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Constitutional Law - Double Jeopardy - A Constitutional Protection or a Formality to Sidestep in Successive Prosecutions - Harvey v. State

Melissa E. Westby

CASENOTES

CONSTITUTIONAL LAW—DOUBLE JEOPARDY—A Constitutional Protection or a Formality to Sidestep in Successive Prosecutions? *Harvey v. State*, 835 P.2d 1074 (Wyo. 1992).

"Justice for all" were the words on the shirt[1] worn by Sharon Ewell when Jetty Lee Harvey, the man who had helped abduct her six years before,[2] was taken to the penitentiary. The delays in this case proved to be frustrating for the defendants as well as for the victim, and caused a great deal of controversy within the general and legal communities.[3]

The crime was actually committed on January 5, 1986, in Rock Springs, Wyoming. Jetty Lee Harvey and David Swazo were riding in a pickup truck driven by Everett Phillips.[4] Phillips saw Sharon Ewell on the street and told Harvey and Swazo that he "wanted to grab her".[5] Subsequently, Phillips turned the truck around and Harvey asked Ewell if she wanted a ride.[6] Ewell tried to ignore the men, but Harvey got out and forced her into the truck.[7] Once in the truck, Swazo forced her to engage in sexual intercourse while Harvey and Phillips laughed and jeered.[8] Phillips then stopped the truck, and began to remove his pants.[9] Fortunately for Sharon Ewell, a pizza delivery man witnessed the abduction and called the police.[10] Three police cars responded to the call and rescued Sharon Ewell. All three men were arrested[11] and later charged with crimes connected to the assault.

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1. DAILY TIMES NEWSPAPER, (Rawlins, Wyoming), July 25, 1992, at 1 (photograph)
2. Harvey v. State, 774 P.2d 87 (Wyo. 1989) [hereinafter *Harvey I*].
3. The Supreme Court reversed Harvey's conviction as well as that of Everett Phillips on the grounds that the two had been denied speedy trials as guaranteed by United States Constitution. There were strong dissenting opinions by Justices Thomas and Golden. Harvey v. State, 774 P.2d 87 (Wyo. 1989); Phillips v. State, 774 P.2d 118 (Wyo. 1989).

There was extensive publicity concerning this Supreme Court decision, and the three Justices concurring in the decision were subject to abuse. *See* Brief for the Appellant at Appendix, Harvey v. State, 835 P.2d 1074 (Wyo. 1992) [hereinafter Brief for the Appellant].

4. *Harvey I*, 774 P.2d at 90.
5. Trial Transcript at 1097-1104 (Vol. IV), *Harvey I*, 774 P.2d 87 (Wyo. 1989).
6. *Harvey I*, 774 P.2d 87, 90 (Wyo. 1989).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Harvey I*, 774 P.2d 87, 90. The police arrived before Phillips actually assaulted Ewell.
11. *Id.* at 90; *See also* Phillips v. State, 774 P.2d 118.

On January 6, 1986,[12] Sweetwater County and the prosecuting attorney charged Harvey with kidnapping, sexual assault, and aiding and abetting those crimes. On July 21, 1987, more than a year and a half later, a jury found Harvey guilty of kidnapping and sexual assault.[13] The jury acquitted on the aiding and abetting charge. The defendant appealed the conviction to the Wyoming Supreme Court claiming a violation of his Fifth Amendment right to a speedy trial because of the year and a half delay in bringing the case to trial.[14] The court reversed the conviction finding a speedy trial violation and ordered the trial court dismiss the information against the Appellant on July 3, 1989.[15]

There was considerable public interest surrounding this case and extensive news coverage of the *Harvey* and *Phillips* decisions.[16] The prosecution was criticized for the delays that caused the acquittal.[17] In the midst of the controversy, the prosecuting attorney for Sweetwater County called a press conference to announce the filing of conspiracy to commit kidnapping and conspiracy to commit sexual assault charges[18] against Harvey and Phillips.[19]

Harvey's preliminary hearing on these charges took place on September 27, 1989. On December 18, 1989, the district court granted Harvey's motion to certify certain constitutional questions regarding double jeopardy and self-incriminating statements to the Wyoming Supreme Court,[20] but the court remanded to the district court with the questions unanswered. A writ of prohibition regarding the double jeopardy issue was filed by Harvey on July 25, 1989, but was rejected by the Wyoming Supreme Court.[21] On January 17, 1990, four years following the commission of the crime, a jury found Harvey guilty of conspiracy to commit kidnapping and not guilty of conspiracy to commit sexual assault.[22]

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12. David Swazo and Everett Phillips were charged with the same offenses. David Swazo pled guilty in exchange for a lighter sentence and is presently serving time in the Wyoming Penitentiary. Everett Phillips' case is almost identical to the Harvey case and the Wyoming Supreme Court decision should be out soon. Phillips v. State, 835 P.2d 1062 (Wyo. 1992).

13. Harvey v. State, 774 P.2d 87 (Wyo. 1989).

14. Brief for the Appellant at 2. Harvey v. State, 835 P.2d 1074 (Wyo. 1992).

15. A petition by the prosecution for reconsideration of the rulings was denied, and the court issued a mandate to the district court to dismiss the charges. Brief for the Appellant at 3.

16. Brief for the Appellant, Appendix D p. 1-29.

17. The district court did not keep adequate records of the proceedings that occurred between January 1986 and July 1987 to document the reasons for the continuances. There was a turnover in the prosecutors office which also caused some delays. *Harvey I*, 774 P.2d 87.

18. Conspiracy to commit kidnapping (WYO. STAT. §§ 6-1-303(a) (1988), 6-2-201 (a)(ii) & (d) (1988), and 6-2-302 (a)(i) (1988); conspiracy to commit sexual assault in the first degree (WYO. STAT. § 6-1-303 (a) (1988)).

19. David Swazo was not charged because he had pled guilty to the first charges.

20. Harvey v. State, 835 P.2d 1074, 1077 (Wyo. 1992) [hereinafter *Harvey II*].

21. *Id.* at 1076.

22. *Id.*

Harvey appealed the conspiracy conviction to the Wyoming Supreme Court. He argued that use of the same evidence to prove conspiracy as was used in the earlier trial for kidnapping and sexual assault violated his Fifth Amendment protection against double jeopardy.[23] The Wyoming Supreme Court upheld the conviction and ruled that the substantive crime and conspiracy to commit that crime were not the "same offense" for double jeopardy purposes. The Court also held that "a mere overlap of proof between two prosecutions did not establish a double jeopardy violation."[24]

This casenote will briefly discuss the development of the Fifth Amendment protection against double jeopardy, where it stands today, and how the Federal Courts vary in their interpretation of recent United States Supreme Court decisions. The casenote then demonstrates the inconsistencies of the *Harvey* decision with the United States Supreme Court as well as other federal courts. Finally, this casenote will advocate a mandatory joinder statute as a solution to the problem of inconsistent double jeopardy analyses.

BACKGROUND

The Fifth Amendment to the United States Constitution provides that no person "shall. . .be subject for the same offense to be twice put in jeopardy of life or limb."[25] The double jeopardy provision protects defendants from successive and therefore oppressive prosecutions.

The United States Constitution as well as the Wyoming Constitution provide double jeopardy protection in three situations[26]. The protection bars a second prosecution for the same offense after ac-

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23. *Id.* at 1076. The *Harvey* opinion also addressed three other issues in addition to the double jeopardy issue:

1. Had the appellant's right to a speedy trial been denied by reason of the second prosecution?
2. Had the appellant been deprived of his right to a public trial by an impartial jury as guaranteed by the Sixth Amendment to the United States Constitution by having to defend himself against conspiracy charges to a jury of persons who were aware of his prior conviction on the underlying substantive offenses from inflammatory pretrial publicity?
3. Did the trial court commit reversible error by allowing statements made by the Appellant at the allocution portion of his sentencing hearing following his initial conviction to be used against him in the second prosecution in violation of Appellant's constitutional rights to silence and due process?

24. *Harvey II*, 835 P.2d 1074, (citing) United States v. Felix, 112 S.Ct. 1377 (1992)); Grady v. Corbin, 495 U.S. 508 (1990); Blockburger v. United States, 284 U.S. 299 (1932); Harris v. Oklahoma, 433 U.S. 682 (1977)).

25. U.S. CONST. amend. V.

26. These three situations are interpreted by the United States Supreme Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969).

quittal as well as a subsequent prosecution for the same offense after conviction. It also bars multiple punishment for the same offense,[27] unless the legislature intended multiple punishments.[28]

Federal Case Law

Blockburger v. United States,[29] decided in 1932, established the test for determining what constitutes the "same offense" for double jeopardy purposes. This case involved two convictions, one for selling morphine not in the original stamped package and the second for executing a sale without a written order by the purchaser.[30] The court reviewed the consecutive sentences and cumulative fines imposed by the trial court.[31] The test that was used was based on the specific elements of the crimes charged. If there was at least one different element in each offense charged, double jeopardy did not apply.[32]

This theory was significantly broadened in *Grady v. Corbin*,[33] by the United States Supreme Court's focus on the defendants conduct.[34] In *Grady*, the defendant was at fault in an automobile collision that caused the death of the driver in the other car. He was charged and pled guilty to driving while intoxicated and failing to keep to the right side of the road.[35] At the time the defendant was initially charged, neither the prosecutor nor the police were aware of the fact that the driver of the other vehicle had died as a result of the accident.[36] The state then brought a separate charge of vehicular manslaughter against the defendant for which he was also convicted. On appeal, the United States Supreme Court found that this second charge constituted a double jeopardy violation[37] because the state was attempting to prove

27. The Wyoming case, *Birr v. State*, 744 P.2d 1117, 1118 (Wyo. 1987) discusses the issue of whether or not consecutive sentences imposed for felony murder and the underlying felony violated the double jeopardy clause. *Birr* was overruled in 1992 by *Cook v. State*, 841 P.2d 1345 (Wyo. 1992).

28. The court cannot impose multiple punishment unless the legislature has specifically provided for multiple punishment and the punishment does not violate the Eighth Amendment. Whalen v. State, 445 U.S. 684, 689 (1980).

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

30. *Id.*

31. *Id.*

32. *Id.* at 304. This test is referred to as the "Blockburger" or "Same Evidence" approach. This is the established test for determining whether successive prosecutions arising out of the same events are for the "same offense".

33. 495 U.S. 508 (1990).

34. *Id.* at 509.

35. *Id.* at 511.

36. *Id.* at 509

37. The United States Supreme Court affirmed the New York Court of Appeals in a 5-4 decision. *See* Casenote, *An Unsuccessful Effort to Define "Same Offense"*, 25 GA. L. REV. 143, 145 (1990).

the same conduct, using the traffic offenses, to which the defendant had pled guilty in the first trial.[38]

In his opinion for the United States Supreme Court in *Grady*[39], Justice Brennan stated that, "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[40] This case established a new two-level test that defines "same offense" using the conduct of the defendant.[41]

At the time of the *Harvey* decision, the *Grady* test had been applied in many federal courts as well as state courts. In *United States v. Felix*,[42] decided two years after *Grady*, the United States Supreme Court stated that the decision in *Grady* did not bar a second prosecution for conspiracy in a case involving a series of criminal activities.[43] The *Felix* case involved federal prosecutions for drug related activities by the defendant in Oklahoma and Missouri. Felix was tried and convicted in Missouri for the substantive drug offense of operation of a drug manufacturing facility. In this first trial, evidence of other offenses that took place in Oklahoma was used to show intent.[44] Felix was then tried in Oklahoma for conspiracy in connection with the operation of a drug manufacturing facility, the substantive offense in the first trial. The Supreme Court stated in its decision that the "actual crimes charged in each case were different in both time and place; there was absolutely no common conduct linking the alleged offenses."[45]

The Supreme Court in *Felix* equated this case with "Racketeer Influenced and Corrupt Organization" (RICO) and "Continuing Criminal Enterprises" (CCE)[46] cases because these type of offenses involve ongoing crimes, not a single discrete crime.[47]

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38. *Corbin*, 495 U.S. 508 (1990). The Court found that the state was going to use the two charges for which Corbin had already pled guilty, to get the conviction for second degree vehicular manslaughter. *Id.*

39. *Id.*

40. *Id.* at 523. This was one of the last opinions written by Justice Brennan before he retired.

41. *Id.* The two-level test involves an analysis of the elements of the crimes charged, and then if necessary a second analysis under a "conduct test."

42. 112 S.Ct. 1377 (1992).

43. *Id* at 1379-80.

44. *Id* at 1380.

45. *Id* at 1382.

46. RICO cases because they deal with criminal organizations, and CCE cases because they deal with criminal operations, require a substantive offense as well as proof that the activities are ongoing in order to prove a violation.

47. RICO charges are used to prosecute organized criminal operations. CCE requires a series of related offenses by the defendant before this charge will be filed. United States v. O'Connor, 953 F.2d 338, 340 (7th Cir. 1992).

Federal Courts have been applying this rationale to establish an exception to the *Grady* test for these two specific types of prosecutions. In *United States v. O'Connor,* the Seventh Circuit Court of Appeals used this exception to allow predicate acts for which the defendant had already been tried, to be used in a subsequent RICO prosecution.[48] O'Connor had previously been prosecuted for receipt of stolen goods from interstate commerce, wire fraud, and other predicate acts which were used to prove the RICO charges.[49] The court held that because RICO charges are based on a series of criminal acts, the use of previously tried charges did not violate the double jeopardy clause under the *Grady* analysis.[50]

In *United States v. Gambino*[51] the Second Circuit Court of Appeals also held that under *Grady*, previously tried charges are admissible in CCE and RICO charges. The court further found that the conspiracy charge in the second case was barred by the "same conduct" test. The defendants in this case were charged with conspiracy to import and distribute heroin and cocaine and also CCE and Rico charges stemming from these activities. The court vacated the conspiracy conviction which "rested at least partially on overt acts for which the defendants had been previously prosecuted."[52] The court upheld RICO and CCE convictions obtained in a similar manner as those in *O'Connor. O'Connor* illustrates the clear distinction made by the court between single discrete crimes and the ongoing criminal activity crimes, as far as double jeopardy issues are concerned.

In *United States v. Calderone,*[53] the court specifically addressed conspiracy charges as they related to the holding in *Grady*. The court stated that the "same conduct" test applied equally to successive prosecutions in a single transaction case, such as *Grady, and* conspiracy cases.[54] Calderone was acquitted on charges of participating in a wide-ranging drug conspiracy and the Court held that the acquittal barred a subsequent and narrower conspiracy charge.[55] The court emphasized that *Grady* is applicable only to single transaction cases. The court distinguished CCE and RICO cases because Congress intended that the conduct proved in the earlier case would be used in the second

48. *Id.* at 341.
49. *Id.* at 339.
50. *Id.* at 342. *See supra* text accompanying notes 42-45.
51. 920 F.2d 1108, 1111-13 (2d Cir. 1990), *cert. denied,* 112 S.Ct. 54, (1991).
52. *Id.* at 1111.
53. 917 F.2d 717 (2d Cir. 1990)
54. *Id.* at 721.
55. *Id.*

prosecution for these types of crimes.[56] The courts decision turned on the fact that under *Grady* a second prosecution was barred when the same conduct would be shown to establish an "agreement" that differed from the first charge only because of the wording in the indictment.

Since the *Grady* decision, two new members have been appointed to the United States Supreme Court making the future in this area uncertain. Under federal case law, the applicable standard in cases involving double jeopardy was already somewhat unclear. The Wyoming Supreme Court has also had difficulty clarifying the proper test and devising an analysis that will work to protect defendants but not unnecessarily burden prosecutors. This, as well as the tentativeness in the court's few decisions in this area make the level of double jeopardy protection in Wyoming hard to determine.

The Law in Wyoming

Some states have limited the application of the *Grady* test[57] to offenses arising out of a single fact situation.[58] Other state courts allow a broad application of the test, by not allowing the same evidence to be used to prove substantially different offenses arising out of a continuing series of fact situations.[59]

The cases in Wyoming follow a similar evolution in their double jeopardy analyses as the United States Supreme Court cases. In *Vigil v. State*,[60] the court originally adopted the *Blockburger* test, stating that the "Wyoming Constitution and the United States Constitution have the same meaning and are coextensive in application." In *Vigil*, the court allowed the jury to return five verdicts for five counts of

56. *Id.* at 721. *See also* United States v. Esposito, 912 F.2d 60, 65 (3d Cir. 1990) (the court held that the conduct needed to prove the RICO charge was different than that needed to prove a racketeering charge).

57. Vestal & Gilbert, *Preclusion of Duplicative Prosecution: A Developing Mosaic*, 47 Mo. L. Rev. 1, 9 (1982). "The phrase 'same offense' in the double jeopardy clause readily lends itself to two interpretations." This article was written long before the decision in *Grady*, but it points out the fact that there has always been confusion about the protection provided by the due process clause.

Grady was a five to four opinion and its "same conduct" test to determine the same offense for double jeopardy purposes has been criticized as being too easily misapplied and misinterpreted. In Casenote: *An Unsuccessful Effort to Define "Same Offense"*, 25 GA. L. REV., 143-166 (1990), Dowling v. United States, 110 S. Ct. 668 (1990) is used as an example of how the "same conduct" test is easily misapplied.

58. *Harvey II*, 835 P.2d 1074 (Wyo. 1992) (Urbigkit, J., dissenting). *See, e.g.*, State v. Hope, 215 Conn. 570, 577 A.2d 1000 (1990), *cert. denied*, 111 S.Ct. 968 (1991); Dixon v. State, 584 So.2d 195 (Fla. App. 1991); Harrelson v. State, 569 So.2d 295 (Miss. 1990).

59. There are numerous state court decisions. *See, e.g.*, State v. Hope, 577 A.2d 1000 (1990); Dixon v. State, 584 So.2d 195 (Fla. App. 1991); Jivers v. State, 406 S.E.2d 154 (S.C. 1991).

60. 563 P.2d 1344 (Wyo. 1977)

assault with a deadly weapon when the defendant had fired a gun at a car full of people.[61] *Vigil* only received one sentence, and the court upheld the five verdicts.[62]

In 1986, the Wyoming Supreme Court altered the *Vigil* test to adopt a "same evidence" rule with its decision in *State v. Carter*.[63] In *Carter*, the defendant was charged with possession with intent to sell hash and with delivery of marijuana. The court upheld the convictions because at the time of arrest Carter had just completed a sale of marijuana but was still negotiating a sale of hash.[64] The court stated that because the state did not use the same evidence to obtain the convictions it did not violate the defendant's double jeopardy protection.[65] The "same evidence" rule is an even broader application of double jeopardy protection than the "same conduct" test from *Grady*.

Birr v. State[66] discussed double jeopardy as it applies to multiple punishments in Wyoming. The Wyoming Supreme Court found that the double jeopardy clause prohibited multiple punishments for the same offense unless specifically authorized by the legislature.[67] In this case, the court found that felony murder and the underlying felony of robbery were distinct offenses and that consecutive sentences were valid because the legislature intended separate punishments.[68]

Birr was overruled in 1992 by *Cook v. State*.[69] The court held that separate sentences could not be imposed for convictions of felony murder and the underlying offense. The defendants in *Cook* pled guilty to felony murder, aggravated robbery, and conspiracy to commit aggravated robbery.[70] They were sentenced for each offense with the terms to run consecutively.[71] The Wyoming Supreme Court reversed the multiple punishments and overruled *Birr*.[72] The court cited *Grady* in their discussion of the test that should be used in determining a double jeopardy violation.[73] The court held that multiple punishments were not authorized by the legislature and that courts

61. *Id.* at 1346.
62. *Id.* at 1349.
63. 714 P.2d 1217 (Wyo 1986)
64. *Id.* at 1219.
65. *Id.* at 1220.
66. 744 P.2d 1117 (Wyo 1987).
67. *Id.* at 1122.
68. *See* Casenote *Consecutive Sentences for Felony Murder and the Underlying Felony: Double Jeopardy or Legislative Intent? Birr v. State*, 744 P.2d 1117 (Wyo. 1987), 23 LAND & WATER L. REV. 603 (1988). This note criticizes the Wyoming Supreme Court's decision in *Birr* because it goes against the long established principle in favor of lenity and construing the statute in favor of the defendant.
69. Cook v. State, 841 P.2d 1345 (Wyo. 1992).
70. *Id.* at 1346.
71. *Id.*
72. *Id.*
73. *Id.* at 1350 (citing Birr v. State, 744 P.2d 1117 (Wyo. 1987)).

imposing these sentences were violating the protection against double jeopardy.[74]

The Wyoming Supreme Court has chosen to view the decision in *Grady* as applying only to identical charges for the same offense. In his dissent in *Harvey*,[75] Justice Urbigkit stated that this was an unfortunate limitation to an extremely important constitutional right.[76]

PRINCIPAL CASE

The majority opinion in *Harvey v. State*[77] begins with a quote from *Grady*[78] defining the "same conduct" test and explaining how it was limited by *United States v. Felix*.[79] The majority stated that *Felix* "resolved the uncertainty and confusion created by *Grady*"[80] by clarifying that the substantive crime and conspiracy are separate and distinct offenses.[81]

In *Harvey*, the Wyoming Supreme Court focused on the differences in the conduct constituting the two offenses.[82] The court also looked at the wording in the Wyoming statutes to show the conduct necessary to prove the elements of each offense.[83] The court acknowledged the fact that the same evidence was used to prove both offenses. The content of the opening and closing statements, the jury instructions, and much of the same testimony were the same in both trials. The court upheld the verdict in spite of these repetitions holding that "a mere overlap of proof between two prosecutions does not establish a double jeopardy violation."[84]

The Wyoming Supreme Court uses a *Blockburger* analysis to determine that an agreement beforehand, which is an element of conspiracy, is not an element of the substantive crime.[85] Also, the court held that the overlapping testimony and evidence went to prove one element of conspiracy which was not an element of either kidnapping

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74. *Id.* at 1346.

75. *Harvey II*, 835 P.2d 1074.

76. Another case pending in Wyoming addresses a similar question as the one in *Harvey II*. In *Longstreth v. State* case the defendant was originally charged with burglary with intent to commit arson. The Wyoming Supreme Court denied a petition for prohibition. The State then charged Longstreth with felony destruction of property and the case is set for trial in Evanston the week of February 22, 1993. *Longstreth v. State*, No. 91-81.

77. *Harvey II*, 835 P.2d 1074, 1077.

78. See text accompanying notes 42-45. The prosecution argued that the rule in *Grady* oversimplified the double jeopardy clause. 835 P.2d 1074.

79. 112 S.Ct. 1377.

80. The *Felix* case stated that conspiracy and the completed substantive offense are separate offenses for double jeopardy considerations.

81. The Court in *Felix* cited several early cases for this proposition, *See, e.g.*, United States v. Bayer, 331 U.S. 532 (1947); Pinkerton v. United States, 328 U.S. 640 (1946).

82. *Harvey II*, 835 P.2d 1074, 1077.

83. *Id.* at 1078.

84. *Id.*

85. *Id.*

or sexual assault. Since the evidence was not used to prove the underlying offense it did not constitute a double jeopardy violation.[86]

The State argued that for double jeopardy to be invoked there has to be more than a single valid prosecution.[87] The prosecution must result in an acquittal or a conviction.[88] In this case, the jury decided all issues of fact against Harvey and his conviction and sentence were set aside on appeal. The State argued that because of this there was no conviction.[89] The reason for the reversal by the supreme court in the *Harvey* case was a speedy trial violation, but there was a valid prosecution as well as a conviction.

Justice Urbigkit in his dissent advocated adoption of a joinder statute to eliminate the possibility of this limited view of double jeopardy being used as a prosecutorial tool to retry a person if the first prosecution is not successful.[90] Any charge which involves more than one party can involve a contention of conspiracy or an agreement beforehand between the parties to commit the crime. Therefore, there would always be the possibility of getting a second chance if the conspiracy charge is held back. In addition, charges of solicitation, attempt, accessory before the fact, accessory after the fact,[91] and the actual offense could all be brought in six different proceedings.

ANALYSIS

The Wyoming Supreme Court's failure to apply the double jeopardy analysis as it was established in *Grady v. Corbin* resulted in an incorrect holding in the *Harvey* case.[92] Under the current "same conduct" test, the second prosecution for conspiracy should have been barred by the Fifth Amendment protection against double jeopardy.[93]

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86. *Id.*

87. Brief for the Appellees at 15, Harvey v. State, 835 P.2d 1074, [hereinafter, Brief for the Appellees].

88. Brief for the Appellees at 7. (If there is a conviction, then there must be a punishment imposed).

89. If setting aside a decision on appeal would circumvent the double jeopardy protection, this would be the standard tactic to use in this situation. There was a valid conviction in the first trial even though it was set aside, and double jeopardy should have attached to all subsequent charges.

90. Justice Urbigkit discussed the ABA Standards of Criminal Justice 13-2.3 and the ALI Model Penal Code for the Joinder Statutes.

The dissent also stated that this decision, in essence, does away with collateral estoppel in the double jeopardy context. *See* Ashe v. Swensen, 397 U.S. 436 (1970).

91. Conspiracy, WYO STAT. § 6-1-303 (1988); Solicitation, WYO. STAT. § 6-1-302 (1988); Attempt, WYO. STAT. § 6-1-301 (1988); Accessory before the fact, WYO. STAT. § 6-1-201 (1988); Accessory after the fact, WYO. STAT. § 6-5-202 (1988).

92. *See supra* text accompanying notes 34-42.

93. In *Dowling v. United States*, 110 S. Ct. 668 (1990), the defendant went through two separate trials for two unrelated robberies. The Court allowed the victim of the first robbery to testify at the second trial. In Justice O'Connor's dissenting opinion in *Grady* she found the

The Constitutional Protection

The Fifth Amendment to the United States Constitution guarantees that "no person shall be subject for the same offense to be twice put in jeopardy of life or limb."[94] When Jetty Lee Harvey's conviction was overturned by the Wyoming State Supreme Court, because he was not given a speedy trial, all further prosecutions for the same offense were barred under the traditional interpretation of the Fifth Amendment.[95] The State should not be allowed to make repeated attempts to convict an individual for the same criminal act.[96]

Successive, and therefore oppressive, prosecutions by the State after failed attempts to convict are obviously the reason for the Fifth Amendment protection against double jeopardy.[97] It is unfortunate that in this instance the prosecution lost a conviction, but there are fundamental rights guaranteed by the Constitution, and the right to a speedy trial is one of those rights.[98] The prosecution argued that this was a mere technicality and the case should have been decided on the merits, but the fundamental rights upon which our judicial system is based are not mere technicalities.[99]

Application of Grady

In *Harvey*, The Wyoming Supreme Court distinguished the *Grady* decision and therefore could decide this case under a much narrowed double jeopardy protection analysis. The majority cited the decision in *Felix* to support the proposition that successive prosecutions for

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decisions in *Dowling* and *Grady* to be inconsistent. *See* Grady v. Corbin, 495 U.S. 508 (1990) (O'Connor, J, dissenting). *United States v. Calderone*, 917 F.2d 717 (2d Cir. 1990), applied the "same conduct" test to a drug conspiracy case. Each judge in the plurality and the dissenting judge came up with different interpretations of the test.

94. U.S. CONST. Amend. V.

95. Mann v. United States, 304 F.2d 394, 397 (D.C. Cir. 1962).

96. Benton v. Maryland, 395 U.S. 784, 796 (1969). The decision in *Benton* overruled *Palko v. Maryland*, 302 U.S. 319 (1937) which used a totality of circumstances test to say that a basic constitutional right can be denied as long as there is not a denial of "fundamental fairness."

97. A speedy trial violation bars the prosecution from bringing the case. The reason for this remedy is to deter future delays and to guarantee the right to a speedy trial. In this instance the only result of the violation was that the State had a second chance to prosecute. This type of violation differs from a claim by the defense that the trial they were given was unfair, where the remedy would be a new trial. The speedy trial violation results in barring the prosecution, not in allowing an even longer time before the defendant is brought to trial.

98. The Court, in *Grady* stated that prosecution offices are often overworked but that does not excuse the need for scrupulous adherence to our constitutional principles.

99. Brief for the Appellees.

a crime and conspiracy to commit that crime do not violate the double jeopardy clause.[100] However, in *Felix* the United States Supreme Court relied on the fact that the offenses were committed in different states and involved separate criminal conduct.[101] In the *Harvey* case, the Wyoming Supreme Court was looking at offenses stemming from the same criminal conduct in a single occurrence, therefore, *Felix* should not be applied over the *Grady* test.

The confusion about the double jeopardy clause is evident throughout the *Harvey* case. The prosecutor admitted to the media that the conspiracy charges filed against Harvey did not involve a "different transaction" but that they were not filing identical charges to "avoid falling into a double jeopardy trap."[102] The media drew attention to the fact that the convictions were set aside as a result of delays by the prosecution. The subsequent public outcry resulted in the filing of the second charges.[103]

The decision in *Grady*[104] should have been applied to the *Harvey* case because the charges arose out of a single occurrence or transaction.[105] Using the "same conduct" test, the second charge for conspiracy would have been barred. Under *Calderone*,[106] the only difference in the two charges would be the agreement before hand and that is not enough to avoid a double jeopardy violation.[107]

The Law in Wyoming

Wyoming has a unique problem concerning double jeopardy because no statute of limitations exists for bringing criminal actions. This, in theory, and more realistically, after the court's decision in *Harvey*, could lead to a common usage of multiple attempts by the prosecution to convict for the same crime.

The dissent in *Harvey* cited *State v. Keefe*,[108] an early Wyoming case, which is similar to *Harvey* because in both cases the convictions

100. 112 S.Ct. 1377, 1381.
101. *Id* at 1382.
102. Brief of the Appellant at 7.
103. *Harvey I*, 774 P.2d at 87. *See*, Scott Farris and Katharine Collins, *Court Frees Two Rapists for Lack of Speedy Trial* CASPER STAR TRIBUNE, May 6, 1989, at A-1; Charles Levendosky, *Letting Rapists Free to Protect Our Rights*, CASPER STAR TRIBUNE, May 7, 1989, A3; *Harvey Makes Appearance*, ROCK SPRINGS ROCKET MINER, June 13, 1989, A1; *Sweetwater County Files New Charges in Rape Case*, THE SHERIDAN PRESS, July 8, 1989. *See also* Brief for the Appellants, Appendix D and E.
104. 495 U.S. 508 (1990). *See* note 32.
105. *Harvey II*, 835 P.2d 1074 (1992).
106. United States v. Calderone, 917 F.2d 717 (2d Cir. 1990). *See* text accompanying notes 54-57.
107. *Id.*
108. State v. Keefe, 98 P. 122 (1908).

were set aside by a violation of the right to speedy trial. However, in *Keefe,* conspiracy charges were filed simultaneously with the underlying charges, while in *Harvey* the conspiracy charges were held back. In *Keefe,* the Wyoming Supreme Court also set aside the conspiracy charge for a violation of the right to a speedy trial. In *Harvey,* the conspiracy charges were finally tried more than four years after Harvey was first arrested. Whether the charges are filed simultaneously or at different times, the protection against double jeopardy is violated by successive prosecutions.

The Wyoming Supreme Court originally applied a "same element" test from *Vigil v. State*[109] to double jeopardy questions. The "same element" test was a narrow interpretation of the Fifth Amendment but was broadened by the court's decision in *Carter v. State.*[110] The "same evidence" test adopted in *Carter* stated that a double jeopardy violation resulted if the same evidence was used to prove two separate charges in two separate prosecutions.[111]

The recent decision of *Cook v. State*[112] overruling *Birr* seems to be a step in broadening the Wyoming Supreme Court's double jeopardy analysis. While the *Harvey* decision has significantly limited double jeopardy protection in Wyoming. The decision in *Harvey* utilizes a test that is much narrower than the recent United States Supreme Court cases as well as the Wyoming Supreme Court's own previous and even more recent decisions.

A Compulsory Joinder Statute Solution

As Justice Urbigkit suggested, the solution to the problem of inconsistent double jeopardy analysis is to adopt a compulsory joinder statute in Wyoming. The American Bar Association Standards for Criminal Justice[113] have already created a model joinder statute to solve this problem. The model statute sets out the procedures that should be followed if the State fails to join certain offenses.[114] The defense should move to have the offenses joined and if the defense fails to make the motion, it constitutes a waiver.[115] If a defendant has been tried for one offense, he can move to dismiss any other offenses based on the same conduct or the same criminal episode subject to the requirements of motions to have offenses joined.[116]

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109. 563 P.2d 1344 (Wyo. 1977). *See* text accompanying notes 58-60.
110. 714 P.2d 1217 (Wyo. 1986). *See* text accompanying notes 61-63.
111. *Id.* at 1218.
112. 841 P.2d 1345 (Wyo. 1992). *See* text accompanying notes 70-74.
113. ABA Standards for Criminal Justice § 13-2.3.
114. The American Law Institute originally adopted the Prosecution for Multiple Offenses section in 1962 and is presently at section 1.07 in the 1985 text.
115. *Id.* §§ (a) and (b).
116. *Id.* § (c) was adopted in 1980.

The American Law Institute has also created a model code which provides another source for a compulsory joinder statutes:[117]

> (1) *Prosecution for Multiple Offenses: Limitation on Convictions.* When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not however be convicted of more than one offense if:
>
> * * *
>
> (b) one offense consists only of a conspiracy or other form of preparation to commit the other.[118]

Rule 8(a) of the Federal Rules of Criminal Procedure as well as rule 8(a) of the Wyoming Rules of Criminal Procedure already permit joinder of offenses, if they are (1) of the same or similar character,[119] (2) based on the same act or transaction,[120] or (3) based on acts or transactions that are connected or that constitute parts of a common scheme.[121] Since Wyoming already permits this type of joinder, all that would be necessary is to make it mandatory.

CONCLUSION

The Constitution should be the overriding concern of the courts, and the goal should be to uphold the protections guaranteed by the Constitution. "Justice for all" does not mean that the law is bent around the facts to get a conviction, it means that there is a framework to our legal system that must be maintained or there will be justice for no one.

The Court in *Green v. United States*[122] stated that the reason for the double jeopardy protection is:

> that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrass-

117. The comments state that if a single crime is involved, a separate sentencing process for the additional crime of conspiracy is unjustified. ALI Model Penal Code part 1.

118. Section 7.06 of the Model Penal Code limits punishment as part of this statute.

119. This presents some problems with the Federal Rule of Evidence 404 that evidence of other crimes is prohibited if it is offered to prove criminal disposition.

120. FED. R. CRIM. P. 8(a). For joinder of offenses to be based on the same transaction, they must be temporally or logically related.

121. The reason for theses rules on joinder and severance are to protect the defendant against prejudicial actions by the court.

122. 355 U.S. 184, 187 (1957).

> ment, expense and ordeal and compelling him to live in a continuing state of anxiety.[123]

A compulsory joinder of charges rule in Wyoming would solve the problem. There would be no question that a defendant would be prosecuted for all possible charges, but there would be only one proceeding.

If this statute had been in effect at the time of this prosecution, Jetty Harvey would have been charged with conspiracy as well as the substantive crimes. The prosecution would have known that this was their one chance and there might not have been the initial delays that led to the first conviction being overturned.

It is regrettable that the crime that Jetty Lee Harvey committed would go unpunished, but United States citizens are all guaranteed fundamental rights by the Constitution that are the basis of our legal system. If rights like the right to be free from double jeopardy are allowed to be circumvented because they produce an undesirable result in some instances, then there is no stability to the legal system, and citizens can not depend on Constitutional rights.

MELISSA E. WESTBY

123. *Id.*