 (2d Cir. 1992)(table), *aff'g* 769 F. Supp. 108, 111 (W.D.N.Y. 1991). We think the better approach is to require the petitioner to make some particularized and substantial showing of anxiety and concern, absent a delay so excessive as to trigger the Doggett presumption of prejudice.

[135] A petitioner has no reason to be anxious or concerned about the time it takes to adjudicate an appeal that is without merit. Therefore, to establish prejudice resulting from anxiety, a petitioner must once again assert a colorable state or federal claim that would warrant reversal of the petitioner's conviction or reduction of sentence to an amount of time less than that taken to adjudicate the appeal. ^{*fn17}

[136] The third form of prejudice a petitioner may suffer is oppressive incarceration pending appeal. In many respects this form of prejudice merely duplicates the prejudice of anxiety discussed above. In both cases, the petitioner must make some showing that his or her incarceration is wrongful. In addition, the petitioner must make a particularized showing that the incarceration is oppressive beyond that experienced by others awaiting the outcome of their appeals. That is, the petitioner must show

some oppressiveness unique to his or her situation that is directly attributable to the excessive delay in adjudicating the petitioner's appeal.

- [137] While we recognize that a habeas petitioner has a right to assert a properly exhausted habeas claim even if incarcerated under another, unchallenged sentence, *Sciberras v. United States*, 404 F.2d 247, 249 (10th Cir. 1968)(2255); *Rhodus v. Patterson*, 404 F.2d 890, 891 (10th Cir. 1968)(2254), incarceration under an unchallenged sentence substantially negates a claim of prejudice arising from incarceration under the challenged sentence. Because the quality of a petitioner's incarceration may be affected by the very multiplicity of his or her convictions or the seriousness of the offense that is being challenged, however, a petitioner's incarceration under another, unchallenged sentence may not always negate the claim of prejudice altogether.
- [138] Recognizing that proving any of the three forms of prejudice is difficult, we will not require a level of proof that would necessitate a full blown trial simply to determine whether a petitioner suffered actual prejudice as a result of excessive appellate delay. Instead, the petitioner need make only a colorable and particularized showing of prejudice. As we stated earlier, however, regardless of the form the prejudice takes, it must arise during the period of appellate delay that the court finds to be excessive if it is to factor into the Barker balancing test.
- [139] The district court determined that it could not evaluate petitioners' due process claims without examining each petitioner's case individually. We agree. While one or more of the factors in the balancing test may weigh the same for every petitioner, not all the factors will. Prejudice, in particular, will vary with the individual. Because the district court has not yet conducted the individual inquiries necessary to resolve petitioners' due process claims, the record is not sufficiently developed for us to review those claims at this time. We therefore remand the action for the district court to conduct the necessary inquiry and make an appropriate record for review.^{*fn18}

- [140] 2. Appropriate remedies

- [141] If the district court finds that a petitioner's due process rights have been violated, it must then address the matter of a remedy. We agree with the district court's Conclusion that any petitioner whose direct criminal appeal has now been decided and whose conviction has been affirmed is not entitled to habeas relief based solely on delay in adjudicating his or her appeal, unless the petitioner can show actual prejudice to the appeal, itself, arising from the delay.^{*fn19} See *Muwwakkil v. Hoke*, 968 F.2d 284, 285 (2d Cir.)(holding that once petitioner's state conviction was affirmed, he was not entitled to release unless he could show a reasonable probability that, but for the appellate delay, his appeal would have been decided differently), cert. denied, 121 L. Ed. 2d 589, 113 S. Ct. 664 (1992).
- [142] Only when appellate delay "prejudiced [the petitioner's] due process rights so as to make his confinement constitutionally deficient," would habeas relief based on appellate delay be appropriate for a petitioner whose conviction has been affirmed. *Diaz v. Henderson*, 905 F.2d 652, 653 (2d Cir. 1990).
- [143] An untainted affirmance of a petitioner's state appeal while his habeas petition is pending makes clear that the petitioner was confined pursuant to a valid judgment of conviction throughout the period of delay. The affirmance establishes that if the delay had not occurred and petitioner's due process right to a timely appeal had been fully satisfied, he would have been subject to exactly the same term of confinement. Because the due process violation did not result in an illegal confinement, it cannot justify granting the habeas remedy of unconditional release.
- [144] *Cody*, 936 F.2d at 720.
- [145] We also agree with the district court that a petitioner whose conviction the state court has reversed with prejudice to retrial is not entitled to federal habeas relief. Because the state court has set such a petitioner's release in motion, federal habeas relief is neither necessary nor available.
- [146] "Absent absolute or qualified immunity or other appropriate defenses," a

petitioner for whom habeas relief is not available may seek redress from the responsible parties for any due process violation caused by state appellate delay through a claim for damages under 42 U.S.C. 1983. DeLancy, 741 F.2d at 1248; accord Diaz, 905 F.2d at 654; McLallen v. Henderson, 492 F.2d 1298, 1299-1300 (8th Cir. 1974); Doescher v. Estelle, 477 F. Supp. 932, 934 (N.D. Tex. 1979), *aff'd in part, vacated in part*, 616 F.2d 205 (5th Cir. 1980). Because this appeal concerns only petitioners' habeas claims, we will not rule on the implications of any pending 1983 claims.

[147] A petitioner whose direct criminal appeal has not yet been decided, however, is entitled to some form of habeas relief if he or she can establish a due process violation arising from delay in adjudicating his or her state appeal.^{*fn20} The most appropriate remedy in these circumstances is to grant a conditional writ, i.e., release the petitioner if the State does not decide the petitioner's appeal within a specified period.^{*fn21} See Harris I, 938 F.2d at 1070; Coe, 922 F.2d at 532-33; Brooks v. Jones, 875 F.2d at 32. The district court should order the State to decide the appeal within sixty days--or such other time as the district court decides is appropriate for good cause shown^{*fn22} --or release the petitioner.^{*fn23}

[148] Although a conditional order of release is the preferred procedure, if the petitioner's underlying substantive claims are federal in nature and, either because of the clarity of the issues or the particular equities involved, the district court concludes that the better procedure would be for it to resolve the federal claims in the absence of exhaustion, the district court has discretion to adjudicate the merits of those claims.^{*fn24} As we discussed *supra* at p. 32, however, because review on the merits by the district court in many regards replicates the petitioner's direct criminal appeal, the district court should consider the appropriateness of appointing counsel for the indigent petitioner, Douglas, 372 U.S. at 356-57, and providing the indigent petitioner a free transcript, Griffin, 351 U.S. at 19-20, when reviewing the petitioner's federal claims.

[149] C. Substantive Claim That Appellate Delay Violates Right To Equal Protection

- [150] "Unfairness results . . . if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty." *Ross v. Moffitt*, 417 U.S. 600, 611. In *Harris I*, we noted that delay by the Public Defender in briefing appeals for indigent clients may implicate equal protection concerns. 938 F.2d at 1067; see also *United States ex rel. Smith v. Twomey*, 486 F.2d at 738; *Gaines v. Manson*, 481 A.2d at 1094. Our informal survey of published Oklahoma Court of Criminal Appeals opinions in *Harris I* suggested that appeals by criminal defendants who were represented by retained counsel were decided considerably faster than appeals by indigent criminal defendants who were represented by the Public Defender. 938 F.2d at 1070 & n.9.
- [151] In its ruling of September 9, 1993, the district court determined the parties did not dispute that criminal defendants in Oklahoma who were represented by private counsel had their appeals decided "in significantly less time" than criminal defendants who were represented by "public appointed counsel." R., Doc. 255 at 11. The court, however, postponed any ruling on petitioners' equal protection claims until it conducts the individual inquiries necessary to resolve petitioners' due process claims.
- [152] Determination of petitioners' equal protection claims raises a variety of issues, including the level of scrutiny to be applied. If the State's conduct creates classifications that "impermissibly interfere[] with the exercise of a fundamental right or operate[] to the peculiar disadvantage of a suspect class" the classifications are subject to strict scrutiny. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976)(per curiam)(footnotes omitted). Absent a classification that interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class, however, the State's conduct need only be "rationally related to a legitimate state interest." *Oklahoma Educ. Ass'n v. Alcoholic Beverage Laws Enforcement Comm'n*, 889 F.2d 929, 932 (10th Cir. 1989).^{*fn25}
- [153] Whether the right to a direct appeal is a fundamental right depends on whether it is "explicitly or implicitly guaranteed by the Constitution." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-34, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973). The Supreme Court has held that

"appeals from state criminal convictions are not 'explicitly or implicitly guaranteed by the Constitution,'" and has noted that "in dealing with equal protection challenges to state regulation of the right of appeal in criminal cases [the Court has] applied the traditional rational-basis test." *Estelle v. Dorrough*, 420 U.S. 534, 538, 43 L. Ed. 2d 377, 95 S. Ct. 1173 (1975)(per curiam); see also *McKane v. Durston*, 153 U.S. at 687 (holding that the Constitution does not require a state to afford a criminal defendant a direct appeal).

- [154] While it would appear that the rational basis test applies to petitioners' equal protection claims, the Ninth Circuit has suggested in dicta that when the classification is based on wealth, the right to a direct appeal may be a fundamental right for equal protection purposes. See *United States v. Avendano-Camacho*, 786 F.2d 1392, 1394 (9th Cir. 1986); *Bell v. Hongisto*, 501 F.2d 346, 353 (9th Cir. 1974), cert. denied, 420 U.S. 962, 43 L. Ed. 2d 439, 95 S. Ct. 1351 (1975). But see *Maher v. Roe*, 432 U.S. 464, 471, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977)("This Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.").
- [155] Because the record on appeal is insufficient for us to review petitioners' equal protection claims at this time, we need not decide the proper level of scrutiny to apply to petitioners' claims. Nor need we decide other thorny issues relating to those claims, such as how unequal the appellate processing time for indigents and non-indigents must be to constitute an equal protection violation. See *Ross*, 417 U.S. at 612 ("The Fourteenth Amendment does not require absolute equality or precisely equal advantages, nor does it require the State to equalize economic conditions. . . . The question is not one of absolutes, but one of degrees.")(internal quotations and citations omitted); *Gaines*, 481 A.2d at 1094 (holding that the difference in processing appeals of indigents and non-indigents of four years and six months, respectively, "reflects a disparity in opportunity of access to the appellate forum that is constitutionally impermissible"); *Carter v. Thomas*, 527 F.2d 1332, 1333 (5th Cir. 1976)(holding that alleged delays of up to twenty-one months between the submission of motions to proceed in forma pauperis and the filing of complaints stated an equal protection claim). The district court must

address these issues in the first instance on remand.

[156] We note that the district court may not need to reach the equal protection claim in some cases. Because the habeas remedies available to redress an equal protection violation based on appellate delay do not differ from the habeas remedies available to redress a due process violation based on appellate delay, once the court determines that a due process violation has occurred that warrants habeas relief, it need not address the other constitutional issues for purposes of the petitioner's habeas action. Likewise, as we discussed earlier with regard to the due process claims, see *supra* (slip op.) at p. 54, if the State has upheld the petitioner's conviction on direct appeal, the petitioner is precluded from obtaining habeas relief based on any equal protection violation resulting from delay in adjudicating the petitioner's appeal. In any event, because we have neither the factual record necessary to evaluate petitioners' equal protection claims, nor the benefit of a reasoned analysis of these claims by the district court, we decline to address petitioners' equal protection claims at this time.

[157] D. Substantive Claim That Appellate Delay Violates Right to Effective Assistance of Counsel

[158] "A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. at 396. In the appellate context, the right to effective assistance of counsel requires that counsel "be available to assist in preparing and submitting a brief to the appellate court and . . . play the role of active advocate." *Id.* at 394 (citation omitted).

[159] In *Harris I*, we said that, although a criminal defendant technically may have appointed counsel, "past and future alleged delays may be so great that at some point his [or her] counsel's delay in filing [an] appellate brief either has or will render such assistance ineffective." 938 F.2d at 1068. The courts in the Second Circuit also have acknowledged that delay by counsel in prosecuting an appeal can give rise to a claim for ineffective assistance of counsel. See *Simmons v. Reynolds*, 898 F.2d at 868 (holding that counsel's failure to file a brief for five years constituted

ineffective assistance of counsel as a matter of law); *Harris v. Kuhlman*, 601 F. Supp. at 993 ("By any measure, counsel's failure to perfect the appeal [for approximately seven years] must be considered ineffective assistance."); *Yourdon v. Kelly*, 769 F. Supp. 112, 115 (holding that delay of nearly four years attributable to counsel was sufficiently long to constitute ineffective assistance of counsel as a matter of law); *Williams v. James*, 770 F. Supp. 103, 107 (W.D.N.Y. 1991)(holding that delay of two and one-half years, even if attributable to counsel, was not sufficient to constitute ineffective assistance of counsel as a matter of law).

- [160] To establish a claim for ineffective assistance of counsel, a petitioner must show both that "counsel's performance was deficient," and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). To establish the first of these requirements, a petitioner must show that counsel's performance "fell below an objective standard of reasonableness" measured by "prevailing professional norms." *Id.* at 688. To establish the prejudice requirement, a petitioner usually has to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Prejudice will be presumed, however, if the assistance of counsel is actually or constructively denied altogether. *Id.* at 692.
- [161] Many of the petitioners here have had to wait three or more years just to get their court-appointed counsel to file an appellate brief on their behalf. The district court may well find that delays of this magnitude fall below the prevailing professional standards for providing effective legal assistance. The real question, therefore, is whether the petitioners can prove prejudice as a result of the briefing delay.
- [162] During the time that counsel delays excessively in preparing and submitting an appellate brief, the petitioner is left in the same position as someone who has no counsel on appeal at all. See *Evitts*, 469 U.S. at 396 ("[A] party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all."). Under these circumstances, prejudice is presumed. See *Strickland*, 466 U.S. at 692. So long as the brief remains unfiled, a petitioner's claim for ineffective

assistance of counsel arising from briefing delay may be redressed through a habeas claim. The federal court may direct the State to appoint new counsel to represent the petitioner or otherwise ensure that the petitioner is provided effective assistance of counsel on appeal, and may grant a conditional writ, i.e., order that the petitioner be released if the brief is not filed and the appeal decided within a specified period of time.

[163] Once counsel files an appellate brief, however, counsel's ineffectiveness because of delay ends. See *Simmons v. Reynolds*, 708 F. Supp. 505, 510 (E.D.N.Y. 1989), *aff'd* 898 F.2d 865 (2d Cir. 1990) (noting that although petitioner was denied effective assistance by counsel who failed to file a brief for six years, petitioner ultimately received effective assistance from new counsel, who filed a brief). Thus, ineffective assistance of counsel arising from delay in filing an appellate brief is unlike other types of ineffective assistance in that it has a temporal limitation. Furthermore, unlike ineffectiveness arising from, for example, counsel's failure to cross-examine a key witness or to raise a crucial argument on appeal, ineffectiveness arising from delay in filing a brief is unlikely to affect the actual outcome of the appeal.

[164] As we said earlier in the context of due process, *supra* (slip op.) at p. 55, if a constitutional violation does not affect the integrity of the State's decision, the petitioner's confinement is not unconstitutional. Granting the petitioner habeas relief based on counsel's past ineffective assistance, which has since ended and has not affected the outcome of the appeal, would go too far. Therefore, if an appellate brief has already been filed on the petitioner's behalf at the time the federal court addresses the petitioner's claim of ineffective assistance of counsel arising from delay in filing an appellate brief, the petitioner is not entitled to habeas relief absent a showing that the briefing delay impaired the petitioner's chances of prevailing on appeal.^{*fn26} Redress for the past constitutional violation is available, if at all, only through a 1983 (or other) claim for damages.

[165] In sum, a future habeas petitioner may be able to obtain habeas relief for an ineffective assistance of counsel claim based on counsel's ongoing and excessive delay in filing a brief in the petitioner's direct criminal appeal. Such relief appears to be foreclosed for the petitioners here, however, in

light of the district court's finding that an appellate brief has been filed with the Oklahoma Court of Criminal Appeals on behalf of all but one petitioner and our assumption that, by now, a brief has been filed on behalf of this petitioner, as well.

[166] III. OTHER ISSUES

[167] A. Recusal of Judge Brett

[168] Shortly after the three-Judge district court panel was designated to adjudicate common issues of law and fact in these habeas cases, petitioners moved Judge Brett, one of the panel members, to disqualify himself. Petitioners filed a motion pursuant to 28 U.S.C. 455, in which they noted that among the named defendants in the actions were the Oklahoma Court of Criminal Appeals and the Judges thereof, including the Honorable Tom Brett, who was the uncle of United States District Court Judge Thomas R. Brett. R., Doc. 113. In their brief in support of the motion, petitioners recited that "allegations have been made in this case which will require federal Judge Thomas R. Brett to review actions in which Tom Brett was involved while sitting on the Oklahoma Court of Criminal Appeals." Id., Doc. 114 at 3. Petitioners expressed their concern that "a decision making process involving a familial relationship between a sitting Judge and a defendant presents at least the appearance of possible bias." Id.

[169] Judge Brett declined to recuse himself because "in the habeas field . . . it's just a matter of reviewing [the] opinions [of the Oklahoma Court of Criminal Appeals]." Tr. 4/6/93 at 101. Judge Brett did agree, however, that though his uncle had died a few months earlier, he should not be involved in any damage claims against his uncle personally. Id.

[170] On appeal, petitioners argue that Judge Brett erred in not recusing himself on the habeas, as well as the damage, claims. In light of this error, petitioners request that we set aside any findings or Conclusions by the three-Judge district court panel that are unfavorable to petitioners. Though we conclude that Judge Brett erred in failing to disqualify

himself in light of the allegations at issue in these cases, under the particular circumstances presented, we decline to set aside any findings or Conclusions of the three-Judge panel on that basis.

[171] Section 455 provides in pertinent part as follows:

[172] (a) Any Justice, Judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

[173] (b) He shall also disqualify himself in the following circumstances:

[174] (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:

[175] (i) Is a party to the proceeding, or an officer, director, or trustee of a party[.]

[176] 28 U.S.C. 455 (emphasis added).

[177] The general purpose of 455(a) is "to promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988). Thus, the section is designed to eliminate "even the appearance of impropriety whenever possible." *Id.* at 865. Pursuant to 455(a), "a Judge has a continuing duty to recuse before, during, or in some circumstances, after a proceeding, if the Judge concludes that sufficient factual grounds exist to cause an objective observer reasonably to question the Judge's impartiality." *United States v. Cooley*, 1 F.3d 985, 992 (10th Cir. 1993). The standard under 455(a) is an objective one, and requires recusal whenever "a reasonable person, knowing all the relevant facts, would harbor doubts about the Judge's impartiality." *Id.* at 993 (further citation omitted). Here, petitioners' habeas and civil rights claims require the district court not only to review the opinions of the Oklahoma Court of Criminal Appeals, but also to decide whether that court participated in, or

at least authorized, alleged violations of petitioners' constitutional rights. Therefore, under 455(a) Judge Brett should have recused himself.

[178] "[Section] 455(b) is stricter than 455(a) and is concerned with situations that may involve actual bias rather than 455(a)'s concern with the public perception of the judicial process." *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1527 (11th Cir. 1988), cert. denied, 490 U.S. 1066, 104 L. Ed. 2d 631, 109 S. Ct. 2066 (1989). It requires recusal if the Judge bears a third degree relationship, or closer, with a party to the suit. Here, although Judge Brett's uncle had died by the time Judge Brett was assigned to these cases, his uncle is, nonetheless, a named party in this action. Therefore, recusal under 455(b) was required.^{*fn27}

[179] A Conclusion that Judge Brett should have recused himself does not, however, end our inquiry. "Although 455 defines the circumstances that mandate disqualification of federal Judges, it neither prescribes nor prohibits any particular remedy for a violation of that duty. Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation." *Liljeberg*, 486 U.S. at 862. Thus, the Supreme Court, noting that "there need not be a draconian remedy for every violation of 455(a)," has held that a Judge's violation of 455(a) may be harmless error that does not warrant setting aside the Judge's previous rulings. *Id.* at 862, 864. Several circuits have extended the Supreme Court's harmless error analysis to violations of 455(b), see *Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415, 1420-21 (Fed. Cir.), cert. denied, 490 U.S. 1047, 104 L. Ed. 2d 425, 109 S. Ct. 1956 (1989); *Parker*, 855 F.2d at 1527-28, and we are persuaded by their reasoning. Therefore, we will apply a harmless error analysis to Judge Brett's violations of 455.

[180] In deciding whether a violation of 455 is harmless error, the Supreme Court has directed us to consider "the risk of inJustice to the parties in the particular case, the risk that the denial of relief will produce inJustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Liljeberg*, 486 U.S. at 864.

[181] We begin our consideration of these factors by noting the following

pertinent facts. First, the very issue involved in the three hundred cases before the district court is that of delay in reviewing petitioners' claims. Although petitioners' claims relate only to delay by the State of Oklahoma, we are ever mindful of the fact that further delay by the federal courts will only exacerbate petitioners' injuries. Second, the facts before the district court were, for the most part, undisputed. Thus, the district court panel was not called upon to make credibility determinations or to make findings on disputed facts that would later be subject to review for clear error only. See *Heins v. Ruti-Sweetwater, Inc.* (In re Ruti-Sweetwater, Inc.), 836 F.2d 1263, 1266 (10th Cir. 1988). The panel's legal Conclusions are subject to de novo review, see *id.*, which we have done. Third, this case presents the very unusual situation that Judge Brett did not act alone, but rather as one member of a three-Judge panel that ruled unanimously on the issues presented.^{*fn28} Finally, we note that Judge Brett's uncle did not act alone, either, but rather as one member of a five-Judge court.

[182] Keeping these pertinent facts in mind, we consider the risks that may attend reviewing the panel's rulings on the merits, rather than vacating the district court's orders to permit an entirely new proceeding, untainted by the conflict.^{*fn29} First, reviewing the district court's decisions as they now stand would not create an inJustice to the State; vacating the decisions and remanding for new proceedings that would be largely duplicative of those before us, however, would, if anything, increase the risk of injury to petitioners by delaying even longer any federal consideration of their constitutional claims. Second, reviewing the present decisions carries little or no risk of inJustice in other cases because our application of harmless error is unique to the procedural posture of these cases. See *Poloroid Corp.*, 867 F.2d at 1420. Finally, we do not think our review of the panel's decisions will undermine the public's confidence in the judicial process under the circumstances here. Rather, our determination that a violation has occurred and our order that Judge Brett should recuse himself from all further proceedings involving these cases, should instill confidence in the judiciary. See *Parker*, 855 F.2d at 1527.

[183] Therefore, we conclude that the proper remedy for Judge Brett's violations of 455 is to review the previous rulings of the three-Judge

district court panel on the merits, but to direct Judge Brett to recuse himself from all further proceedings relating to these matters on remand, including any individual hearings that may be necessary. See, e.g., *supra* (slip op.) at pp. 53-54.

[184] B Attorney Fees

[185] In the district court, counsel for petitioners sought an award of attorney fees and expenses for work performed through April 30, 1993, and for monthly payments thereafter, on the ground that petitioners were prevailing parties under 42 U.S.C. 1988. R., Doc. 142. Section 1988 provides in pertinent part that "in any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Counsel subsequently sought an award of fees for prosecuting the fee application, as well. R., Doc. 176.

[186] The district court denied both motions by order entered June 29, 1993. Id., Doc. 210. The court determined that the fee application was premature because the court had bifurcated the 1983 claims from the habeas claims and had yet to address petitioners' 1983 claims, which formed the predicate for an award of fees under 1988. Id. at 3, 7. The court ruled that "any attorneys fees claimed as [a] prevailing party under the 42 U.S.C. 1983 claims must await another day." Id. at 8.

[187] The district court subsequently denied counsel's motion to reconsider the denial of fees.^{*fn30} The court indicated that the award of any fees beyond those counsel already was receiving pursuant to his appointment under the Criminal Justice Act was premature, regardless of whether the fees were sought pursuant to 1988 or pursuant to the language in *Hill v. Reynolds*, 942 F.2d at 1498, suggesting that an appropriate remedy for any constitutional deprivations might include "assessment against the state of costs and possibly even attorneys' fees." R., Doc. 233 at 2-3. The court noted that it had yet to enter any remedy of which attorney fees might be an appropriate part. Id. at 3.

- [188] "We review [a] district court's award of attorney fees for an abuse of discretion. Underlying factual findings will only be upset when clearly erroneous. However, a district court's statutory interpretation or legal analysis which provides the basis for the fee award is reviewable *de novo*." *Homeward Bound, Inc. v. Hissom Memorial Ctr.*, 963 F.2d 1352, 1355 (10th Cir. 1992).
- [189] The district court's rulings did not preclude the possibility that petitioners and their counsel may be entitled to an award of fees against the State in the future. Rather, the court ruled only that the present request for fees was premature. The district court did not err in so ruling.
- [190] Only after the district court conducts the analyses of petitioners' due process and equal protection claims that we have directed on remand can it enter appropriate remedies for petitioners' habeas claims. At that time, as indicated by our directions in *Hill*, 942 F.2d at 1498, the district court may consider whether the assessment of fees against the State would be an appropriate part of any remedy. But see *Kennedy v. Shillinger*, 971 F.2d 558, 562 (10th Cir.) (reversing an award of fees against the State in a habeas proceeding on the ground that the State's conduct in that action did not "justify a sanction of this sort"), cert. denied, 121 L. Ed. 2d 556, 113 S. Ct. 623 (1992). Likewise, when the district court ultimately addresses petitioners' civil rights claims, it may then consider whether petitioners are entitled to fees as prevailing parties under 42 U.S.C. 1988. For the time being, we agree with the district court that the application for attorney fees is premature.
- [191] IV. CONCLUSION
- [192] The orders and judgments of the United States District Court for the Northern District of Oklahoma are AFFIRMED IN PART, REVERSED IN PART, and the matter is REMANDED for further proceedings consistent with this opinion.
- [193] Disposition

[194] AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Opinion Footnotes

[195] ^{*fn1} The Public Defender is the predecessor in interest to the Oklahoma Indigent Defense System (OIDS), which came into being in July 1991. We will refer to both as the Public Defender.

[196] ^{*fn2} The Public Defender's fiscal year runs from July 1 of the named year through June 30 of the following calendar year.

[197] ^{*fn3} Judge Lumpkin, the Presiding Judge of the Oklahoma Court of Criminal Appeals, testified that the Oklahoma Court of Criminal Appeals decided that granting extensions of time to the Public Defender was preferable to the alternative of reviewing appeals without the benefit of briefs on behalf of the appellants. He explained that, under the court's rules, if a case were submitted with no brief, it would be reviewed for fundamental error only. The Oklahoma Court of Criminal Appeals thought that reviewing cases without the benefit of briefs from the Public Defender would likely lead to the indigent appellants filing motions for post-conviction relief based on ineffective assistance of counsel. Because granting a new appeal on the basis of ineffective assistance of counsel would only send the indigent appellant back to the bottom of the pile at the Public Defender's Office, the court determined that the indigent appellants would best be served by waiting for the Public Defender to file its briefs, however tardy. Apparently neither the Public Defender nor the Oklahoma Court of Criminal Appeals considered releasing the indigent appellants pending resolution of their appeals.

[198] ^{*fn4} The Oklahoma Court of Criminal Appeals attempted to remedy the problem indirectly by repeatedly asking the legislature to provide more funds.

- [199] ^{*fn5} The Oklahoma Court of Criminal Appeals has jurisdiction over all criminal appeals in Oklahoma. Every person convicted of a crime in Oklahoma has an appeal as of right to the Oklahoma Court of Criminal Appeals, which is the only appellate court in the state that hears criminal matters. There is no intermediate court and the Oklahoma Supreme Court hears only civil matters. Five Judges make up the Oklahoma Court of Criminal Appeals. Decisions are circulated to all five Judges for signature, and cannot be issued until at least three of the five Judges concur.
- [200] ^{*fn6} The Oklahoma Court of Criminal Appeals' fiscal year runs from July 1 of the previous calendar year through June 30 of the year stated. In later documentation submitted to the district court, the number of pending cases at the end of FY 1990 was reported to be 1,533.
- [201] ^{*fn7} The district court subsequently bifurcated petitioners' habeas and 1983 claims. We review only the habeas claims in this opinion.
- [202] ^{*fn8} The period of 11.7 months was based on the median time, from notice of appeal to decision, required by the United States Court of Appeals for the Tenth Circuit to adjudicate criminal appeals in 1991.
- [203] ^{*fn9} When a petitioner has been granted an appeal out of time, the length of the appellate process should be measured from the entry of that order, unless, of course, delay in perfecting the appeal in the first instance is attributable to the State.
- [204] ^{*fn10} We modify the district court's ruling only in one particular. We use the two year period only to presume excessive delay, and not to presume the ultimate issue of unconstitutionality. To reach that ultimate issue, the other prongs of the Barker test also must be addressed.
- [205] ^{*fn11} The district court arrived at the two-year period by taking into account the following time periods permitted for each stage of the appeal under the Rules of the Oklahoma Court of Criminal Appeals, plus

reasonable extensions: three (previously six) months to prepare the transcript and record, per Rule 2.3A(2), plus one extension not to exceed sixty days; sixty days to file appellant's brief, per Rule 3.4B, plus one extension not to exceed sixty days; sixty days to file appellee's brief, per Rule 3.4C, plus one extension not to exceed sixty days; and the remainder of the time, consisting of eleven months, to hear and decide the appeal. R., Doc. 143 at 21-22; *id.*, Doc. 255 at 7-8. The district court suggested that delay beyond any of these individual interim times might also create a presumption of inordinate delay that would be subject to redress through habeas corpus. See *id.*, Doc. 143 at 23-24; *id.*, Doc. 255 at 8-9. While we understand the district court's reluctance to require a petitioner whose direct criminal appeal has not progressed in a timely fashion to wait two full years before coming to federal court to seek redress, we think treating each component of the two-year period as a separate presumptive period is ill-advised and would open the federal courts to an unnecessary flood of litigation. Instead, we think the better practice is to recognize that the two-year presumptive period is neither absolute nor inflexible. For example, if unique circumstances dictate the need for a shorter adjudication time, the petitioner may establish that a delay of less than two years is inordinate under the circumstances. Similarly, if a substantial amount of time has passed and it appears a petitioner's direct criminal appeal cannot realistically be completed within the two-year period because of inordinate delay in the early stages of the appellate process, the petitioner may seek redress in federal court before the full two years has elapsed.

[206] ^{*fn12} We have searched, with little success, for appellate standards from other jurisdictions to guide us in our analysis of petitioners' claims of appellate delay. We note that the Standards Relating to Appellate Delay Reduction, which were established by the Appellate Delay Reduction Committee of the Appellate Judges Conference of the American Bar Association in 1988, provide that all appeals, whether civil or criminal, should be decided within 280 days from the filing of the notice of appeal. See Rita M. Novak & Douglas K. Somerlot, American Bar Ass'n, Delay on Appeal App. F at 187, 214 (1990).

The ABA standards, which are significantly shorter than the two-year presumption we have created, have been widely criticized as unrealistic,

e.g., Honorable Carl West Anderson, Are the American Bar Association's Time Standards Relevant for California Courts of Appeal?, 27 U.S.F.L. Rev. 301, 307, 351 (1993); Roger Hanson et al., National Center for State Courts, Time on Appeal: Beyond Conjecture 3 (1993), and no court has formally adopted them without modification, Anderson, *supra* at 359. Only a handful of state courts have adopted appellate time standards, and the time standards adopted vary widely. For instance, a delay reduction team in the First Appellate District of the California Court of Appeals has proposed the following standards: for appeals from criminal cases that were disposed of before a trial, the court should process fifty percent of the appeals within 185 days and ninety percent of the appeals within 305 days; and for appeals from criminal cases that were disposed of after a trial, the court should process fifty percent of the appeals within 305 days and ninety percent of the appeals within 475 days. *Id.* at 359, App. H-3. Justice Anderson's "comprehensive search of state appellate rules" revealed that the following standards have been formally adopted by state courts: Florida: "decision within 180 days of oral argument;" Maryland: "decision within 130 days of appeal for jointly-elected, expedited appeals;" New Mexico: "decision within 10 months of appeal." *Id.* at 351 n.191. Wisconsin has adopted an internal operating procedure providing that "the average time for rendering a decision should not exceed 40 days, and the maximum time for any case, except one of extraordinary complexity, should not exceed 70 days." Court of Appeals of Wisconsin Internal Operating Procedure VI(4)(h). Idaho and Virginia have informally adopted the following appellate standards: Idaho: "written but unpublished administrative goal to decide appeals within 418 to 508 days;" Virginia: administrative goal of decision within 210-295 days of appeal, "depending upon whether a transcript must be prepared and/or the opinion is to be published." Anderson, *supra* at 351 n.191. There do not appear to be clear remedies for the appellant if any of these time standards are not met.

[207] ^{*fn13} In her March 23, 1992, comments on data submitted by petitioners to the district court, the Attorney General conceded that

whether the delay and backlog are the result of understaffing and underfunding or whether the delay is the result of possible mismanagement of the internal operations and allocation of resources

within the [Public Defender] agency, the result is still the same, that the reason for the delay is attributable to [the Public Defender] and not to the Petitioner. R., Doc. 29 at 9.

- [208] ^{*fn14} The State did offer an alternative reason for the delay in adjudicating petitioner Doyle King's appeal, which was at issue and pending before the Oklahoma Court of Criminal Appeals for almost seven years without resolution. The State explained that a majority of the members of the Oklahoma Court of Criminal Appeals could not reach agreement on the Disposition of the case. R., Doc. 143 at 29; Tr. 4/9/93 at 57. While we appreciate the court's dilemma, its deadlock did not justify the lengthy delay in adjudicating King's appeal.
- [209] ^{*fn15} In *Rheuark v. Shaw*, 628 F.2d at 303 n. 8, the Fifth Circuit gave the following example of delay impairing the grounds for appeal. The passage of time made it more difficult for the court reporter to read and transcribe the notes of the trial he had taken. As a result, he omitted defense counsel's oral motion for a mistrial. On appeal, the state court refused to rule on an issue because the record did not reflect any motion for mistrial. *Id.* Although such examples of delay affecting the appeal may exist, they are rare; a petitioner is more likely to be able to establish that delay has impaired the grounds for defense in the event of retrial. Therefore, our Discussion focuses on this latter type of prejudice rather than impairment of the grounds for the appeal itself.
- [210] ^{*fn16} In determining the issue of prejudice, the federal district court need only address the colorability of the underlying claim and is not required to rule on the merits of the underlying claim.
- [211] ^{*fn17} We recognize that the length of sentence imposed may affect not only when a petitioner is subject to release, but the quality of a petitioner's incarceration prior to release. Cf. *Burkett II*, 951 F.2d at 1443 (acknowledging that prejudice may arise from excessive delay that affects the quality of a petitioner's incarceration). Therefore, a petitioner might justifiably suffer anxiety if, for example, he or she had a colorable claim warranting a reduction in sentence that, though not enough to make the petitioner eligible for release before the Conclusion of the appeal, was

sufficient to affect the quality of the petitioner's incarceration by making the petitioner eligible for a lower level of security or for rehabilitative programs. See *Strunk v. United States*, 412 U.S. 434, 439, 37 L. Ed. 2d 56, 93 S. Ct. 2260 (1973)(recognizing that "the prospect of rehabilitation" may be adversely affected by delay); *Burkett II*, 951 F.2d at 1443 (finding merit in petitioner's claim that sentencing delay kept him in county jail, where he could not avail himself of rehabilitative programs that would have been available in the state penitentiary).

[212] ^{*fn18} Petitioners contend that the district court's due process rulings are insufficient in several other respects. Based on language in *Harris I*, 938 F.2d at 1071, petitioners assert that the district court should have made findings about how much time the Public Defender can be expected to require in the future to file appellate briefs, as well as the specific reasons for the past delay in filing appellate briefs. Neither of these findings was necessary to the district court's analysis of petitioners' habeas claims, however, and neither is necessary to our review. The remainder of petitioners' challenges to the district court's due process rulings merit no independent Discussion.

[213] ^{*fn19} Of course, if the State has decided the appeal and affirmed, the State's decision will be conclusive on any state claims. If the federal claims were properly presented in the state proceeding, however, they can then be regarded as exhausted, enabling the federal court to consider them on the merits in the habeas action.

[214] ^{*fn20} As of August 13, 1993, 217 criminal appeals by Harris group petitioners were still pending before the Oklahoma Court of Criminal Appeals.

[215] ^{*fn21} If the claims at issue in the direct appeal concern only the length of the petitioner's sentence, then release will be available only after the petitioner has served the uncontested portion of his or her sentence. Furthermore, if the petitioner is serving or has yet to serve another sentence that has not been challenged, "release" from the conviction and sentence being challenged will not actually set the petitioner free.

- [216] ^{*fn22} For example, if the briefs have not yet been filed, good cause may exist to give the State more than sixty days to decide the appeal. We note, however, that the district court found in its order of September 8, 1993, that a brief had been filed on behalf of all but one of the petitioners in their respective direct criminal appeals. R., Doc. 255 at 4.
- [217] ^{*fn23} Of course, it will not be necessary to provide the State a time to cure if the due process violation is incurable.
- [218] ^{*fn24} In Harris I, 938 F.2d at 1071, we addressed other remedies that may be appropriate depending on the particular circumstances of the case.
- [219] ^{*fn25} An intermediate level of review exists for "'quasi-suspect' classifications based on characteristics beyond an individual's control, such as gender, illegitimacy, and alienage." Oklahoma Educ. Ass'n, 889 F.2d at 932.
- [220] ^{*fn26} Petitioners' claims for ineffective assistance of counsel relate only to briefing delays and are distinct from their due process claims, which relate to delays in the entire appellate process. Although the eventual filing of an appellate brief ends a petitioner's ability to obtain habeas relief on an ineffective assistance of counsel claim arising from delay in briefing the appeal, it does not end a petitioner's ability to obtain habeas relief on a due process claim arising from delay in the entire appellate process. So long as a petitioner's appeal remains undecided, the petitioner may still obtain habeas relief for a due process violation even if counsel has filed a brief on the petitioner's behalf. See *supra* (slip op.) at pp. 56-57.
- [221] ^{*fn27} On December 27, 1993, the district court dismissed Judge Brett's uncle from this habeas action because he is not the custodian of any petitioner. See *Mackey v. Gonzalez*, 662 F.2d 712, 713 (11th Cir. 1981). The district court also dismissed the 1983 claims against Judge Brett's uncle on the ground that he is absolutely immune from damages liability. See *Snell v. Tunnell*, 920 F.2d 673, 686 (10th Cir. 1990), cert. denied,

499 U.S. 976, 113 L. Ed. 2d 719, 111 S. Ct. 1622 (1991).

- [222] ^{*fn28} Further, on remand Judge Brett should recuse himself from all cases consolidated in this appeal. Thus, he will be removed from the ultimate Disposition of petitioners' claims.
- [223] ^{*fn29} In deciding whether to vacate the panel's previous rulings, we cannot simply pick and choose among the panel's findings and Conclusions, as petitioners would have us do. Either we will vacate all the rulings, or none of them.
- [224] ^{*fn30} The parties did not designate the motion to reconsider as part of the record on appeal.

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Amendments to the United States Constitution.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment 14

(Ratified July 9, 1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or

other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provision of this article.

Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

No History for Constitution

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Last revised: Thursday, November 30, 2000

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section **63-46a-12.1**;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original

appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

Amended by Chapter 302, 2001 General Session

Amended by Chapter 255, 2001 General Session

Download Code Section Zipped WP 6/7/8 78_03004.ZIP 3,120 Bytes

[Sections in this Chapter](#) | [Chapters in this Title](#) | [All Titles](#) | [Legislative Home Page](#)

Last revised: Monday, October 22, 2001

76-5-104. Consensual altercation.

In any prosecution for criminal homicide under Part 2 of this chapter or assault, it is no defense to the prosecution that the defendant was a party to any duel, mutual combat, or other consensual altercation if during the course of the duel, combat, or altercation any dangerous weapon as defined in Section 76-1-601 was used or if the defendant was engaged in an ultimate fighting match as defined in Section 76-9-705.

Amended by Chapter 83, 1997 General Session

Download Code Section [Zipped](#) WP 6/7/8 [76_05012.ZIP](#) 1,953 Bytes

[Sections in this Chapter](#)|[Chapters in this Title](#)|[All Titles](#)|[Legislative Home Page](#)

Last revised: Thursday, July 12, 2001

78-35a-107. Statute of limitations for post-conviction relief.

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed; or

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based.

(3) If the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations.

(4) Sections 78-12-35 and 78-12-40 do not extend the limitations period established in this section.

Renumbered and Amended by Chapter 235, 1996 General Session
Download Code Section [Zipped](#) WP 6/7/8 [78_2F008.ZIP](#) 2,567 Bytes

[Sections in this Chapter](#) | [Chapters in this Title](#) | [All Titles](#) | [Legislative Home Page](#)

Last revised: Monday, October 22, 2001

68-3-11. Rules of construction as to words and phrases. Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition.

No Change Since 1953

Download Code Section Zipped WP 6/7/8 68_01013.ZIP 3,477 Bytes

[Sections in this Chapter](#)|[Chapters in this Title](#)|[All Titles](#)|[Legislative Home Page](#)

Last revised: Thursday, July 12, 2001

Rule 11. The record on appeal.

(a) Composition of the record on appeal. The original papers and exhibits filed in the trial court, the transcript of proceedings, if any, the index prepared by the clerk of the trial court, and the docket sheet, shall constitute the record on appeal in all cases. A copy of the record certified by the clerk of the trial court to conform to the original may be substituted for the original as the record on appeal. Only those papers prescribed under paragraph (d) of this rule shall be transmitted to the appellate court.

(b) Pagination and indexing of record.

(1) Immediately upon filing of the notice of appeal, the clerk of the trial court shall securely fasten the record in a trial court case file, with collation in the following order:

(A) the index prepared by the clerk;

(B) the docket sheet;

(C) all original papers in chronological order;

(D) all published depositions in chronological order;

(E) all transcripts prepared for appeal in chronological order; and

(F) a list of all exhibits offered in the proceeding

(2) (A) The clerk shall mark the bottom right corner of every page of the collated index, docket sheet, and all original papers as well as the cover page only of all published depositions and the cover page only of each volume of transcripts constituting the record with a sequential number using one series of numerals for the entire record.

– (B) If a supplemental record is forwarded to the appellate court, the clerk shall collate the papers, depositions, and transcripts of the supplemental record in the same order as the original record and mark the bottom right corner of each page of the collated original papers as well as the cover page only of all published depositions and the cover page only of each volume of transcripts constituting the supplemental record with a sequential number beginning with the number next

68

ADDED TO A^{II}A

following the number of the last page of the original record.

(3) The clerk shall prepare a chronological index of the record. The index shall contain a reference to the date on which the paper, deposition or transcript was filed in the trial court and the starting page of the record on which the paper, deposition or transcript will be found.

(4) Clerks of the trial and appellate courts shall establish rules and procedures for checking out the record after pagination for use by the parties in preparing briefs for an appeal or in preparing or briefing a petition for writ of certiorari.

(c) Duty of appellant. After filing the notice of appeal, the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of paragraphs (d) and (e) of this rule and shall take any other action necessary to enable the clerk of the trial court to assemble and transmit the record. A single record shall be transmitted.

(d) Papers on appeal.

1) Criminal cases. All of the papers in a criminal case shall be included by the clerk of the trial court as part of the record on appeal.

2) Civil cases. In all civil cases, the papers to be transmitted shall consist of the following.

A) Civil cases with short records. In civil cases where all the papers, excluding any transcripts, total fewer than 300 pages, all of the papers will be transmitted to the appellate court upon completion of the filing of briefs. In such cases, the appellant shall serve upon the clerk of the trial court, simultaneously with the filing of appellant's reply brief, notice of the date on which appellant's reply brief was filed. If appellant does not intend to file a reply brief, appellant shall notify the clerk of the trial court of that fact within 30 days of the filing of appellee's brief.

B) All other civil cases. In all other civil cases where the papers, excluding any transcripts, are or exceed 300 pages, all parties shall file with the clerk of the trial court, within 10 days after briefing is completed, a joint or separate designation of those papers referred to in their respective briefs. Only those designated papers and the following, to the extent applicable, shall be transmitted to the clerk of the appellate court by the clerk of the trial court:

- (i) the pleadings as defined in Rule 7(a), Utah Rules of Civil Procedure;
- (ii) the pretrial order, if any;
- (iii) the final judgment, order, or interlocutory order from which the appeal is taken;
- (iv) other orders sought to be reviewed, if any;
- (v) any supporting opinion, findings of fact or conclusions of law filed or delivered by the trial court;
- (vi) the motion, response, and accompanying memoranda upon which the court rendered judgment, if any;
- (vii) jury instructions given, if any;
- (viii) jury verdicts and interrogatories, if any;
- (ix) the notice of appeal.

(3) Agency cases. Where all papers in the agency record total fewer than 300 pages, the agency shall transmit all papers to the appellate court. Where all papers in the agency record total 300 or more pages, the parties shall, within 10 days after briefing is completed, file with the agency a joint or separate designation of those papers necessary to the appeal. The agency shall transmit those designated papers to the appellate court. Instead of filing all papers or designated papers, the agency may, with the approval of the court, file only the chronological index of the record or of such parts of the record as the parties may designate. All parts of the record retained by the agency shall be considered part of the record on review for all purposes.

(e) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.

(1) Request for transcript; time for filing. Within 10 days after filing the notice of appeal, the appellant shall request from the court executive a transcript of such parts of the proceedings not already on file as the appellant deems necessary. The request shall be in writing and shall state that the transcript is needed for purposes of an appeal. Within the same period, a copy shall be filed with the clerk of the trial court and the clerk of the appellate court. If the appellant desires a transcript in a

ompressed format, appellant shall include the request for a compressed format within the request for transcript. If no such parts of the proceedings are to be requested, within the same period the appellant shall file a certificate to that effect with the clerk of the trial court and a copy with the clerk of the appellate court.

2) Transcript required of all evidence regarding challenged finding or conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript.

3) Statement of issues; cross-designation by appellee. Unless the entire transcript is to be included, the appellant shall, within 10 days after filing the notice of appeal, file a statement of the issues that will be presented on appeal and shall serve on the appellee a copy of the request or certificate and a copy of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the request or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has requested such parts and has so notified the appellee, the appellee may within the following 10 days either request the parts or move in the trial court for an order requiring the appellant to do so.

f) Agreed statement as the record on appeal. In lieu of the record on appeal as defined in paragraph (a) of this rule, the parties may prepare and sign a statement of the case, showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or ought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the trial court may consider necessary fully to present the issues raised by the appeal, shall be approved by the trial court. The clerk of the trial court shall transmit the statement to the clerk of the appellate court within the time prescribed by Rule 12(b)(2). The clerk of the trial court shall transmit the index of the record to the clerk of the appellate court upon approval of the statement by the trial court.

g) Statement of evidence or proceedings when no report was made or when transcript is unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, or if the appellant is impecunious

and unable to afford a transcript in a civil case, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement shall be served on the appellee, who may serve objections or propose amendments within 10 days after service. The statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and, as settled and approved, shall be included by the clerk of the trial court in the record on appeal.

(h) Correction or modification of the record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated, the parties by stipulation, the trial court, or the appellate court, either before or after the record is transmitted, may direct that the omission or misstatement be corrected and if necessary that a supplemental record be certified and transmitted. The moving party, or the court if it is acting on its own initiative, shall serve on the parties a statement of the proposed changes. Within 10 days after service, any party may serve objections to the proposed changes. All other questions as to the form and content of the record shall be presented to the appellate court.

PROSECUTOR Court's
EXHIBIT 1

do not destroy

~~GENERAL~~ ~~Hammer~~
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CHARITATION
OR

INSTRUCTION

13-C

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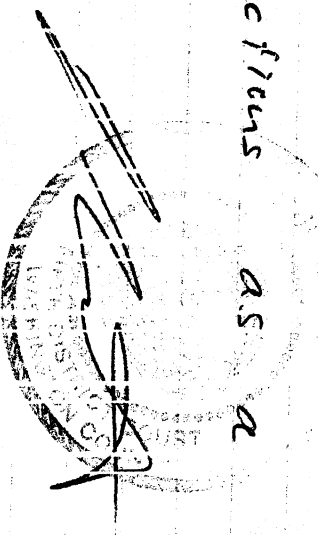
language of 13-C

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whole.



FILED
BY Hammer
MAR 3 1980
FBI - NEW YORK

agreed by the jury on what
was presented by the
prosecution
and the jury's verdict

2-21-81
notations
[initials]

1 THE COURT: And still based upon that, you are
2 telling me that you want to waive your right to be
3 sentenced during that period of time provided by law and
4 have the Court proceed now? Is that right, sir?

5 MR. FRAUSTO: Yes.

6 THE COURT: The record should reflect that the
7 defendant, Mr. Richard Andrew Frausto, appears to this
8 court as he has throughout the entirety of this trial to be
9 in full command of all of his faculties. He is clearly a
10 reasonable and intelligent individual. I have watched him
11 testify here in court and have seen him ably deal with this
12 situation. I find that that is a full and voluntary waiver
13 of the statutory time for the imposition of sentence.

14 With respect to the imposition of sentence,
15 Mr. Wright, I will hear you in mitigation.

16 MR. WRIGHT: Well, Your Honor, I -- I know that
17 the standard sought is that when a jury finds him guilty,
18 that that's it. That there's no argument. But, Your
19 Honor, I think that there is substantial evidence in this
20 case that suggests that there was a self-defense. While
21 apparently the jury has neglected that, I'm concerned about
22 some of the questions that the jury expressed to us.
23 Questions that we were unable to respond to before the --
24 before the jury came back. And I frankly think that there
25 is sufficient evidence to indicate that this man was -- who

1 is a man with a family whom he dearly loves -- and the
2 Court, I think, has seen occasions in the statements that
3 were given and his demeanor, that the utmost concern was
4 his family many times during this trial. And it seems to
5 me, Your Honor, that with the very strong evidence that
6 there was -- even though it may not have impressed the
7 jury -- that there was very strong evidence that this was,
8 in fact, a self-defense. That it was not an intentional
9 ambush, as was so graphically explained during this trial.
10 Which just is not logical. I think there should be some
11 kind of -- of mercy.

12 I would suggest, Your Honor, at the very most,
13 that there should be a ninety-day evaluation.

14 THE COURT: Thank you, Counsel.

15 Mr. Langston, on behalf of the State?

16 MR. LANGSTON: Your Honor, the jury has spoken.
17 We're talking about a first-degree felony, with a minimum
18 mandatory consecutive time for the firearms enhancement. I
19 think a ninety-day evaluation would not really help
20 anyone. He has expressed a desire to be sentenced today
21 right now, and a ninety-day evaluation would simply put
22 that off. And that would go, I believe, against his
23 wishes. That is not a sentencing. And we think that he --
24 the Court should concede to his requests and sentence him
25 as the Court has indicated it intends to do to a period of

1 time in prison for five years to life, with the enhancement
2 of one to five for the firearms enhancement. And we would
3 ask that the Court follow that indication and sentence
4 Mr. Frausto accordingly.

5 THE COURT: Thank you, Counsel.

6 Mr. Wright, anything in addition?

7 MR. WRIGHT: No, Your Honor. I've said
8 everything I can say.

9 THE COURT: Thank you.

10 Mr. Frausto, would you stand, please.

11 Mr. Richard Andrew Frausto, it is the sentence of this
12 court that you be committed to the Division of Corrections
13 in the state of Utah to be imprisoned in the Utah State
14 Prison for a period of time not less than five years nor
15 more than your natural life. No fine is imposed.

16 It is the further sentence of this court that
17 the Court, finding the enhancement provisions by use of a
18 firearm in the commission of this offense, that the
19 applicability of 76-3-203(1) is appropriate -- the Court
20 sentences you to an additional consecutive one year,
21 consecutive to the initial five years. And the Court,
22 specifically finding that it is the intention of the
23 legislature of the State of Utah and of the people of the
24 State of Utah having spoken through their legislature that
25 those who use firearms in the commission of crimes shall be

1 punished accordingly, it is the Court's additional sentence
2 that additionally to the consecutive one year as provided
3 for in 76-3-203, that an additional indeterminate term of
4 five years be imposed again consecutively to the initial
5 sentence of five to life.

6 With respect to restitution, the Court shall
7 order that the defendant pay restitution in an amount
8 equivalent to the costs of funeral expenses. And pursuant
9 to the provisions of the Utah state law with respect to
10 restitution, the Court specifically orders that that amount
11 be doubled. The Court will provide for a hearing once
12 notice of the funeral costs is submitted to the Court in
13 order to challenge those costs if the defendant deems that
14 appropriate.

15 Anything else, Mr. Langston?

16 MR. LANGSTON: I have nothing further.

17 We will determine those costs and provide it to
18 defense counsel. And then he if he wishes a hearing --

19 THE COURT: Within 30 days of today's date,
20 Counsel.

21 MR. LANGSTON: We will do that.

22 THE COURT: Mr. Wright, anything else?

23 MR. WRIGHT: Nothing, Your Honor.

24 THE COURT: That's the order. The Court stands
25 in recess.

77

1 MR. WRIGHT: Your Honor, there is one other
2 matter. I'm wondering if there is some way that
3 Mr. Frausto could have a visit with his wife before he is
4 sent up. He'd like to have a contact visit. Maybe just an
5 hour or two. A very short duration. But he'd like to have
6 that before he leaves.

7 THE COURT: I'll encourage the sheriff's
8 department to make that possible, in view of the
9 precipitative decision on the part of Mr. Frausto to
10 involve himself in a sentencing this quickly. However, I
11 will not order it, because I leave the management of the
12 jail to the sheriff's department. But I think that they
13 could probably accommodate that. And I'd certainly
14 encourage them to do so.

15 MR. LANGSTON: Your Honor, we will get the
16 judgment to the Court Monday. I think we could get it
17 prepared by then.

18 THE COURT: Counsel, I'll not be around. But
19 you can contact me by phone and run it out to the house, if
20 necessary.

21 MR. LANGSTON: All right.

22 THE COURT: Counsel, while we're on the record,
23 the Court -- and this is for the purposes of the record --
24 in response to what has been marked as Court's Exhibit
25 No. 2, and Instruction No. 13-C, the Court has marked an

1 inquiry from the jury as Court's Exhibit No. 2. That will
2 go in the file.

3 The Court also, at the agreement of counsel,
4 prepared what was going to be given as a supplemental
5 instruction prior to the time that the jury came back with
6 a verdict and before we could answer the question in
7 Exhibit No. 2 -- Court's Exhibit No. 2. Those will be
8 placed in the file.

9 MR. LANGSTON: Okay.

10 THE COURT: Thank you, gentlemen. Good
11 evening.

12 (Whereupon the proceedings in the above-entitled
13 matter were concluded at 8:59 P.M.)
14
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C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF WASHINGTON)

I, PAUL G. MCMULLIN, CSR, RPR, an Official Court Reporter in and for the Fifth Judicial District, State of Utah, do hereby certify:

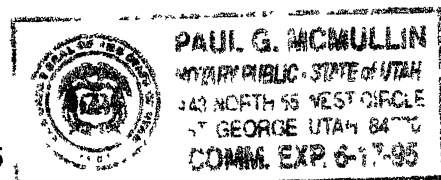
That the foregoing matter, to wit, **STATE OF UTAH VS. RICHARD ANDREW FRAUSTO, CRIMINAL NO. 921500702**, was taken down by me in shorthand at the time and place therein named and thereafter reduced to computerized transcription under my direction.

I further testify that I am not interested in the event of the action.

WITNESS my hand and seal this 24th day of February, 1993.


PAUL G. MCMULLIN, CSR, RPR

RESIDING AT: St. George, Utah
MY COMMISSION EXPIRES: 6-17-95



80

File
No Action
15 Apr 97

THURSDAY
FIFTH DISTRICT COURT
April 16 1997
'97 APR 17 PM 1 27

James L Schumate
220 North 200 East

WASHINGTON COUNTY

St. George, UT 84770

921500902

Dear Judge Schumate:

Thank you for responding to my letter of last December. I have received the court docket for my case and the sentencing and commitment statement.

In reviewing my sentencing and commitment report I find that I was sentenced to a 5 to life and a 1 to 5 consecutive weapons enhancement. The docket paperwork however reflects a 5 to life and a 1 to 5 consecutive weapons enhancement as well as a 5 to 5 years consecutive, for a total of 11 years to life.

It was my understanding that the sentence was 5 to life with a 1 to 5 year consecutive weapons

SEP 2 PM 2:29

BY

BY

Richard A. Frausto, #2183.
Utah State Prison
Wasatch, B-213-B
P.O. Box 250
Draper, Utah 84020

August 26, 1997

Clerk of Court
Fifth Judicial District Court
220 North 200 East
St. George, Utah 84770

Re: Case No. 921500702, State of Utah - vs
Richard A. Frausto.

Dear Clerk:

Please find enclosed for filing, in the
above-captioned case; the "Defendant's -
Motion To Withdraw Court Appointed -
Counsel, Thomas A. Blakely", and its
attached Exhibits #1 thru #10.

Certificate of Service has been performed.
Thanking you.

Sincerely,

Richard A. Frausto
Richard A. Frausto #21

82

[R1408]

Richard A. Frausto, #21830, pro-se

Utah State Prison

Wasatch, B-213-B

P.O. Box 250

Draper, Utah 84020

SEP 2 PM 3 28

WASHINGTON COUNTY

BY MM

Just File it strict Court - For
then. State of Utah

State of Uta
Plain

No further
Action
Needed.

00702

-Vs.-

Richard A. Fra
Defendant.

James L. Humate.

"Defendant's Motion To Withdraw Court
Appointed Counsel, Thomas A. Blakely"

Comes Now, the Defendant, Richard A.
Frausto, pro-se, and respectfully request
and prays this Honorable Court will grant
this Motion, and states:

1) Defendant submits, he is presently
incarcerated, at the Utah State Prison,
located in Draper, Utah; as a result of
a judgment from this Honorable Court.

11 83

2 11 199

GALLIAN & WESTFALL
ATTORNEYS AND COUNSELORS AT LAW
DIXIE STATE BANK BUILDING
150 D L MAIN STREET
P.O. BOX 407
SALT LAKE CITY, UTAH 84101
(801) 628-1092
FAX (801) 628-9501

FRANK J. GALLIAN
CRAIG WESTFALL
JEFFREY WILCOX
JOHN E. HUMMEL

OF COUNSEL
J. MACARTHUR WRIGHT
JONATHAN WRIGHT

ALSO LICENSED IN

Exhibit #1,
PART (A)

January 28, 1993

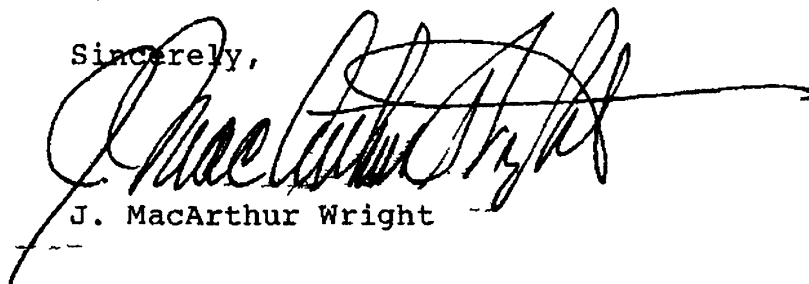
Wayne A. Freestone
David J. Angerhofer
Contract Attorneys
50 West 300 South, Suite 900
Salt Lake City, Utah 84101

Gentlemen:

In reply to your letter of January 25, 1993, the answer is, I have filed a Notice of Appeal and filed the Request for Transcript.

However, I will not be handling the appeal for Mr. Frausto. Because of some statements he made in his latest letter to me concerning what issues he thinks should be the basis of an appeal, I believe it would be inappropriate for me to handle the appeal. Consequently I'm in the process of arranging for someone else, probably Mr. Michael Miller, to do it for him.

Sincerely,



J. MacArthur Wright

JMW/lq

84 [1434]

Exhibit #1,
PART (B)

WAYNE A. FREESTONE
DAVID J. ANGERHOFER
CONTRACT ATTORNEYS
50 West 300 South, Suite 900
Salt Lake City, Utah 84101
(801) 322-1503
(801) 363-0844

M E M O R A N D U M

TO: Richard Frausto USP #17886
DATE: February 1, 1993
RE: REQUESTED LEGAL SERVICES

Enclosed please find a copy of the letter we received from MacArthur Wright in response to the letter we wrote him on your behalf.

Thank You.

CONTRACT ATTORNEYS



85
[1435]

Exhibit #2, Part (A)

Judith M. Billings
Presiding Judge

Leonard H. Russon
Associate Presiding Judge

Russell W. Bench
Judge

Regnal W. Garff
Judge

Pamela T. Greenwood
Judge

Norman H. Jackson
Judge

Gregory K. Orme
Judge

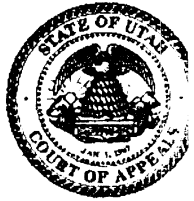
Utah Court of Appeals

230 South 500 East, Suite 400
Salt Lake City, Utah 84102

Clerks' Office 801-578-3950
Administration 801-578-3900

Fax 801-578-3999

February 1, 1994



Mary T. Noonan
Clerk of the Court

Richard A. Frausto
Iron County/Utah State Correctional Facility
2136 North Main
Cedar City, UT 84720

In Re:

State of Utah,
Plaintiff and Appellee,

v.
Richard Andrew Frausto,
Defendant and Appellant.

Case No. 930357-CA

Dear Mr. Frausto:

In response to your letter of January 25, 1994, received January 31, 1994, our records do not indicate an Anders brief having been filed for your appeal.

Further, our records indicate you are represented by counsel as Mr. Michael L. Miller has not filed a notice of withdrawal. The Court will only consider documents on your behalf if they are filed by your attorney. It is unclear if counsel is aware of your sending a letter and suggest you discuss your intentions with your attorney. You must communicate through him regarding your appeal.

Your above letter has been forwarded to your attorney that he might respond to you and possibly give you some assistance.

Sincerely,

A handwritten signature in cursive script that reads "Janice Hill".
Janice Hill
Deputy Clerk

cc: Michael L. Miller
Jan Graham

86 [1436]

Exhibit #9, Part (A)

FILED
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

APR 25 1994

-----00000-----

State of Utah,)
)
Plaintiff and Appellee,)
)
v.)
)
Richard Andrew Frausto,)
)
Defendant and Appellant.)

ORDER

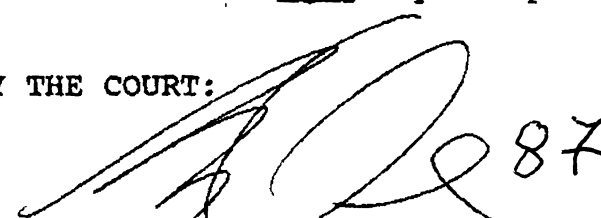
Case No. 930357-CA

This matter is before the Court upon appellant's pro se request for appointment of substitute counsel, filed 7 March 1994, and also upon the motion to supplement the record, filed by Michael L. Miller, counsel for appellant. Appellee's objection to the motion to supplement the record was filed 28 March 1994.

IT IS HEREBY ORDERED that the matter is temporarily remanded to the Fifth Judicial District Court for consideration of appellant's pro se request for appointment of counsel and for proceedings pursuant to Rule 11(f) or (g), Utah R. App. P. It is FURTHER ORDERED that upon disposition, the clerk of the trial court shall forward a copy of the court's order to the Utah Court of Appeals.

Dated this 25th day of April, 1994.

BY THE COURT:


Gregory K. Orme, Judge

[1437] ADDENDUM Pg. #A

Exhibit #9 Part (A)

FOOT COPY

MICHAEL L. MILLER, Bar No. 4633
Attorney for Defendant / Appellant
32 East 100 South, Suite 203
St. George, Utah 84770
Telephone: (801) 628-7525

MAR 18 1994

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff / Appellee,	:	MOTION TO SUPPLEMENT RECORD
	:	
vs.	:	
	:	
RICHARD ANDREW FRAUSTO,	:	Case No. 930357-CA
	:	District No. 921500702
Defendant / Appellant,	:	

COMES NOW Defendant / Appellant, by and through counsel, and moves in the above-entitled court to supplement the record on appeal in this matter, pursuant to Rule 15, Utah Rules of Appellate Procedure, and upon the following grounds.

1. Counsel for Appellant was not his trial counsel. When Appellant counsel reviewed the transcript and spoke with trial counsel, it became apparent that the official transcript in this matter was missing a discussion between the court, and counsel for both parties. Counsel is informed and believes that this discussion concerned one of the jury instructions which the jury seemed to be having difficulty understanding, Instruction 13-C.

2. Counsel then asked trial counsel for both parties to prepare an affidavit of what was discussed during regarding this instruction, which ultimately led to a Supplemental Instruction

88₁ [1442]
(35)

EXHIBIT #7, PART(B)

being prepared, although never given.

3. Defendant's trial counsel prepared his affidavit which is attached hereto as the proposed supplement to the record. The State's trial counsel did not prepare an affidavit, but ultimately read the affidavit of Defendant's counsel.

4. Counsel next attempted to obtain a stipulation from the Attorney General's Office as to the supplementation of the record based upon the affidavit of Defendant's trial counsel. The Attorney General's office was not willing to agree to the proposed stipulation, and requested that counsel attempt to obtain the stipulation from the Washington County Attorney's office, who was trial counsel for the State. The Washington County Attorney's office declined to agree to the proposed stipulation, thus making this Motion the only course Appellant can pursue in order to insure that the record to be reviewed by this court is as full and complete as possible.

WHEREFORE Appellant requests that the record on appeal be supplemented by the Affidavit of trial counsel; or that in the alternative, this Court order a remand to Fifth District Court for an evidentiary hearing on the subject matter of said affidavit.

DATED this 16th day of March, 1994.

151
Michael L. Miller
Attorney for Appellant

89 [1443]
2
(36)

Exhibit # 7, Part (C)

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing, postage prepaid, to:

Jan Graham, Esq.
Attorney General
236 State Capital Bldg.
Salt Lake City, Utah 84114

DATED this 16th day of March, 1994.

151
Michael L. Miller

90 3 [1444]
(37)

Defendant

Reference: 921500702

COA Case: 921500702 FS

FRAUSTO, RICHARD ANDREW

State Felony

Judge: JAMES L SHUMATE

535 SOUTH 28 EAST
IVINS

UT

Exhibit #9, Page (1)

OTN #: 585758

ChargesBail

Violation Date: 07/28/92

1. MURDER	76-5-203	.00
Sev: F1		
2. POSSESSION OF A DANGEROUS WEAPON	76-10-503	.00
Sev: F3		

Proceedings

3/11/92 Case filed from Circuit Court bindover. JNS
ARR scheduled for 8/19/92 at 9:00 A in room with JS JNS
ARR rescheduled to 8/12/92 at 8:58 A in room D with JLS JNS
** REFER TO HARD COPY - DELETED IN CIRCUIT COURT JBH
3/12/92 Fel Arraignment JUDGE: SHUMATE, JAMES L. JNS
TAPE: 920414 COUNT: 1050 JNS
ATD: WRIGHT, J MACARTHUR ATP: LANGSTON, W BRENT JNS
Def't is present JNS
CUSTODY: County Sheriff JNS
Chrg: 76-5-203 Plea: Not Guilty JNS
Chrg: 76-10-503 Finding: Dismissed JNS
TO BE SET FOR 3-DAY JURY TRIAL IN 60-90 DAYS; REQUEST FOR JNS
APPOINTMENT OF INVESTIGATOR GRANTED WITH INITIAL CAP OF \$2,000 JNS
FILED: MOTION TO DISMISS COUNT II JNS
FILED: ORDER OF DISMISSAL ON COUNT II JNS
FILED: REQUEST FOR INVESTIGATOR JNS
FILED: AFFIDAVIT OF DEFENDANT ON ARRAIGNMENT JNS
3/19/92 Judge ID changed from JS to JLS JNS
Notice of Setting ~~3-day trial~~ JNS
TRJ scheduled for 10/22/92 at 0900 A in room D with JLS JNS
PTC scheduled for 10/07/92 at 0900 A in room D with JLS JNS
4/03/92 FILED: MOTION TO RELEASE EXHIBIT # 7 - FIREARM GSS
4/04/92 FILED: ORDER RELEASING EXHIBIT # 7- FIREARM TLH
4/08/92 FILED: MOTION TO REQUIRE BALLISTICS TESTING TLH
4/09/92 FILED: ORDER REQUIRING BALLISTICS TESTING TLH
FILED: RECEIPT OF EXHIBIT # 7- FIREARM (DEP PAM HUMPHREYS) TLH
4/06/92 FILED: MOTION FOR CONTINUANCE OF TRIAL DATE TLH
FILED: MOTION FOR ADDITIONAL FUNDS FOR INVESTIGATOR TLH
FILED: NOTICE OF HEARING (10-7-92) TLH
4/07/92 Continuance JUDGE: SHUMATE, JAMES L. TLH
TAPE: 920493 COUNT: 0272 TLH
Def't Present TLH
ATD: WRIGHT, J MACARTHUR ATP: LANGSTON, W BRENT TLH
CUSTODY: County Sheriff TLH

91 (39) 11/11/97

Defendant Reference: 921500702
FRAUSTO, RICHARD ANDREW

COA Case: 921500702 FS
State Felony

10/07/92 COURT GRANTS DEF MOTION FOR CONT OF JURY TRIAL AND MOTION FOR \$1000 ADDITIONAL FUNDS. MR LANGSTON CONCURS. JURY TRIAL TO BE RESCHEDULED FOR LATE NOV OR EARLY DEC TL
10/19/92 TRJ on 10/22/92 was cancelled #9, page(2) CH
TRJ on 10/23/92 was cancelled GH
TRJ on 10/26/92 was cancelled GH
FILED: REPORTER'S PRELIMINARY HEARING TRANSCRIPT (08-10-92) GH
10/22/92 Notice of Setting [3 day trial] JN
TRJ scheduled for 12/15/92 at 0900 A in room D with JLS JN
PTC scheduled for 12/09/92 at 0900 A in room D with JLS JN
(JURY TRIAL SET FOR 12/15/92, 12/17/92 & 12/18/92) JN
12/07/92 HRG scheduled for 12/ 7/92 at 2:30 P in room C with JLS JN
FILED: NOTICE OF HEARING GH
FILED: STIPULATED MOTION FOR COURT REPORTER GH
FILED: ORDER FOR COURT REPORTER [JLS 12-09-92] GH
MINUTE ENTRY GH
Hearing: JUDGE: SHUMATE, JAMES L. GH
TAPE: 920594 COUNT: 1199 GH
Deft Present GH
ATD: WRIGHT, J MACARTHUR ATP: LANGSTON, W BRENT GH
12/09/92 MINUTE ENTRY GH
FILED: SUBPOENA AND RETURN OF SERVICE (7) GS
GRANT AREND GS
CONNIE FRAUSTO GS
DAVID ICE GS
DEBBIE HERN GS
MELANIE LEE AREND GS
TRISH ICE GS
KATHY SCHEAR GS
Hearing (PRE-TRIAL CONFERENCE): JUDGE: SHUMATE, JAMES L. GH
TAPE: 920596 COUNT: 1576 GH
Deft Present GH
ATD: WRIGHT, J MACARTHUR ATP: LANGSTON, W BRENT GH
CUSTODY: County Sheriff GH
12/14/92 TRJ scheduled for 12/16/92 at 10:00 A in room D with JLS TL
FILED: ORDER FOR COURT REPORTER SL
FILED: DEFENDANT'S REQUESTED JURY INSTRUCTIONS JN
12/15/92 JURY TRIAL: JAMES L SHUMATE TL
ATP W BRENT LANGSTON ATD J MACARTHUR WRIGHT TL
12/16/92 CONTINUANCE OF JURY TRIAL TL
12/17/92 CONTINUANCE OF JURY TRIAL TL
12/18/92 FILED: DEFENDANT'S REQUESTED JURY INSTRUCTIONS TL
FILED: SUBPOENA'S AND RETURN OF SERVICE GS
JOSHUA MICHAELS GS
TROY WILKINSON GS
WILLIAM LEE DORNEY GS
LEIGHANN REBER GS
CONTINUANCE OF JURY TRIAL TL
JURY VERDICT: GUILTY AS CHARGED ON INFORMATION TL
DEFENDANT WAIVE TIME FOR SENTENCING TL
SENTENCE: 5 YEARS TO LIFE IMPRISONMENT. TL
NO FINE IMPOSED. TL

(40) 92 [1447]

FTH DISTRICT COURT-ST GEORGE

TUESDAY JANUARY 14, 1997

2:09 PM

Defendant Reference: 921500702
FRAUSTO, RICHARD ANDREW

COA Case: 921500702 FS
State Felony

/18/92 * 1 YEAR CONSECUTIVE TO 5 YEARS (WEAPON ENHANCEMENT) + TLH
5 YEARS CONSECUTIVE TO 5 YEARS (WEAPON ENHANCEMENT) TLH
FOR A TOTAL OF 11 YEARS TO LIFE. TLH
RESTITUTION ORDERED AMOUNT TO BE DOUBLED AFTER DETERM TLH
INATION BY COA TLH
DEFENDANT COMMITTED TO CUSTODY OF SHERIFF FOR TRANSPOR TLH
TO UTAH STATE PRISON TLH
Chrg: 76-5-203 Find: Guilty - Jury TLH
FILED: SUPPLEMENTAL INSTRUCTION TLH
FILED: MENU FOR JURORS (COURT EXHIBIT #3) #9, page (3) TLH
FILED: COURT EXHIBIT #1 TLH
FILED: COURT EXHIBIT #2 TLH
FILED: JURY INSTRUCTIONS TLH
FILED: JURY VERDICT TLH
/21/92 HRG scheduled for 12/23/92 at 8:00 A in room D with JLS GHM
/23/92 MINUTE ENTRY GHM
Hearing: JUDGE: SHUMATE, JAMES L. GHM
TAPE: 920588 COUNT: 0020 GHM
Deft Present GHM
ATD: WRIGHT, J MACARTHUR ATP: LANGSTON, W BRENT GHM
CUSTODY: Dept of Corrections GHM
/06/93 FILED: JUDGMENT, RESTITUTION JUDGMENT, SENTENCE & COMMITMENT GSS
Entered case disposition of: Closed GSS
/20/93 FILED: NOTICE OF APPEAL GHM
FILED: REQUEST FOR TRANSCRIPT GHM
/21/93 FILED: ORDER TO PROVIDE TRANSCRIPT [JLS 01-21-93] GHM
/22/93 FILED: AMENDED NOTICE OF APPEAL GHM
*AMENDED NOTICE APPEAL FORWARDED TO UTAH SUPREME COURT GHM
/26/93 FILED: SUPREME COURT THIS DAY NOTICE OF APPEAL CASE #930034 GHM
/28/93 FILED: NOTICE OF TRANSFER FROM SUPREME COURT TO UTAH COURT GHM
OF APPEALS FOR DISPOSITION GHM
/10/93 FILED: WITHDRAWAL OF ATTORNEY AND APPEARANCE OF SUBSTITUTE GSS
COUNSEL (MICHAEL MILLER) GSS
/08/93 FILED: REPORTERS TRIAL TRANSCRIPTS (FOUR VOLUMES) JBH
FILED: REPORTERS HEARING TRANSCRIPT (12-23-92) JBH
/11/93 FILE SENT TO SUPREME COURT JBH
/03/93 FILED: LETTER FROM SUPREME COURT (SENT TO COURT OF APPEALS) GSS
/16/93 FILED: UTAH COURT OF APPEALS CASE # 930357-CA GHM
/08/93 FILED: LETTER FROM UTAH COURT OF APPEALS GHM
/03/94 Notice of Setting TLH
HRG scheduled for 05/25/95 at 0900 A in room D with JLS TLH
*SET FOR HEARING PER JLS TLH
/09/94 HRG rescheduled to 5/25/94 at 9:00 A in room D with JLS SLW
/19/94 FILED: TRANSPORTATION ORDER [JLS 05-18-94] GHM
/25/94 Hearing: JUDGE: SHUMATE, JAMES L VPF
TAPE: 940265 COUNT: 0001 VPF
ATD: Deft pro se ATP: LANGSTON, W BRENT VPF
Deft Present and pro se VPF
/31/94 REV scheduled for 6/ 1/94 at 9:00 A in room D with JLS ONE
FILED: EX PARTE MOTION TO CONTINUE KLH
/01/94 FILED: ORDER OF CONTINUANCE (JLS 5/31/94) KLH
REV rescheduled to 6/ 8/94 at 9:00 A in room D with JLS JNS

(41) 93 [1448]

Defendant

FRAUSTO, RICHARD ANDREW

Reference:921500702

COA Case: 921500702 FS
State Felony

06/06/94 FILED: TRANSPORTATION ORDER (JLS 6-3-94) JN
HRG IND scheduled for 6/ 8/94 at 8:54 A in room D with JLS GH
REV on 6/ 8/94 was cancelled GH
06/08/94 MINUTE ENTRY GH
Hearing (INDIGENCY HEARING): JUDGE: SHUMATE, JAMES L GH
TAPE: 940284 COUNT: 0040 GH
ATD: None Present ATP: LUDLOW, ERIC GH
Deft Present GH
CUSTODY: Dept of Corrections GH
THE ISSUE OF THE PRIOR PUBLIC DEFENDER IS MUTE. MR. LUDLOW GH
THE WASHINGTON COUNTY ATTORNEY IS ATTEMPTING TO RETAIN COUN- GH
SEL IN IRON COUNTY TO ASSIST THE DEFENDANT. GH
THE HEARING IS CONTINUED TO JUNE 15, 1994. GH
HRG scheduled for 6/15/94 at 8:54 A in room D with JLS GH
06/14/94 HRG rescheduled to 6/15/94 at 1:29 P in room D with JLS GH
06/15/94 MINUTE ENTRY GH
Hearing: JUDGE: SHUMATE, JAMES L GH
TAPE: 940293 COUNT: 2260 GH
ATD: HOLM, FLOYD W ATP: LANGSTON, W BRENT GH
Deft Present GH
CUSTODY: Dept of Corrections GH
MR. FLOYD HOLM IS RETAINED BY WASHINGTON COUNTY TO ASSIST GH
THE DEFENDANT WITH HIS APPEAL AND HEARINGS. COUNSELS REQUIRE GH
ADDITIONAL TIME BEFORE PROCEEDING. THE HEARING IS RESCHEDUL- GH
ED FOR JULY 13, 1994 AT 1:30 P.M. ON MOTION TO SUPPLEMENT GH
THE RECORD. GH
06/16/94 HRG scheduled for 7/13/94 at 1:30 P in room D with JLS GH
06/22/94 FILED: NOTICE OF ENTRY OF APPEARANCE OF COUNSEL (F HOLM) SL
07/11/94 HRG rescheduled to 7/13/94 at 1:29 P in room D with JLS JN
07/13/94 Hearing: JUDGE: SHUMATE, JAMES L JN
TAPE: 940319 COUNT: 0624 JN
ATD: None Present ATP: LANGSTON, W BRENT JN
Deft not present JN
MR LANGSTON INFORMS THE COURT THAT STIPULATION HAS BEEN JN
REACHED BETWEEN COUNSEL AS TO MOTION TO SUPPLEMENT THE RECORD; JN
COURT INSTRUCTS MR LANGSTON TO SUBMIT WRITTEN STIPULATION WHICH JN
HAS BEEN SIGNED BY COUNSEL AND DEFENDANT JN
10/14/94 FILED: ORDER SUPPLEMENTAL RECORD) (JLS 10/12/94) MJ
03/06/95 **CLERK'S CERTIFICATE OF MAILING SUPPLEMENTAL RECORD TO THE TL
COURT OF APPEALS TL
03/09/95 **FILE MAILED TO COURT OF APPEALS ON REQUEST (SUE)** TL
09/14/95 FILED: COPY OF LETTER TO FLOYD W HOLM FROM UTAH COURT OF APPEALS CM
RE: BRIEFING SCHEDULE CM
11/28/95 FILED: LETTER FROM DEFENDANT RE: DISMISSAL OF ATTORNEY FLOYD CM
HOLM *PER JLS, FILE CM
12/28/95 FILED: LETTER FROM DEFENDANT REQUESTING COPY OF FILE CM
01/09/96 *COPY OF DOCKET MAILED TO DEFENDANT CM
*COPY OF LETTER MAILED TO UTAH COURT OF APPEALS CM
01/12/96 FILED: LETTER TO JUDGE SHUMATE FROM DEFENDANT RE: NEW COUNSEL CM
FILED: MEMORANDUM DECISION [JLS 1-12-96] CM
(COURT HAS NO JURISDICTION ON MOTION - COURT OF APPEALS) CM
02/06/96 FILED: ORDER FROM UTAH COURT OF APPEALS (MATTER IS TEMPORARILY CM

(42) 94 [R1449]

Defendant

FRAUSTO, RICHARD ANDREW

Reference: 921500702

COA Case: 921500702 FS
State Felony

2/06/96 REMANDED TO FIFTH DISTRICT FOR EXPEDITED HEARING RE: CMS
DEFENDANT'S COUNSEL'S ALLEGED CONFLICT OF INTEREST) CMS
**COPIES OF THESE DOCUMENTS ARE INCLUDED WITH THE ORDER: CMS
LETTER FROM RICHARD FRAUSTO TO UTAH COURT OF APPEALS (2/2/96) CMS
CROSS-MOTION FOR REMAND FOR HEARING ON COUNSEL CMS
MOTION TO SUSPEND BRIEFING SCHEDULE CMS
AFFIDAVIT OF FLOYD W HOLM CMS
2/07/96 Notice of Setting CPS
HRG scheduled for 02/21/96 at 1100 A in room D with JLS CPS
2/08/96 FILED: NOTICE OF HEARING (2/21/96) CMS
2/15/96 RECEIVED: "FAXED" COVER LETTER AND ORDER OF TRANSPORTATION CMS
FILED: ORDER OF TRANSPORTATION [JLS 2-15-96] CMS
*FAXED TO FLOYD HOLM ON 2/16/96 CMS
2/21/96 MINUTE ENTRY GHM
Hearing: JUDGE: SHUMATE, JAMES L GHM
TAPE: 960072 COUNT: 11:11 GHM
ATD: HOLM, FLOYD W ATP: LANGSTON, W BRENT GHM
Deft Present GHM
CUSTODY: Dept of Corrections GHM
DUE TO CONFLICT MR. FLOYD W HOLM IS RELEASED FROM THE CASE & GHM
MR. THOMAS A BLAKELY IS APPOINTED TO REPRESENT THE DEFENDANT. GHM
2/22/96 FILED: ORDER [JLS 2-22-96] (FLOYD HOLM RELEASED AS COUNSEL AND CMS
THOMAS BLAKELY APPOINTED) CMS
2/23/96 FILED: NOTICE OF WITHDRAWAL AS COUNSEL (FLOYD W HOLM) CMS
2/26/96 FILED: CLERK'S CERTIFICATE OF MAILING (PAGE 5 - SUPPLEMENTAL CMS
INDEX OF RECORD ON APPEAL AND COPIES OF ALL DOCUMENTS CMS
LISTED) CMS
2/18/96 Began tracking Appeal Review on 06/30/96 CMS
2/13/96 Appeal Review date changed to 12/31/96 CMS
2/01/96 FILED: ORDER OF DISMISSAL FROM UTAH COURT OF APPEALS CMS
Ended tracking of Appeal CMS
2/14/96 FILED: REMITTITUR AND COPY OF DISMISSAL FROM UTAH COURT OF CMS
APPEALS CMS
2/14/97 FILED: LETTER FROM DEFENDANT REQUESTING COPIES TLH
PER JLS: SEND COPY OF JUDGMENT AND COPY OF DOCKET TO DEFENDANT TLH
Citation Amount:

Additional Case DataSentence Summary

1. MURDER	Plea: Not Guilty	Find: Guilty - Jury
Prison: 11 98 YR	Suspended:	
2. POSS DNGR WEAP	Plea:	Find: Dismissed

Case Disposition

Disposition.....: Closed

DATE: 01/06/93

Parties

Atty for Plaintiff

LANGSTON, W BRENT
178 NORTH 200 EAST
ST GEORGE

UT 84770

Work Phone: (801) .634-5723

(42) 95 TR 14507

Defendant

FRAUSTO, RICHARD ANDREW

Reference: 921500702

COA Case: 921500702 FS
State FelonyAtty for Defendant

BLAKELY, THOMAS A

P O BOX 2181

205 EAST TABERNACLE

ST GEORGE

UT 847712181

Home Phone: () -

Work Phone: (801) 628-5130

#9, page(6)

Personal Description

Sex: M DOB: 06/30/54

Dr. Lic. No.:

State: UT Expires:

Scheduled Hearing Summary

HEARING	on 05/25/94	0900 A in room D with
FUGITIVE HEARING	on 06/08/94	0854 A in room D with
HEARING	on 06/15/94	0129 P in room D with
HEARING	on 07/13/94	0129 P in room D with
HEARING	on 02/21/96	1100 A in room D with

End of the docket report for this case.

(44) 96 [R.451]

State of Utah vs. Richard Andrew Frausto

District Court Case #921500702 FS

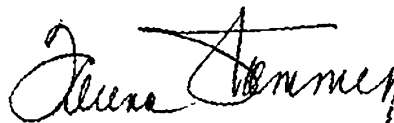
Court of Appeals Case #930347-CA

6/3/93	Letter from Supreme Court re: Court of Appeals court	1348
6/16/93	Letter from Court of Appeals re: case number	1349
10/8/93	Letter from Court of Appeals re: extension to file brief	1350
5/3/94	Notice of Hearing (5/25/94)	1351-1352
5/19/94	Transportation Order	1353
5/25/94	Minute Entry - Notice	1354-1355
5/31/94	Ex Parte Motion to Continue	1356
6/1/94	Order of Continuance	1357
6/6/94	Transportation Order	1358
6/8/94	Minute Entry - Notice	1359
6/15/94	Minute Entry - Notice	1360
7/13/94	Minute Entry - Notice	1361
10/14/94	Order Supplementing Record	1362-1364

Mailing Certificate

I do hereby certify that I mailed, postage prepaid, or sent via United Postal Service, prepaid, the supplemental pleadings in file State of Utah vs Richard Andrew Frauston, court case 921500702 FS, court of appeals # 930347-CA, to the Court of Appeals, on this 6th day of March, 1995.

Utah Court of Appeals
230 South 500 East, Suite 400
Salt Lake City, UT 84102



Tauna Hammer
Deputy Court Clerk

