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Criminal Law—The Road Not Taken: Parameters of the Speedy Trial Right and How Due Process Can Limit Prosecutorial Delay; *Humphrey v. State*, 185 P.3d 1236 (Wyo. 2008)

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CASE NOTE

CRIMINAL LAW—The Road Not Taken: Parameters of the Speedy Trial Right and How Due Process Can Limit Prosecutorial Delay; *Humphrey v. State*, 185 P.3d 1236 (Wyo. 2008).

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INTRODUCTION

The murder of Jack Humphrey occurred early morning on November 22, 1977.¹ The events surrounding his death led police to identify his wife, Rita Humphrey, as the prime suspect.² The State of Wyoming subsequently indicted Humphrey for first-degree murder on April 11, 1980.³ Incriminating evidence included an adulterous affair between Humphrey and Ron Akers, which continued soon after the death of Jack Humphrey.⁴ Overdue bills, bad checks, and unaccounted-for withdrawals additionally strained the Humphreys' relationship.⁵ Police found Humphrey's custom-made rifle and a shell casing in the snow outside her home where the victim was shot.⁶ This discovery, along with a gunshot-residue analysis revealing gunpowder on her left hand, implicated Humphrey.⁷ The victim's sister, Bonnie Humphrey, approached Humphrey at the police station the morning of the murder, and Humphrey allegedly hid her face and cried: "God, what have I done?"⁸

Following an April 11, 1980 indictment, Humphrey applied for a preliminary hearing and waived her right to a speedy trial by agreeing to a hearing date of June 23, 1980.⁹ Despite the affair, gunpowder residue, and other suggestive evidence, the preliminary hearing resulted in the dismissal of the murder charges due to lack of probable cause.¹⁰ Twenty-four years later, the State recharged Humphrey for first-degree murder on March 5, 2004.¹¹ Humphrey contended the victim's

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¹ *Humphrey v. State (Humphrey I)*, 185 P.3d 1236, 1241 (Wyo. 2008).

² *Id.* at 1242.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 1241.

⁶ *Humphrey II*, 185 P.3d at 1241.

⁷ *Id.* at 1242.

⁸ *Id.* at 1241–42.

⁹ *Id.* at 1242.

¹⁰ *Id.* (stating the county court formally dismissed the charges on August 22, 1980).

¹¹ *Humphrey II*, 185 P.3d at 1242.

sister, the newly elected mayor of Evansville, Wyoming, abused her appointment by compelling police to reopen Humphrey's case and press charges.¹²

In response to the twenty-four year delay preceding these renewed charges, Humphrey challenged her indictment on the grounds of a constitutional, speedy trial violation.¹³ She argued a prejudiced defense, and the Natrona County District Court agreed with this claim.¹⁴ The district court found that the twenty-four year delay between indictments led to the unavailability of evidence, which significantly damaged Humphrey's defense and required case dismissal.¹⁵ Missing evidence included the attorney files used in Humphrey's original defense and the records from the 1980 preliminary hearing.¹⁶ Humphrey valued this evidence since her defense at the 1980 hearing resulted in dismissal of her case.¹⁷

However, the State appealed and the Wyoming Supreme Court held that the district court misapplied the speedy trial analysis, and remanded the case for a new trial.¹⁸ At trial, Humphrey continued to assert her procedural rights to a speedy trial and due process, but the district court overruled these objections.¹⁹ Ultimately, a jury convicted Humphrey of second-degree murder.²⁰ For a second time this case received appellate review.²¹ The Wyoming Supreme Court, in *Humphrey II*, declined to find either a speedy trial or due process violation and affirmed Humphrey's conviction.²²

This case note discusses the scope of one's speedy trial right and its relationship to the law of pre-charge delay.²³ The right to a speedy trial and due process both serve as procedural safeguards, but they address different aspects of the criminal process which, as the case history shows, can confuse practitioners.²⁴ Beyond

¹² *Id.* at 1247.

¹³ *Id.* at 1242.

¹⁴ *Id.* (claiming the twenty-four year delay between her 1980 and 2004 prejudiced her defense since exculpatory evidence was no longer available for rebutting the State's evidence).

¹⁵ *Id.* at 1242, 1246 n.6 (noting the Natrona County District Court dismissed Humphrey's criminal charges in 2004 because of unobtainable evidence and witnesses).

¹⁶ *Humphrey II*, 185 P.3d at 1248.

¹⁷ *Id.*

¹⁸ *Id.* at 1242–43 (citing to *Humphrey v. State (Humphrey I)*, 120 P.3d 1027 (Wyo. 2005)).

¹⁹ *Id.* at 1243 (declining to find either a speedy trial violation or a violation of due process).

²⁰ *Id.* (Humphrey's trial began March 13, 2006 and concluded March 24, 2006).

²¹ *Humphrey II*, 185 P.3d at 1243. Humphrey appealed her conviction. *Id.*

²² *Id.* at 1246–47 (concluding the reasons for delay between Humphrey's 2005 indictment and 2006 trial outweighed alleged prejudice, and the defendant failed to prove substantial prejudice caused by intentional misconduct by the prosecution).

²³ See *infra* notes 26–129 and accompanying text.

²⁴ *Humphrey I*, 120 P.3d at 1029–30 (finding both the district court and the defendant incorrectly believed that one's speedy trial right continues between dismissal of charges and re-indictment).

clarifying when the speedy trial right activates, this note seeks to explain the potential of due process as a guard against harmful delays in criminal prosecutions.²⁵

BACKGROUND

Humphrey challenged the renewed murder charge against her on constitutional grounds.²⁶ Declining to hold the delays in *Humphrey II* as constitutional violations, the Wyoming Supreme Court applied principles and law promulgated by a line of United States Supreme Court cases.²⁷ Consequently, an examination of these United States Supreme Court cases explains the progression of speedy trial and due process law, and illuminates the court's analysis of *Humphrey II*.²⁸ The Speedy Trial Clause and Due Process Clause provide distinguishable protections against prosecutorial delay.²⁹ Therefore, this section will explain the parameters of the Speedy Trial Clause, and then discuss how due process limits prosecutorial delay.³⁰

The Right to a Speedy Trial

The Sixth Amendment to the United States Constitution guarantees the right to a speedy trial, which is considered one of our most basic rights.³¹ Wyoming's Constitution and Code of Criminal Procedure contain similar guarantees.³² In Wyoming, a defendant can challenge pre-trial delay either by demonstrating the State's failure to adhere to Wyoming Rule of Criminal Procedure § 48(b), or by alleging deprivation of the constitutional right to a speedy trial.³³ This section will focus on the application of the constitutional objection to a speedy trial violation.³⁴

²⁵ See *infra* notes 171–240 and accompanying text (urging the Wyoming Supreme Court to adopt a due process analysis that mimics speedy trial analyses to better ensure fairness in criminal trials).

²⁶ *Humphrey II*, 185 P.3d at 1241, 1243–49 (asserting a violation of the Speedy Trial and Due Process clauses of the United States Constitution).

²⁷ *Id.*

²⁸ See *infra* notes 31–170 and accompanying text.

²⁹ See *infra* notes 96–97 and accompanying text (discussing the limits of the speedy trial right).

³⁰ See *infra* notes 31–129 and accompanying text.

³¹ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”); see *United States v. Lovasco*, 431 U.S. 783, 800 (1977) (Stevens, J., dissenting) (explaining the presence of speedy trial notions since the Magna Carta).

³² WYO. CONST. art. 1 § 10 (“In all criminal prosecutions the accused shall have the right . . . to a speedy trial.”); WYO. R. CR. P. 48(b)(5) (“Any criminal case not tried or continued as provided in this rule shall be dismissed 180 days after arraignment.”).

³³ See *Humphrey II*, 185 P.3d at 1243 (evaluating both).

³⁴ See *infra* notes 35–95 and accompanying text.

Despite the early existence of the speedy trial right in American law, the scope of this constitutional right lacked a full assessment until the United States Supreme Court heard *Barker v. Wingo* in 1972.³⁵ This case involved the murder of an elderly couple, and the prosecutor suspected a man named Willie Barker.³⁶ To bolster its case, the State repeatedly postponed trial in order to extract incriminating testimony from Barker's accomplice, pushing the trial back almost five years.³⁷ After spending ten months in prison, Barker posted bond and remained free until his trial, at which time the jury convicted him of murder.³⁸

In response to Barker's contention that the government denied him a speedy trial, the United States Supreme Court created a test to define the concept of "speedy."³⁹ The Court acknowledged the myriad of interests involved when bringing an accused to trial.⁴⁰ One such interest involves the impact to an accused's defense resulting from a delay between arrest and trial.⁴¹ Moreover, this type of delay can negatively affect a criminal's rehabilitation, especially when a defendant remains incarcerated.⁴²

In addition, Barker's ability to post bond and spend most of his accused life in the community exemplifies how delay provides a criminal with the chance to do more harm.⁴³ Long delays may also entice accused individuals to "jump bail," and when unable to post bond, the problem of overcrowded jails arises.⁴⁴ Overpopulation in prisons can lead to rioting, and longer jail terms increase the overall price of detaining an individual.⁴⁵ In addition, a swift and fair proceeding also furthers society's interest in bringing an accused to trial.⁴⁶ A congested docket allows defendants to offer guilty pleas in exchange for lesser offenses, which does not comport with society's retributive values.⁴⁷

³⁵ 407 U.S. 514, 515–16 (1972).

³⁶ *Id.* at 516.

³⁷ *Id.* at 516, 518.

³⁸ *Id.* at 517–18.

³⁹ *Id.* at 529–30.

⁴⁰ *Barker*, 407 U.S. at 529–36.

⁴¹ *Id.* at 521 (expressing concern with lost evidence, faded memories, and missing witnesses).

⁴² *Id.* at 520 n.10, 12 (citations omitted).

⁴³ *Id.* at 519.

⁴⁴ *Id.* at 520.

⁴⁵ *Barker*, 407 U.S. at 520–21; *see generally* James J. Stephan, U.S. Dep't of Justice, State Prison Expenditures, 2001 1 (2004), <http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf> (finding average state and Federal costs of housing one inmate equaled \$22,650 per year and \$22,632 per year, respectively).

⁴⁶ *Barker*, 407 U.S. at 519–20 (citations omitted).

⁴⁷ *Id.* (citations omitted).

Based on these legitimate concerns, the United States Supreme Court in *Barker* held a prosecutor has an affirmative duty to bring an accused to trial, and to do so in a manner that upholds due process.⁴⁸ Ultimately, the Court held the best way to ensure due process was to balance four factors: the length of delay, reasons for such delay, whether the defendant asserted his or her right to a speedy trial, and the level of prejudice affecting the defendant.⁴⁹ Adopting a multi-faceted test allows courts to carefully assign a value to each factor based on the circumstances, in relation to the others, as no one factor is dispositive.⁵⁰ The virtue of carefully considering all parties' interests led the majority of courts nationwide to accept and apply *Barker's* factor test.⁵¹

Factor One: The Length of Delay

The first factor relates to the promptness of bringing a defendant to trial, but also serves as a threshold question, necessary to answer before a court must engage in a full speedy trial analysis.⁵² If a defendant can point to a lengthy delay, the circumstances will imply prejudice to the defendant and warrant further inquiry into the harms of the delay.⁵³ Furthermore, this factor establishes the time frame during which prejudice can result.⁵⁴ A court will more likely find a speedy trial violation if the pre-trial delay is significant, because ongoing delays intensify the degree of prejudice presumed to harm a defendant.⁵⁵ Therefore, when the speedy trial clock begins has significant implications for the total analysis.⁵⁶

⁴⁸ *Id.* at 527 (citing *Dickey v. Florida*, 398 U.S. 30, 37–38 (1970) and *Hodges v. United States*, 408 F.2d 543, 551 (8th Cir. 1969)).

⁴⁹ *Id.* at 530 (rejecting alternative methods of discerning a speedy trial violation, including a fixed-time and demand-waiver analysis).

⁵⁰ *Id.* at 533; *Warner v. State*, 28 P.3d 21, 26 (Wyo. 2001) (noting the analysis asks whether a delay prior to trial unreasonably, and substantially, impairs an accused's right to fair procedure).

⁵¹ *E.g.*, *United States v. Yehling*, 456 F.3d 1236, 1243 (10th Cir. 2006) (citing to *Barker v. Wingo* and applying the balancing test set forth therein); *United States v. Trueber*, 238 F.3d 79, 87 (1st Cir. 2001) (same); *Moody v. Corsentino*, 843 P.2d 1355, 1363 (Colo. 1993) (same); *State v. Trafny*, 799 P.2d 704, 706 (Utah 1990) (same).

⁵² *Barker*, 407 U.S. at 521, 530 (“Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.”).

⁵³ *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) (acknowledging that post-accusation delays approaching one year will lead most courts to consider the threshold met); *United States v. Loud Hawk*, 474 U.S. 302, 314 (1986) (analyzing a 90-month delay); *Warner*, 28 P.3d at 26 (analyzing a 658-day delay); *Sisneros v. State*, 121 P.3d 790, 797 (Wyo. 2005) (performing a speedy trial analysis based on a 349-day delay); *Strandlien v. State*, 156 P.3d 986, 990 (Wyo. 2007) (analyzing a 762-day delay).

⁵⁴ *See Barker*, 407 U.S. at 532 (implying a court must only consider prejudice that occurs during the post-charge delay).

⁵⁵ *E.g.*, *Doggett*, 505 U.S. at 656 (noting the degree of presumed prejudice increases with the passage of time); *accord United States v. Batie*, 433 F.3d 1287, 1290 (10th Cir. 2006).

⁵⁶ *See supra* notes 53–55 and accompanying text for a discussion of how the length of delay affects the total analysis.

The United States Supreme Court in *United States v. Marion* sought to clarify when one's speedy trial right activates.⁵⁷ The *Marion* Court noted the historic policies for constitutionally protecting an accused's speedy trial interest: long, oppressive confinement without explanation; the degree of personal anxiety accompanied by such incarceration; and the notion that an accused will lose the ability to adequately establish a defense while in prison.⁵⁸ The Court held that lengthy incarceration, corresponding anxiety, and prejudice to one's defense were interests implicated only *after* arrest or the filing of formal charges.⁵⁹ Therefore, only the formal charging or arrest of an accused triggers the speedy trial right.⁶⁰

A decade later, the United States Supreme Court heard another significant case and further explained the scope of the speedy trial right.⁶¹ The Court in *United States v. MacDonald* held delay between the dismissal of charges and re-indictment should be assessed under the Due Process Clause, not the speedy trial right.⁶² The *MacDonald* Court justified this holding based on the same policies used to justify why the speedy trial right did not protect against pre-charge delay.⁶³ Despite prior accusation, a person is no longer subjected to the same restrictions on liberty as someone formally charged or under arrest.⁶⁴ The United States Supreme Court later expanded this holding when it declared that appearing for evidentiary hearings and hiring counsel were also not events that triggered the speedy trial clock.⁶⁵

⁵⁷ 404 U.S. 307 (1971).

⁵⁸ *Id.* at 320 (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)).

⁵⁹ *Id.* Certainly, prejudice to an accused's defense can occur before arrest or the filing of public charges, especially when a defendant remains unaware of the pending investigation against him or her. See *Doggett*, 505 U.S. at 654–58. The *Marion* Court held, however, that the Speedy Trial Clause is not meant to completely shield a defendant from prejudice. *Marion*, 404 U.S. at 319. The *Marion* Court stated:

[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. . . . Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

Id.

⁶⁰ *Marion*, 404 U.S. at 320.

⁶¹ *United States v. MacDonald*, 456 U.S. 1 (1982).

⁶² *Id.* at 7 (noting, once again, the unique interests implicated only upon formal indictment or arrest).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Loud Hawk*, 474 U.S. 302, 312 (1986) (explaining that while bothersome, the Speedy Trial Clause must not shield a suspect from every harm incidental to criminal proceedings).

Factor Two: The Reason for the Delay

The United States Supreme Court in *Barker* discussed how courts should analyze the reasons for delay.⁶⁶ Valid reasons for delay, such as the unavailability of an ill witness, should not affect the analysis, while intentional procrastination should weigh heavily against the misbehaving party.⁶⁷ Negligence also tips the scale against the responsible party, although not as much as intentional conduct.⁶⁸ Even overcrowded dockets must slightly weigh against the prosecution since it has an affirmative duty to try suspects in a manner that affords due process.⁶⁹ The United States Supreme Court also determined how delays attributable to interlocutory appeals should be factored in the analysis.⁷⁰

Factor Three: The Defendant's Assertion of the Speedy Trial Right

Speedy trial delays can benefit a defendant when memories fade and evidence disappears.⁷¹ The State has the burden of proof, thus, it may be in the defendant's best interest not to insist on a speedy trial and hope the prosecution fails to establish guilt.⁷² A defendant's failure to object to delays in the judicial process will not amount to a waiver of the speedy trial right.⁷³ The United States Supreme Court in *Barker* charged courts to apply discretion and assign weight to a defendant's actions based on the defendant's intentions, the effectiveness of his or her counsel, and the frequency and force of any objections made.⁷⁴ As a general rule, courts must balance affirmative requests for a speedy trial in favor of the claimant; such requests evidence that delays were harmful.⁷⁵

Factor Four: Prejudice to the Defendant

The Court in *Barker* listed three interests of a defendant worthy of constitutional protection.⁷⁶ The aims of the speedy trial clause are to (1) minimize

⁶⁶ *Barker*, 407 U.S. at 531.

⁶⁷ *Id.* (citations omitted).

⁶⁸ *Id.* (citations omitted).

⁶⁹ *Id.* (citations omitted).

⁷⁰ *Loud Hawk*, 474 U.S. at 316 (valuing delays from appeals based on the merits of the requested appeal, the importance of preventing unjust incarceration, and society's interest in protecting itself).

⁷¹ *Barker*, 407 U.S. at 521.

⁷² *Id.*

⁷³ *Id.* at 527–29.

⁷⁴ *Id.* at 529.

⁷⁵ *Loud Hawk*, 474 U.S. at 314; *Barker*, 407 U.S. at 531–32. The *Loud Hawk* Court warned, however, that a superficial demand for a speedy trial will not count as behavior evidencing an accused's deprivation of the right. *Loud Hawk*, 474 U.S. at 314.

⁷⁶ *Barker*, 407 U.S. at 532 (citations omitted).

an accused's jail-time preceding trial, thereby (2) reducing unnecessary anxiety and (3) the risk of losing evidentiary support for a defendant's case.⁷⁷ The *Barker* Court considered these three interests as sub-factors to the general concern of prejudice to a defendant.⁷⁸ In addition, *Barker* viewed the third sub-factor, prejudice to one's defense, as the most significant when determining the existence of a speedy trial violation.⁷⁹

This assertion contradicted what the Court stated a year earlier in *United States v. Marion* about the primary role of the speedy trial clause.⁸⁰ Twice since *Marion*, the United States Supreme Court suggested that preventing prejudice to one's defense was a secondary concern in a speedy trial analysis.⁸¹ However, in *Doggett v. United States* the Court eventually returned to its position in *Barker*, holding prejudice as the most important, protectable interest.⁸² The Wyoming Supreme Court also considers the impairment of one's defense as the most damaging form of prejudice caused by pre-trial delay.⁸³

A court's valuation of factor four, prejudice to one's defense, depends on what an accused can prove at trial.⁸⁴ *Doggett*, the most recent United States Supreme Court case discussing this issue, acknowledged that prejudice can exist despite what is specifically demonstrable, and the inability to show actual prejudice does not preclude a court from finding a speedy trial violation.⁸⁵ The Court, relying on its commentary in *Barker*, recognized the inherent difficulty in proving actual harm to one's defense caused by the passage of time.⁸⁶ In response, the Court

⁷⁷ *Id.* at 531 n.32, 532 (reiterating the historic reasons for the speedy trial right, as identified in *United States v. Marion*: lengthy pre-trial confinement, corresponding anxiety, and prejudice to one's defense); see *supra* notes 58–59 and accompanying text (discussing the effects of arrest or formal accusation on a defendant).

⁷⁸ *Barker*, 407 U.S. at 532.

⁷⁹ *Id.* (“[T]he most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.”).

⁸⁰ *Marion*, 404 U.S. at 320 (“[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense.”).

⁸¹ *MacDonald*, 456 U.S. at 8 (citations omitted); *Loud Hawk*, 474 U.S. at 311.

⁸² *Doggett*, 505 U.S. at 655.

⁸³ *Strandlien*, 156 P.3d at 991 (citing *Barker*, 407 U.S. at 532); *Whitney v. State*, 99 P.3d 457, 475 (Wyo. 2004) (citation omitted).

⁸⁴ See *Fortner v. State*, 843 P.2d 1139, 1146 (Wyo. 1992) (“Although [Defendant] has shown a delay which could be prejudicial and did assert his right to speedy trial, he has not . . . demonstrated actual prejudice from the delay.”); see *Loud Hawk*, 474 U.S. at 314 (affirming the lower court's decision to give only “little weight” to the fourth factor since the defendant could only point to the possibility of prejudice).

⁸⁵ *Doggett*, 505 U.S. at 655.

⁸⁶ *Id.* (“[I]mpairment to one's defense is the most difficult form of . . . prejudice to prove because time's erosion of exculpatory evidence and testimony ‘can rarely be shown.’” (quoting *Barker*, 407 U.S. at 532)). The Court added that the likelihood of prejudice is directly proportional to length of pre-trial delay. *Id.* at 651–52.

suggested that as delay intensifies, the burden of demonstrating actual prejudice begins to shift from the defendant to the State.⁸⁷

Many courts have adopted *Doggett's* method of analyzing prejudice.⁸⁸ However, the unique and lengthy pre-trial delay in *Doggett* left courts with only an outer limit as to when a delay requires the prosecution to rebut a presumption of prejudice.⁸⁹ In *Doggett*, more than eight years passed between formal indictment and *Doggett's* trial, compelling the Court to charge the prosecution with rebutting a presumption of prejudice against the defendant.⁹⁰ A similar delay would require state courts to apply this burden-shifting procedure; however, *Doggett* did not explain whether a presumption of prejudice could arise before an eight-year delay.⁹¹ Wyoming courts have yet to encounter a case of excessive pre-trial delay warranting the presumption that a defendant's case suffered from prejudice.⁹²

In summation, the line of United States Supreme Court cases emerging from *Barker* and *Marion* highlight the many interests implicated by delays in bringing

⁸⁷ See *id.* at 657–58 n.4 (admitting *Doggett* failed to specify any prejudice from the eight-and-a-half year delay between indictment and trial, but finding for him because the State did not persuasively rebut his allegations by showing how the defendant was unharmed by the delay).

⁸⁸ E.g., *State v. Ariegwe*, 167 P.3d 815, 835 (Mont. 2007) (“[A s]howing by the accused of particularized prejudice decreases, and the necessary showing by the State of no prejudice correspondingly increases, with the length of the delay.”); see *Heiser v. Ryan*, 15 F.3d 299, 304 (3rd Cir. 1994) (affirming the lower court's decision to apply the *Doggett* presumption, but finding the State successfully rebutted the presumption of prejudice); *United States v. Aguirre*, 994 F.2d 1454, 1457 (9th Cir. 1993) (“Five years delay attributable to the government's mishandling of [Defendant's] file, like the eight year delay in *Doggett*, creates a strong presumption of prejudice . . . the government [has not] ‘persuasively rebutted’ the presumption of prejudice.” (citations omitted)); *State v. Williams*, 698 N.E.2d 453, 454–55 (Ohio App. 2 Dist. 1997) (finding a five-year delay caused by prosecutorial negligence required the State to rebut a presumption of prejudice).

⁸⁹ E.g., *Pelletier v. Warden*, 627 A.2d 1363, 1371 n.12 (distinguishing *Doggett* based on its unique facts and significant delay); *Goodrum v. Quarterman*, No. 06-20980, 2008 WL 4648459, at *7 (5th Cir. Oct. 22, 2008) (“Additionally, the 2 1/2 year length of delay in this case falls well short of the 6 years attributed to official negligence in *Doggett* and which warranted a presumption of prejudice in that case.”) (citations omitted); *Jackson v. Ray*, 390 F.3d 1254, 1264 (10th Cir. 2004) (“[B]ecause the delay is less than six years, clearly established Supreme Court law does not require application of the *Doggett* rule.”).

⁹⁰ *Doggett*, 505 U.S. at 658. The government was responsible for six years of the delay. *Id.*

⁹¹ Compare *id.* (finding a presumption of prejudice from a six-year delay due to prosecutorial negligence), with *Aguirre*, 994 F.2d at 1457 (noting a greater delay in *Doggett* but requiring the government to rebut a presumption of prejudice after five years), and *United States v. Bergfeld*, 280 F.3d 486, 491 (5th Cir. 2002) (finding presumed prejudice after a five-year delay caused by the government).

⁹² *Humphrey II*, 185 P.3d at 1246 (holding until the length of delay gives rise to a probability of substantial prejudice, the defendant retains the burden of proving prejudice). In Wyoming, a 561-day delay does not create a probability of substantial prejudice. *Id.*; *Standlien*, 156 P.3d at 991 (finding a delay of 762 days does not lead to a presumption of prejudice); *Warner*, 28 P.3d at 27 (holding delay of 658 days does not presumptively prejudice); *Whitney*, 99 P.3d at 475 (holding a 374 day delay is not presumptively prejudicial).

defendants to trial.⁹³ To harmonize zealous prosecutions with the mandates of the Sixth Amendment, a four-factor test was devised.⁹⁴ Consequently, this test and all its nuances serve as the backbone of Wyoming's speedy trial law.⁹⁵

The Fundamental Right to Due Process Bars Excessive Delay in Formally Charging or Arresting an Accused

Although the speedy trial right seeks to prevent harm from delays in the judicial process, it cannot operate until the prosecution arrests or formally charges an accused.⁹⁶ Thus, the Speedy Trial Clause does not account for pre-charge or pre-arrest delays in prosecution; however, other protections exist to accomplish this goal.⁹⁷ The United States Supreme Court in *Marion* asserted that applicable statutes of limitations serve this function, along with the Due Process Clause of the Fifth Amendment.⁹⁸ The Due Process Clause, in pertinent part, indicates no person shall be "deprived of life, liberty, or property, without due process of law," and the Fourteenth Amendment of the Constitution compels states to ensure this same guarantee.⁹⁹ Consequently, Wyoming's pre-charge law reflects the principles and guidelines set forth in *Marion*.¹⁰⁰ Understanding Wyoming's pre-charge law requires an examination of the United States Supreme Court's approach to this issue.¹⁰¹

The Court in *Marion* reiterated the maxim that due process signifies a fair trial.¹⁰² An ambiguous term itself, the *Marion* Court did not say when a fair trial exists, but recognized that a fair trial does not exist when the prosecution

⁹³ See *supra* notes 52–92 and accompanying text (discussing the role of the speedy trial clause in criminal prosecutions).

⁹⁴ *Barker*, 407 U.S. at 529–30; accord *MacDonald*, 456 U.S. at 7; *Loud Hawk*, 474 U.S. at 312–16.

⁹⁵ See *Humphrey II*, 185 P.3d at 1243–44, *passim* (applying the speedy trial law from the applicable United States Supreme Court cases).

⁹⁶ *Marion*, 404 U.S. at 320.

⁹⁷ *Id.* at 322–24.

⁹⁸ *Id.*

⁹⁹ Compare U.S. CONST. amend. V., with U.S. CONST. amend. XIV § 1 ("[N]or shall any State deprive any person of . . . due process of law.").

¹⁰⁰ *Saldana v. State*, 846 P.2d 604, 658 (Wyo. 1993) ("[T]he United States Supreme Court's construction of the federal [Constitution] is both authoritative for the federal system and a constitutional minimum which states must obey."); see also *Story v. State*, 721 P.2d 1020, 1027–29 (Wyo. 1986) (adopting *Marion*'s interpretation of due process in the context of pre-charge delay) (citations omitted).

¹⁰¹ See *supra* note 99 and accompanying text.

¹⁰² *Marion*, 404 U.S. at 324 (citations omitted).

(1) intentionally delays arrest or formal accusation of a defendant, and (2) such delay was so extensive that it caused substantial prejudice to the accused's defense.¹⁰³ Thus, scrutinizing prosecutorial delay became a fact specific analysis.¹⁰⁴

Two main factors illustrate why the *Marion* Court set the base level of protection at a showing of intentional misconduct by the state and actual prejudice to one's defense.¹⁰⁵ First, the defendant alleged a violation of due process, notwithstanding an unexpired statute of limitation.¹⁰⁶ *Marion* considered statutes of limitations as "the primary guarantee" against attempted prosecution long after the commission of a crime.¹⁰⁷ By these legislative enactments, society acknowledges that a defendant will be deprived of a fair trial at some point.¹⁰⁸ Thus, as secondary protection against delay, the *Marion* Court required defendants to prove glaring injustice before finding a due process violation.¹⁰⁹

Second, *Marion* valued prosecutorial discretion in choosing when to seek convictions.¹¹⁰ The Court found it irrational to charge criminals immediately when investigators could establish probable cause.¹¹¹ In *United States v. Lovasco*, the United States Supreme Court held when pre-charge delay violates "fundamental conceptions of justice" and "the community's sense of fair play," a court must order dismissal of the case.¹¹²

The community's sense of fair play embraces prosecutorial discretion regarding when to charge and arrest suspects.¹¹³ Expecting the state to prosecute as soon as legal, probable cause exists may lead to the dismissal of unripe, but worthy cases.¹¹⁴ Convincing a jury of a defendant's guilt, at trial, requires more than probable cause.¹¹⁵ Faced with the possibility of dismissals, prosecutors would imprison or

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 324–25 (noting that length of delay cannot be dispositive because actual prejudice can result from even short delays).

¹⁰⁵ *See id.* at 322–24 (discussing the significance of statutes of limitations and prosecutorial discretion in choosing when to charge defendants).

¹⁰⁶ *Id.* at 324.

¹⁰⁷ *Marion*, 404 U.S. at 324 (citing *United States v. Ewell*, 386 U.S. 116, 122 (1966)).

¹⁰⁸ *See generally id.* at 322–23 (discussing the prejudicial effects of the passage of time).

¹⁰⁹ *Id.* at 323–24 (explaining that statutes of limitation anticipate unfairness, but only by the end of the limitation period).

¹¹⁰ *Id.* at 325 n.18 (citation omitted).

¹¹¹ *Id.* (citation omitted).

¹¹² *Lovasco*, 431 U.S. at 790–91 (citations omitted).

¹¹³ *Id.* at 791, 792, 793, *passim* (citations omitted).

¹¹⁴ *Id.* at 791–92 (citations omitted).

¹¹⁵ *Id.* at 792 n.11 (citing *United States v. Watson*, 423 U.S. 411, 431 (1976) (Powell, J., concurring)); *Granzer v. State*, 193 P.3d 266, 269 (Wyo. 2008) (reciting proof beyond a reasonable doubt as the evidentiary standard of proving guilt in criminal cases).

charge defendants earlier than necessary, and before fully developing its case.¹¹⁶ In turn, the prosecutor would be racing against the speedy trial clock and the accused would face longer periods of anxiety, unemployment, and diminished social relations.¹¹⁷ Reality proves that cases often involve multiple actors and various crimes, and simply require more time to develop than what is necessary to arrest or charge a suspect.¹¹⁸ Thus, a prosecutor must have freedom to decide when it should seek convictions.¹¹⁹

Courts have recognized the difficulties inherent in meeting the requirements of this *Marion* test.¹²⁰ In particular, showing prosecutorial misconduct poses a significant hurdle since the prosecution usually controls the information essential to prove this element.¹²¹ In response, the Wyoming Supreme Court decided to adopt a more balanced test but retained the defendant's burden of proving each element: if the defendant can make a prima facie showing of intentional misconduct, the State must submit its reasons for delaying prosecution.¹²² To prevail, the State need only rebut the assertion that the delay resulted from bad faith.¹²³

The Wyoming Supreme Court also explained its method of evaluating actual prejudice.¹²⁴ If a defendant no longer has access to evidence, and the defendant can prove that the use of such evidence would have altered the outcome of the

¹¹⁶ *Lovasco*, 431 U.S. at 792 n.11 (citations omitted).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 729–93 (citations omitted).

¹¹⁹ *Id.* at 795.

¹²⁰ See Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & MARY L.REV. 607, 620, 621, *passim* (1990) (discussing the hurdles to proving actual prejudice and tactical delay by the prosecution); *Tiemens v. United States*, 724 F.2d 928, 929 (11th Cir. 1984) (“It was recently observed that this standard is an exceedingly high one.”); see *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985) (adopting a due process analysis that requires less than actual prejudice and intentional delay).

¹²¹ *Fortner*, 843 P.2d at 1143.

¹²² Compare *id.* at 1143–44, and *United States v. Comosona*, 614 F.2d 695, 696–97 (10th Cir. 1980) (shifting the burden of proof upon a prima facie showing of tactical delay or harassment by the prosecution), with *United States v. Carlock*, 806 F.2d 535, 549 (5th Cir. 1986) (requiring the defendant to carry the entire burden of proof for both elements: actual prejudice and strategic delay), and *United States v. Watkins*, 709 F.2d 475, 479 (7th Cir. 1983) (requiring the defendant carry the entire burden of proof for both elements). Neither *Marion* nor *Lovasco* clarified how courts should allocate the burden of proof. See Goldfarb, *supra* note 120, at 623, 624, *passim* (discussing how various state and federal courts choose to distribute the burden of proving actual prejudice and intentional delay by the prosecution). See also *Gonzales*, 805 P.2d at 631–32 (explaining the jurisdictional differences in allocating the burden of proof).

¹²³ *Fortner*, 843 P.2d at 1143 (characterizing bad faith as harassment or strategic delay).

¹²⁴ *Russell v. State*, 851 P.2d 1274, 1280 (Wyo. 1993) (“[T]o establish substantial prejudice, [Defendant] is required to show . . . that, but for the delay, the result of his trial would be different.”). *Marion* interchangeably used “actual prejudice” and “substantial prejudice” when referring to this element of the test. See *Marion*, 404 U.S. at 324, 326.

trial, a court will find such circumstances amount to actual prejudice.¹²⁵ The defendant must convey the value of missing evidence or witnesses by emphasizing the exculpatory propensity of such evidence.¹²⁶ Again, the reasonable probability of actual prejudice will persuade a Wyoming court to dismiss charges, not possible prejudice.¹²⁷

In summary, the United States Supreme Court decisions in *Barker* and *Marion* laid the foundation for analyzing the speedy trial right, as well as due process violations caused by pre-charge delay.¹²⁸ The Wyoming Supreme Court has structured its law accordingly, and recently confronted a murder case ripe for applying both constitutional principles.¹²⁹

PRINCIPAL CASE

Humphrey accused the State of violating her right to a speedy trial and denying her due process when prosecutors reinstated murder charges against her, twenty-four years after the dismissal of her case.¹³⁰ The Wyoming Supreme Court, in a unanimous decision, ruled the State did not violate her constitutional rights.¹³¹ Beginning with the speedy trial analysis, the court first considered whether the prosecution failed to follow Wyoming Rule of Criminal Procedure § 48(b), finding Humphrey waived the time limitations rule and consented to a trial date beyond the 180-day requirement.¹³² Next, the court addressed the speedy trial claim from a constitutional standpoint, applying the *Barker* test.¹³³ Although the State re-charged Humphrey twenty-four years after her initial indictment, the court excluded this time when evaluating the first factor, length of delay.¹³⁴

¹²⁵ *Russell*, 851 P.2d at 1280; *Story*, 721 P.2d at 1029 (suggesting defendants must prove actual prejudice by a preponderance of the evidence).

¹²⁶ *Vernier v. State*, 909 P.2d 1344, 1349–50 (Wyo. 1996).

¹²⁷ *Id.* at 1350 (declining to dismiss based on speculative accusations); *Fortner*, 843 P.2d at 1143 (“Appellant has not claimed that the roommate would definitely support an alibi defense, only that he *might* if he could be found. This falls short of being actual prejudice.”).

¹²⁸ *Barker*, 407 U.S. at 529–30; *Marion*, 404 U.S. at 322–24.

¹²⁹ See *Humphrey II*, 185 P.3d 1241–49 (analyzing Defendant’s speedy trial claim and due process claim).

¹³⁰ *Id.* at 1242.

¹³¹ *Id.* at 1249.

¹³² *Id.* at 1243; see *supra* notes 32–33 and accompanying text (noting the procedural rule).

¹³³ *Humphrey II*, 185 P.3d at 1243–44.

¹³⁴ *Id.* at 1244 (running the speedy trial clock from her original indictment on April 11, 1980 until dismissal on August 22, 1980; tacking on the time between her second indictment on March 5, 2004 and her trial on March 13, 2006; excluding the time from December 2004 to October 2005, when the district court briefly dismissed her second charge).

Accordingly, the delay totaled 561 days, which compelled the court to continue its speedy trial analysis.¹³⁵

The second factor, reasons for the delay, neutrally affected both Humphrey and the State.¹³⁶ The third factor, assertion of the constitutional right, weighed slightly in Humphrey's favor since she asserted her speedy trial right through motions, but acquiesced when the State sought continuances.¹³⁷ In addressing the fourth factor, prejudice to the defendant, the court noted the three evils targeted by the speedy trial clause: lengthy pre-trial incarceration, corresponding anxiety, and prejudice to one's defense.¹³⁸ The court also reiterated that defendants have the burden of proving prejudice until the delay is truly excessive.¹³⁹ The court found the delay of 561 days insufficient to presume prejudice.¹⁴⁰

The court then addressed Humphrey's claim of actual prejudice in connection with the fourth factor, prejudice to the defendant.¹⁴¹ Humphrey argued the twenty-four years between her 1980 and 2004 indictments severely hampered her defense, resulting in unavailable documents and witnesses.¹⁴² The court acknowledged that this twenty-four year delay subjected Humphrey to significant prejudice.¹⁴³ The twenty-four year delay, however, did not fall within the ambit of the Speedy Trial Clause.¹⁴⁴ The clause did account for the 561-day delay preceding Humphrey's 2006 trial, but this delay was not responsible for the lost evidence.¹⁴⁵ Accordingly,

¹³⁵ *Id.*; see *supra* note 53 and accompanying text (discussing the threshold amount of delay required to apply the *Barker* test).

¹³⁶ *Humphrey II*, 185 P.3d at 1245 (explaining that of the 561-day delay, Humphrey sought continuances and preliminary hearings, causing a 175-day delay; the State caused a 138-day delay due to a continuance, part of which was sluggishness by the court; and 80 days originated from neutral factors like miscommunication between the defendant and the State).

¹³⁷ *Id.* (noting Humphrey asserted her right but accepted State scheduling, and made numerous pretrial motions that required evidentiary hearings, and requested a five-month continuance in order to file a complaint with the United States Supreme Court).

¹³⁸ *Id.* at 1245–46 (citing *Barker*, 407 U.S. at 532).

¹³⁹ *Id.* at 1246 (reminding the defendant that prejudice is only presumed after truly extensive delay).

¹⁴⁰ *Id.* (requiring Humphrey to bear the burden of proving prejudice).

¹⁴¹ *Humphrey II*, 185 P.3d at 1249 (finding Humphrey failed to adequately make a claim of actual prejudice).

¹⁴² *Id.* at 1246.

¹⁴³ See *id.* at 1246 n.6.

¹⁴⁴ *Id.* at 1246 (“[T]he protection of the Speedy Trial Clause has no application to the period of time in which she was neither under arrest nor formally charged for the murder of her husband.”).

¹⁴⁵ *Id.* (reiterating only post-charge, pre-trial delay implicates the Speedy Trial Clause, not delay between a crime and prosecution).

this factor did not weigh in favor of Humphrey, and the court ultimately ruled that a comparison of all four *Barker* factors did not justify the dismissal of her charge on the basis of a speedy trial violation.¹⁴⁶

The Wyoming Supreme Court also analyzed whether re-charging the defendant for the murder, twenty-four years after the dismissal of her 1980 indictment, amounted to a violation of due process.¹⁴⁷ The court outlined the elements necessary to prove such a violation: actual prejudice to the defendant and intentional delay by the State to gain a tactical advantage.¹⁴⁸ First, regarding actual prejudice, the court found Humphrey's claims of missing evidence and unavailable witnesses did not support a finding of actual prejudice.¹⁴⁹

The defendant argued that files used to establish her prior defense in 1980 had unique exculpatory value since her prior efforts convinced the district court to dismiss the charges for lack of probable cause.¹⁵⁰ However, the Wyoming Supreme Court accorded little value to this argument because Humphrey could not point to specific evidence in those documents that could alter the outcome of her current trial.¹⁵¹ Next, the defendant pointed to missing tape-recordings and transcripts of the 1980 preliminary hearing, which may have contained persuasive arguments for Humphrey's case and functioned to impeach the State's key witnesses.¹⁵² The court ruled Humphrey did not specifically explain how these items would help her defense, and thus found they were not demonstrative of a prejudiced defense.¹⁵³

Additionally, Humphrey claimed the missing financial records of her 1977 bank account would prove that she and her former husband did not have monetary problems.¹⁵⁴ Humphrey argued these documents would effectively refute the prosecution's argument that financial instability caused tension between Jack and Rita Humphrey and motivated her to kill Mr. Humphrey.¹⁵⁵ The Wyoming Supreme Court also found this speculative and not representative of actual prejudice.¹⁵⁶ The court reiterated that mere passage of time will not emancipate

¹⁴⁶ *Humphrey II*, 185 P.3d at 1246.

¹⁴⁷ *Id.* at 1246–49.

¹⁴⁸ *Id.* at 1247.

¹⁴⁹ *Id.* at 1248.

¹⁵⁰ *Id.*

¹⁵¹ *Humphrey II*, 185 P.3d at 1248–49.

¹⁵² *Id.* at 1248 (arguing that certain witnesses for the prosecution have altered their stories, rendering Humphrey more culpable).

¹⁵³ *Id.* at 1249 (ruling this evidence to be of no value).

¹⁵⁴ *Id.* at 1248.

¹⁵⁵ *Id.*

¹⁵⁶ *Humphrey II*, 185 P.3d at 1249 (noting similar evidence was available through cross-examining the State's witness for this issue).

an accused and that the legislature excluded statutes of limitations to prevent such an event.¹⁵⁷ Rather, a defendant must prove actual prejudice.¹⁵⁸ Ultimately, the court in *Humphrey II* had no basis on which to dismiss Humphrey's case due to actual prejudice to the defendant.¹⁵⁹

Regarding the second element of the due process violation claim, intentional delay by the state, the Wyoming Supreme Court found that Humphrey's allegations did not satisfy the requisite prima facie showing of prosecutorial misconduct.¹⁶⁰ Humphrey accused the victim's sister, Bonnie Humphrey, of using her status as mayor to hire a police chief who would reopen Humphrey's case.¹⁶¹ The court explained that aside from Bonnie Humphrey's motive, Humphrey could not prove the prosecutors, themselves, intentionally delayed pressing charges.¹⁶² Nonetheless, Humphrey urged the court to require the State to explain the reasons for postponing accusation.¹⁶³ The court declined to uproot its law, and ruled that Humphrey failed to meet her burden for this element.¹⁶⁴

In deciding how to assess the twenty-four years preceding Humphrey's renewed charges, the Wyoming Supreme Court analyzed the speedy trial right and due process right using its established law.¹⁶⁵ The court held the twenty-four years did not fall within the ambits of speedy trial protection.¹⁶⁶ Turning to the protection of due process, the court did not find that the State deprived Humphrey of a fair trial.¹⁶⁷ Although the Natrona County District Court believed the delay left Humphrey prejudiced, the Wyoming Supreme Court did not find actual prejudice.¹⁶⁸ The court also held that Humphrey failed to make a prima facie case of prosecutorial bad faith.¹⁶⁹ The outcome of the principal case evidences the patent difficulties in proving the requisite elements of a due process violation.¹⁷⁰

¹⁵⁷ *Id.* at 1246–47 (quoting *Vernier*, 909 P.2d at 1348).

¹⁵⁸ *Id.* at 1247, 1249 (“By itself, the fact 24 years elapsed between the dismissal of the original criminal case and the filing of the new murder charge does not establish a due process violation.”).

¹⁵⁹ *Id.* at 1247.

¹⁶⁰ *Id.*

¹⁶¹ *Humphrey II*, 185 P.3d at 1247.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* (referring to the court's holding in *Fortner v. State* that the State must provide reasons for its delay *only after* a defendant makes a prima facie showing of prosecutorial bad faith).

¹⁶⁵ *Id.* at 1243, 1246.

¹⁶⁶ *Humphrey II*, 185 P.3d at 1246.

¹⁶⁷ *Id.* at 1246–49.

¹⁶⁸ *Id.* at 1246 n.6, 1249.

¹⁶⁹ *Id.*

¹⁷⁰ See *infra* note 172 and accompanying text.

ANALYSIS

Although the United States and Wyoming constitutions guarantee the quality of criminal adjudicative processes, the Wyoming Supreme Court's decision in *Humphrey II* suggests an accused charged with a crime in Wyoming may not, pragmatically, be protected by these documents.¹⁷¹ By striving to convince the Wyoming Supreme Court to consider the time between her indictments in its speedy trial analysis, Humphrey actually sought the more probable avenue to protecting her right to a fair trial.¹⁷² The difficult burden of proving a due process violation in Wyoming implies the State's pre-charge law needs reconfiguration.¹⁷³

The Pre-charge Law Established in Marion Must Be Tailored to Adequately Guard Against the Prosecution of Overly Stale Criminal Charges

To begin, revisiting the context of Wyoming's adopted due process law will illuminate the core problems in the State's current law.¹⁷⁴ In *Marion*, the appellees, as in *Humphrey II*, sought to apply their speedy trial right to pre-accusation delay.¹⁷⁵ The Court acknowledged the harmful effects of pre-charge delay and unjust criminal proceedings.¹⁷⁶ However, the speedy trial protection does not activate until the prosecution publicly charges or arrests an accused.¹⁷⁷ Nonetheless, policy dictates that prejudice must always remain a factor when reviewing criminal procedure to insure the reliability of the system.¹⁷⁸ Thus, the Court held that due

¹⁷¹ Compare U.S. CONST. amend. XIV, § 1, with WYO. CONST. art. 1 § 10.

¹⁷² Compare Petition for Writ of Certiorari at 5, *Humphrey I*, 120 P.3d 1027 (Wyo. Nov. 14, 2005) (No. 05-649) ("The speedy trial analysis in this case, without any doubt, results in a conclusion that the prejudice suffered by the defendant as a result of the delay in bringing her to trial is significant.") (citation omitted), with *Humphrey II*, 185 P.3d 1236, 1243, 1246 n.6, 1248-49 (Wyo. 2008) (acknowledging the lower courts finding of substantial prejudice, but reviewing the same evidence and arguments using a due process analysis, finding the defendant failed to demonstrate actual prejudice).

¹⁷³ E.g., *Vernier v. State*, 909 P.2d 1344, 1348-50 (Wyo. 1996) (declining to find defendants met their burden of proving both intentional delay and actual prejudice); *Fortner v. State*, 843 P.2d 1139, 1142-44 (Wyo. 1992) (same); *Story v. State*, 721 P.2d 1020, 1027-29 (Wyo. 1986) (same).

¹⁷⁴ *Story*, 721 P.2d at 1027 (adopting the principles and tests set forth in *United States v. Marion*).

¹⁷⁵ *United States v. Marion*, 404 U.S. 307, 313 (1971) (declining to accept the appellees' argument that a three-year delay between the crime and indictment inherently prejudiced them, providing the grounds for dismissal).

¹⁷⁶ *Id.* at 320, 323 (noting loss of one's defense, social repose, and vigorous police work are interests connected to lengthy pre-charge delay) (citations omitted).

¹⁷⁷ *Id.* at 321 (citation omitted).

¹⁷⁸ See *Barker v. Wingo*, 407 U.S. 514, 532 (1972) ("Of [all the defendant's interests], the most serious is the last, because the inability of a defendant to adequately prepare his case skews the fairness of the entire system."). The integrity of judicial proceedings, by the administration of

process would address concerns of lengthy pre-charge delay that prejudice one's defense.¹⁷⁹

To require proof of intentional misconduct and actual prejudice, however, demands much from a challenging defendant.¹⁸⁰ For one, a defendant cannot usually obtain the evidence illustrating the reasons for the pre-charge delay.¹⁸¹ Without access to such information, an accused may have difficulty even building a prima facie case of intentional misconduct.¹⁸² Second, only in rare instances can a defendant actually show to what extent the passage of time caused prejudice.¹⁸³ The exculpatory value of missing evidence will usually appear speculative, even when such evidence would effectively undermine a prosecutor's case.¹⁸⁴ In lieu of a more balanced test, however, the United States Supreme Court set these one-sided, stringent requirements in response to existing statutes of limitations.¹⁸⁵

The United States Supreme Court in *Marion* analyzed due process *in conjunction* with an unexpired statute of limitation, and stated generally that such legislation served as the primary means of barring stale prosecutions.¹⁸⁶ *Marion*

fair and just convictions, is the senior policy concern in criminal adjudications. *See Marion*, 404 U.S. at 324 (requiring dismissal if a defendant proves a violation of due process from prosecutorial delay); *see also* United States v. Comosona, 614 F.2d 695, 696 (10th Cir. 1980) (reaffirming that pre-charge delay, which violates due process, must result in case dismissal); *see Fortner*, 843 P.2d at 1152 (Urbigkit, J., dissenting) (commenting that notwithstanding the defendant's guilt, the accused did not receive a fair trial and the court should have dismissed the case).

¹⁷⁹ *Marion*, 404 U.S. at 324 (stating that if pre-charge delay (1) causes substantial prejudice to one's defense, and (2) stems from prosecutorial bad-faith, courts must dismiss the case for lack of a fair trial) (citations omitted).

¹⁸⁰ *See* United States v. Barken, 412 F.3d 1131, 1134 (9th Cir. 2005) (indicating defendants rarely meet the burden of showing intentional misconduct and actual prejudice); *see generally* Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 119 (2008) (stating that due process has been "watered-down" in the context of pre-charge delay, and offers limited protection).

¹⁸¹ *Fortner*, 843 P.2d at 1143 (citing Goldfarb, *supra* note 120, at 624–25).

¹⁸² *See id.* at 1150 (Urbigkit, J., dissenting).

¹⁸³ *Doggett v. United States*, 505 U.S. 647, 655 (1992) (quoting *Barker*, 407 U.S. at 532).

¹⁸⁴ *Id.*

¹⁸⁵ *Marion*, 404 U.S. at 323–24.

¹⁸⁶ *Id.* at 322–23. *Marion* stated:

[Statutes of limitations] represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they "are made for the repose of society and the protection of those who may (during the limitation) . . . have lost their means of defence." . . . These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.

Id. (emphasis added) (internal citations omitted). *Accord* United States v. Lovasco, 431 U.S. 783, 789 (1977); Jones v. Angelone, 94 F.3d 900, 906–07 (4th Cir. 1996); *Doggett*, 505 U.S. at 665–66 (Thomas, J., dissenting).

acknowledged that prejudice to an accused's defense will eventually arise in a way a defendant cannot actually demonstrate at trial.¹⁸⁷ Fairness to the defendant, the integrity of the judicial process, and the difficulty of proving substantial prejudice caused by pre-charge delay motivate legislatures to enact statutes of limitations.¹⁸⁸ Such statutes preemptively account for defendants' interests in receiving a fair trial.¹⁸⁹ Due process is a secondary protection in the area of pre-charge delay.¹⁹⁰ Thus, *Marion* required more from a defendant who sought to prove the criminal process failed to administer substantial justice, despite an applicable statute of limitations.¹⁹¹ A major problem arises, however, when a jurisdiction lacks this primary guarantee against prejudicial delay in prosecution.¹⁹²

Only two states, including Wyoming, do not have statutes of limitations for any criminal offense.¹⁹³ Social mores change and justify the decision against enacting statutes of limitations.¹⁹⁴ This case note does not seek to criticize the Wyoming legislature for declining to promulgate such statutes, nor does it advocate for their adoption.¹⁹⁵ Wyoming courts must acknowledge, however, that the United States Supreme Court's due process analysis complemented statutes of limitations.¹⁹⁶ Without legislation limiting pre-charge delay, the Due Process Clause becomes the sole means of shielding an accused from prejudicial delay.¹⁹⁷

¹⁸⁷ See *Marion*, 404 U.S. at 322 (noting that undeniable prejudice will occur eventually).

¹⁸⁸ See *id.* at 322 n.14 (quoting *Mo., Kan. & Tex. Ry. Co. v. Harriman*, 227 U.S. 657, 672 (1913)); see also Powell, *supra* note 180, at 129; James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS. L. REV. 1205, 1209 (2004).

¹⁸⁹ See Powell, *supra* note 180, at 129–30; see *infra* note 190.

¹⁹⁰ *Marion*, 404 U.S. at 322. *Marion* stated:

The law has provided other mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge. As we [have] said . . . “the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges.”

Id.

¹⁹¹ See *Lovasco*, 431 U.S. at 789 (accord[ing] great weight to statutes of limitation, then proceeding to set demanding burdens for proving due process violations, and implying that such burdens are justified by an alternative means of protection).

¹⁹² See Goldfarb, *supra* note 120, at 620–21, 657–58 (suggesting the *Marion* analysis demands too much of a defendant, and thereby, does not adequately focus on protecting a defendant's due process, but focuses on safeguarding prosecutorial discretion).

¹⁹³ See Powell, *supra* note 180, at 149 (identifying South Carolina as the other jurisdiction without such limitations).

¹⁹⁴ See generally *id.* at 124, 135, 138, *passim* (discussing the history of statutes of limitations and the rise of retributivism and victims' rights).

¹⁹⁵ See *infra* note 202 and accompanying text.

¹⁹⁶ See *Marion*, 404 U.S. at 322; see *supra* notes 186–91 and accompanying text.

¹⁹⁷ *Fortner*, 843 P.2d at 1142; *Story*, 721 P.2d at 1027 (noting that no state has a statute of limitations for murder).

Maintaining the basal requirements for proving due process violations, set out in *Marion*, inadequately accounts for a defendant's interests when alternate means of protection do not exist.¹⁹⁸ The Wyoming Supreme Court has even quoted *Marion*, saying that *in consideration of* an applicable statute of limitations, the mere possibility of prejudice cannot serve as the basis for proving a denial of due process.¹⁹⁹ The United States Supreme Court noted, however, that this ruling might have been different in the absence of such a limitation period.²⁰⁰

When legislatures do not protect an accused's interest in avoiding unidentifiable prejudice from pre-charge delay, courts must do this; fairness and efficiency must always be central to the judicial process.²⁰¹ Wyoming courts can ensure the integrity of this process by adopting a more balanced due process analysis.²⁰² Many jurisdictions apply a balancing approach, the type the Wyoming Supreme Court rejected in *Fortner v. State*.²⁰³ The basis for this balancing analysis stems from ambiguity in the United States Supreme Court case *United States v. Lovasco*.²⁰⁴

¹⁹⁸ *Cf. Humphrey II*, 185 P.3d at 1249 (affirming defendant's conviction and finding that she failed to prove intentional prosecutorial misconduct and actual substantial prejudice twenty-four years after her case was already dismissed and twenty-seven years after the crime occurred).

¹⁹⁹ *Story*, 721 P.2d at 1027 (quoting *Marion*, 404 U.S. at 326).

²⁰⁰ *See Marion*, 404 U.S. at 322 (justifying why the Court would not presume prejudice, noting the legislature accounted for the probability of prejudice when deciding the length of a limitations period).

²⁰¹ *Barker*, 407 U.S. at 532; *see Powell*, *supra* note 180, at 139 (stating when governments abolish statutes of limitations, "interest-balancing," basic fairness, and efficiency are lost as well).

²⁰² *See Goldfarb*, *supra* note 120, at 679 (explaining that current applications of the *Marion* test are inadequate to shield defendants, and the judicial system, from the effects of pre-charge delay). Goldfarb views current pre-charge delay jurisprudence as a "contradiction of other widely shared norms, such as the need for a high level of accuracy in criminal convictions as an elemental feature of procedural fairness." *See Goldfarb supra* note 120, at 673.

²⁰³ *Fortner*, 843 P.2d at 1144; *e.g. United States v. Sowa*, 34 F.3d 447, 451 (7th Cir. 1994) ("[O]nce the defendant has proven actual and substantial prejudice, the government must come forward and provide its reasons for the delay. The reasons are then balanced against the defendant's prejudice."); *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990) (holding that once a defendant makes a showing of actual prejudice, the defendant must submit legitimate reasons for the delay, at which time the reviewing court will weigh the degree of prejudice with the reasons for delay to decide whether the prosecution violated due process); *Fritz v. State*, 811 P.2d 1353, 1367 (Ok. App. Ct. 1991) (balancing the reasons for delay with prejudice to the defendant); *People v. Lesiuk*, 617 N.E.2d 1047, 1050 (N.Y. 1993) ("Where there has been a prolonged delay, we impose a burden on the prosecution to establish good cause." (citation omitted)); *State v. Robinson*, No. L-06-1182, 2008 WL 2700002, at *17 (Ohio App. 6th Dist. July 11, 2008) (requiring defendant to show actual prejudice to his or her defense, then requiring the State to justify its delay, and then the court weighs the reasons for delay with the degree of prejudice).

²⁰⁴ *State v. Gonzales*, 794 P.2d 361, 363-64 (N.M. Ct. App. 1990); *United States v. Mays*, 549 F.2d 670, 675, (9th Cir. 1977) ("[T]here has been a good deal of confusion as to whether the two elements delineated in the [*Marion*] opinion actual (or substantial) prejudice, and intentional delay by the government for an improper purpose are to be applied in a conjunctive or disjunctive

Although the defendant in *Lovasco* proved actual prejudice, the United States Supreme Court considered the reasons for the delay before dismissing the case.²⁰⁵ The Court held the government justifiably delayed prosecution, which outweighed the prejudice it caused the defendant.²⁰⁶ Since this decision, various United States appellate courts either balance the due process elements as factors (the disjunctive approach), consider each a necessary element for the defendant to prove (conjunctive approach), or have yet to clearly choose an analysis.²⁰⁷ To better account for defendants' rights, jurisdictions without statutes of limitations, like Wyoming, should adopt the disjunctive method of analyzing pre-charge delay, instead of the one-sided conjunctive approach.²⁰⁸

Adding Presumptive Prejudice to the Law of Pre-Charge Delay May Better Ensure Due Process

To completely guarantee due process, without the assistance of statutes of limitations, Wyoming courts should also consider adopting part of the speedy trial analysis: the presumption of prejudice when excessive delays ensue.²⁰⁹ The United States Supreme Court case, *Doggett v. United States*, provides justification for this method.²¹⁰ In that case, the government formally indicted a defendant

manner.”). The “conjunctive” approach requires the defendant to prove both elements, while the “disjunctive” approach distributes the burden of proof. *Gonzales*, 794 P.2d at 363–67.

²⁰⁵ *Lovasco*, 431 U.S. at 790.

²⁰⁶ *See id.* at 796–97 (“In light of [the government’s] explanation, it follows that compelling respondent to stand trial would not be fundamentally unfair.”). The Court did find prejudice to the accused, however. *Id.*

²⁰⁷ *See generally* WAYNE R. LAFAVE ET AL., *Unconstitutional pre-accusation delays*, in 5 CRIM. PROC. § 18.5(b) (3d ed. 2008) (discussing the various approaches); *Gonzales*, 794 P.2d at 363–67; *Mays*, 549 F.2d at 675 n.6–7 (discussing the various approaches). *See supra* note 203 (citing examples of jurisdictions applying the disjunctive analysis).

²⁰⁸ *United States v. Sabath*, 990 F. Supp. 1007, 1017 (N.D. Ill. 1998) (indicating that while prosecutorial discretion in bringing charges is highly valued and the remedy of dismissal is extreme, due process requires fair proceedings and the truest method of testing the process is for a court to weigh the interests of both parties) (quoting *United States v. Williams*, 738 F.2d 172 (7th Cir. 1984)). A good argument exists that proving unlawful pre-charge delay is too difficult. *See LAFAVE supra* note 207, § 18.5(b). *See also* Goldfarb *supra* note 120, at 666–67, 679–80 (explaining that current pre-charge delay jurisprudence is overly burdensome for a defendant, and courts should adopt more balanced means of testing due process). Goldfarb also proposes examining due process violations using the same factor test employed in speedy trial analyses. *See Goldfarb supra* note 120, at 625, 679–80.

²⁰⁹ *See Marion*, 404 U.S. at 321 (“Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself.”); *see* Goldfarb, *supra* note 120, at 631–32 (“In fact, uncharged defendants lacking notice of a prosecution that would induce them to forestall the erosion of defense evidence are likely to suffer even greater delay-related prejudice than are charged defendants.”).

²¹⁰ *Doggett*, 505 U.S. at 655.

who the police could not locate.²¹¹ For eight-and-a-half years the accused remained unaware of the indictment and lived freely, under his true name, until the government apprehended him.²¹² While examining the fourth factor of the speedy trial analysis, prejudice to the accused, the Court realized the defendant could only allege one type of prejudice: an injured defense.²¹³ Although Doggett could not specify how the delay hindered his defense, the Court dismissed the case.²¹⁴ In doing so, the Court explained that instances of lengthy delay may require a court to assume prejudice to an accused's defense, since demonstrating actual prejudice could be impossible.²¹⁵

Aside from the technical fact that the government indicted Doggett, the circumstances resembled those in a pre-charge analysis.²¹⁶ It seems reasonable, then, to allow for this presumption in a due process context.²¹⁷ As evidenced in *Doggett*, delay in compelling a defendant to stand trial, regardless of formal charges or arrest, leads to the unavailability of evidence and testimony, and precisely the type of harm pre-charge delay begets.²¹⁸ Again, instances arise when neither a defendant nor a prosecutor can truly demonstrate the effects of missing evidence and faded memories, which suggests that always requiring an accused to show actual prejudice undermines the integrity of the judicial process.²¹⁹

Humphrey II exemplifies the injustice that can result from strictly applying *Marion's* due process analysis without alternate means of guarding against overly stale prosecution.²²⁰ Twenty-four years after a dismissal for lack of *probable cause*, with no indication of newly discovered evidence, the Natrona County District Court weighed the interests of both parties and found the re-prosecution unconstitutional.²²¹ Had the Wyoming Supreme Court fully recognized that

²¹¹ *Id.* at 648–49.

²¹² *Id.* at 649–50.

²¹³ *Id.* at 654 (noting the absence of oppressive incarceration and anxiety, the other evils targeted by the Speedy Trial Clause).

²¹⁴ *Id.* at 658.

²¹⁵ *Doggett*, 505 U.S. at 655 (“[E]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.”).

²¹⁶ *See id.* at 656.

²¹⁷ *See Marion*, 404 U.S. at 322 (implying the passage of time, eventually, will prejudice a defendant's case in an undeniable manner).

²¹⁸ *See Humphrey II*, 185 P.3d at 1246 n.6 (recognizing the Natrona County District Court's finding of actual prejudice to defendant regarding the twenty-four year delay between subsequent indictments).

²¹⁹ *Doggett*, 505 U.S. at 655.

²²⁰ *See Humphrey II*, 185 P.3d at 1246 n.6, 1249 (acknowledging the lower court's finding of actual prejudice through the sensitive speedy trial test, but overruling this finding when viewing the same evidence under the tenets of the Due Process Clause).

²²¹ *Id.* at 1242.

Humphrey's interests were not accounted for by the legislature, and balanced this prejudice against the reasons for delay, Humphrey would have received due process.²²² In addition, the court may have also dismissed Humphrey's case.²²³

In summary, statutes of limitations normally reflect the interests of defendants and society in barring overly stale prosecutions.²²⁴ Due to the absence of such legislation in Wyoming, however, the Supreme Court of Wyoming must remodel its due process analysis to prevent unfair, pre-charge delay.²²⁵ By comparing the prosecution's reasons for the pre-charge delay with the resulting prejudice, defendants will have realistic means of protecting their right to a fair trial.²²⁶ Notably, the only other jurisdiction without any statutes of limitations, South Carolina, employs this balancing method of analysis.²²⁷

CONCLUSION

The district court's dismissal of Humphrey's latest murder charges in 2005 reflected sound reasoning; the twenty-four year period between indictments seemed to irreparably harm Humphrey's defense.²²⁸ In fact, the court did find the pre-indictment delay to substantially prejudice her case.²²⁹ However, the court's

²²² See *supra* note 172 and accompanying text (comparing the different court findings in relation to the type of analysis used: speedy trial factor-test versus the due process analysis).

²²³ See Petition for Writ of Certiorari at 5, *supra* note 172, at 5 ("The speedy trial analysis in this case, without any doubt, results in a conclusion that the prejudice suffered by the defendant as a result of the delay in bringing her to trial is significant.") (citation omitted). The district court applied the speedy trial analysis, balancing prejudice with reasons for the delay. See *Humphrey II*, 185 P.3d at 1242.

²²⁴ *Marion*, 404 U.S. at 322; *accord, e.g., Lovasco*, 431 U.S. at 789–90, 793, 794; *Comosona*, 848 F.2d at 1114.

²²⁵ See *supra* notes 197–203 and accompanying text. "It still remains 'a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'" *Arizona v. Youngblood*, 488 U.S. 51, 73 (1988) (Blackmun J., dissenting) (citation omitted).

²²⁶ See *supra* notes 207–08 and accompanying text (explaining why courts should adopt a balanced method of evaluating due process violations from pre-charge delay). See also *supra* note 203 (citing courts that have chosen to employ a more balanced analysis (the disjunctive approach)).

²²⁷ *State v. Brazell*, 480 S.E.2d 64, 68–69 (S.C. 1997); *State v. Lee*, 602 S.E.2d 113, 117 (S.C. Ct. App. 2004). No state has a statute of limitation for serious crimes like murder. *Story*, 721 P.2d at 1027. Some courts have adopted a balancing approach to evaluate pre-charge delay in murder cases. *People v. Nelson*, 185 P.3d 49, 58 (Cal. 2008) (synthesizing its precedent, in a case of first-degree felony murder, to expressly hold that reasons for delay will be compared to the defendant's prejudice); *State v. Luck*, 472 N.E.2d 1097, 1104–05 (Ohio 1984) (balancing the defendant's prejudice with the State's reasons for delay, in a murder case).

²²⁸ See *supra* notes 150, 152, 159 and accompanying text (noting the unavailability of evidence).

²²⁹ See *supra* notes 13–15 and accompanying text (noting the district court's finding of substantial prejudice).

finding did not ultimately favor Humphrey, because the speedy trial right only applies after formal indictment or arrest.²³⁰ As the Wyoming Supreme Court later directed, the district court should have determined the effects of that twenty-four year period under a due process analysis.²³¹ Interestingly, by doing so the outcome of Humphrey's case was drastically altered.²³²

Humphrey's pre-charge situation, viewed through a speedy trial lens, permitted the district court to balance the reasons for delay against the resulting prejudices and dismiss her case.²³³ Unlike the evenhanded speedy trial analysis, proving the lack of due process requires a defendant to prove actual prejudice and prima facie intentional delay by the prosecution.²³⁴ This case highlights how difficult it can be for a defendant to successfully prove a due process violation caused by pre-charge delay, even if circumstances suggest otherwise.²³⁵

In light of Wyoming's reluctance to enact statutes of limitations for any crime, and that the United States Supreme Court established the law of pre-charge delay with such statutes in mind, this case note seeks to encourage the Wyoming Supreme Court to revamp its due process law.²³⁶ The court can properly guarantee a fair trial by adopting a method of evaluating due process that compares reasons for the pre-charge delay to the level of prejudice asserted by the accused.²³⁷ In certain instances, a court should even consider a presumption of prejudice when the delay is truly excessive.²³⁸

"To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case."²³⁹ In the case of *Humphrey II*, had the Wyoming Supreme Court applied this logic and carefully balanced the interests of both the prosecution and defense, the State would have ensured fair play and justice, displaying the integrity of Wyoming's judicial system.²⁴⁰

²³⁰ See *supra* note 144 and accompanying text.

²³¹ See *supra* notes 18, 144 and accompanying text.

²³² See *supra* note 172 and accompanying text.

²³³ See *supra* notes 13, 15, 49 and accompanying text.

²³⁴ See *supra* notes 103, 122 and accompanying text.

²³⁵ See *supra* notes 172, 202.

²³⁶ See *supra* notes 201–02 and accompanying text.

²³⁷ See *supra* note 208 and accompanying text.

²³⁸ See *supra* notes 209–19 and accompanying text.

²³⁹ *United States v. Marion*, 404 U.S. 307, 325 (1971).

²⁴⁰ See *supra* notes 178, 201 and accompanying text (discussing why a lack of statutes of limitations requires courts to modify their pre-charge law in order to guarantee due process in cases of prosecutorial delay).