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Criminal Procedure - The Right to a Speedy Trial - Has the Wyoming Supreme Court Correctly Applied the Balancing Test - Harvey v. State

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CRIMINAL PROCEDURE — The Right to a Speedy Trial—Has the Wyoming Supreme Court Correctly Applied the Balancing Test? *Harvey v. State*, 774 P.2d 87 (Wyo. 1989).

On the evening of January 5, 1986, Jetty Lee Harvey, Everett W. Phillips¹ and David Swazo abducted a 38 - year old woman from a sidewalk in Rock Springs, Wyoming, forced her into Phillips' crew cab pickup, and drove away. Thereafter, the vehicle proceeded to the outskirts of the city and Swazo sexually assaulted the victim while Harvey and Phillips looked on encouraging him.² Fortunately for the victim, an individual in a nearby vehicle witnessed the abduction and reported it to the police. The police immediately responded to the call, intercepted Phillips' pickup, and arrested both Harvey and Swazo on the spot.³ The police did not arrest Phillips because the victim did not initially implicate him in the crime.⁴ On January 9, 1986, following further investigation, the police arrested Phillips.⁵

Following Harvey's arrest, on January 5, 1986, approximately eighteen months elapsed before he was brought to trial. On February 5, 1986, the prosecution filed an information in district court charging Harvey with kidnapping and sexual assault.⁶ On February 18, 1986, Harvey filed a motion for discovery and a motion to dismiss. After that date, the record was silent for a period of nearly ten months as to any further proceedings.⁷

Finally, December 5, 1986, the record indicates that the court sent a letter notifying the parties that the individual cases of Harvey, Phillips and Swazo⁸ would be consolidated for trial. This trial was set for January 6, 1987. On December 9, 1986, the State obtained a continuance of the trial.⁹

On January 16, 1987, Harvey retained counsel and submitted a *pro forma* motion to the district court to dismiss for lack of a speedy trial.¹⁰

1. For the purposes of this casenote the discussion will focus on *Harvey v. State*, 774 P.2d 87 (Wyo. 1989), with reference to *Phillips v. State*, 774 P.2d 118 (Wyo. 1989), made in the footnotes.

2. *Harvey*, 774 P.2d at 90.

3. *Id.*

4. *Phillips*, 774 P.2d at 120.

5. Phillips was arrested on January 9, 1986. His trial commenced on July 21, 1987. *Phillips*, 774 P.2d at 120-21. Harvey's trial also began on July 21, 1987. *Harvey*, 774 P.2d at 91.

6. *Harvey*, 774 P.2d at 90. There were 531 days between the filing of the information and the trial. *Id.* at 93. The total delay in Phillips' case was also approximately eighteen months, but the time from information to trial was only 372 days. The information in Phillips' case was filed on July 14, 1986. *Phillips*, 774 P.2d at 122.

7. *Harvey*, 774 P.2d at 90.

8. Swazo subsequently entered a guilty plea and had been sentenced to the Wyoming State Penitentiary. *Id.* at 91.

9. *Id.* at 90. The court found no record of the continuance, but the State acknowledged obtaining the continuance in its brief. Without the State's concession there would be no explanation of why the trial was not held on January 6, 1986. *Id.*

10. *Id.* at 91. For unknown reasons this motion was never filed, but the State conceded in its brief that the motion was submitted on that date. *Id.*

On April 27, 1987, he filed another motion with an accompanying certificate stating that the January 16th motion had been submitted.¹¹ Harvey did not request a hearing on either of these motions, and after sixty days the motions were deemed automatically denied.¹² On July 20, 1987, one day prior to trial, Harvey joined in Phillips' motion to dismiss for lack of speedy trial.¹³

On July 21, 1987, trial was finally held, 562 days after the arrest. Harvey was convicted of kidnapping and first-degree sexual assault.¹⁴ Harvey appealed the conviction to the Wyoming Supreme Court which determined that the dispositive issue in the case was whether, under the circumstances, Harvey had been denied his right to a speedy trial.¹⁵

The Wyoming Supreme Court concluded that a delay of eighteen months between Harvey's arrest and the time he was brought to trial violated his right to a speedy trial.¹⁶ The court reversed the conviction and dismissed Harvey's information.¹⁷

This casenote focuses on the Wyoming Supreme Court's application of the *Barker* balancing test to the facts in *Harvey*, and specifically, it examines whether the Wyoming Supreme Court gave undue weight to certain factors in the balancing formula; thus leading the court to an erroneous result.

BACKGROUND

The right to a speedy trial is one of the fundamental rights secured by the sixth amendment of the Constitution of the United States.¹⁸ The United States Supreme Court has applied the right to a speedy trial to the states through the fourteenth amendment.¹⁹ The Wyoming Constitution also provides defendants with the right to a speedy trial.²⁰ In addition, under Rule 204 of the Uniform Rules for the District Courts of the State of Wyoming, the prosecution has 120 days from the filing

11. *Id.* On July 6, 1987, Phillips made a motion to dismiss for speedy trial, fifteen days before the trial began. *Phillips*, 774 P.2d at 121.

12. UNIF. R. DIST. CTS. WYO. 301.

13. *Harvey*, 774 P.2d at 91.

14. *Id.* Phillips was also convicted of the same charges. *Phillips*, 774 P.2d at 119.

15. *Harvey*, 774 P.2d at 89. For purposes of the appeal, Phillips was the companion case to *Harvey*. *Phillips*, 774 P.2d at 119.

16. *Harvey*, 774 P.2d at 97.

17. *Id.* (citing *Strunk v. United States*, 412 U.S. 434 (1973)). The Wyoming Supreme Court also dismissed Phillips' information and overturned his conviction. Phillips' case was much closer than Harvey's because Phillips was responsible for some of the delay, and he was not diligent in asserting his right to a speedy trial. *Phillips*, 774 P.2d at 125.

18. U.S. CONST. amend. VI, 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.

19. *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967).

20. WYO. CONST. art. I, § 10.

of an information or indictment to bring a defendant to trial.²¹ However, Wyoming courts have used this rule in an advisory nature, and have not interpreted it as a mandatory rule.²²

The United States Supreme Court attempted for the first time to decide what constitutes a speedy trial in *Barker v. Wingo*.²³ The *Barker* Court developed a four part balancing test to determine whether the defendant's right to a speedy trial was violated.²⁴ Under the balancing test four factors were assessed: length of the delay, the reason for the delay, whether the defendant asserted his right to a speedy trial, and whether the delay prejudiced the defendant.²⁵

In *Barker*, Willie Barker and Silas Manning were arrested in July of 1958 for the brutal murder of an elderly couple. The State of Kentucky had a stronger case against Manning, and felt that Barker could

21. Rule 204 provides:

- a) It is the responsibility of court and counsel to insure to each person charged with crime a speedy trial.
- b) A criminal charge shall be brought to trial within 120 days following the filing of information or indictment.
- c) The following periods shall be excluded in computing the time for trial:
 - 1) All proceedings related to the mental illness or deficiency of the defendant.
 - 2) Proceedings on another charge.
 - 3) Delay granted by the court pursuant to Section (d).
 - 4) The time between the dismissal and the refiling of the same charge.
 - 5) Delay occasioned by defendant's change of counsel or application therefor.
- d) Continuances may be granted as follows:
 - 1) On motion of defendant supported by affidavit of defendant and defendant's counsel.
 - 2) On motion of the prosecuting attorney or the court if:
 - i) the defendant expressly consents; or
 - ii) the state's evidence is unavailable and the prosecution has exercised due diligence; or
 - iii) Required in the due administration of justice and the defendant will not be substantially prejudiced.
- e) Upon receiving notice of possible delay the defendant shall show in writing how the delay may prejudice his defense.
- f) If the defendant is unavailable for any proceeding at which his presence is required, the time period shall begin anew upon defendant's being available.

UNIF. R. DIST. CTS. WYO. 204.

22. *Robinson v. State*, 627 P.2d 168, 172 (Wyo. 1981). *Robinson* discusses Rule 22 which was the precursor to Rule 204.

23. 407 U.S. 514 (1972).

24. The Court rejected two approaches that had been used in the past. The first was that the Constitution require a defendant to be offered a trial within a specific number of days or months. This would require the Court to engage in legislative or rulemaking activity, rather than the adjudicative process to which they should confine their efforts. *Barker*, 407 U.S. at 523. The demand-waiver rule was also rejected. The demand-waiver doctrine states that a defendant waives his right to a speedy trial for the period of time that he has not demanded a trial. *Id.* at 524-25. The Court felt this would place defense counsel in an awkward position to demand an early trial. *Id.* at 527-28.

25. *Id.* at 530. The balancing test is essentially an ad hoc approach to determine if the right has been violated.

not be convicted unless Manning testified against him.²⁶ The State proceeded to prosecute Manning and obtained a series of sixteen continuances of Barker's trial. After nearly four and a half years, and six trials, Manning was finally convicted in December of 1962.²⁷ During this time, Barker was incarcerated for ten months and had made two *pro forma* motions to dismiss for violation of speedy trial.²⁸ Following Manning's conviction, the State moved to set Barker's trial for March 19, 1963. However, because of illness to a primary witness, the trial was again continued. In October of 1963, Barker's trial finally commenced.²⁹ Over five and a half years had elapsed between Barker's arrest and trial.

The Court found that the five and a half year lapse between Barker's arrest and trial was extraordinary and that it was mostly attributable to the prosecution.³⁰ However, the Court concluded that the delay did not violate Barker's right to a speedy trial because it was outweighed by two counterbalancing factors: 1) the prejudice to Barker caused by the delay was minimal because there was no claim that the delay had impaired his defense; and 2) that Barker had not vigorously asserted his right to a speedy trial.³¹

Under the balancing test, length of delay is essentially a "triggering mechanism". Until a delay exists which is "presumptively prejudicial"³², there is no necessity to inquire into the other three factors.³³ The Court reasoned that the speedy trial right is so imprecise, a court must consider the individual facts of each case in deciding whether the length of delay will trigger further analysis.³⁴ If the length of the delay is sufficient, then the other factors must be considered.

The second factor, is the reason for the delay, or "the reason the government assigns to justify the delay."³⁵ The weight assigned to this

26. *Id.* at 516.

27. *Id.* at 516-17.

28. *Barker*, 407 U.S. at 517.

29. *Id.* at 517-18.

30. *Id.* at 533-34.

31. *Id.* at 534.

32. W. LAFAYE & J. ISRAEL, CRIMINAL PROCEDURE § 18.2 at 688 (1985). LaFave and Israel attempted to shed light on what presumptively prejudicial is, by stating:

The reference to "delay which is presumptively prejudicial" is somewhat confusing, but viewing the case in its entirety it seems fair to say that this phrase does *not* mean a period of time so long that it may actually be presumed the defense at trial would be impaired. Nor does it mean that once a sufficient time has been shown the prosecution has the burden of establishing that in fact there was no prejudice. The Court apparently meant that a claim of denial of speedy trial may be heard after the passage of a period of time which is, *prima facie*, unreasonable in the circumstances.

Id.

33. *Barker*, 407 U.S. at 530.

34. *Id.* The Court exemplified this by stating that, "[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Id.* at 531.

35. *Id.*

factor will vary depending on the reason for the delay. A deliberate attempt to delay the trial will weigh heavily against the government; a more neutral reason, such as negligence or overcrowded courts, will weigh less heavily but should still be considered; and a valid reason will serve to justify the delay.³⁶

The third factor is the assertion by the defendant of his right to a speedy trial. This factor is entitled to strong evidentiary weight in deciding if a right has been violated.³⁷ Courts should weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection.³⁸ Significant weight will not be given simply by making a *pro forma* motion for a speedy trial. The defendant must diligently assert his right or it will be difficult for him to prove he was denied a speedy trial.³⁹

The fourth factor is the prejudice to the defendant caused by the delay. Prejudice to the defendant is broken down into three categories: 1) oppressive pretrial incarceration; 2) anxiety and concern of the accused; and 3) the possibility that the defense will be impaired as a result of the delay.⁴⁰ Of these, the extent to which the defense will be impaired is the most important, "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."⁴¹

None of the four factors are necessary to establish that a violation has occurred. They are related factors to be considered along with other relevant circumstances.⁴² An affirmative demonstration of prejudice is not necessary to prove a denial of the right to a speedy trial.⁴³ The *Barker* Court outlined this test to aid lower courts in determining whether a speedy trial violation exists, not to establish a rigid test.

The Wyoming Supreme Court has consistently applied the *Barker* test: The length of delay is a triggering mechanism,⁴⁴ allocating the appropriate weight to the various classifications of reason for delay;⁴⁵ inquiring into whether the defendant vigorously pressed his right to a speedy trial;⁴⁶ and taking into account any evidence regarding the

36. *Id.*

37. *Id.* at 531-32. Although the Court rejected the demand-waiver rule they were not willing to go so far as to say that the defendant has no responsibility in asserting the right. *Id.* at 528.

38. *Id.* at 529.

39. *Id.* at 532.

40. *Id.*

41. *Id.* If witnesses die or disappear, or if loss of memory prevents witnesses from accurately recalling past events, this will result in prejudice to the defendant brought about by the delay. *Id.*

42. *Id.* at 533. "In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." *Id.*

43. *Moore v. Arizona*, 414 U.S. 25, 26 (1973).

44. *Phillips v. State*, 597 P.2d 456, 460 (Wyo. 1979).

45. *Caton v. State*, 709 P.2d 1260, 1265 (Wyo. 1985).

46. *Robinson*, 627 P.2d at 171.

three types of prejudice⁴⁷ to determine if there was actual prejudice.⁴⁸ In addition, the court has used Rule 204 of the Uniform Rules for the District Courts as a factor in the balancing test.⁴⁹ Only once, prior to the instant case has the court found the balance tipped in favor of the defendant, warranting a dismissal.⁵⁰

The Wyoming Supreme Court adopted the four part balancing test from *Barker* in *Cosco v. State*.⁵¹ The *Cosco* court held that a nineteen month delay was not a deprivation of the right to a speedy trial where the delay did not prejudice the defendant.⁵² In *Cosco*, the delays which did occur were mostly for the benefit of or caused by the defendant and there was no indication of unreasonable delay attributable to the prosecution.⁵³

The Wyoming Supreme Court has decided a long line of cases since *Cosco* without finding a speedy trial violation under the *Barker* balancing test.⁵⁴ In *Cherniwchan*, the court found that the speedy trial rights were infringed, but decided that when all things were considered the stringent remedy of dismissal was not called for.⁵⁵

Relying on *Barker*, the *Cherniwchan* court determined the length of delay of 107 days was unconscionable and the county and court were to blame. However, the court noted that the defendants did not assert their rights to a speedy trial during the delay, and that left the court to decide if there was prejudice sufficient to warrant dismissal.⁵⁶ Although the defendants had been wronged, the wrongs did not prejudice their ability to defend.⁵⁷ The court found there was no violation because the defendants failed to show that the delay had prejudiced their ability to defend.⁵⁸ Although the court found no violation, they did issue a stern warning admonishing law enforcement officials in Wyoming. "[T]his must not happen again, and all persons—whether

47. Oppressive pretrial incarceration; any unusual pretrial anxieties; or any impairment of the defense. *Heinrich v. State*, 638 P.2d 641, 645 (Wyo. 1981).

48. *Grable v. State*, 649 P.2d 663, 671 (Wyo. 1982).

49. *Harvey*, 774 P.2d at 93 (citing *Caton v. State*, 709 P.2d 1260 (Wyo. 1985); *Cook v. State*, 631 P.2d 5 (Wyo. 1981); *Robinson v. State*, 627 P.2d 168 (Wyo. 1981)). In *Cook*, the Wyoming Supreme Court rejected a strict reading of Rule 204, holding that a strict reading of the time limitations conflicts with the balancing test from *Barker*. The time limitation of the rule limits the flexibility and thus the balancing test is preferred. *Cook*, 631 P.2d at 10 (citing *Robinson v. State*, 627 P.2d 168 (Wyo. 1981)).

50. *Stuebgen v. State*, 548 P.2d 870, 875 (Wyo. 1976).

51. 503 P.2d 1403, 1405 (Wyo. 1972).

52. *Id.* at 1406.

53. *Id.*

54. *See, e.g.*, *Sodergren v. State*, 715 P.2d 170 (Wyo. 1986); *Caton v. State*, 709 P.2d 1260 (Wyo. 1985); *Grable v. State*, 649 P.2d 663 (Wyo. 1982); *Robinson v. State*, 627 P.2d 168 (Wyo. 1981); *Cook v. State*, 631 P.2d 5 (Wyo. 1981); *Heinrich v. State*, 638 P.2d 641 (Wyo. 1981); *Estrada v. State*, 611 P.2d 850 (Wyo. 1980); *Phillips v. State*, 597 P.2d 456 (Wyo. 1979); *Cherniwchan v. State*, 594 P.2d 464 (Wyo. 1979); *Hurst v. State*, 563 P.2d 232 (Wyo. 1977).

55. *Cherniwchan*, 594 P.2d at 470.

56. *Id.* at 469.

57. *Id.*

58. *Id.* at 470.

they be prisoners or whomsoever will be given their Rule-5 and speedy-trial rights, failing which the supervisory authority of this court will be brought into play to address such negligent conduct."⁵⁹

In *Estrada v. State*, the court again applied the *Barker* test to reach the conclusion that there was no sixth amendment violation of a speedy trial.⁶⁰ Eleven months elapsed between the filing of the complaint and Estrada's trial. The court found the delay was sufficient to trigger further inquiry into the other factors.⁶¹ Although the delay was partly attributed to extradition procedures, necessary to bring Estrada from Kansas to Wyoming to face charges, the court determined that there was no sinister motive in any unnecessary delay in bringing Estrada into Wyoming.⁶² Estrada also failed to show any evidence to support his claim of prejudice.⁶³ The court again found that without evidence of prejudice or bad faith causing the delay, the defendant's speedy trial right had not been violated.⁶⁴

In fact, only one Wyoming case prior to *Harvey* has found a violation of the right to a speedy trial under the *Barker* balancing test.⁶⁵ In *Stuebgen v. State*, there was an eighteen month delay between arrest and trial. The court found that the State could not show good cause for the delay or that the delay was necessary. The delay also resulted in prejudice to the defendants' employment and education. The court found the failure to show good cause, and the prejudice were sufficient to establish a speedy trial violation.⁶⁶

PRINCIPAL CASE

Justice Macy, writing for the majority stated that, "It was perhaps inevitable, . . . that this Court would eventually be confronted with a case wherein the result in *Stuebgen* and the warning in *Cherniwchan* would not have been heeded."⁶⁷ In a 3-2 decision the Wyoming Supreme Court determined that the State had violated Jetty Lee Harvey's right to a speedy trial.⁶⁸ The court arrived at this conclusion by applying the *Barker* balancing test: the length of the delay; the reason for the delay; the assertion of his right to a speedy trial; and the

59. *Id.*

60. *Estrada v. State*, 611 P.2d 850, 855 (Wyo. 1980).

61. The Wyoming Supreme Court stated that the *Barker* facts were different, but they cited *Barker* to illustrate the point that even very lengthy delays are not *per se* violative of the constitution. *Id.* at 853.

62. *Id.* at 854. The Wyoming Supreme Court quoted the pertinent language from *Barker*: "'Neutral' unnecessary delay 'should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.'" *Id.*

63. *Id.* at 855.

64. *Id.*

65. *Stuebgen v. State*, 548 P.2d 870 (Wyo. 1976).

66. *Id.* at 875.

67. *Harvey*, 774 P.2d at 90.

68. *Id.* at 97.

prejudice resulting from the delay.⁶⁹ Balancing all four factors led the court to the conclusion that a speedy trial violation had occurred.⁷⁰

The court determined that a delay of eighteen months from arrest to trial raised a presumption of prejudice that weighed heavily in the defendant's favor.⁷¹ The court also used Wyoming District Court Rule 204 as a touchstone in the analysis, and concluded that a delay four times greater than the period prescribed by the rule was sufficient to trigger further analysis into the other three factors.⁷²

Likewise, the Court found that the State had failed to meet the burden of showing that the delays were reasonable or necessary.⁷³ Therefore, the court attributed the entire reason for the delay to the State. However, the court made no finding regarding whether the delay was neutral as opposed to deliberate, nor did it find anything in the record indicating sinister motive on behalf of the State.⁷⁴ Nevertheless, the court found the reason for the delay weighed substantially in favor of Harvey.⁷⁵

Next, the court concluded that Harvey had adequately asserted his right to a speedy trial and that this weighed in his favor.⁷⁶ Even though Harvey did not vigorously press his two motions to dismiss, the court stated that Harvey had no duty to bring himself to trial.⁷⁷

Finally, the court found that the prejudice factor also weighed in Harvey's favor.⁷⁸ Despite the fact that there was no lengthy pretrial incarceration, no prejudice in the ability to defend, or any actual anxiety suffered, the court felt the eighteen month delay was sufficient to presume prejudice. Relying on Justice Brennan's concurrence in *Dickey v. Florida*, the court reasoned that prejudice should be presumed in the case of excessive delay.⁷⁹

The majority's presumption of prejudice led Justice Thomas to dissent. He argued that there was not any actual prejudice to Harvey.⁸⁰ There was no evidence that Harvey suffered from anxiety or any other aspect of prejudice; the effects were simply presumed.⁸¹ Even if Harvey had shown he was anxious, Justice Thomas concluded no speedy

69. *Id.* at 92-97.

70. *Id.* at 97.

71. *Id.* at 94.

72. *Id.* (citing *Caton*, 709 P.2d at 1265).

73. *Id.* at 95 (citing *Estrada*, 611 P.2d at 854; *Stueben*, 548 P.2d at 875).

74. *Id.* The court concluded that there had been no good faith effort to bring Harvey to trial as quickly as possible. *Id.*

75. *Id.*

76. *Id.* at 96.

77. *Id.* (citing *Barker*, 407 U.S. at 527; *Dickey v. Florida*, 398 U.S. 30, 38 (1970)).

78. *Harvey*, 774 P.2d at 97.

79. *Id.* at 96 (citing *Dickey*, 398 U.S. at 39 (1970) (Brennan, J., concurring)). The Wyoming Supreme Court adopted the language from Brennan's concurrence in *Dickey*, in *Cherniuchan*, 594 P.2d at 469, and *Caton*, 709 P.2d at 1266.

80. *Harvey*, 774 P.2d at 114 (Thomas, J., dissenting).

81. *Id.*

trial violation occurred because, "he doubted that a cloud of suspicion is very troublesome to the guilty" ⁸²

Justice Golden, also dissented asserting that the majority had achieved an inspired application of the doctrine of *stare decisis*.⁸³ By comparing the facts from *Barker* with those in *Harvey*, Justice Golden concluded that the majority had reached an absurd result.⁸⁴ He felt that if the majority were deciding a Willie Barker-like case today, they would reverse his conviction.⁸⁵

Justice Golden also felt the majority was trying to send a message to the district judge with the opinion.⁸⁶ Justice Golden feared the majority had lost sight of the issue before the court; whether substantive analysis would be given to the factors in *Barker*.⁸⁷

ANALYSIS

To analyze the *Harvey* decision, it is necessary to look carefully at the way in which the Wyoming Supreme Court applied the four factors from *Barker*.⁸⁸ The Wyoming Supreme Court was blinded by their determination to realize their warning from *Cherniowchan*, and misapplied the *Barker* balancing test. The four factors must be considered together and balanced in relation to all relevant circumstances.⁸⁹

Length of Delay

Initially, the courts should consider the length of delay mainly as a triggering mechanism.⁹⁰ "Until there is some delay which is presumptively prejudicial there is no necessity for inquiry into the other factors that go into the balance."⁹¹ In cases where the length of delays

82. *Id.*

83. *Id.* at 117 (Golden, J., dissenting). Justice Golden's dissent in *Harvey* is consistent with his stance in *Phillips*. *Phillips*, 774 P.2d at 126 (Golden, J., dissenting).

84. *Harvey*, 774 P.2d at 117. Making the comparison, Justice Golden stated: Of course, Mr. Harvey's and Mr. Phillips' facts of consequence were not quite the same as Willie Barker's. Willie Barker's trial was delayed nearly five years, Mr. Harvey's and Mr. Phillips' only eighteen months. Willie Barker suffered nearly ten months' pretrial incarceration; Mr. Harvey and Mr. Phillips suffered none. Willie Barker made several *pro forma* pretrial speedy trial assertions, as did Mr. Harvey; Mr. Phillips made none. Mr. Barker's conviction was affirmed and he is now serving his life sentence. Mr. Harvey's and Mr. Phillips' convictions were reversed and they are now roaming the streets of Wyoming as free men.

Id.

85. *Id.*

86. *Id.*

87. *Id.* at 118.

88. Unless noted, this analysis applies equally to the situation in *Phillips*.

89. *Harvey*, 774 P.2d at 92 (citing *Moore v. Arizona*, 414 U.S. 25 (1973); *Heinrich v. State*, 638 P.2d 641 (Wyo. 1981)).

90. *Barker*, 407 U.S. at 530.

91. *Id.*

have been factually similar to the delay in *Harvey*,⁹² the court has used the length of delay merely as a touchstone to prompt further investigation.

However, in *Harvey*, the Wyoming Supreme Court gave substantial weight to the defendant simply because of the length of delay.⁹³ This is inconsistent with prior decisions.⁹⁴ The *Barker* Court characterized the five and a half year delay as extraordinary, but refused to give the delay factor substantial weight and did not indicate whether the length of delay weighed in Barker's favor.⁹⁵ The delay in *Barker* was considerably longer than the delay in *Harvey*. If the United States Supreme Court did not give substantial weight to a five and a half year delay, it is illogical that a delay one-third as long should weigh heavily in *Harvey*'s favor.

Reason for the Delay

Secondly, courts must examine the reason or cause for the delay.⁹⁶ "[I]t is recognized that neutral or innocent unnecessary delay should be weighed less heavily against the State than deliberate unnecessary delay"⁹⁷ Mere negligence in bringing the defendant to trial is considered a neutral delay and weighs less heavily than a deliberate attempt to delay the trial.⁹⁸

In *Harvey*, the Wyoming Supreme Court afforded substantial weight to the reason for the delay because the State could not justify the delay, and because no good faith effort was made to bring *Harvey* to trial.⁹⁹ However, the court found no evidence that the delay was attributable to any sinister motive on behalf of the State in bringing *Harvey* to trial.¹⁰⁰ Finding no good faith effort, nor any sinister motive, would imply that the reason for the delay was simple negligence on the part of the State. Since negligence is considered a neutral delay, receiving less weight, substantial weight should not be attributed to the reason for the delay. Certainly this factor should weigh in favor of *Harvey*, but giving this factor substantial weight is too liberal.

The first two factors of the *Barker* test tip the balance in favor of *Harvey*, but not by the considerable weight allocated by the majority. The situation in *Barker*, was considerably more egregious than the case

92. *Grable*, 649 P.2d at 670; *Heinrich*, 638 P.2d at 644. The delays were 419 and 453 days respectively, and there was no discussion by the court of the delay weighing heavily in favor of the defendant. The delay only triggered further analysis, and would be taken into account in applying the balancing test.

93. *Harvey*, 774 P.2d at 94.

94. *Grable*, 649 P.2d at 670; *Heinrich*, 638 P.2d at 644.

95. *Barker*, 407 U.S. at 533.

96. *Id.* at 531.

97. *Harvey*, 774 P.2d at 95 (citing *Caton*, 709 P.2d at 1265; *Estrada v. State*, 611 P.2d 850 (Wyo. 1980); *Barker v. Wingo*, 407 U.S. 514 (1980)).

98. *Barker*, 407 U.S. at 531.

99. *Harvey*, 774 P.2d at 95.

100. *Id.*

at hand. The delay was five and a half years, of which nearly all was attributable to the State. Yet, in *Barker*, the weight given to the length and reason for delay was counterbalanced by the other two factors.¹⁰¹

Defendant's Assertion of His Right

Thirdly, courts inquire into the defendant's responsibility to assert his right to a speedy trial.¹⁰² The majority in *Harvey* glosses over the distinction between a *pro forma* objection and one that is diligently asserted. The majority correctly distinguished between a counseled failure to object versus an uncounseled failure to object.¹⁰³ However, this distinction focuses on the timing of the objection as opposed to the nature of the objection itself. Even though *Harvey* asserted his right shortly after he retained counsel, the motion was merely *pro forma*.¹⁰⁴ In *Barker*, the Court weighed the frequency and force of the objections instead of attaching significant weight to purely *pro forma* objections.¹⁰⁵

The Wyoming Supreme court afforded weight to *Harvey's* two *pro forma* motions to dismiss on speedy trial grounds.¹⁰⁶ The *Barker* Court gave no weight to *Barker's* three *pro forma* motions, holding that *Barker's* failure to vigorously assert his right weighed heavily against him.¹⁰⁷ Since *Harvey's* motions were *pro forma* the majority erred in affording any weight to them.

The United States Supreme Court has indicated that they would be hard pressed to find a speedy trial violation when the facts indicate that the defendant did not want a speedy trial.¹⁰⁸ Two *pro forma* motions that were never diligently asserted certainly implies that no speedy trial was wanted.

Prejudice to Defendant

Finally, the court must consider the prejudice that the defendant suffers as a result of the delay.¹⁰⁹ The Wyoming Supreme Court found this factor weighed in *Harvey's* favor because they presumed *Harvey* was prejudiced by the lengthy delay.¹¹⁰ No evidence was presented to

101. *Barker*, 407 U.S. at 534.

102. *Id.* at 531.

103. *Harvey*, 774 P.2d at 96. The court gave credence to the fact that shortly after *Harvey* retained private counsel he promptly asserted his right to a speedy trial. This distinction between counseled and uncounseled objection was first recognized in *Estrada*. *Estrada*, 611 P.2d at 854-55.

104. *Harvey*, 774 P.2d at 117 (Golden, J., dissenting).

105. *Barker*, 407 U.S. at 529.

106. *Harvey*, 774 P.2d at 96. In *Phillips* there was no assertion of right until fifteen days prior to trial. The majority determined that failing to assert the right did not weigh for or against *Phillips*. *Phillips*, 774 P.2d at 121, 124.

107. *Barker*, 407 U.S. at 534-36.

108. *Id.* at 536.

109. *Id.* at 532.

110. *Harvey*, 774 P.2d at 97.

indicate that Harvey had suffered any actual prejudice from the delay.¹¹¹ The court deemed the eighteen month delay sufficiently long to find a presumption of prejudice with respect to pretrial anxiety and related concerns.¹¹²

In *Barker*, the United States Supreme Court did not articulate a presumption of prejudice when discussing the fourth factor in the balance.¹¹³ The *Barker* Court gave virtually no weight to any anxiety that Willie Barker may have experienced during his five and a half year delay.¹¹⁴

The *Harvey* court relied on the language of Justice Brennan's concurring opinion in *Dickey*¹¹⁵ to justify a finding of presumed anxiety prejudice. Brennan's discussion was not binding precedent for future speedy trial cases, it was offered as an academic comment that the Court should begin to consider the basic questions presented by various speedy trial scenarios.¹¹⁶ Certainly, if the Supreme Court had intended for Justice Brennan's language to be binding they could have adopted it in *Barker* and presumed anxiety prejudice to Willie Barker.¹¹⁷ But they did not. Therefore, the Wyoming Supreme Court incorrectly provided weight in favor of Harvey under the prejudice factor.

The *Barker* Court found no prejudice that would favor the defendant in that case since the Court described the factor of prejudice as a counterbalance that outweighed length, and reason for delay.¹¹⁸ Never before had the Wyoming Supreme Court presumed any sort of prejudice in the long line of speedy trial cases it had decided. The Wyoming Supreme Court has also given very little weight to the idea of anxiety prejudice. They have recognized that the defendant may be anxious during the delay but no more severely than is usually experienced by an accused.¹¹⁹

In a case where length of delay and reason for delay were much greater, the United States Supreme Court found these deficiencies could be outweighed. In a case where the length of delay was much shorter and the reason for the delay was neutral, the Wyoming Supreme Court concluded that a presumption of prejudice and *pro forma* assertions of right, resulted in a speedy trial violation.

111. It is not necessary that prejudice be affirmatively shown in order to prove a violation of the constitutional right to a speedy trial, *Moore*, 414 U.S. at 26, and *Heinrich*, 638 P.2d at 644, but it is an important factor to consider.

112. *Harvey*, 774 P.2d at 97.

113. *Barker*, 407 U.S. at 532.

114. Although the *Barker* Court did find minimal anxiety prejudice to Barker, it did not affect his ability to defend. *Id.*

115. *Dickey*, 398 U.S. at 39 (Brennan, J., concurring).

116. *Phillips*, 774 P.2d at 129 (Golden, J., dissenting).

117. "More telling is Justice Brennan's vote in *Barker*, where he joined Justice White's concurrence . . . but, when push came to shove, concurred in affirming Barker's conviction." *Id.* at 129-30.

118. *Barker*, 407 U.S. at 534.

119. *Sodergren*, 715 P.2d at 178; *Grable*, 649 P.2d at 671.

Certainly the possibility for prejudice was much greater in *Barker* where there was a five and a half year delay and he was incarcerated for ten months, than in Harvey's case where the delay was approximately eighteen months and there was no incarceration. The *Barker* Court found minimal anxiety prejudice to Barker, none of which weighed in his favor in the balance. In *Harvey*, prejudice was presumed from a year and a half delay and weighed in favor of Harvey. This appears to be contradictory to the finding from *Barker*. Certainly Willie Barker was prejudiced more by a five year delay than Harvey by an eighteen month delay. If the length and reason for delay were overcome by the other two factors in *Barker*, then a shorter, neutral delay should be counterbalanced by the lack of prejudice and failure to vigorously assert the speedy trial right in *Harvey*.¹²⁰

CONCLUSION

If the Wyoming Supreme Court had properly applied the balancing test, and followed the precedent from the United States Supreme Court they would have affirmed Harvey's conviction. In a case that is far less extreme than the landmark United States Supreme Court decision which established speedy trial precedent the Wyoming Supreme Court reached an opposite result. Whatever force was driving the Wyoming Supreme Court and whatever message it was trying to send was done by compromising a long history of precedent, and the rights of an innocent victim.

CHRISTOPHER J. WALSH

120. Since Harvey's case was a closer decision than that of Phillips, based on the facts, the logical conclusion is that *Phillips* was also erroneously decided.