BIVENS V. STATE: IS THE PROCESS REALLY "DUE"?

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I. INTRODUCTION

"[T]he question of what amounts to due process in any given case must be determined by the circumstances or nature of the particular case and, thus, what process is due in a given case depends upon its own particular facts."[1] While *Bivens v. State* likely was not intended to be a groundbreaking case regarding due process, as the Court largely glossed over the term, that is precisely the reason this decision matters—after all, it's what we do when no one is looking, right?

Appellant's propositions on appeal, specifically Proposition X, which introduces the concept of a *cumulative effect* of the errors, open up a dialogue about what due process really looks like during the trial and appeal process.[2] As it turns out, due process looks more like a staircase and each step, or proposition, is as important as the next in preserving a defendant's right to due process and a fair trial guaranteed by the Fifth, Sixth, and Fourteenth Amendments.[3]

Part II of this Comment explores the history of the constitutional protections of due process and the guarantees of a fair trial. Part III of this Comment examines the facts and procedural history of *Bivens*. Additionally, Part III discusses the Court's legal rulings on each of Appellant's propositions and its reasons for upholding his conviction. Part IV of this Comment analyzes the three most important, or controversial,

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1. 16C C.J.S. *Constitutional Law* § 1867, Westlaw (database updated Sept. 2019).
2. Bivens v. State, 2018 OK CR 33, ¶ 2, 431 P.3d 985, 991 ("The cumulative effect of all the errors addressed above deprived Appellant of a fair trial.").
3. U.S. CONST. amends. V, VI, XIV.

propositions raised by Appellant that either explicitly or implicitly concern his due process rights, as "even long-standing practices are subject to constitutional scrutiny and must meet the advancing standards of due process. Thus, the fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process . . . ."[4] This Comment questions and challenges the practical application of due process during trial and suggests improvements for the future.

II. HISTORY

A. Due Process: Constitutional Roots

The most well-known constitutional guarantee of due process is found in the Fifth Amendment of the United States Constitution. It reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[5]

Simply put, the Fifth Amendment provides five basic rights that relate to criminal trials: (1) right to indictment by a grand jury; (2) protection against double jeopardy; (3) protection against forced self-incrimination; (4) right to a fair trial; and (5) protection against the government's seizure of private property without fair or just compensation.[6] One of the explicit due process issues in *Bivens* is the Appellant's contention regarding double jeopardy. The protection against double jeopardy ensures that an individual will not be subjected to "successive prosecutions of the same

4. 16C C.J.S. *Constitutional Law* §1867, Westlaw (database updated Sept. 2019).

5. U.S. CONST. amend. V.

6. Legal Information Institute, *Fifth Amendment,* CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/fifth_amendment [https://perma.cc/ZYT8-JMYS] (last updated by Jonathan Kim 2017).

alleged act."[7] The clause does this by ensuring that an individual "will not face a second prosecution after an acquittal . . . face a second prosecution after a conviction, and . . . that a defendant will not receive multiple punishments for the same offense."[8]

While the right to a fair trial is guaranteed by the Fifth Amendment, the Sixth Amendment expands on that right and what it encompasses. The Sixth Amendment provides:

> 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 defence.[9]

Explicitly at issue in *Bivens* is Appellant's claim of ineffective counsel.[10] While the Sixth Amendment guarantees that a defendant has the right to assistance of counsel, this Comment will explore what it looks like and how far it extends, such as whether the Sixth Amendment's guarantee of a *right to counsel* includes the right to effective counsel.

Additionally, the guarantees of due process from the Fifth Amendment are incorporated to the States through the Fourteenth Amendment. The Fourteenth Amendment provides:

> 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.[11]

7. *Id*.
8. *Id*.
9. U.S. CONST. amend. VI.
10. Bivens v. State, 2018 OK CR 33, ¶¶ 32-33, 431 P.3d 985, 996.
11. U.S. CONST. amend. XIV.

The Due Process Clause of the Fourteenth Amendment has been interpreted by the Supreme Court to include the Fifth Amendment.[12] As required by the Fourteenth Amendment, Oklahoma's incorporation of the Due Process Clause can be found in Article II, Section 7 of the Oklahoma Constitution. It reads: "No person shall be deprived of life, liberty, or property, without due process of law."[13]

In addition to the explicit rights granted to us by the Fifth, Sixth, and Fourteenth Amendments, "the Supreme Court has found implicit in the constitutional guarantee of 'due process of law' a number of additional 'free-standing' rights that attach at a criminal trial."[14] The Supreme Court has already recognized a defendant's right to an "unbiased judge, right to a presumption of innocence, the right to have the government prove its case beyond a reasonable doubt, and the right to obtain exculpatory evidence in the government's possession."[15] Published in Columbia Law Review, Michael T. Fisher's Note on the topic says:

> Due process is thus a set of fair procedures designed to determine truth in a manner consistent with the process goals of the system. Due process requires not only that criminal proceedings reach a correct outcome—that justice be done—but also that the correct outcome be reached only through the use of fundamentally fair procedures.[16]

This Comment will attempt to show how due process is an all-encompassing mechanism in which each proposition raises its own unique issue. However, each proposition—even those that do not put due process infringement on display—deserves full consideration to be ruled on in accordance with *traditional notions of fair play*—perhaps another implicit due process right not yet recognized by the Supreme Court.[17]

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12. Legal Information Institute, *Fourteenth Amendment*, CORNELL LAW SCHOOL, (1992), https://www.law.cornell.edu/wex/fourteenth_amendment_0 [https://perma.cc/8UCS-A5QC].
13. OKLA. CONST. art. II, § 7.
14. Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 18 (2006).
15. *Id.* at 19.
16. Michael T. Fisher, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process Than the Bottom Line,* 88 COLUM. L. REV. 1298, 1300 (1988).
17. *Id.* at 1298.

III. *BIVENS V. STATE*

A. Facts

Appellant Byron Bivens was arrested in July 2015, following a traffic stop of a vehicle of which Bivens was a passenger.[18] During the traffic stop, Bivens got in and out of the vehicle multiple times, and when the passengers were notified that the driver was being arrested and the pickup was to be impounded, Appellant became especially upset and remained by the drivers-side door.[19] The officer began inventorying the vehicle, and Bivens asked for a bag of tools located on the floorboard of the passenger side.[20] The officer declined his request, and Appellant then tried to convince the officer to allow him to move the vehicle.[21] Again, Bivens's request was denied and he finally left the scene as requested by the officer. Upon completing the inventorying of the vehicle, the officer found a tool bag, a power tool, and a bottle of vodka on the passenger side floorboard.[22] Underneath the floorboard, the officer "found a black nylon bag containing $280.00 cash, a silver spoon containing a crystal like residue, a digital scale with residue, and three clear baggies of a white, crystal-like substance which tested as methamphetamine in quantities of 205.01 grams, 13.13 grams and 2.91 grams."[23] Additionally, the officer found "3 baggies of a green leafy substance that tested as marijuana in the quantities of 4.25 grams, 0.43 grams, and 0.91 grams."[24] Lastly, another bag was found that contained ten Xanax tablets.[25] Appellant was taken into custody three days after the search of the vehicle.[26]

B. Procedural History

1. The District Court of Blaine County: Conviction and Sentencing

Appellant Byron Bivens was tried and convicted by a jury on four

18. Bivens v. State, 33 OK CR 2018, ¶ 4, 431 P.3d 985, 991.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* ¶ 5, 431 P.3d at 991.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*

counts of drug-related charges.[27] On Count I, Appellant was convicted of Trafficking in Illegal Drugs.[28] On Count II, Appellant was convicted of Possession of a Controlled Dangerous Substance, and on Counts III and IV, Appellant was convicted of Unlawful Possession of Drug Paraphernalia and Possession of a Dangerous Drug without a Prescription, respectively.[29] Since Appellant was previously convicted of two or more felonies, the jury was instructed to consider this information in sentencing, and "[t]he jury recommended as punishment fifty (50) years in prison and a $500,000.00 fine in Count I, and one (1) year in prison and a $1,000.00 fine in each of Counts II, III, and IV."[30] The trial court sentenced Bivens according to the jury's recommendation.

2. Oklahoma Court of Criminal Appeals

In the hope of reversing the trial court's judgment and sentence, Bivens appealed to the Oklahoma Court of Criminal Appeals.[31] The Oklahoma Court of Criminal Appeals affirmed the judgment of the trial court in October 2018.[32] Presiding Judge Lumpkin authored the opinion, and two separate concurrences were filed by Judge Hudson and Judge Kuehn.[33] The Court held that no relief was warranted after considering Appellant's propositions, the record, transcripts, and briefs of the parties.[34]

On appeal, Appellant raised ten propositions of error.[35] The Court

27. *Id.* ¶ 1, 431 P.3d at 990.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* ¶ 36, 431 P.3d at 996.
33. *Id.*
34. *Id.* ¶ 3, 431 P.3d at 991.
35. *Id.* ¶ 2, 431 P.3d at 990-91 ("I. The State's evidence . . . was insufficient to convict Appellant of Counts I-IV. II. Appellant's separate convictions . . . in Counts I, II, and IV violate his Constitutional protection against Double Punishment and Double Jeopardy . III. [T]he jury was erroneously instructed as to the range of punishment for Trafficking methamphetamine in excess of 200 grams. IV. Prosecutorial misconduct . . . V. The trial court committed fundamental error by failing to instruct the jury on the lesser-related offense . . . [thereby] violat[ing] Appellant's right to due process and a fair trial . . . VI. The trial court committed fundamental error by not instructing the jury that Appellant would be ineligible for good time credits. VII The jury [was not instructed] that Appellant would receive [the extra] punishment of methamphetamine registration if found guilty. VII. . . . [I]neffective counsel. IX. [Excessive sentence, and] X. [A]ll of the errors addressed [have a cumulative effect that deprived] Appellant of a fair trial.").

reviewed each of these propositions in accordance with its proper standard of review.

a. Proposition I

Regarding Appellant's contention of insufficient evidence for his conviction, the Court reviewed his challenge "in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt."[36] The Court noted that "[e]ach of the offenses Appellant was convicted of [requires] an element of knowing and intentional possession."[37] Because proof of knowledge in order to convict a defendant of possession "can be and usually is circumstantial[,]" Appellant's argument that "his mere proximity to the bag of drugs" was insufficient evidence to convict him of possession did not hold up.[38] The Court stated that the evidence "supports the inference that Appellant knew the bag of drugs was under the front passenger seat where he had been sitting, next to the very visible tool bag."[39] The Court ultimately held that "any rational trier of fact could have found beyond a reasonable doubt that Appellant knowingly and intentionally committed the charged crimes. . . . [as the evidence] shows much more than [Appellant's] mere proximity to the drugs," due to his multiple attempts to retrieve the bag from the truck.[40]

b. Proposition II

The Court reviewed for plain error Appellant's second proposition regarding double jeopardy, meaning that the Court needed to determine "whether Appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights."[41] The Court found that Appellant's convictions were not barred by the statutory prohibition

36. *Id.* ¶ 7, 431 P.3d at 992 (citing Davis v. State, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111).

37. *Id.* ¶ 8, 431 P.3d at 992 ("*See* 63 O.S.Supp.2014 § 2-415 (Trafficking); 63 O.S.Supp.2012, § 2-402 (Possession of a Controlled Dangerous Substances); 63 O.S.2011 § 2-405 (Unlawful Possession of Paraphernalia) and 59 O.S.2011 § 353.24(7) (Possession of a Dangerous Drug Without a Prescription.").

38. *Id.* (citing Johnson v. State*,* 1988 OK CR 246, ¶ 6, 764 P.2d 530, 532).

39. *Id.* ¶ 10, 431 P.3d at 992.

40. *Id.*

41. *Id.* ¶ 11, 431 P.3d at 992. *See also Plain Error,* BLACK'S LAW DICTIONARY (5th ed. 2016).

against double jeopardy because he was "convicted of violating three separate statutes."[42] Accordingly, each statute has different elements that must be met in order for a defendant to be convicted.[43] The Court noted that "each offense required proof of a fact which the other did not, and given the differences between the statutes involved, we find no legislative intent to treat the offenses as parts of a single criminal transaction."[44] The Court then used *Blockburger v. United States*, a traditional double jeopardy analysis, to solidify its holding that "[a]ppellant's convictions were for three separate and distinct offenses requiring dissimilar proof."[45] The Court found no error; therefore, no plain error.[46]

c. Proposition III

Again, the Court reviewed Appellant's proposition regarding the jury instructions on the range of punishment for plain error.[47] The Court held that the State properly relied on all six of Appellant's previous convictions (both drug and non-drug related offenses) to enhance his sentence under the Habitual Offender Act.[48] While the Habitual Offender Act itself does not impose a fine in addition to imprisonment, the Court treated this as a classic *dog didn't bark* scenario, in that "there is no indication . . . that the absence of any language regarding fines is to be interpreted as a prohibition against the imposition of fines."[49] The substantive trafficking statute has been amended since *Coates v. State* "to provide that the term of imprisonment imposed for Trafficking shall be 'in addition to any fines'

42. *Bivens*, ¶ 12, 431 P.3d at 992. *See also* OKLA. STAT. tit. 21, § 11(A) (2011).
43. *Bivens*, ¶ 12, 431 P.3d at 992.
44. *Id.*
45. *Id.* ¶ 13, 431 P.3d at 992-93 (citing Logsdon v. State, 2010 OK CR 7, ¶ 19, 231 P.3d 1156, 1165; Blockburger v. United States, 284 U.S. 299, 304 (1932)).
46. *Id.*
47. *Id.* ¶ 14, 431 P.3d at 993 (citing Watts v. State, 2008 OK CR 27, ¶ 9, 194 P.3d 133, 136-37).
48. *Id.* ¶ 15, 431 P.3d at 993 (citing OKLA. STAT. tit. 21, § 51.1 (2011 & Supp. 2018). *See also* McIntosh v. State, 2010 OK CR 17, ¶ 9, 237 P.3d 800, 803 ("[w]hen the two year sentence provided by § 2-401(B)(2) is doubled under § 2-415(D), as required for a trafficking offense, and then tripled under 21 O.S.Supp.2002, § 51.1(C) for McIntosh's three prior felony convictions, the correct minimum sentence in McIntosh's case should have been twelve years").
49. *Id.* ¶ 17, 431 P.3d at 993. *See also* Arthur Conan Doyle, *The Adventure of Silver Blaze: The Memoirs of Sherlock Holmes* 3 (1892). ("The dog did nothing in the nighttime. That is the curious incident.").

specified by subsection 2-415(D)."[50] Accordingly, the Court overruled *Coates*, reasoning that "[s]tatutory amendments enacted since *Coates* have rendered unworkable *Coates* and predecessors."[51] The Court held there was no error in the trial court's instruction when the underlying substantive statute states that the fine "shall be imposed in addition to other punishment provided by law."[52]

d. Proposition IV

Appellant's Proposition IV alleged prosecutorial misconduct.[53] The court "evaluate[s] alleged prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant."[54] Here, the Court stated that it would "reverse the judgment or modify the sentence only where grossly improper and unwarranted argument affects a defendant's rights."[55] However, the Court found that the prosecutor's conduct did not affect Appellant's right to a fair trial, nor did it shift the burden of proof or misstate the law of drug possession and drug trafficking.[56] No plain error was found.[57]

e. Proposition V

The Court again reviewed this proposition regarding the trial court's failure to instruct the jury on the lesser included or related offense for plain error.[58] Using a two-part test, the Court first determined whether Appellant's crime constituted a lesser included offense.[59] However, the Court did not complete the second part of the test after determining that

50. *Bivens,* ¶ 17, 431 P.3d at 993. *See also* Coates v. State, 2006 OK CR 24, ¶ 6, 137 P.3d 682, 685, *overruled by Bivens*, ¶ 4, 431 P.3d at 991; OKLA. STAT. tit. 63, § 2-415 (D)(2011 & Supp. 2018).
51. *Bivens,* ¶ 17, 431 P.3d at 993.
52. *Id.* ¶ 19, 431 P.3d at 994.
53. *Id.* ¶ 20, 431 P.3d at 994.
54. *Id.* ¶ 21, 431 P.3d at 994.
55. *Id.* (citing Sanders v. State, 2015 OK CR 11, ¶ 21, 358 P.3d 280, 286).
56. *Id.* ¶¶ 21-22, 431 P.3d at 994.
57. *Id.* ¶ 22, 431 P.3d at 994.
58. *Id.* ¶ 23, 431 P.3d at 994 (citing Daniels v. State, 2016 OK CR 2, ¶ 3, 369 P.3d 381, 383).
59. *Id.* ¶ 24, 431 P.3d at 994 (citing Davis v. State, 2011 OK CR 29, ¶ 101, 268 P.3d 86, 115). *See also* Shrum v. State, 1999 OK CR 41, ¶ 7, 991 P.2d 1032, 1035.

Appellant failed to meet the first part of the test, as "Possession with Intent to Distribute is not a legally recognized lesser included or lesser related offense to the crime of Trafficking."[60] Both of the concurrences to the majority's opinion concern the Court's reasoning used in deciding this proposition.[61] Judge Hudson and Judge Kuehn opine that precedent supports use of the *evidence test*, and that Possession with Intent to Distribute is a related offense.[62]

f. Proposition VI

Appellant raised this proposition regarding the trial court's failure to instruct the jury on Appellant's institutional earned credits.[63] The Court used its reasoning in *Watts v. State* stating, there was "no plain error in the omission of an instruction on the defendant's ineligibility for some institutional earned credits to reduce his prison sentence as such an instruction would introduce highly speculative factors into jury sentencing decisions."[64]

g. Proposition VII

Regarding registration as a methamphetamine offender, the Court stated that the "Methamphetamine Registry Act is a regulatory scheme that is entirely separate and distinct from the applicable punishment range."[65] Using the reasoning from *Reed v. State*, in which the Court held that "a jury instruction on the Sex Offender Registration Act is not required," the Court held in *Bivens* that trial courts do not have a duty to instruct the jury about the required methamphetamine registration if convicted.[66] Additionally, "registration pursuant to [the] Oklahoma Methamphetamine Act is not a material consequence of sentencing and is a collateral matter outside the jury's purview."[67] The Court found no plain error regarding

60. *Bivens*, ¶ 24, 431 P.3d at 995 (citing Dufries v. State, 2006 OK CR 13, ¶ 20, 133 P.3d 887, 891).
61. *Compare id.* ¶ 1, 431 P.3d at 996-97 (Hudson, J., concurring), *with id.* ¶ 1, 431 P.3d at 997 (Kuehn, J., concurring).
62. *Id.*
63. *Id.* ¶ 25, 431 P.3d at 995.
64. *Id.*
65. *Id.* ¶ 30, 431 P.3d at 995 (citing Reed v. State, 2016 OK CR 10, ¶ 17, 373 P.3d 118, 123).
66. *Id.* ¶ 29, 431 P.3d at 995.
67. *Id.* ¶ 31, 431 P.3d at 995.

this proposition.[68]

h. Proposition VIII

When claiming *ineffective assistance of counsel*, Appellant must have shown both "deficient performance and prejudice."[69] In order to do so, Appellant had to overcome the presumption that counsel's conduct constituted sound trial strategy, and show that "but for counsel's unprofessional errors," there was a reasonable probability that the result would have been different.[70] However, this Court held that even if Appellant's counsel would have objected to the alleged errors at trial, the objections would have been overruled anyway; therefore, Appellant was not denied effective assistance of counsel.[71] This Court thoroughly reviewed the allegations under the plain error standard.[72]

i. Proposition IX

Citing *Rackley v. State,* the Court reasoned that "the question of excessiveness of punishment must be determined by a study of all the facts and circumstances of each case."[73] Ultimately, the sentence will not be disturbed by the appellate court if the punishment is compliant with the statute Appellant has been convicted of violating unless, considering all the facts and circumstances of the case, "it is so excessive as to shock the conscience of the court."[74] Here, the Court held that Appellant's 50-year sentence "is not so excessive as to shock the conscience of the court," considering the facts and circumstances surrounding it.[75]

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68. *Id.*
69. *Id.* ¶ 32, 431 P.3d at 996 (citing Goode v. State, 2010 OK CR 10, ¶ 81, 236 P.3d 671, 686).
70. *Id.* (citing Goode v. State, 2010 OK CR 10, ¶¶ 81-82, 236 P.3d 671, 686).
71. *Id.* ¶ 33, 431 P.3d at 996 (citing Eizember v. State, 2007 OK CR 29, ¶ 155, 164 P.3d 208, 244).
72. *Id.*
73. *Id.* ¶ 34, 431 P.3d at 996 (citing Rackley v. State, 1991 OK CR 70, ¶ 7, 814 P.2d 1048, 1050).
74. *Id.* (citing Pullen v. State, 2016 OK CR 18, ¶ 16, 387 P.3d 922, 928).
75. *Id.*

j. Proposition X

Lastly, Appellant asked the Court to consider the accumulation of errors listed above that denied him a fair trial.[76] However, "[t]his Court has held that a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant," as was the case here.[77]

IV. ANALYSIS

Proposition X, the last proposition raised by Appellant, was the most easily dismissed by the Court, but perhaps the most noteworthy. In two sentences, the Court disposed of the central idea of Appellant's argument and magnified the hurdles one has to jump when appealing a judgment of a lower court based on the theory of a violation of due process. As mentioned, the Court cited precedent for dismissing Proposition X, noting that "a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant."[78] Though the Court's reason for its conclusion on Proposition X may stand, it is worth analyzing some of the most controversial propositions in this case.[79] The Court was correct regarding its decision to uphold Appellant's conviction, but there is a bigger picture we can glean from *Bivens*: the nitty gritty of due process.

A. Effective Assistance of Counsel: An Implicit Due Process Guarantee

It seems appropriate to begin with this proposition, as Appellant's counsel's failure to object at trial affected this Court's standard of review for Propositions II, III, IV, V, VI, and VII.[80] Even so, this Court held that Appellant's counsel was not ineffective, as "trial counsel will not be found ineffective for failing to raise objections which would have been overruled."[81] The Supreme Court recognizes that the Sixth Amendment guarantees the right to assistance of effective counsel because "it envisions counsel's playing a role that is critical to the ability of the adversarial

76. *Id.* ¶ 35, 431 P.3d at 996.
77. *Id.* (citing Engles v. State, 2015 OK CR 17, ¶ 13, 366 P.3d 311, 315; Lott v. State, 2004 OK CR 27, ¶ 166, 98 P.3d 318, 357).
78. *Id.* (citing *Engles*, ¶ 13, 366 P.3d at 315; *Lott,* ¶ 166, 98 P.3d at 357).
79. *Id.*
80. *Id.* ¶ 33, 431 P.3d at 996.
81. *Id.* (citing Eizember v. State, 2007 OK CR 29, ¶ 155, 164 P.3d 208, 244).

system to produce just results."[82] Additionally, a defendant's right to effective counsel is of the highest importance because his attorney "directly affects [his] ability to assert and protect those rights."[83]

In order to analyze actual ineffective assistance of counsel claims, Oklahoma adopted the two-prong test set forth by the Supreme Court in *Strickland v. Washington*.[84] *Strickland* requires that "Appellant must show both deficient performance and prejudice" to prove that his counsel was ineffective.[85] As proving prejudice is a higher bar for defendants to meet, 43.3% of courts dispose of these claims on the prejudice prong,[86] "thus avoiding the performance prong altogether."[87] The *Bivens* Court took this route on Proposition VIII.[88] Some critics and professionals call for the use of new tests rather than using the *Strickland* test. It is worth noting that Appellant might have succeeded on this claim had the test evolved into one fashioned more like a checklist for the defense attorney,[89] including requiring "timely objections that further the defendant's interests."[90] As mentioned, this Court was bound by precedent because Oklahoma already adopted *Strickland's* two-prong test.[91] However, there is a bigger issue that *Bivens* introduces: the success rates of ineffective assistance of counsel claims using the *Strickland* test; the question of whether the *Strickland* test really is the best option for upholding the Sixth Amendment's guarantee

82. Martin C. Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard For Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 415 (1988).

83. *Id*. (citing Kimmelman v. Morrison, 477 U.S. 365, 377 (1986)).

84. Goode v. State, 2010 OK CR 10, ¶ 81, 236 P.3d 671, 686 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

85. *Id.*

86. Calhoun, *supra* note 82, at 455.

87. *Id.* at 416.

88. Bivens v. State, 33 OK CR 2018, ¶ 33, 431 P.3d 985, 996 ("Appellant has failed to show how he was prejudiced by counsel's omissions").

89. Calhoun, *supra* note 82, at 417 ("The proposed test would address two different situations: (1) When a petitioner proves that counsel failed to substantially satisfy one of the basic components of effective representation as established by the Court, prejudice would be presumed and relief granted unless the government could show from the record that counsel's omission either was 'justified' or was 'insubstantial'; and (2) when a petitioner alleges that the representation, although including all of these necessary components, was nonetheless ineffective under the special circumstances of a particular case, relief would be granted only if the petitioner's proof satisfied the more rigorous, two-prong *Strickland* test.").

90. *Id*. at 439.

91. *Bivens*, ¶ 32, 431 P.3d at 996.

of a general right to counsel; and the implicit right of effective assistance of counsel.[92] After all, what good is it to ensure that all defendants are guaranteed the assistance of counsel if that counsel might actually hinder a defendant's case, rather than help it?

B. Double Jeopardy and its Roots of Statutory Construction

"When the government wants to impose exceptionally harsh punishment on a criminal defendant, one of the ways it accomplishes this goal is to divide the defendant's single course of conduct into multiple offenses that give rise to multiple punishments."[93] Again, *Bivens* has presented an opportunity to think critically about due process and the social policy behind it. Appellant contended that his convictions for Counts I, II, and IV were barred by the statutory prohibition against double punishment and the constitutional protection against double jeopardy, though the Court did not agree.[94] The *Blockburger* test asks whether "[e]ach of the offenses created requires proof of a different element."[95] The Court went on to say that "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[96] Appellant pointed out in his brief that "th[is] Court reviews the relationship between the crimes to determine whether more than one conviction and sentence truly arose out of one act."[97] As mentioned, all three controlled substances were discovered in a single nylon bag, indicating simultaneous possession, or "one act" as Appellant

92. Calhoun, *supra* note 82, at 418.

93. John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955, 1955 (2015).

94. *Bivens*, ¶ 2, 431 P.3d at 990 ("Appellant's separate convictions for Possession of a Controlled Dangerous Substance in Counts I, II, and IV violate his constitutional protection against Double Punishment and Double Jeopardy."). *See also* Brown v. Ohio, 432 U.S. 161, 164 (1977) ("The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth [Amendment], provides that no person shall, 'be subject for the same offence to be twice put in jeopardy of life or limb.'"); *Bivens*, ¶ 13, 431 P.3d at 992.

95. Blockburger v. United States, 284 U.S. 299, 304 (1932).

96. *Id.*

97. Brief for Appellant at 14, Bivens v. State, 2018 OK CR 33, 431 P.3d 985 (No. F-2017-259), 2017 (citing Davis v. State, 1999 OK CR 48, 993 P.2d 124, 127).

urged the Court.[98] Appellant argued that "the wording of the substantive portion of each section makes it a singular offense to possess a controlled drug, regardless of the type or number of prohibited controlled drug substances."[99] However, as the *Blockburger* test requires, determinations of double jeopardy are often matters of statutory construction.[100] Even though there may be evidentiary overlap between the statutes, the *Blockburger* test can still be satisfied.[101] Because the Court was able to show that Appellant violated three distinct statutes, and there was no concern of a hybrid statute in this case that punishes two crimes in relation to one another, the Court properly decided this issue.[102]

However, there is a broader conversation surrounding courts' interpretations of drug trafficking and possession statutes. "The Double Jeopardy clause was originally supposed to prevent the risk of multiple punishments for the same offense. The Court now holds that legislatures are utterly free to impose multiple punishments for the same offense if they wish to do so."[103] Although we have the *Blockburger* test that seems clear cut, the problem arises when "[p]rosecutors who [wish] to increase an offender's punishment [can] not only divide a single course of conduct into multiple temporal units, but also [can] prosecute that conduct under multiple overlapping statutes," as in *Bivens*.[104] The ability to prosecute one act under those overlapping statutes walks a fine line between affording due process to defendants and keeping nonviolent defendants behind bars for the maximum amount of time, contributing to over-criminalization and rising prison populations.[105]

C. Instruction on a Lesser Included or Related Offense: Which Test?

As both of the concurrences to the majority's opinion critiqued Judge Lumpkin's use of the *elements test* to reach a decision on this proposition, it seemed necessary to expand on this proposition to illustrate the use of precedent as an essential implicit element of due process.[106]

98. *Id.* at 15.
99. *Id.* at 16 (citing Watkins v. State, 1991 OK CR 119, 829 P.2d 42, 43).
100. Stinneford, *supra* note 93, at 1969.
101. 34 GEO. L.J. ANN. REV. CRIM. PROC. 424 (2005).
102. *Id.* at 1971.
103. *Id.* at 2010.
104. *Id.* at 2019.
105. *Id.* at 2026.
106. *See generally* Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459

Judge Lumpkin opined that "[t]he proper test for determining whether instructions on a lesser related or lesser included offense are required involves a two part analysis which first requires courts to make a legal determination about whether a crime constitutes a lesser included offense of the charged crime."[107] As a result, Judge Lumpkin held that Appellant failed to meet the first part of this test, as "Intent to Distribute is not a legally recognized lesser included or lesser related offense to the crime of Trafficking."[108]

While it is true that the elements of Intent to Distribute are not necessarily included in Trafficking, Judge Hudson suggested that the *elements test* was not the test that this Court adopted in *Shrum v. State*.[109] Rather, Judge Hudson reminded us that this Court decided in *Shrum* that the *evidence test* was the most appropriate to use for future cases.[110] Here, Judge Lumpkin did not overrule or attempt to overrule *Shrum*; rather, he overlooked the *Shrum* decision or chose to use another test. Either way, Judge Lumpkin's choice to use the *elements test* to determine whether an instruction on a lesser included or related offense did not comply with the doctrine of stare decisis. This Court's decision in *Shrum* to adopt the *evidence test* established precedent that should have been followed by this Court in *Bivens*.[111]

Accordingly, Judge Hudson's analysis using the *evidence test* resulted in the same outcome on Appellant's fifth proposition, as there was "uncontroverted evidence that Appellant possessed in excess of 200 grams of methamphetamine, [and] no rational trier of fact could have rejected the evidence and convicted him of the lesser related offense."[112]

Judge Kuehn's concurrence asserted a similar opinion, but she suggested that Possession with Intent to Distribute is a lesser related offense, and the proper test for whether lesser related offense instructions are warranted is "whether any rational juror could have rejected evidence

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(2013).

107. Bivens v. State 2018 OK CR 33, ¶ 24, 431 P.3d 985, 994 (citing Davis v. State, 2011 OK CR 29, ¶ 101, 268 P.3d 86, 115).

108. *Id.* ¶ 24, 431 P.3d at 994-95 (citing Dufries v. State, 2006 OK CR 13, ¶ 20, 133 P.3d 887, 891).

109. *Id.* ¶ 1, 431 P.3d at 997 (Hudson, J., concurring) (citing Shrum v. State, 1999 OK CR 41, ¶ 10, 991 P.2d 1032, 1036).

110. *Id.* (citing *Shrum*, ¶ 10, 991 P.2d at 1036).

111. *Shrum*, ¶ 10, 991 P.2d at 1036 ("[W]e find the better approach is to use the evidence test to determine what constitutes a lesser included offense of any charged crime.").

112. *Bivens*, ¶ 2, 431 P.3d at 997 (Hudson, J., concurring). *See also* OKLA. STAT. tit. 63, § 2-415 (2011 & Supp. 2018).

that distinguishes the greater crime from the lesser."[113] Agreeing with Judge Lumpkin and Judge Hudson, she held that here, no rational trier of fact could have disregarded the evidence that the quantity of methamphetamine "exceeded the threshold for Trafficking."[114]

On appeal, Appellant correctly relied on the *evidence test* as previously adopted by this Court, rather than the *elements test* used by the majority.[115] The word "correctly" is used to describe Appellant's reliance on the *evidence test* because courts should follow precedent in order to "protect the legitimate reliance interests of the public."[116] "Otherwise, judicial opinions lose their predictive power, and we would be justified in discounting them in deciding how to act."[117] While an instruction on a lesser included or related offense might have been denied regardless of the test used by the Court, a simple choice like using a test that was not established through precedent can slowly encroach on the due process rights of appellants and their right to a fair trial. Appellant relied on precedent in his brief and should have been granted the courtesy of the same on appeal.

V. CONCLUSION

This Court ultimately reached the correct decision. However, this Comment aims to shed light on some areas that are established processes followed by this Court that might not always be "due," but can be improved by using common sense and digging deeper. Many defendants are in the same situation as Appellant, either their attorney failed to object or made some other simple mistake that significantly affected the appeal process, but wasn't enough to show prejudice. Many non-violent drug traffickers are behind bars for life because they were convicted under multiple, substantively overlapping statutes. Many defendants do not get an instruction on a lesser included or lesser related offense because the court might have decided that an instruction was not warranted by using the wrong test. On its face, most of these issues do not raise a due process

113. *Id.* ¶ 1, 431 P.3d at 997 (Kuehn, J., concurring) (citing McHam v. State, 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670).
114. *Id.*
115. Brief for Appellant at 31, Bivens v. State, 33 OK CR 2018, 431 P.3d 985 (No. F-2017-259), 2017 (citing *Shrum*, 1994 OK CR 41, 991 P.2d 1032).
116. Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GEO. L. REV. 1035, 1054 (2013).
117. *Id.*

concern that can be explicitly found in the Fifth, Sixth, or Fourteenth Amendments. However, it is worth considering how the Court's treatment of each of the propositions raised by Appellant is a microcosm of the broader and more traditional picture of due process, as Proposition X suggests.