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Multiple Convictions for Single Acts of Possession - The Eighth Circuit Finally Gets It Right

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Multiple Convictions for Single Acts of Possession — The Eighth Circuit Finally Gets It Right

United States v. Richardson[1]

I. INTRODUCTION

Until the recent decision in *United States v. Richardson*, the Eighth Circuit was the only circuit in the United States to permit multiple convictions for single acts of possessing a firearm or ammunition.[2] This Note will explore the rationale and the ramifications of this decision and illustrate that, while it took the Eighth Circuit longer than it should have, this shift represents a step toward the realization of a more just and satisfactory criminal justice system, where convictions are based not on conjecture and speculation, but on practical interpretations of legislative intent.

II. FACTS AND HOLDING

On September 18, 2002, at about 10:00 a.m., two Minneapolis Police officers, Corporal Francisco Javier Porras and Officer Laura Hanks, were driving around a neighborhood in North Minneapolis when they noticed three men huddled together on a corner about a block away.[3] As the officers approached, the three men split up, and the officers followed Earnest Jesse Richardson, who repeatedly looked back toward the squad car as he walked down the street.[4] After realizing that the officers were following him, Richardson made his way up the front steps of a nearby house and knocked on the door.[5] Upon seeing this, the officers pulled over and stopped, and Offi-

1. 439 F.3d 421 (8th Cir. 2006) (en banc) (per curiam). This Note will refer to two different *Richardson* opinions, both decided by the Eighth Circuit. The first one is the panel decision, U.S. v. Richardson, 427 F.3d 1128 (8th Cir. 2005), which was later vacated, in part, by the decision in U.S. v. Richardson, 439 F.3d 421 (8th Cir. 2006) (en banc) (per curiam).

2. *Richardson*, 439 F.3d at 422-23.

3. The majority of these facts are taken from the panel decision. U.S. v. Richardson, 427 F.3d 1128, 1130 (8th Cir. 2005), *vacated in part by* U.S. v. Richardson, 439 F.3d 421 (8th Cir. 2006). The officers were driving in a marked squad car. *Id.* They were patrolling the Fourth Precinct, the city's most violent neighborhood. Brief for Appellee at 3, U.S. v. Richardson, 427 F.3d 1128 (8th Cir. 2005). Approximately eighty percent of the crimes in the precinct involved illegal drugs. *Id.* at 3.

4. Brief for Appellee, *supra* note 3, at 3. Richardson was wearing a "bright red shirt." Brief for Appellant at 4, U.S. v. Richardson, 427 F.3d 1128 (8th Cir. 2005).

5. *Richardson*, 427 F.3d at 1130.

cer Hanks asked Richardson if he knew who owned the house.[6] Despite knowing who lived in the house, Richardson answered by telling the officers that he had not done anything wrong.[7] Then, Richardson walked down the front steps of the house, at which point Corporal Porras asked whether the officers could talk to him.[8] Richardson responded, "No way, man," and sprinted into the alley between the houses.[9]

After being chased around the block, Richardson surrendered to the officers and was placed in the back of the squad car.[10] The officers then searched the alley and found a .22 caliber revolver and Richardson's wallet, which contained crack cocaine.[11] While sitting in the squad car, Richardson allegedly told the officers, without prompting, that the drugs were his, but not the firearm.[12]

On March 11, 2003, a federal grand jury issued a two-count indictment under 18 U.S.C. § 922,[13] charging Richardson with being a felon in possession of a firearm and also with being a drug user or addict in possession of a firearm.[14] Richardson moved to suppress the evidence and the statement, claiming that the police had seized him illegally. The district court denied the

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6. *Id.* The owner of the house was Ronnaye Riggins, a check cashing investigator for Twin City Federal Savings and Loan, and one of Richardson's family friends. Brief for Appellant, *supra* note 4, at 5. Corporal Porras thought that an Asian family lived at the home. *Id.*

7. *Richardson*, 427 F.3d at 1130.

8. Brief for Appellant, *supra* note 4, at 6. Thinking that an Asian family lived in the home, Corporal Porras thought that Richardson's behavior was suspicious. *Id.* at 5-6.

9. *Id.* at 6.

10. *Richardson*, 427 F.3d at 1130. While chasing Richardson, Corporal Porras wrecked the squad car into a retaining wall. Brief for Appellant, *supra* note 4, at 7.

11. Brief for Appellant, *supra* note 4, at 7-8. The revolver was loaded, and it had been stolen, apparently by Richardson. Brief for Appellee, *supra* note 3, at 2. Richardson's left ring fingerprint was found on the revolver. *Richardson*, 427 F.3d at 1131.

12. *Richardson*, 427 F.3d at 1130. At this time, Richardson had not received a *Miranda* warning. *Id. See* Miranda v. Ariz., 384 U.S. 436 (1966). The next morning, Richardson met with Sergeant Granroos at the Hennepin County Jail, who informed Richardson of his *Miranda* rights, which Richardson waived. Brief for Appellant, *supra* note 4, at 9. During this interview, Richardson again told the officers that he was responsible for the drugs, but not the gun. *Richardson*, 427 F.3d at 1131.

13. 18 U.S.C. § 922 states, in part, that it "shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" or anyone "who is an unlawful user of or addicted to any controlled substance . . . [to possess] any firearm or ammunition." 18 U.S.C. § 922(g)(1), (3) (2000). See *infra* Section III.A for a discussion of § 922.

14. *Richardson*, 427 F.3d at 1131. The state also charged Richardson, who claimed that his seizure was illegal and that the subsequently acquired evidence should have been suppressed. *Id.* The state district court agreed, and on February 4, 2003, granted his motion to suppress. *Id.*

motions,[15] and ultimately, the jury convicted on both counts.[16] On September 27, 2004, the district court "sentenced Richardson to 103 months on each count, to be served concurrently, with three years [of] supervised release, and a . . . special assessment of $100 for each count."[17]

Richardson filed an appeal, in which he made several claims.[18] First, Richardson argued that, because he was illegally seized by the police, all of the subsequently acquired evidence should have been suppressed, including the statements he made while in custody.[19] Richardson also claimed that evidence regarding his failure to meet his release conditions was irrelevant, and that it should not have been presented to the jury.[20] Finally, Richardson argued that, for purposes of sentencing, his status as a drug abuser and his status as a felon should have been merged, and that, because of the Supreme Court's recent decision in *United States v. Booker*,[21] his case should have been remanded for resentencing.[22]

On November 4, 2005, an Eighth Circuit panel affirmed the district court's decision, concluding that Richardson's seizure was not illegal, that the evidence pertaining to his release conditions was relevant, and that, in light of Eighth Circuit precedent, Richardson's sentencing was correct.[23] After partially vacating the panel decision, the Eighth Circuit granted *en banc* review, and on March 2, 2006, the court held that, based on a single act of possession, Richardson could not be convicted and punished for being both a felon in possession of a firearm and a drug user in possession of a firearm.[24]

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15. *Id.* The federal magistrate judge rejected Richardson's contention that the court should have been bound by the earlier state court decision to suppress the evidence. *Id.* At trial, Richardson admitted to being a felon, but he did not admit to being a drug user or an addict. *Id.*

16. *Id.* Two weeks after the district court issued its ruling, Richardson failed to show up for a mandatory drug test, which had been a condition of his pretrial release. *Id.* On July 21, 2003, he failed to appear for his trial, and a warrant was issued for his arrest. *Id.* Additionally, after being stopped for making a wrong turn down a one-way street on December 10, 2003, Richardson was found carrying crack cocaine and a crack pipe. *Id.*

17. *Id.* Richardson argued that the sentencing guidelines were unconstitutional, but the district court determined that Richardson had a criminal history category of V and that his total offense level was 24. *Id.* These determinations resulted in a sentence ranging from 92 to 115 months. *Id.*

18. Brief for Appellant, *supra* note 4, at 4.

19. *Richardson*, 427 F.3d at 1131.

20. *Id.* For a discussion of Richardson's failure to meet these conditions, see *supra* note 16.

21. 543 U.S. 220 (2005).

22. *Richardson*, 427 F.3d at 1131. In addition to these claims, Richardson argued that the four different defense attorneys who had represented him throughout these proceedings were collectively ineffective. *Id.* at 1133.

23. *Id.* at 1134.

24. U.S. v. Richardson, 439 F.3d 421 (8th Cir. 2006) (en banc) (per curiam).

III. LEGAL BACKGROUND

The *Richardson* decisions revolve around 18 U.S.C. § 922, a relatively narrow, but far-reaching, body of federal criminal law centered on controlling public access to firearms. In an effort to frame the discussion in the *Richardson* decisions, this section will begin by exploring the foundations and purposes of § 922. Then, the section will delve into two of criminal law's most important cases, *Blockburger v. United States*,[25] and *Bell v. United States*.[26] After outlining the Supreme Court's tests resulting from these opinions, this section will conclude by discussing the case law surrounding and leading up to the recent *Richardson* decision.

A. 18 U.S.C. § 922

In 1968, following the assassinations of Martin Luther King, Jr. and Robert Kennedy, Congress enacted § 922 in a "major effort . . . to curb [the] growing use of firearms in violent crimes [and restrict] public access to firearms."[27] According to gun control scholar Franklin Zimring, the three major objectives of § 922 were to eliminate interstate traffic in firearms and ammunition, deny certain groups[28] access to firearms, and end the importation of all surplus military firearms.[29]

In addition to placing restrictions on firearms dealers, the Act "imposed restrictions on who could legally receive or possess firearms."[30] Specifically, the Act states that it shall be unlawful for any person –

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25. 284 U.S. 299 (1932).

26. 349 U.S. 81 (1955).

27. Lynn Murtha & Suzanne Smith, *"An Ounce of Prevention . . .": Restriction Versus Proaction in American Gun Violence Policies*, 10 ST. JOHN'S J. LEGAL COMMENT. 205, 211 (1994) (footnote omitted). Also known as the Gun Control Act of 1968 (the "Act"), § 922 has "formed the legal core of national gun policy in the United States" for over three decades. William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79, 79 (1999). According to Vizzard, the "preamble to the [Act] defined its purpose as providing support to state efforts at firearm regulation without placing a burden on legitimate firearm users." *Id.* at 89.

28. *See generally* 18 U.S.C. § 922(d)(1)-(9), (g)(1)-(9) (2000).

29. Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 149 (1975). *See also* Huddleston v. U.S., 415 U.S. 814, 824 (1974) ("The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.").

30. Richard J. Durbin, *Taking Guns Seriously: Common Sense Gun Control to Keep Guns Out of the Hands of Kids and Criminals*, 18 ST. LOUIS U. PUB. L. REV 1, 3, (1999). The Act "provided a more effective licensing system for firearms," and it also "restricted transactions involving rifles and shotguns." Murtha & Smith, *supra* note 27, at 211.

> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
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> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to any controlled substance . . . ;
>
> (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
>
> (5) who, being an alien – (A) is illegally or unlawfully in the United States; or (B) . . . has been admitted . . . under a nonimmigrant visa . . . ;
>
> (6) who has been [dishonorably] discharged from the Armed Forces . . . ;
>
> (7) who . . . has renounced his [United States] citizenship;
>
> (8) who is subject to a court order [restraining him or her from harassing or threatening an intimate partner or child] or
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence,
>
> to *ship* or *transport* in interstate or foreign commerce, or *possess* in or affecting commerce, any firearm or ammunition; or to *receive* any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.[31]

As asserted by the United States Supreme Court, these "potentially irresponsible persons" are "comprehensively barred" from acquiring, shipping or transporting any firearm in interstate commerce.[32]

This seemingly simple mandate, however, has resulted in an inconsistent and unpredictable body of case law, as evidenced by the cases leading up to *Richardson*.[33] At base, these disagreements stem from competing applications

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31. 18 U.S.C. § 922(g) (emphasis added). Section 922(d) states that it "shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person" meets any of the § 922(g) characteristics. *Id.* § 922(d)(1)-(9).

32. Barrett v. U.S., 423 U.S. 212, 218 (1976).

33. See *infra* Section III.D for a discussion of the case law leading up to *Richardson*.

of two of criminal law's most puzzling tests: the "same elements"[34] test from *Blockburger* and the "unit of prosecution"[35] test from *Bell.*

B. Blockburger*'s "Same Elements" Test*

In *Blockburger v. United States*,[36] after being charged with violating several provisions of the Harrison Narcotic Act,[37] the defendant was sentenced to five years imprisonment and required to pay a fine of $2,000 on each count.[38] The Seventh Circuit Court of Appeals affirmed the decision, and Blockburger appealed to the Supreme Court, contending that the second and third counts should have constituted a single offense, and similarly, that the "sale charged in the third count . . . and the same sale charged in the fifth count" constituted a single offense, for which only a single penalty could be imposed.[39]

Ultimately, the Supreme Court affirmed the appellate court's decision.[40] As to Blockburger's first argument, the Court stated that the test is to determine whether the *individual acts* are prohibited, or whether the *entire course of action* is prohibited.[41] Because the Narcotic Act penalized *any* sale not satisfying certain requirements, the Court held that the second and third counts constituted individual offenses.[42]

In analyzing Blockburger's second argument, the Court began by stating that the Narcotic Act created two distinct offenses, one for selling the forbidden drugs except in an original stamped package, and the other for selling the drugs "not in pursuance of a written order of the person to whom the drug is sold."[43] Further, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether

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34. Blockburger v. U.S., 284 U.S. 299, 304 (1932).

35. Bell v. U.S., 349 U.S. 81, 81 (1955).

36. 284 U.S. 299 (1932).

37. 26 U.S.C. § 692 (1914).

38. *Blockburger*, 284 U.S. at 300-01. The indictment contained five counts, and the jury found the man guilty on the second, third, and fifth counts. *Id.* The second count charged Blockburger with selling ten grains of morphine hydrochloride "on a specified day." *Id.* at 301. The third count charged a sale "on the following day" of several grains of the drug, and the fifth count charged this "latter sale . . . as having been made not in pursuance of a written order . . . as required by the statute." *Id.*

39. *Id.* at 299, 301.

40. *Id.* at 305.

41. *Id.* at 302. According to the Court, if the individual acts are prohibited, then each act is punishable separately, but if the course of action is prohibited, then only one penalty is proper. *Id.*

42. *Id.* These sales, "although made to the same person, were distinct and separate sales made at different times." *Id.* at 301.

43. *Id.* at 303-04. According to the Court, each of these offenses required "proof of a different element." *Id.* at 304.

there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."[44] Applying this "same elements" test, as it came to be known, the Court concluded that two separate offenses were committed because each offense required proof of additional facts.[45]

As evidenced by the case law surrounding *Richardson*, the *Blockburger* test has proven to be a difficult one for courts to apply, especially in light of the Supreme Court's decision in another criminal case, *Bell v. United States*.[46]

C. Bell's *"Unit of Prosecution" Test*

In *Bell*, the defendant pled guilty to two violations of the Mann Act,[47] which prohibited the transportation of women across state lines for purposes of prostitution, debauchery, or other immoral purposes.[48] He was sentenced to consecutive terms of two years and six months on each count.[49] Because he had transported the two women on the "same trip and in the same vehicle," he claimed that he had committed only a single offense and that he should not be subjected to cumulative punishments.[50] The district court, however, ruled that, because his purpose must have been "selective and personal as to each of the women" involved, Bell had committed two separate offenses.[51] After the Sixth Circuit Court of Appeals affirmed the district court's decision, Bell appealed to the Supreme Court.[52]

The Court began its analysis by stating that appropriate federal punishments are matters for the discretion of Congress, who "could no doubt make the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported."[53] However, if "Congress leaves to the Judiciary the task of [determining the

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44. *Id.* (citing Gavieres v. U.S., 220 U.S. 338, 342 (1911)). *See also* Morey v. Commonwealth, 108 Mass. 433, 434 (1871) ("A single act may be an offence against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.").

45. *Blockburger*, 284 U.S. at 304.

46. 349 U.S. 81 (1955).

47. The Mann Act, in part, stated that, "Whoever knowingly transports in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose . . . [s]hall be fined not more than $5,000 or imprisoned not more than five years, or both." *Id.* at 82 (quoting 18 U.S.C. § 2421 (1910)) (alteration in original).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 81.

53. *Id.* at 82-83. Essentially, if Congress desires to "make each stick in a faggot a single criminal unit," it should have no difficulty in achieving this goal. *Id.* at 83.

appropriate unit of prosecution and] imputing to Congress an undeclared will, the *ambiguity should be resolved in favor of lenity.*"[54] Therefore, because the Mann Act's provisions and purposes were ambiguous as to whether defendants should be subject to cumulative punishments, the Court reversed the appellate court's decision, holding that Bell had committed only one offense.[55]

Bell's "unit of prosecution" test, as it is known today, has suffered from application problems similar to those surrounding the *Blockburger* "same elements" test. Numerous Eighth Circuit cases in this area demonstrate the tension that has arisen between these two tests, which, until recently, had resulted in a disorderly and unpredictable body of case law.

D. Eighth Circuit Decisions

The *Richardson* decisions are the latest in a series of Eighth Circuit cases that attempt to balance *Blockburger*'s "same elements" test with *Bell*'s rule of lenity. In the 1970s, after the Eighth Circuit's decisions in *United States v. Kinsley*[56] and *United States v. Powers*,[57] it appeared that *Bell*'s influence had won over, but in 1989, with the decision in *United States v. Peterson*,[58] the Eighth Circuit restored the *Blockburger* test and renewed the controversy in this unstable area of criminal law.

In *Kinsley*, two men were "convicted on all counts of a four-count indictment charging them, as previously convicted felons, with the unlawful possession of firearms in violation of 18 U.S.C. App. § 1202(a)(1)."[59] The district court sentenced the men to the "maximum two-year term on each count and provided that the terms of three of the four counts would run consecutively."[60] On their appeal to the Eighth Circuit, the men claimed that their singular acts of possessing the four firearms should have constituted only one

54. *Id.* (emphasis added). According to the Court, this lenience followed not from sentimentality or sympathy for the defendant, but because it "may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Id.* In conclusion, if "Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses." *Id.* at 84.

55. *Id.* Three judges dissented, claiming that the statute's intent was to protect each individual woman, and that because of this, Bell should be subject to multiple punishments. *Id.*

56. 518 F.2d 665 (8th Cir. 1975).

57. 572 F.2d 146 (8th Cir. 1978).

58. 867 F.2d 1110 (8th Cir. 1989), *overruled by* U.S. v. Richardson, 439 F.3d 421 (8th Cir. 2006).

59. *Kinsley*, 518 F.2d at 666.

60. *Id.*

violation of § 1202(a) and that their six year prison sentence was therefore illegal.[61]

The court began its analysis by outlining *Bell*, and by asserting that *Bell*'s "rule of construction is founded on the dual considerations that criminal legislation must provide fair warning and that the legislature and not the courts should define criminal activity."[62] After highlighting a number of cases, the court stated that the question to be answered was "whether the allowable unit of prosecution under § 1202(a) should be deemed ambiguous."[63] To answer this question, the court looked into the statutory language, the legislative history, and the "congressional intent as manifested in the overall legislative plan."[64] The court concluded that none of these three areas helped clarify the ambiguous language of § 1202 and that "problems of this sort must be resolved in favor of the criminal defendant."[65] Ultimately, upon affirming the use of *Bell*'s test, the court reversed the district court's decision and remanded for resentencing.[66]

Three years later, in *United States v. Powers*,[67] the Eighth Circuit again attempted to divine legislative intent and clarify an ambiguous statute, this time 18 U.S.C. § 922.[68] In *Powers*, a previously convicted felon was charged with the "unlawful receipt of firearms which had been transported in interstate commerce" and convicted for four counts under § 922.[69] On appeal, Powers alleged that he was "erroneously indicted and convicted on three counts for the simultaneous receipt of three firearms."[70] Powers argued that,

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61. *Id.*

62. *Id.* at 667. The court noted that in applying these considerations, courts have not been reluctant to a *Bell*-like "rule of lenity to a wide variety of legislative contexts in which Congress has failed to clearly indicate the allowable unit of prosecution." *Id. See, e.g.*, Castle v. U.S., 368 U.S. 13 (1961) (per curiam) (holding that the unlawful transportation of five falsely made money orders constituted one offense); Ladner v. U.S., 358 U.S. 169 (1958) (holding that one assault was proper when the discharge of a gun wounded two federal officers); U.S. v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952) (concluding that wage and hour violations as to numerous employees occurring over the course of several weeks constituted a single course of conduct and only one offense); U.S. v. Deaton, 468 F.2d 541 (5th Cir. 1972) (holding that the simultaneous harboring of two prisoners constituted only one offense); U.S. v. Melville, 309 F. Supp. 774 (S.D.N.Y. 1970) (determining that an attempt to destroy three Army trucks was only one offense). *But see* U.S. v. Steeves, 525 F.2d 33 (8th Cir. 1975) (holding that receiving firearms on multiple occasions warranted multiple counts).

63. Kinsley, 518 F.2d at 668.

64. *Id.* at 688, 670.

65. *Id.* at 670.

66. *Id.*

67. 572 F.2d 146 (8th Cir. 1978).

68. *Id.*

69. *Id.* at 149.

70. *Id.* at 150.

because the statute was ambiguous in instructing "whether the simultaneous receipt of the guns constitutes one offense or . . . separate offenses under the statute," the court should adopt *Kinsley*'s rationale and merge the three counts.[71]

In analyzing Powers' arguments, the court noted that, like the statute in *Kinsley*, § 922(h)(1) also utilized the word "any" in defining the offense.[72] Aware of *Kinsley*'s reliance on *Bell*, the government in *Powers* argued that *Kinsley* was inapplicable because Powers was being charged with receipt, instead of possession, and also because the firearms statutes were different.[73] In responding to these arguments, the court stated that, "where the acquisition of several firearms is accomplished simultaneously in a single theft," there is "no greater burden than where the government must prove the simultaneous *possession* of multiple weapons."[74] Moreover, while *Kinsley* dealt with § 1202 possession and receipt, the court pointed out that other "courts have reached similar results when confronted by ambiguities" in § 922.[75] Ultimately, because the government was unable to clarify § 922's ambiguities, the court followed *Kinsley* and *Bell*, and dismissed two of the counts against Powers.[76]

After *Kinsley* and *Powers*, the Eighth Circuit seemed content with *Bell*'s rule of lenity, but in 1989, *United States v. Peterson*[77] arrived and sent this

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71. *Id.*

72. *Id.* As explained in *Kinsley*, the word "any" frequently gives rise to *Bell*-like ambiguity. U.S. v. Kinsley, 518 F.2d 665, 667 (8th Cir. 1975). *See, e.g.*, Ladner v. U.S., 358 U.S. 169, 171 n.1 (1958) ("Whoever shall forcibly . . . interfere with any person . . . ."); Bell v. U.S., 349 U.S. 81, 82 (1955) ("[W]hoever knowingly transports . . . any woman or girl"); U.S. v. Deaton, 468 F.2d 541, 543 (5th Cir. 1972) ("Whoever . . . harbors . . . any prisoner . . . ."); Parmagini v. U.S., 42 F.2d 721, 724 (9th Cir. 1930) ("any narcotic drug"); Braden v. U.S., 270 F. 441, 443 (8th Cir. 1920) ("any of the aforesaid drugs"); U.S. v. Martin, 302 F. Supp. 498, 500 (W.D. Pa. 1969) ("any narcotic drug"). *But see* Ebeling v. Morgan, 237 U.S. 625 (1915) (holding that where the statute said "[w]hoever shall tear . . . any mail bag," and the defendant tore several mail bags, multiple offenses occurred).

73. *Powers*, 572 F.2d at 151.

74. *Id.* (emphasis added). However, if separate firearms are received on separate occasions, multiple offenses occur. *See generally* U.S. v. Steeves, 525 F.2d 33 (8th Cir. 1975). *See also* U.S. v. Rosenbarger, 536 F.2d 715 (6th Cir. 1976); U.S. v. Killebrew, 560 F.2d 729 (6th Cir. 1977); U.S. v. Calhoun, 510 F.2d 861 (7th Cir. 1975).

75. *Powers*, 572 F.2d at 152. *See, e.g.*, U.S. v. Carty, 447 F.2d 964 (5th Cir. 1971) (merging the simultaneous transport of three stolen firearms into one offense) *and* McFarland v. Pickett, 469 F.2d 1277 (7th Cir. 1972).

76. *Powers*, 572 F.2d at 152.

77. 867 F.2d 1110 (8th Cir. 1989), *overruled by* U.S. v. Richardson, 439 F.3d 421 (8th Cir. 2006).

area of criminal law onto a path of bewilderment and uncertainty.[78] In *Peterson*, after being convicted of a number of crimes,[79] a husband and wife appealed to the Eighth Circuit, claiming that the inclusion of multiple counts for the possession of firearms and ammunition, as prohibited by § 922, violated the Fifth Amendment's prohibition against double jeopardy.[80] The Eighth Circuit disagreed with the Petersons and affirmed the district court's judgment.[81]

In analyzing the Petersons' double jeopardy claim, the court cited *Blockburger*, stating that the "test for duplicative charges is whether each charge requires proof of an element that the other does not."[82] According to the court, each of the firearms charges against Steven Peterson "required an element of proof unique to the other charges."[83] For instance, "[p]roof was required to show that Steven, as a convicted felon, unlawfully possessed ammunition during the days of *each* search, since each day was a separate offense."[84] Similarly, for the court, "the possession of a firearm by a convicted felon was a separate offense requiring additional proof," and finally, proof of Steven's "controlled substances use" was necessary to find guilt on the last count.[85] Based on this line of reasoning, the court concluded that the charges against Steven were not duplicative, but that they "simply reflected the broad pattern of Steven's illegal behavior."[86]

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78. *See also* U.S. v. Marino, 682 F.2d 449 (8th Cir. 1982) (following *Kinsley* and *Powers* and holding that simultaneous possession of multiple firearms constitutes a single offense).

79. Steven Peterson was convicted of conspiracy to distribute a controlled substance, tampering with a witness, solicitation to commit a felony, three counts of unlawful possession of firearms and ammunition by a convicted felon, unlawful possession of firearms and ammunition by a user of controlled substances, three counts of unlawful possession of a controlled substance, and general conspiracy. *Peterson*, 867 F.2d at 1111-12. Peterson's wife, Mary, "was convicted of tampering with a witness, unlawful possession of firearms and ammunition by a user of controlled substances, three counts of possession of a controlled substance, general conspiracy, and obstruction of justice." *Id.* at 1112. Steven and Mary were sentenced to thirty years and five years in prison, respectively. *Id.* On appeal, the Peterson's challenged whether certain evidence used at trial was constitutionally seized, whether their indictments were sufficiently specific, whether their sentences were proper, whether the admissibility of a prior conviction was proper, whether the verdict was against the weight of the evidence, and finally, whether the inclusion of multiple counts in violation of § 922 was constitutionally permissible. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1115. The *Peterson* court did not mention *Bell* or its "rule of lenity" or "unit of prosecution" test.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

After *Peterson*'s shift, the next case to present itself was *United States v. Walker*,[87] in which a man was convicted of being a felon in possession of a firearm and a felon in possession of ammunition.[88] In *Walker*, the government conceded that, "absent evidence Walker acquired the firearm and ammunition at different times, or possessed or stored them in different places or at different times, *all* circuits other than the Eighth Circuit would find that [he] committed only one, not two, offenses."[89] Nonetheless, the Eighth Circuit affirmed Walker's convictions, stating that they were bound by *Peterson* until the entire Eighth Circuit, sitting *en banc*, "abolishe[d] the distinction . . . between permissible counts for multiple firearms . . . and firearms in combination with ammunition."[90]

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87. 380 F.3d 391 (8th Cir. 2004), *overruled by* U.S. v. Richardson, 439 F.3d 421 (8th Cir. 2006).

88. *Id.* at 392.

89. *Id.* at 393 (emphasis added). *See generally* U.S. v. Verecchia, 196 F.3d 294, 298 (1st Cir. 1999) (holding that a convicted felon's possession of multiple weapons constituted one offense under § 922(g)(1)); U.S. v. Dunford, 148 F.3d 385, 388-90 (4th Cir. 1998) (holding that whether a defendant satisfies a single or numerous disqualifying classes under § 922(g) is irrelevant, as the defendant should only be charged for one offense); U.S. v. Cunningham, 145 F.3d 1385, 1399 (D.C. Cir. 1998) (holding that because the jury was never allowed to consider whether weapons were acquired separately or at the same time, the convictions must be merged); U.S. v. Keen, 104 F.3d 1111, 1118-20 (9th Cir. 1996) (holding that because Congress did not intend to punish a felon twice for simultaneously possessing firearm and ammunition, the defendant's conviction here must be overturned); U.S. v. Hall, 77 F.3d 398, 402 (11th Cir. 1996) (holding that dual convictions for possession of firearm and possession of ammunition were improper); U.S. v. Berry, 977 F.2d 915, 919 (5th Cir. 1992) (holding that possession of multiple firearms constituted only one offense, as Congress's intent in enacting § 922 was not to permit simultaneous possession of ammunition to stand as a distinct unit of prosecution); U.S. v. Throneburg, 921 F.2d 654, 657 (6th Cir. 1990) (holding that while a defendant may be prosecuted for multiple charges in these situations, he or she may not be sentenced on multiple charges); U.S. v. Pelusio, 725 F.2d 161, 168-69 (2d Cir. 1983) (holding that under § 922(h), absent any evidence that defendants received a firearm and five rounds of ammunition on separate occasions, they could not be found guilty of receipt of the gun and ammunition as separate crimes forming the subject of multiplicitous counts); U.S. v. Valentine, 706 F.2d 282, 292-94 (10th Cir. 1983) (§ 922 suffers from *Bell*'s ambiguity); U.S. v. Frankenberry, 696 F.2d 239, 244-45 (3d Cir. 1982) (holding that "simultaneous receipt of more than one weapon covered by section 922(h)(1) supports conviction for only one offense"); U.S. v. Oliver, 683 F.2d 224, 232-33 (7th Cir. 1982) (holding that where the Government failed to show that ammunition and a firearm were acquired at different times, the two separate offenses must only count as one). All of these circuits apply *Bell*'s "unit of prosecution" test, which looks at congressional intent to find whether a statute permits multiple convictions. *Walker*, 380 F.3d at 393.

90. *Walker*, 380 F.3d at 395.

With *Peterson* and *Walker* as its backdrop, *Richardson* made its way up to the Eighth Circuit in late 2004.[91] *Walker*'s reluctance, however, signaled that things were bound to change in *Richardson*.

IV. INSTANT DECISION

As mentioned earlier,[92] the Eighth Circuit delivered two *Richardson* decisions, both of which are helpful in demonstrating how the court resolved the confusion that existed between the Eighth Circuit and numerous other circuits.

A. The Panel Decision

The Eighth Circuit panel that delivered the *per curiam Richardson* opinion[93] consisted of Judge Melloy, Judge Heaney, and Judge Gruender. Their opinion began by recounting the charges against Richardson and by noting that, in addition to challenging the admissibility of certain evidence and the effectiveness of his counsel, Richardson's appeal claimed that his sentence was improper and unconstitutional.[94] After then discussing the facts and procedural posture of the case, the court entered into its analysis of Richardson's arguments.[95]

The court began by investigating Richardson's claim that his initial encounter with the police resulted in an illegal seizure, as protected by the Fourth Amendment.[96] The court noted that police questioning does not amount to a seizure and that "officers do not violate the Fourth Amendment by merely approaching an individual . . . [and] asking him if he is willing to answer some questions."[97] After advocating a circumstantial analysis of a challenged encounter, the court asserted that for a seizure to occur, the police conduct would have to communicate to a "reasonable person that he was not free to ignore the police presence and go about his business."[98]

In applying this circumstantial analysis to Richardson's encounter with Corporal Porras and Officer Hanks, the court noted that neither "officer displayed a weapon, threatened physical force, or told Richardson to stop."[99]

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91. See *supra* Section II for a more detailed explanation of *Richardson*'s procedural posture.

92. *See supra* note 1.

93. U.S. v. Richardson, 427 F.3d 1128 (8th Cir. 2005), *vacated in part by* U.S. v. Richardson, 439 F.3d 421 (8th Cir. 2006).

94. *Id.* at 1129-30.

95. *Id.* at 1130-31. See *supra* Section II for a discussion of the facts and procedural posture of *Richardson*.

96. *Richardson*, 427 F.3d at 1132.

97. *Id.*

98. *Id.*

99. *Id.*

The panel pointed out that, instead, the officers stopped their squad car on the opposite side of the street and "asked whether Richardson knew who lived in the house, and whether they could talk to him."[100] Ultimately, the court concluded that under Eighth Circuit precedent, these "circumstances simply do not amount to a seizure."[101] The court also held that, because "Richardson had not been seized [at] the time he lost" his wallet and firearm, the "attempt to apprehend Richardson during his flight also did not amount to a seizure."[102] Finally, in responding to Richardson's argument that the officers violated his Fourth Amendment rights in searching for and eventually discovering the firearm and crack cocaine, the court asserted that Richardson had abandoned any "expectation of privacy" in the objects, and that the district court was correct in denying the suppression motion.[103]

Then, the panel turned its attention to Richardson's argument that the statements he made "while in the squad car should have been suppressed because he had not been advised of his *Miranda* rights."[104] According to the court, though, "[v]oluntary statements that are not the product of police questioning or police action likely to produce an incriminating response are admissible."[105] The court further stated that, "[w]hether specific conduct is designed to produce an incriminating response is determined from the perspective of the suspect, without regard for the actual intent of the police."[106] Additionally, the panel noted Eighth Circuit precedent stating that "a factual description of the state of an investigation, without additional questioning or coercion, is not an interrogation."[107]

In applying these guidelines to Richardson's interaction in the squad car, the court pointed out that the officers did not attempt to elicit information from Richardson, nor did they apply "indirect emotional pressure on Richardson to talk."[108] In the end, the court held that there had been no interrogation because the officers' words and actions were not designed to elicit an "incriminating response" from Richardson.[109]

Next, the court focused on the issue of whether evidence of Richardson's post-arrest drug use and flight was admissible.[110] The court, however, noted that because Richardson had refused to admit of his addiction, the

100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 1133.
109. *Id.*
110. *Id.* Richardson's claim, according to the Court, was that "his evasive behavior . . . was not relevant to the firearm charge before the jury" because it was prejudicial. *Id.*

prosecution was "required to present evidence" of his drug use.[111] According to the court, "[t]his evidence was probative on an essential element of the charges against Richardson: that he was an addict or user of controlled substances."[112] Therefore, the court held that the district court had not abused its discretion in admitting this evidence.[113]

After denying these evidentiary motions, the court quickly dismissed Richardson's other arguments, the first of which was a claim of ineffective assistance of counsel.[114] As stated by the court, these "claims are typically not heard on direct appeal, and should be . . . brought pursuant to 28 U.S.C. § 2255."[115] Therefore, because there were no exceptions warranting direct appeal, the court rejected this claim.[116]

The court's next area of inquiry involved Richardson's argument that the "counts of conviction . . . arose out of the same act of firearm possession and . . . should have been merged at sentencing into a single offense."[117] In reviewing the district court's decisions *de novo*, the court acknowledged that the Eighth Circuit had previously held that "separate convictions . . . arising out of a single act of firearm possession were not multiplicitous."[118] Guided by this earlier decision, the court affirmed the "imposition of separate sentences for each count of conviction."[119]

Finally, the Court investigated Richardson's claim that, in light of the United States Supreme Court's decision in *United States v. Booker*,[120] the guidelines used at his sentencing hearing were unconstitutional.[121] The court

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111. *Id.* The prosecution's evidence consisted of "Richardson's failure to attend scheduled drug tests, his flight from the police, and the . . . cocaine found on his person when he was apprehended." *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* The Court noted that Richardson's sentences were to run concurrently and also that the district court assigned him a $100 assessment for each count. *Id.*

118. *Id.* at 1133-34. Specifically, the Court mentioned its decision in *U.S. v. Peterson*, 380 F.3d 391, 393 (8th Cir. 2004). *Id.* For a discussion of *Peterson*, see *supra* notes 77 – 86 and accompanying text.

119. *Richardson*, 427 F.3d at 1134.

120. 543 U.S. 220 (2005).

121. *Richardson*, 427 F.3d at 1134. Richardson's argument concerning the unconstitutionality of his sentence was based on two recent decisions from the United States Supreme Court, *Blakely v. Washington*, 542 U.S. 296 (2004) and *U.S. v. Booker*, 543 U.S. 220 (2005). *See Richardson*, 427 F.3d at 1134. In *Blakely*, the "Supreme Court held that a court cannot enhance a sentence beyond the statutory maximum based on judicial findings that were neither admitted by the defendant nor found by a jury beyond a reasonable doubt." U.S. v. Idriss, 436 F.3d 946, 950 (8th Cir. 2006). In *Booker*, the Supreme Court "extended *Blakely*'s holding to the federal guidelines, holding that they run afoul of the Sixth Amendment insofar as the scheme [is] based

acknowledged that the district court erred in sentencing Richardson under the "mandatory guidelines regime," but held that the error was "harmless because the court stated that it would have imposed the same sentence" under *Booker's* advisory scheme.[122] With this in mind, the court affirmed the district court's decision.[123]

B. Concurring Opinion

Judge Melloy and Judge Heaney authored a concurring opinion, which began by acknowledging that *United States v. Peterson*[124] directly controlled the facts of Richardson's case.[125] In writing separately to note their disagreement with *Peterson*, the concurrence's authors did not believe that Richardson "should be subjected to multiple convictions and multiple punishments . . . for a single act of possession that involves a firearm and ammunition."[126] Further, the authors did not believe that a defendant in Richardson's shoes, "who satisfies more than one . . . characteristic subsection of § 922(g), should be subjected to multiple convictions for the possession of a single firearm."[127] The authors conceded, though, that until the Eighth Circuit, sitting *en banc*, overruled *Peterson*, they were bound to obey it.[128]

The concurrence began its analysis of *Peterson* by mentioning *United States v. Walker*,[129] in which an Eighth Circuit panel interpreted *Peterson* to hold "that a convicted felon's possession of a firearm and ammunition for that firearm comprised two separate offenses."[130] According to the authors of the concurrence, previous Eighth Circuit cases stood for the proposition that the "simultaneous possession or receipt of multiple firearms could only result in a single conviction and punishment."[131] However, as the concurrence pointed

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on certain facts found by the sentencing judge and requires the judge to impose a more severe sentence than could have been imposed based on facts found by the jury or admitted by the defendant." *Id.* (alteration in original).

122. *Richardson*, 427 F.3d at 1134.

123. *Id.*

124. 867 F.2d 1110 (8th Cir. 1989).

125. *Richardson*, 427 F.3d at 1134 (Melloy & Heaney, JJ., concurring).

126. *Id.*

127. *Id.*

128. *Id.*

129. 380 F.3d 391 (8th Cir. 2004).

130. *Richardson*, 427 F.3d at 1134 (Melloy & Heaney, JJ., concurring). The concurrence recognized that in *Walker*, the Eighth Circuit took note of the conflict between *Peterson* and two previous Eighth Circuit cases, *U.S. v. Powers*, 572 F.2d 146 (8th Cir. 1978), and *U.S. v. Kinsley*, 518 F.2d 665 (8th Cir. 1975.) *Id.* For a discussion of *Powers* and *Kinsley*, see *supra* Section III.C.

131. *Richardson*, 427 F.3d at 1134 (Melloy & Heaney, JJ., concurring).

out, the Eighth Circuit in *Walker* was bound by *Peterson*, which was directly on point.[132]

After establishing *Walker*'s precedential basis, the concurrence addressed the conflict that had developed between *Peterson* and other Eighth Circuit cases, as well as the conflict that had arisen between *Peterson* and opinions of other circuits.[133] The concurrence stated that these conflicts "arose largely because the court in *Peterson* had applied the 'same elements' test from *Blockburger v. United States*[134] . . . to find that § 922(g) permitted multiple convictions."[135] And, as asserted by the concurrence, other circuits had applied *Bell*'s "unit of prosecution" test to "conclude that Congress intended the allowable unit of prosecution to be an 'incident of possession' regardless of whether a defendant satisfied more than one § 922(g)" characteristic.[136] The concurrence concluded that *Bell*'s position was correct, and that it should be the law in the Eighth Circuit.[137]

Then, the concurrence noted that while the government, in *Richardson*, had argued that multiple convictions were permitted for single acts of possession, the government had "taken the opposite position before other courts, including the [United States] Supreme Court."[138] As an example, the concurrence discussed *United States v. Munoz-Rumo*,[139] which had held that "convictions under § 922(g)(1) . . . and § 922(g)(5) . . . based on a single instance of possession were not multiplicitous."[140] According to the concurrence, when the Supreme Court granted Munoz-Rumo certiorari, the Solicitor General "confessed error and asked the Supreme Court to remand to the Fifth Circuit to vacate one of the two convictions."[141] Ultimately, as the concurrence pointed out, the Fifth Circuit adopted the government's stance that the "structure and language of [§ 922(g)] demonstrated Congress's clear intent not to impose cumulative punishments when the same incident violates two subdivisions of subsection (g)."[142]

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132. *Id.*
133. *Id.*
134. 284 U.S. 299 (1932).
135. *Richardson*, 427 F.3d at 1134 (Melloy & Heaney, JJ., concurring).
136. *Id.*
137. *Id.* at 1134-35.
138. *Id.* at 1135.
139. 947 F.2d 170 (5th Cir. 1991).
140. *Richardson*, 427 F.3d at 1135 (Melloy & Heaney, JJ., concurring).
141. *Id.*
142. *Id.* A footnote in the concurrence mentioned that the Solicitor General's position in *Munoz-Rumo* was "essentially the same as that of the Eleventh Circuit in *United States v. Winchester*, 916 F.2d 601 (11th Cir. 1990)." *Id.* at 1135 n.5. The concurring authors explained that, in *Winchester*, the court pointed out that if courts were to permit "multiple convictions for a single act of possession under § 922," a felon who satisfies several requirements could be sentenced to multiple, consecutive terms of imprisonment for the same accident. *Id.* With this in mind, the concurrence

Concerned about these inconsistencies, the concurrence then asserted that while they agreed in a party's right to advance alternative arguments, they did not believe that it was appropriate "for the government to advance diametrically opposed theories as to the interpretation of a single criminal statute."[143] The concurrence argued further that their position was especially true in Richardson's context, where the changes of position would cause the "Supreme Court to forgo the opportunity to review" these circuit splits on issues of constitutional significance.[144] Nonetheless, they concluded that because the Eighth Circuit had not addressed the issue *en banc*, they were bound by *Peterson*, and thus were forced to concur.[145]

C. The En Banc Opinion

Following the panel's decision on November 4, 2005, Richardson applied for *en banc* rehearing on the issue of whether a "defendant, based on a single act of possession, can be convicted and punished under both 18 U.S.C. § 922(g)(1) (felon in possession) and (g)(3) (drug user in possession)."[146] After pointing out that the government had joined Richardson in requesting a rehearing on this issue, the court noted that the rehearing would do nothing to affect the other sections of the panel decision.[147]

Then, the court summarized the relevant facts of Richardson's case, observing that the panel decision was correct, in light of the fact that *Peterson* controlled.[148] Aware of its position as the only circuit to allow multiple convictions for defendants who satisfy numerous § 922 subcategories, the Eighth Circuit overruled *Peterson*, holding that "Congress intended the allowable 'unit of prosecution' to be an *incident* of possession regardless of whether a defendant satisfied more than one § 922(g) classification, possessed more than one firearm, or possessed a firearm and ammunition."[149] Ultimately, the court remanded the case to the district court to vacate the initial sentence, merge the counts of conviction into one count, and resentence Richardson as if he only satisfied one condition of § 922(g).[150]

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hypothesized that in the Eighth Circuit, under *Peterson*, a "defendant in possession of a firearm with a single bullet in his or her pocket" could be sentenced to ten or more punishments for the same crime. *Id.* The concurrence concluded by stating that they did "not believe Congress intended such a result." *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. U.S. v. Richardson, 439 F.3d 421, 422 (8th Cir. 2006) (en banc) (per curiam), *overruling* U.S. v. Richardson, 427 F.3d 1128 (8th Cir. 2005).

147. *Id.*

148. *Id.*

149. *Id.* (emphasis added).

150. *Id.* at 423.

V. COMMENT

Never has the old adage, "Ask and you shall receive," rung more true than in the case of the Eighth Circuit's two recent *Richardson* decisions.[151] In the *Richardson* panel opinion, the concurring authors lamented that their decision was constrained by *Peterson*, an earlier Eighth Circuit case affirming the imposition of multiple convictions for single acts of possession.[152] After granting Richardson's request for rehearing *en banc*, the Eighth Circuit overruled *Peterson* and held that, in enacting § 922, Congress "intended the 'allowable unit of prosecution' to be an incident of possession regardless of whether a defendant satisfied more than one § 922(g) classification, possessed more than one firearm, or possessed a firearm and ammunition."[153]

The immediate effect of this decision was to bring the Eighth Circuit in line with every other circuit that had addressed this issue and decided that defendants like Richardson should be subject to only a single conviction under § 922 for single acts of possession.[154] The long-term consequences of this decision include more predictability and efficiency in this area of criminal law, as well as a more satisfactory sentencing process, based not on conjecture and speculation, but on practical interpretations of legislative intent. This section will more closely examine these various effects and illustrate that, while the Eighth Circuit was slow to change, the recent *Richardson* decision is an affirmative step in the right direction for our criminal justice system.

As mentioned in the *Richardson* panel's concurring opinion,[155] as well as in *United States v. Walker*,[156] the Eighth Circuit had stood alone as the only circuit to permit multiple convictions under § 922[157] for single acts of possession. In holding that Richardson should not have been subject to multiple convictions for his single act of possession, the Eighth Circuit joined the other federal circuits on this issue. In so doing, the court also addressed two other issues not found in *Richardson*, but issues which are often present in

151. U.S. v. Richardson, 427 F.3d 1128 (8th Cir. 2005), *vacated in part by* U.S. v. Richardson, 439 F.3d 421 (8th Cir. 2006); U.S. v. Richardson, 439 F.3d 421 (8th Cir. 2006) (en banc) (per curiam).

152. See *supra* Section III.C for a discussion of *Peterson* and Section IV.A for discussion of the concurring opinion in the *Richardson* panel decision.

153. *Richardson*, 439 F.3d at 422.

154. *See supra* note 88 and accompanying text.

155. *See Richardson*, 439 F.3d at 422 ("We now overrule *Peterson* and join all the other Circuits that have addressed this issue . . . .").

156. 380 F.3d 391, 393 (8th Cir. 2004), *overruled by* U.S. v. Richardson, 439 F.3d 421 (8th Cir. 2006) (citing authority from every other circuit contrary to the Eighth Circuit's position in *Peterson*).

157. While most of the case law has involved § 922, other statutes have been the subject of controversies similar to the one in *Richardson*. *See* U.S. v. Kinsley, 518 F.2d 665 (8th Cir. 1975) (interpreting 18 U.S.C. § 1202 to suffer from a *Bell*-like ambiguity).

these situations. The first issue was the possession of multiple firearms in cases like these, and the second issue was simultaneous possession of firearms *and* ammunition.[158]

As explained in the *Richardson* panel's concurrence, the old Eighth Circuit rule would have seemingly permitted a defendant in Richardson's situation to be charged with an unlimited number of crimes under § 922. For instance, imagine a situation in which a convicted felon was also a fugitive from justice, a drug addict, a "mental defective," and an illegal alien.[159] Further, envision this defendant carrying around three prohibited firearms and several bullets in his or her pocket. Under the *Peterson* rule, which allowed separate convictions for possession of firearms *and* ammunition, the defendant in our hypothetical would be subject to and possibly convicted of up to twenty different counts under § 922(g).[160] After *Richardson*, however, the result would be that our defendant would be charged with one count of violating § 922(g). In light of the overwhelming body of case law pointing toward this result, and in the absence of any significant evidence that Congress intended otherwise, this post-*Richardson* result seems more appropriate.

In addition to providing more palatable sentences, the recent *Richardson* decision makes cases like these more predictable, and it makes the criminal justice system operate more efficiently. Advocates will no longer have to devote their energy to arguments about whether their client satisfied numerous classifications under § 922(g), nor will they have to worry about whether a defendant possessed multiple firearms or a firearm and ammunition. Judges, previously bewildered by § 922's purposes, will no longer need to entertain and monitor these arguments. Instead, because results are guided by *Bell*'s "unit of prosecution" test, which requires a single conviction under § 922, these issues will become easier to resolve at trial.

In siding with *Bell*'s "rule of lenity," the recent *Richardson* decision also helps clarify the sentencing process that occurs when defendants like Richardson are convicted. In a straightforward case like Richardson's, where there were only two counts being charged, sentencing would be relatively simple, although a court would need to decide whether to run any sentences

158. *See Richardson*, 439 F.3d at 421.

159. These five characteristics are from the list in § 922(g).

160. *See generally* U.S. v. Richardson, 427 F.3d 1128, 1235 n.5 (8th Cir. 2005), *vacated in part by* U.S. v. Richardson, 439 F.3d 421 (8th Cir. 2006). *See also* U.S. v. Dunford, 148 F.3d 385 (4th Cir. 1998). In *Dunford*, based on the "six guns and the ammunition" seized from his house, Dunford was convicted on fourteen firearms counts, seven under § 922(g)(1) and seven more under § 922(g)(3). *Id.* at 388. On appeal, Dunford was able to convince the Fourth Circuit that these multiple convictions were unnecessary. *Id.* at 388-89. The court agreed with Dunford, holding that there was nothing in § 922 which would suggest "that Congress sought to punish persons by reason of their legal status alone." *Id.* at 389. According to the court, the result of having fourteen convictions would, "in effect, be criminalizing the status itself." *Id.*

consecutively or concurrently. After *Richardson*, because the defendant would only be convicted of one count, a court determining the sentence would no longer need to determine concurrent or consecutive sentences, at least on the firearms portion of the charges.

In more complicated cases, like the one that arose in *United States v. Peterson*,[161] courts have struggled with determining appropriate sentences, especially when several of the base crimes counted as "multiple charges." Because of the recent *Richardson* ruling, however, courts will not have to concern themselves with determining whether these multiple charges should be sentenced as a single charge, or if they should be sentenced separately. Instead, because of *Richardson*'s holding that these situations should result in only a single charge, sentencing would also be based on this single charge.[162]

Most importantly, the recent *Richardson* decision provides defendants with protection in cases where, after being previously convicted for multiple counts under § 922, the defendant is charged again with another crime. When determining appropriate sentences in federal courts, judges look to the federal sentencing guidelines, which delineate a range of sentences based on the relationship between a defendant's previous criminal history and the seriousness of the instant offense.[163] The recent *Richardson* decision does not affect the previous criminal history component of this determination, but it greatly influences the way in which courts calculate the number of points assigned to the instant offense. For example, if a defendant is convicted of eleven counts of various crimes, the number of points assigned in the overall calculation will increase with the number of crimes committed. After *Richardson*, the number of convictions in situations like these will be merged into only a single offense, thereby decreasing the points assigned to the instant offense, and ultimately decreasing the permissible sentence.

In introducing reliability, predictability, and more appropriate sentencing into the criminal justice system, the recent *Richardson* decision consti-

161. 867 F.2d 1110 (8th Cir. 1989), *overruled by* U.S. v. Richardson, 439 F.3d 421 (8th Cir. 2006). In *Peterson*, Stephen Peterson was convicted of eleven different crimes, seven of which were different. *Id.* at 1111-12. Stephen's wife, Mary, was convicted of seven different crimes, five of which were different. *Id.* at 1112.

162. It is important to remember that the federal sentencing guidelines add points for the seriousness of the crime. For example, if the underlying offense involved more than three guns, points are added to the base offense, and the sentence increases accordingly. Neither *Richardson* opinion purports to affect these guidelines, except in situations where the guidelines would increase a penalty for the increasing number of underlying charges.

163. The horizontal axis of the guideline's grid involves a particular defendant's previous criminal history. The vertical axis of the grid focuses on the number of "points" obtained for the increasing seriousness of the instant offense. After finding the point at which these various components intersect, courts are given a range of sentences to impose on the defendant. Determining a sentence within a given range is discretionary.

tutes a positive step for the Eighth Circuit. Moreover, in siding with *Bell*'s "rule of lenity" and leaving the task of establishing crimes and sentences to the legislature, the *Richardson* opinion helps maintain our judicial system's commitment to separation of powers. Overall, the court should be applauded for their decision, even though it took longer than it should have.

VI. CONCLUSION

As evidenced by the overwhelming body of case law that was contrary to the Eighth Circuit's pre-*Richardson* decision, the recent *Richardson* decision was a long time coming. Nevertheless, it is important to appreciate the effects of the decision. Ultimately, the *Richardson* decision succeeds in promoting consistent and unsurprising trials, as well as more appropriate and rational sentences in these situations. Despite the tardiness of the decision, the Eighth Circuit finally got things right in *Richardson*, and the criminal justice system is better off as a result.

BRAD THOENEN