IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

CLINT RAYMOND WEBB – PETITIONER

vs.

WYOMING DEPARTMENT OF CORRECTIONS

MEDIUM INSTITUTION WARDEN, ET AL – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX A

Decision of the U.S. Court of Appeals for the Tenth Circuit

FILED
United States Court of Appeals
Tenth Circuit

March 15, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CLINT RAYMOND WEBB,

Petitioner - Appellant,

v.

WYOMING DEPARTMENT OF CORRECTIONS MEDIUM CORRECTIONAL INSTITUTION WARDEN; WYOMING ATTORNEY GENERAL,

Respondents - Appellees.

No. 20-8023
(D.C. No. 1:19-CV-00039-ABJ)
(D. Wyo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **BALDOCK**, and **CARSON**, Circuit Judges.

Pro se prisoner Clint Raymond Webb was convicted in Wyoming state court of multiple offenses against his estranged wife, including attempted second-degree murder. He seeks a certificate of appealability ("COA") to challenge the district court's denial of his 28 U.S.C. § 2254 habeas petition. Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss this matter.[1]

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Because Mr. Webb is pro se, we construe his filings liberally, but we do not act as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

I. BACKGROUND

A. *Factual Background*

In June 2014, Mr. Webb's estranged wife, Julie Webb, was driving her SUV in Casper, Wyoming. While stopped at an intersection, she saw Mr. Webb in his pickup truck. He drove by and yelled profanity at her. At another intersection, he crashed his truck into her SUV "with enough force that the airbags deployed and a number of car parts scattered across the road." *Webb v. State*, 401 P.3d 914, 919 (Wyo. 2017). He drove away.

Ms. Webb exited her car and attempted to call 911. Before she was able to reach an operator, "she heard 'car engines revving up'" and saw Mr. Webb's truck turn the corner. *Id.* She ran into a nearby yard as "Mr. Webb drove his vehicle quickly from the roadway, onto a sidewalk, and toward [her]." *Id.* She jumped out of the truck's path "and, with the help of a Good Samaritan, sought refuge in the . . . Samaritan's [home]." *Id.* Mr. Webb drove off, collided with a parked minivan, and fled to Las Vegas, Nevada, where he surrendered to authorities.

B. *Procedural History*

On July 1, 2014, the State charged Mr. Webb in an information with one count of aggravated assault and battery with a deadly weapon. On July 31, the State dismissed that information and filed a new one, adding counts of aggravated assault and battery and felony property destruction. On August 15, Mr. Webb demanded a speedy trial. On October 23, the State voluntarily dismissed the July 31 information and filed a new one, adding a count of attempted second-degree murder.

On October 29, 2014, defense counsel sought and received a competency evaluation for Mr. Webb, which "delayed [his trial for] seventy-five days." *Id.* at 923. Mr. Webb was deemed competent. Mr. Webb filed another demand for a speedy trial and unsuccessfully moved to dismiss for lack of a speedy trial.

Trial began on July 27, 2015. On July 31, the jury returned guilty verdicts on all counts. The trial court sentenced Mr. Webb to concurrent terms of five to seven years for each count of aggravated assault and battery with a deadly weapon, a concurrent term of one to three years for property destruction, and a consecutive term of 30 to 45 years for attempted second-degree murder.

Mr. Webb began several attempts to overturn his convictions. Appealing to the Wyoming Supreme Court, he raised speedy trial, prosecutorial misconduct, ineffective assistance of trial counsel, jury instruction, and double jeopardy issues. The court affirmed.

Mr. Webb then filed a pro se state postconviction petition asserting speedy trial and ineffective assistance of appellate counsel claims. The postconviction court dismissed the petition, reasoning that most of Mr. Webb's claims were procedurally barred and that others were not legally cognizable. Mr. Webb sought review in the Wyoming Supreme Court, which summarily denied review.

Mr. Webb next filed the instant habeas petition in federal district court. He alleged a violation of his speedy trial rights, a conflict of interest between trial and appellate counsel, improper use of a privileged attorney-client communication, and ineffective assistance of trial counsel. The State filed a response and moved to dismiss

"that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Our consideration of a habeas petitioner's request for a COA must account for the Antiterrorism and Effective Death Penalty Act's ("AEDPA") "deferential treatment of state court decisions." *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004). Under AEDPA, when a state court has adjudicated the merits of a claim, a federal court may grant habeas relief only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2). We therefore "look to the District Court's application of AEDPA to [Mr. Webb's] constitutional claims and ask whether that resolution was debatable amongst jurists of reason." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

In addition to these demanding AEDPA standards, federal habeas petitioners face procedural hurdles. "Federal habeas review is generally barred where the prisoner defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule . . . ." *Smith v. Duckworth*, 824 F.3d 1233, 1242 (10th Cir. 2016) (quotations omitted). And when a habeas petition contains unexhausted claims,[3] a federal

[3] To fairly present a claim, and therefore to exhaust it, state prisoners "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). "The exhaustion requirement is satisfied if the

In his state postconviction petition, Mr. Webb argued the Wyoming Supreme Court "appl[ied] two conflicting interpretations to W.R.Cr.P. 48(b)(7)" and "reward[ed] the prosecution for a[n] unnecessary delay [ ]through dismissing and re-filing" the charges. ROA, Vol. I at 529, 536. The postconviction court said his claim was procedurally barred by Wyo. Stat. Ann. § 7-14-103(a)(iii) because the claim was decided earlier on the merits:[6] "Although Webb phrases the claims as something new, the substance is still his assertion that his speedy trial rights were violated. The [Wyoming] Supreme Court has already determined those rights were not violated." ROA, Vol. I at 1126 (citation omitted).[7] Mr. Webb advanced his postconviction claim in the Wyoming Supreme Court, which denied relief without comment.

ii. Sixth Amendment

Addressing the Sixth Amendment claim on direct appeal, the Wyoming Supreme Court analyzed the factors in *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (length of the

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[6] Wyoming Statute § 7-14-103 governs the doctrine of procedural bar in Wyoming courts regarding petitions for postconviction relief:

> (a) A claim under this act is procedurally barred and no court has jurisdiction to decide the claim if the claim:
>
> > (i) Could have been raised but was not raised in a direct appeal from the proceeding which resulted in the petitioner's conviction;
> > (ii) Was not raised in the original or an amendment to the original petition under this act; or
> > (iii) Was decided on its merits or on procedural grounds in any previous proceeding which has become final.

[7] Further, the postconviction court said, "Mr. Webb wrongly treats this petition as an appeal, arguing that the Wyoming Supreme Court erred in applying the law to his case[,] and arguing the substance of his speedy trial claims." *Id.*

delay, reason for the delay, the defendant's assertion of his right, and resulting prejudice), and held that the 396-day period from the first information's filing to Mr. Webb's conviction did not result in a speedy trial violation. *Webb*, 401 P.3d at 924-25.

The court found the first *Barker* factor, length of the delay, did not favor Mr. Webb because he "was convicted of multiple serious felony offenses, and the trial concluded only thirty-one days after the one-year anniversary of the State filing the first Information." *Id.* at 922.

As for the second factor, reason for the delay, the court found it was neutral. It said the 75-day delay caused by the competency evaluation did not count against either side. And while the State caused delay by twice dismissing and refiling the charges, there were no facts to "support a finding that the State dismissed the first two Informations in an attempt to thwart Mr. Webb's defense." *Id.* at 923. Finally, the court observed that Mr. Webb had delayed the proceedings by fleeing to Nevada and later selecting a trial date three weeks after the first available start date.

Turning to the third *Barker* factor, the defendant's assertion of his speedy trial right, the court determined it only "slightly" weighed in Mr. Webb's favor because, shortly before trial, he requested a second competency evaluation, new counsel, and a continuance. *Id.*

On the last *Barker* factor, prejudice, the court said it did not weigh in Mr. Webb's favor because the "defense was not hindered by the" 396-day period from the filing of charges to conviction. *Id.* at 924. The court rejected Mr. Webb's assertion that "the delay prevented his attorneys from inspecting Ms. Webb's [SUV]," as the police never

took it into evidence and simply released it to her. *Id.* Nor did the court discern any prejudice from the delay's impact on witness recollections given Mr. Webb's opportunity to cross-examine witnesses about inconsistent statements and testimony. Finally, the court found no "extraordinary or unusual pretrial anxiety" caused by the delay that would have been prejudicial. *Id.*[8]

Thus, "balanc[ing] all of the *Barker* factors, [the Wyoming Supreme Court] conclude[d] that Mr. Webb's right to a speedy trial was not violated." *Id.*

b. *Federal district court proceedings*

The district court said that insofar as Mr. Webb's claim "allege[d] constitutional violations arising from the Wyoming Supreme Court's analysis of the Wyoming Rules of Criminal Procedure," the claim presented a non-reviewable state law issue. ROA, Vol. II at 143. As to the Sixth Amendment speedy trial issue, the district court "deemed [it] exhausted but procedurally defaulted" because Mr. Webb's postconviction petition did not contain "one word about the Sixth Amendment." *Id.*

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[8] "The fourth factor, prejudice to the defendant, should be assessed . . . in the light of the interests of defendants which the speedy trial right was designed to protect, i.e., (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Lott v. Trammell*, 705 F.3d 1167, 1174 (10th Cir. 2013) (quotations omitted). Mr. Webb does not address the Wyoming Supreme Court's analysis of prejudice in his COA application. The issue is therefore waived. *See United States v. Springfield*, 337 F.3d 1175, 1178 (10th Cir. 2003) (concluding that the applicant waived his claim on appeal "because he failed to address that claim in either his application for a COA or his brief on appeal"). Moreover, even if he had addressed the issue, it would, in part, be anticipatorily barred because his appellate counsel raised on direct appeal only the anxiety and defense-impairment elements of prejudice. *See Lott*, 705 F.3d at 1179 (applying anticipatory bar to two of the petitioner's *Barker* prejudice arguments).

2. **Analysis**

To the extent our analysis of these claims varies from the district court's, we may deny a COA on a ground that is supported by the record even if the district court did not rely on it. *See Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005).

a. *Wyoming Rule of Criminal Procedure 48 claim*

In his brief to this court, Mr. Webb claims his due process rights were violated by the "state courts unfairly applying two conflicting meanings" to the word "dismissal" in Wyoming's speedy trial rule, Wyo. R. Crim. P. 48. Pet. Br. at 21. He contends that "[b]y applying two competing meanings to 'dismissal[,]' the state is able to continually dismiss charges within 180 days and refile the charges to start the speedy trial time clock anew for years and years without ever bringing a defendant to trial." *Id.* at 24.

Mr. Webb's arguments in the Wyoming Supreme Court and the state postconviction court complained about the interpretation and application of Rule 48. He did not explicitly assert a federal constitutional claim. Federal habeas relief is not available to correct errors of state law. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.'' *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

If Mr. Webb implicitly alleged a due process violation in the state courts and attempts to advance that argument in his federal habeas proceedings, "a habeas applicant cannot transform a state law claim into a federal one merely by attaching a due process label." *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1043 (10th Cir. 2017). He has done

little more than that.[9] Indeed, his due process theory in this court rests on the same argument his appellate counsel made in state court—that Rule 48(b)(7) prohibits the re-filing of charges if the defendant has demanded a speedy trial and there is *any* dismissal under the rule. The Wyoming Supreme Court's resolution of this issue presents a non-reviewable determination of state law.

b. *Sixth Amendment claim*

The federal district court did not address the Wyoming Supreme Court's application of *Barker*. Instead, it said Mr. Webb's *Barker* claim was unexhausted and procedurally defaulted in state court. But the claim was exhausted, as Mr. Webb had raised it on direct appeal, so we address it under AEDPA review. Mr. Webb claims the Wyoming Supreme Court's decision rejecting his Sixth Amendment speedy trial claim was contrary to, or an unreasonable application of, *Barker v. Wingo*. Reasonable jurists would not debate the district court's denial of this claim, so we deny a COA.

In his request for a COA, Mr. Webb contests the weight assigned by the Wyoming Supreme Court to the *Barker* factors. He contends the factors weigh in his favor because he merely committed "an ordinary street crime," the court's "overcrowded docket" was attributable to the State, the State was more to blame for the delay, and he had vigorously asserted his speedy trial right. Pet. Br. at 47-48. But Mr. Barker has not shown that attempted second-degree murder is an ordinary street crime or that an overcrowded

[9] The same analysis applies to Mr. Webb's argument that the Wyoming Supreme Court's speedy trial decision on direct appeal violated "his equal protection right" because it "treated [him] differently than those similarly situated." Pet. Br. at 46.

docket delayed his trial. And he has not addressed the delays from his fleeing to Nevada (23 days), rejecting an earlier trial date (21 days), and seeking a competency evaluation (75 days). It was not unreasonable for the Wyoming Supreme Court to deduct these time periods from the 396 days it took to try and convict Mr. Webb. Finally, Mr. Webb has not shown the court unreasonably discounted his assertions of the speedy trial right in light of his requests for a second competency evaluation, new counsel, and a trial continuance.

Mr. Webb's "arguments . . . do nothing to establish that the [Wyoming Supreme Court's] determination was an unreasonable application of clearly established federal law." *Lott v. Trammell*, 705 F.3d 1167, 1177 (10th Cir. 2013); *see also Jackson v. Ray*, 390 F.3d 1254, 1267 (10th Cir. 2004) ("In order to grant habeas relief [on a speedy trial claim], . . . we must find pursuant to clearly established Supreme Court law that there is no possible balancing of these factors that is consistent with the [state appellate court's] decision." *Jackson v. Ray*, 390 F.3d 1254, 1267 (10th Cir. 2004).[10]

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Mr. Webb has not shown that reasonable jurists could debate the district court's denial of his speedy trial claims.

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[10] *See also Davis v. Kelly*, 316 F.3d 125, 127 (2d Cir. 2003) ("Balancing the *Barker* factors necessarily requires a court to make discretionary judgments."); *Rashad v. Walsh*, 300 F.3d 27, 45 (1st Cir. 2002) (suggesting that AEDPA "deference is heightened in a *Barker*-type case, because constructing a balance among the four factors is more judicial art than science" (quotations omitted)).

B. *Conflict of Interest*

In the state postconviction proceedings, Mr. Webb claimed his appointed appellate counsel was ineffective due to a conflict of interest with appointed trial counsel. He argued that because both sets of attorneys were from the Wyoming Public Defender's Office, appellate counsel "chose to protect the interests of her fellow attorneys from her office by omitting issues that have merit on the claim of ineffective assistance of [trial] counsel." ROA, Vol. I at 1150. The postconviction court rejected the claim on separate procedural grounds, reasoning that (1) "appellate counsel raised ineffective assistance of trial counsel on direct appeal, ineffective assistance of counsel is a single claim or issue, and claims already addressed on the merits are procedurally barred";[11] and (2) Wyoming's postconviction statute "provides relief only for errors in the proceedings which resulted in [the defendant's] conviction or sentence." *Id.* at 1125-26 (quotations omitted).

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[11] On direct appeal, appellate counsel raised one ineffective assistance claim, which targeted trial counsel's failure to "request a jury instruction on accident." *Webb*, 401 P.3d at 926. The Wyoming Supreme Court held that Mr. Webb was not prejudiced because "Mr. Webb was not precluded from arguing the events at issue were the product of an accident" based on the other instructions on intent. *Id.* at 927.

Wyoming sets an expansive bar in postconviction proceedings for ineffective assistance of appellate counsel claims if there was a claim of ineffective assistance of trial counsel on direct appeal. *See Schreibvogel v. State*, 269 P.3d 1098, 1103 (Wyo. 2012) ("Where the appellant has raised the claim of ineffective assistance of trial counsel in his direct appeal," he may not "raise the claim again, on different factual grounds, in a petition for post-conviction relief by arguing that appellate counsel was ineffective for not raising those different factual grounds[.]").

In his request for a COA, Mr. Webb complains he "has been procedurally barred from having his 'fundamental' claim of ineffective assistance of appellate counsel heard in any court." Pet. Br. at 35. But, even if this claim of conflict of interest is procedurally barred, we exercise our discretion to address it on the merits. *See Smith*, 824 F.3d at 1242 (observing that where a "claim may be disposed of in a straightforward fashion on substantive grounds, this court retains discretion to bypass the procedural bar and reject the claim on the merits" (quotations omitted)); *cf. Cone v. Bell*, 556 U.S. 449, 466 (2009) ("When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review.").

Our case law recognizes no inherent conflict when the same public defender's office employs appellate and trial counsel. *See Smallwood v. Gibson*, 191 F.3d 1257, 1270 (10th Cir. 1999) (rejecting conflict of interest argument where appellate counsel from same public defender's office "raised over twenty issues on direct appeal, including an ineffective assistance of counsel claim"). Mr. Webb speculates that appellate counsel chose to protect trial counsel by omitting the ineffective assistance claims he requested. But this does not show "that a relationship to trial counsel hindered his appellate counsel." *Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885, 902 (10th Cir. 2019) (rejecting habeas petitioner's "infer[ence] [of] potential bases for conflicts" and "invit[ation] . . . to imagine the dilemma appellate counsel might be placed in" (brackets and quotations omitted)), *cert. denied*, 140 S. Ct. 844 (2020).[12]

[12] *See also Keats v. State*, 115 P.3d 1110, 1113, 1117 (Wyo. 2005) (concluding that petitioner's ineffective trial counsel claim was not subject to the § 7–14–103(a)(i)

Reasonable jurists could not debate the district court's denial of this claim. A COA is thus not warranted.

C. *Ineffective Assistance of Appellate Counsel*

1. **Procedural Background**

In his state postconviction petition, Mr. Webb claimed that appellate counsel should have argued (1) trial counsel's ineffectiveness in interviewing witnesses, presenting evidence, impeaching witnesses, investigating tire marks, and not compelling the prosecution to produce Ms. Webb's SUV; (2) *Brady* violations; and (3) prosecutorial misconduct.

The postconviction court found the first ground procedurally defaulted by Wyo. Stat. Ann. § 7-14-103(a)(iii) because Mr. Webb had already claimed on direct appeal that trial counsel was ineffective. *See supra* note 11.

The second ground concerned alleged *Brady* violations arising from the State's releasing the SUV to Ms. Webb and not disclosing evidence of witness perjury.[13] The

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procedural bar where petitioner's "direct appeal was handled by trial counsel's law office, and trial counsel's employee," felt "it would have been [in]appropriate to" claim her "boss" was ineffective (quotations omitted)).

[13] Regarding witness perjury, Mr. Webb "complain[ed] about the difference between witnesses' statements at trial compared to the police reports . . . disclosed in discovery." ROA, Vol. I at 1128. For instance, he noted that witness DeGraeve testified at trial she was "standing with Ms. Webb near the back of her Honda Odyssey when Mr. Webb cut across the corner of her yard," despite earlier stating in a video disclosed by the prosecution that "she [Ms. DeGraeve] was in front of her Honda Odyssey." *Id.* at 671-72. Similarly, Mr. Webb complained that witness Holley testified at trial he was standing outside on his father's driveway and could see there was only one person in Mr. Webb's truck when it "cut across the corner yard," despite earlier stating in a video

postconviction court resolved the claim on the merits, finding no ineffective appellate assistance because there was no evidence the State prevented Mr. Webb from inspecting Ms. Webb's SUV or withheld evidence of witnesses' prior inconsistent statements.

Mr. Webb based his third ground, prosecutorial misconduct, on his allegation that the State obtained a letter he wrote to defense counsel while in jail. The postconviction court found no ineffective assistance because Mr. Webb (a) only speculated that the State obtained the letter and (b) waived the attorney-client privilege by sending the letter to his mother for copying and forwarding.

The Wyoming Supreme Court summarily denied review of the postconviction court's decision.

In his federal habeas petition, Mr. Webb asserted numerous claims of ineffective assistance of trial counsel, some of which appear to correspond to the claims he raised in the postconviction proceedings and some of which do not. Regarding his exhausted claims, we proceed to the merits.[14]

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disclosed by the prosecution that he witnessed the incident from inside his father's house and could not see if anyone else was in the truck. *Id.* at 674.

[14] Regarding any unexhausted claims, we apply anticipatory procedural bar because Mr. Webb would be barred from returning to the Wyoming postconviction court to exhaust them. *See* Wyo. Stat. Ann. § 7-14-103(a)(ii) ("A claim under this act is procedurally barred and no court has jurisdiction to decide the claim if the claim . . . [w]as not raised in the original or an amendment to the original petition . . . ."); *see also Bland v. Sirmons*, 459 F.3d 999, 1012 (10th Cir. 2006) (stating that "[g]enerally, a federal court should dismiss unexhausted claims without prejudice so that the petitioner can pursue available state-court remedies," but "if the court to which Petitioner must present his claims in order to meet the exhaustion requirement would now find those claims procedurally barred, there is a procedural default for the purposes of federal habeas review" (quotations omitted)).

2. **Legal Background**

The Supreme Court established the ineffective assistance of counsel standard in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant is entitled to relief if (1) counsel's performance was deficient, and (2) the defendant was thereby prejudiced. *Id.* at 687-88. A defendant establishes the first *Strickland* requirement by showing counsel's performance "fell below an objective standard of reasonableness." *Id.* To meet this requirement, the defendant must overcome a "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance . . . [and] might be considered sound trial strategy." *Id.* at 689 (quotations omitted). "A

Anticipatory procedural bar can be overcome only by establishing cause and prejudice or a fundamental miscarriage of justice. *Frost*, 749 F.3d at 1231. Mr. Webb argues that he has cause for not exhausting ineffective-assistance claims because appellate counsel "acted to protect trial counsel[ ] that were in their office." Pet. Br. at 37. We have already rejected this argument.

He also alleges actual innocence. He must identify new evidence "sufficient to show that it is more likely than not that no reasonable juror would have convicted [him] in the light of the new evidence." *Frost*, 749 F.3d at 1232. As new evidence, he cites (1) the "analyses" of "four automotive body and collision experts" who purportedly opined that his vehicle was damaged by a side impact; and (2) tire marks allegedly showing he "decelerated in order to avoid hitting Ms. Webb." Pet. Br. at 41-42. Mr. Webb discussed this evidence in his postconviction petition as showing that "Ms. Webb was the one who hit Mr. Webb's [truck]," ROA, Vol. I at 429, and he "let off the gas pedal," leaving tire marks on a driveway, "when she ran out [on foot] from in front of [a parked car] and across his path of travel," *id.* at 430. Even if this is new evidence, it hardly proves that he "had no intention to cause any type of harm." *Id.* at 428. The Wyoming Supreme Court's recitation of the facts, which Mr. Webb has not demonstrated is unreasonable, indicates that he purposefully collided with Ms. Webb's SUV and then tried to run her down as she was on foot. He has not shown that "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (quotations omitted) ("caution[ing] . . . that tenable actual-innocence gateway pleas are rare").

claim of appellate ineffectiveness can be based on counsel's failure to raise a particular issue on appeal, although it is difficult to show deficient performance under those circumstances because counsel need not (and should not) raise every nonfrivolous claim . . . ." *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003) (quotations omitted). A defendant establishes the second requirement of prejudice by showing "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

3. **Analysis**

a. *Trial counsel's performance in interviewing witnesses, presenting evidence, impeaching witnesses, investigating tire marks, and not compelling the production of Ms. Webb's SUV*

In his COA application, Mr. Webb argues that "[a]ppellate counsel omitted the many issues of ineffective assistance of [trial] counsel that [he wanted] asserted [on direct appeal]." Pet. Br. at 37. He complains that trial counsel failed to proffer evidence to "corroborate [his] testimony that Ms. Webb drove into [his truck]," *id.* at 38; failed to investigate the tire marks from his truck to show he "took actions to avoid hitting Ms. Webb," *id.*; and failed to investigate a rock on the roadway to show he "accidentally sideswipe[d] the [minivan]," *id.* at 39. According to Mr. Webb, had trial counsel offered this evidence, the result of his trial would likely have been different. As previously noted, these issues were not raised on direct appeal, and the state postconviction court held they were procedurally defaulted. We nonetheless, as with the conflict-of-interest claim, review this ineffective assistance claim on the merits de novo.

Mr. Webb does not address the State's evidence against him. At most, he asserts that Ms. Webb and three other prosecution witnesses "gave perjured testimonies regarding the location of Ms. Webb." *Id.* at 43. *Strickland* requires more. Even assuming trial counsel's performance was deficient, "the defendant [must] affirmatively prove prejudice" by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 693, 694. The prejudice analysis necessarily requires "consider[ation] [of] the totality of the evidence before the judge or jury." *Id.* at 695.

Because Mr. Webb does not address the totality of the evidence against him, he has not shown prejudice from trial counsel's representation. And by extension, he has not shown that appellate counsel performed deficiently by omitting Mr. Webb's ineffective trial counsel claims. *See Cargle*, 317 F.3d at 1202 (explaining that when analyzing appellate counsel's performance, we "look to the merits of the omitted issue," and "if the issue is meritless, its omission will not constitute deficient performance" (quotations omitted)).[15]

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[15] Mr. Webb argues the district court violated his constitutional rights by denying him an evidentiary hearing to present the evidence omitted by trial counsel. He maintains he "has presented critical physical evidence that was not presented at trial," Pet. Br. at 49, and that such evidence is consistent with the post trial opinions of "four different automotive body and collision experts" who "explained that the damage to [his] vehicle occurred from a side impact and therefore could not have happened from [him] hitting or 'ramming' Ms. Webb's [SUV]," *id.* at 41.

The district court denied Mr. Webb's evidentiary hearing request as premature because it had neither completed reviewing the nearly 1,600 pages of documents the parties had submitted nor ruled on Respondents' motion to dismiss. The court did not expressly revisit the issue of an evidentiary hearing. Whether to conduct an evidentiary hearing in habeas proceedings is within the discretion of the district court. *See Fairchild*

b. *Brady*

Because the state postconviction court addressed this part of the ineffective assistance claim on the merits, finding no ineffective assistance of appellate counsel, Mr. Webb's claim is subject to AEDPA review. A *Brady* violation requires proof that "(1) the prosecution suppressed evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material to the defense." *Becker v. Kroll*, 494 F.3d 904, 924 (10th Cir. 2007) (quotations omitted). The postconviction court's finding of no appellate ineffectiveness in omitting a *Brady* claim was reasonable because the State did not prevent Mr. Webb from inspecting Ms. Webb's SUV.

Brady also protects a defendant from the improper suppression of impeachment evidence. *United States v. Torres*, 569 F.3d 1277, 1282 (10th Cir. 2009). The postconviction court's determination of no ineffectiveness of appellate counsel in omitting this type of *Brady* claim was reasonable because there was no indication the State failed to disclose impeachment evidence.

c. *Prosecutorial misconduct*

The postconviction court also reviewed this claim on the merits, again limiting federal court review of that court's decision to reasonableness under AEDPA. The state court reasonably concluded that appellate counsel was not ineffective for omitting a misconduct claim premised on a violation of the attorney-client privilege given that

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v. Workman, 579 F.3d 1134, 1147 (10th Cir. 2009). And where, as here, a petitioner's habeas claims are capable of being resolved on the existing record, there is no entitlement to an evidentiary hearing. *Torres v. Mullin*, 317 F.3d 1145, 1161 (10th Cir. 2003).

Mr. Webb had waived the privilege. *See United States v. Ary*, 518 F.3d 775, 782 (10th Cir. 2008) ("Because confidentiality is critical to the privilege, it will be lost if the client discloses the substance of an otherwise privileged communication to a third party." (quotations omitted)).

* * * *

Reasonable jurists could not debate the district court's denial of the ineffective assistance of appellate counsel claims.

III. CONCLUSION

We deny a COA and dismiss this matter.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

IN THE

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PETITION FOR WRIT OF CERTIORARI

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APPENDIX B

Decision of the U.S. District Court for the District of Wyoming

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

CLINT RAYMOND WEBB,

Petitioner,

vs.

WYOMING DEPARTMENT OF CORRECTIONS STATE PENITENTIARY WARDEN, WYOMING ATTORNEY GENERAL,

Respondents.

Case No. 1:19-cv-39-ABJ

ORDER GRANTING RESPONDENTS' MOTION TO PARTIALLY DISMISS PETITION UNDER 28 U.S.C. § 2254 FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY AND DISMISSING ENTIRE PETITION WITH PREJUDICE

This matter is before the Court upon a Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody, filed by Petitioner Clint Raymond Webb [Doc. 1], and a Motion to Partially Dismiss said petition filed by Respondents. [Doc. 20.] The Court, having carefully considered each pleading, having reviewed the complete file herein, and being otherwise fully advised, FINDS Respondents' Motion to Partially Dismiss should be GRANTED, and FURTHER FINDS that all claims set forth in the petition should be dismissed. All dismissals are WITH PREJUDICE.

BACKGROUND

Petitioner Clint Raymond Webb was convicted of two counts of aggravated assault and battery with a deadly weapon, one count of felony property destruction, and one count of attempted second-degree murder. *Webb v. State*, 401 P.3d 914, 918 (Wyo. 2017). He was sentenced to "concurrent terms of five to seven years for each count of aggravated assault and battery with a deadly weapon, a concurrent term of one to three years for the felony property destruction, and a consecutive term of thirty to forty-five years for the attempted second degree murder." *Id.* at 919-920.

The Wyoming Supreme Court succinctly described the factual background of these offenses in its opinion affirming Petitioner's convictions:

> On June 30, 2014, Julie Webb was driving her Nissan Murano in Casper, Wyoming. As she was stopped at the intersection of Walsh and Second Street, she saw her estranged husband, Mr. Webb, in his Honda Ridgeline. Ms. Webb testified that as the two passed each other in the intersection, Mr. Webb yelled a profanity at her, but Ms. Webb ignored him and continued driving. A couple of blocks later, when Ms. Webb approached the intersection of 12th Street and Payne, she saw Mr. Webb approach a nearby stop sign and then begin to drive directly towards her car. Ms. Webb swerved in an attempt to avoid a collision but was unsuccessful. Mr. Webb hit the Murano with enough force that the airbags deployed and a number of car parts scattered across the road. Mr. Webb fled the area, and Ms. Webb exited her car and attempted to call 911.
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> Before Ms. Webb could connect with the 911 operator, she heard "car engines revving up." When she looked up, she saw the Honda Ridgeline turn the corner. She ran into a nearby yard and Mr. Webb drove his vehicle quickly from the roadway, onto a sidewalk, and toward Ms. Webb. Ms. Webb was able to jump out of the Ridgeline's path and, with the help of a Good Samaritan, sought refuge in the basement of the Samaritan's home. Again, Mr. Webb fled the scene, striking a parked vehicle in the process. After abandoning the Ridgeline and taking his mother's car, Mr. Webb drove to Las Vegas, Nevada, and turned himself into the authorities three days later.

Id., at 919.

Petitioner's week-long trial began on July 27, 2015, and the jury found him guilty on all counts. *Id.* He was sentenced in December 2015.

Petitioner appealed his convictions to the Wyoming Supreme Court, raising six issues:

> I. Was [Wyoming Rule of Criminal Procedure] 48 violated when [Mr. Webb] was prosecuted for the same charges after dismissal, when [he] had filed a demand for speedy trial?
>
> II. Was [Mr. Webb] denied his constitutional right to a speedy trial?
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> III. Did the prosecutor commit misconduct in closing argument when he mischaracterized the role of the defense expert witness, Dr. Loftus?
>
> IV. Was trial counsel ineffective for failing to offer an accident instruction?
>
> V. Did plain error occur[ ] when the trial court gave an inference of malice instruction?
>
> VI. Should this Court reconsider its holding in *Jones v. State*, 2016 WY 110, [384 P.3d 260] (Wyo. 2016) as this Court did not analyze the legislative history of Wyo. Stat. Ann. §§ 6-2-502(a)(ii) and 6-2-104 and determine that the legislature expressly intended the result reached in *Jones*?

Webb v. State, 401 P.3d at 918-919.

The Court issued its opinion on September 15, 2017, affirming all four convictions. Petitioner did not file a petition for writ of certiorari to the United States Supreme Court. [Doc. 1, p. 3.]

In July of 2018, Petitioner filed a Petition for Post-Conviction Relief in state district court. The petition, including its various exhibits, was almost 700 pages in length. *See Webb v. The State of Wyoming*, S-18-0291, Petition (Wyoming Supreme Court Dec. 14,

2018) [Doc. 19-4]. Petitioner raised ten claims in his petition, reiterated below from the district court's order:

> I. The Wyoming Supreme Court violated his right to due process by inconsistently interpreting the law on speedy trial, (Petition at 104);
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> II. The Supreme Court violated his right to equal protection by applying speedy trial precedent from cases that are factually distinguishable from his case, (*Id.* at 138);
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> III. Appellate counsel was ineffective due to a conflict of interest, (*Id.* at 187);
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> IV. Appellate counsel was ineffective for not raising trial counsel's ineffectiveness in interviewing witnesses, (*Id.* at 191-92);
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> V. Appellate counsel was ineffective for not raising trial counsel's ineffectiveness for failing to present evidence showing his innocence, (*Id.* at 197-98);
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> VI. Appellate counsel was ineffective for not raising trial counsel's ineffectiveness in impeaching witnesses, (*Id.* at 209);
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> VII. Appellate counsel was ineffective for not asserting constructive denial of counsel, (*Id.* at 220);
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> VIII. Appellate counsel was ineffective for not raising trial counsel' s ineffectiveness in investigating tire marks, (*Id.* at 237);
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> IX. Appellate counsel was ineffective for not raising *Brady* violations, (*Id.* at 242);
>
> X. Appellate counsel was ineffective for not alleging prosecutorial misconduct. (*Id.* at 261).

[Doc. 19-5, pp. 2-3.]

The district court issued its Findings of Fact, Conclusions of Law and Order on November 27, 2018, granting the State's Motion to Dismiss in its entirety. In its eleven-page order, the court reviewed each of Petitioner's ten claims and found that the claims

were either procedurally barred under Wyoming's post-conviction statute, Wyo. Stat. §7-14-103(a)(iii), or that Petitioner had failed to raise a claim cognizable under the post-conviction relief statute. The court granted the State's motion to dismiss, denied the petition, and dismissed the claims with prejudice. [Doc. 19-5, p. 11.]

Petitioner next petitioned the Wyoming Supreme Court for a writ of certiorari/review, submitting his entire petition for post-conviction relief and additional briefing. *Webb v. State*, S-18-0291 (Wyoming Supreme Court, Dec. 14, 2018) [Doc. 19-6]. He raised eleven issues for the Court's review, arguing that the state district court abused its discretion in the following ways:

1. [B]y dismissing Mr. Webb's Count I constitutional due process claim by the district court and appellate court doing indirectly that which it cannot do directly by stating that it was barred by Wyo. Stat. Ann. § 7-14-103(a) and (a)(iii);

2. [B]y dismissing Mr. Webb's Count II constitutional equal protection claim of the district court and appellate court treating Mr. Webb differently than others who are similarly situated by stating that it was barred by Wyo. Stat. Ann. § 7-14-103(a) and (a)(iii);

3. [B]y dismissing Mr. Webb's Count III claim of ineffective assistance of appellate counsel due to a conflict of issue [sic] on the claim of ineffective assistance of trial counsel in his direct appeal where appellate counsel denied Mr. Webb from being able to bring to the record the evidence of ineffective assistance of trial counsel by stating that it was barred;

4. [B]y dismissing Mr. Webb's Count IV claim of ineffective assistance of trial counsel when Mr. Webb was denied conflict free representation on the claim of ineffective assistance of trial counsel on his direct appeal;

5. [B]y dismissing Mr. Webb's Count V constitutional due process claim where innocence may be proven with new reliable exculpatory evidence and critical physical evidence that was not presented at trial;

6. [B]y dismissing Mr. Webb's Count VI claim of ineffective assistance of trial counsel when Mr. Webb was denied conflict free representation on the claim of ineffective assistance of trial counsel on his direct appeal;

7. [B]y dismissing Mr. Webb's Count VII claim of the district court's constructive denial of counsel to Mr. Webb;

8. [B]y dismissing Mr. Webb's Count VIII constitutional due process claim where innocence may be proven with new critical physical evidence that was not presented at trial;

9. [B]y dismissing Mr. Webb's Count IX constitutional due process claim of *Brady* violations and *Giglio* violations for using known false witness testimonies where it pertains to the required elements of the charges;

10. [B]y dismissing Mr. Webb's Count X claim of prosecutorial misconduct for their intrusion into the privileged attorney-client communication;

11. [B]y denying Mr. Webb a requested evidentiary hearing to bring to the record evidence that the appellate counsel had conflict of interest to protect trial counsel interests in Mr. Webb's direct appeal; new reliable exculpatory evidence, physical evidence and expert analyses which was not presented at trial that proves Mr. Webb's innocence.

Webb v. State, S-18-0291 (Wyoming Supreme Court, Dec. 14, 2018) [Doc. 19-6, pp. 2-3].

The Court denied the petition without comment on January 17, 2019. *Id.*, Order Denying Petition for Writ of Certiorari/Review; *see also* Doc. 19-7. On February 21, 2019, Petitioner filed his Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody. [Doc. 1.] He now presents five grounds for relief:

I. An alleged violation of his Fifth and Fourteenth Amendment rights to due process by the Wyoming Supreme Court's interpretation and application of Wyoming Rule of Criminal Procedure 48, and a concomitant violation of his Sixth Amendment right to a speedy trial. [Doc. 1, pp. 7-9.]

II. An alleged violation of his Sixth Amendment right to effective assistance of appellate counsel as guaranteed by the Fourteenth

Amendment because of a conflict of interest between appellate and trial counsel. [Doc. 1, pp. 12-14.]

III. An alleged violation of his Sixth Amendment right to counsel and the Due Process clause of the Fourteenth Amendment by the State's intrusion into and use of privileged attorney-client communication. [Doc. 1, pp. 16-18.]

IV. An alleged denial of his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to due process because of counsel's failure to:
1. Interview any witnesses;
2. Failure to present evidence of innocence;
3. Failure to impeach witnesses with recanted testimonies;
4. Failure to independently investigate the damage to the vehicles;
5. Failure to independently investigate the tire marks;
6. Failure to investigate the distance from Derrington Avenue to the driveway;
7. Failure to independently investigate the Suburban;
8. Failure to investigate Petitioner's line of sight;
9. Failure to investigate the rock causing Petitioner to sideswipe the Caravan;
10. Failure to present heat of passion evidence or request instruction; and
11. Failure to present the State's use of privileged communications to revise the evidence. [Doc. 1, pp. 21-27.]

V. An alleged denial of his right to a speedy trial under the Sixth Amendment and his equal protection right under the Fourteenth Amendment by the Wyoming Supreme Court's application of speedy trial law. [Doc. 1, pp. 29-33.]

These claims are set forth in detail because a resolution of this matter requires an analysis of what claims were presented, in which court, and how those claims were articulated.

DISCUSSION

Because Petitioner is proceeding *pro se*, the Court will construe his pleadings liberally. "'[A] pro se litigant's pleadings are to be construed liberally and held to a less

stringent standard than formal pleadings drafted by lawyers.'" *Garrett v. Selby Connor Maddux & Janer,* 425 F.3d 836, 840 (10th Cir. 2005), quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). If a court "can reasonably read the pleadings to state a valid claim on which Petitioner could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction or his unfamiliarity with pleading requirements." *Hall v. Bellmon*, 935 F.2d at 1110. "This court, however, will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf." *Whitney v. New Mexico,* 113 F.3d 1170, 1173-74 (10th Cir.1997).

Furthermore, because Petitioner filed his petition after the effective date of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, *see* Pub. L. No. 104-132, 110 Stat. 1228, he has the burden of satisfying AEDPA's requirements before this Court can grant relief. This includes exhausting all state remedies. 28 U.S.C. § 2254(b), (c).

Respondents have urged two grounds in their motion to partially dismiss the Petition: first, Petitioner has raised non-cognizable grounds for relief [Doc. 21, pp. 7-9], and second, many of the claims are procedurally defaulted. [Doc. 21, pp. 9-25.]

Non-cognizable grounds for relief. In his first claim, Petitioner asserts "[a]n alleged violation of his Fifth and Fourteenth Amendment rights to due process by the Wyoming Supreme Court's interpretation and application of Wyoming Rule of Criminal Procedure 48, and a concomitant violation of his Sixth Amendment right to a speedy trial." [Doc. 1, pp. 7-9; Doc. 2, pp. 16-35.] Despite Petitioner's reference to three provisions of the United States Constitution, in fact he is challenging the Wyoming Supreme Court's interpretation

and application of Wyoming law – specifically, Rule 48 of the Wyoming Rules of Criminal Procedure.

The law is well-established: "federal habeas corpus relief does not lie for errors of state law." *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). When a state court interprets state law, that interpretation is binding on a federal court sitting in habeas corpus. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *Williams v. Trammell*, 782 F.3d 1184, 1195 (10th Cir. 2015). As the United States Supreme Court noted, "we have never required federal courts 'to peer majestically over the [state] court's shoulder so that [they] might second-guess its interpretation . . ..' " *Godfrey v. Georgia*, 446 U.S. 420, 450 (White, J., dissenting) (footnote omitted). Federal habeas is limited to questions of federal law and "this [C]ourt's role on collateral review isn't to second-guess state courts about the application of their own laws but to vindicate federal rights." *Eizember v, Trammell*, 803 F.3d 1129, 1145 (10th Cir. 2015). A petitioner cannot "transform a state-law issue into a federal one merely by asserting a violation of due process." *Langford v. Day*, 110 F.3d 1380, 1389 (10th Cir. 1996).

Petitioner's first claim challenges how Wyoming courts interpret and apply Rule 48 of the Wyoming Rules of Criminal Procedure. [Doc. 1, pp. 7-9; Doc. 2, pp. 16-35.] He phrases his argument in terms of due process, but his plea is actually for this Court to overturn the Wyoming Supreme Court's application of state law.

On direct appeal, Petitioner argued Rule 48 of the Wyoming Rules of Criminal Procedure was violated. *Webb v. State,* 401 P.3d at 918.[1] He also argued he was "denied his constitutional right to a speedy trial." *Id.* The Wyoming Supreme Court analyzed Rule 48 at length and concluded Petitioner's speedy trial rights under Rule 48 were not violated. *Id.* at 921, 929.

Rule 48 provides a procedural mechanism to protect the constitutional right to speedy trial. *Tate v. State*, 382 P.3d 762, 767 (Wyo. 2016). This is not a question of federal law because Wyoming courts treat the Sixth Amendment right distinct from the procedural rule. *Osban v. State*, 439 P.3d 739 (Wyo. 2019). Rule 48 "provide[s] structure" to the constitutional right to a speedy trial. *Id.* at 742.

This Court is bound by the state court's analysis of state law. *Bradshaw v. Richey*, 546 U.S. at 76. Thus, this portion of Claim I is not cognizable in federal habeas review and must be dismissed with prejudice.

The Wyoming Supreme Court also analyzed Petitioner's speedy trial claim by looking at the four factors established in *Barker v. Wingo*, 407 U.S. 514 (1972). *Webb v. State*, 401 P.3d at 921. After this analysis, the Court concluded Petitioner's right to a speedy trial was not violated. *Webb v. State*, 401 P.3d at 924-25.

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[1] Three hundred ninety-six days elapsed between the date the State filed its first Information against Petitioner (July 1, 2014) and the conclusion of trial (July 31, 2015). *Webb v. State*, 401 P.3d at 922. Part of this delay – and the part about which Petitioner complains – was attributable to the three Informations filed by the State. On July 1, 2014, Petitioner was charged with one count of aggravated assault and battery with a deadly weapon in violation of Wyo. Stat. § 6-2-502(a)(ii) and (a)(iii). On July 31, 2014, the State dismissed that Information and filed a new Information, adding an additional count of aggravated assault and battery with a deadly weapon and one count of felony property destruction in violation of Wyo. Stat. §§ 6-3-201(a) and (b)(iii). The case was bound over to the district court; but on October 23, 2014, the State filed a new Information that added a count of attempted second degree murder, in violation of Wyo. Stat. §§ 6-1-301(a)(i) and 6-2-104. [Doc. 19-5, pp. 1-2.]

Because of the manner in which Petitioner raised this particular aspect of the Wyoming Supreme Court decision in his subsequent post-conviction filing and petition for writ of certiorari/review, the issue of procedural default must be discussed. This concept also applies to the remainder of Petitioner's claims.

Procedurally defaulted claims.

Section 28 U.S.C. 2254(b)(1) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
> (B)(i) there is an absence of available State corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

"A state prisoner generally must exhaust available state-court remedies before a federal court can consider a habeas corpus petition." *Bland v. Sirmons*, 459 F.3d 999, 1011 (10th Cir. 2006). The purpose of the exhaustion requirement is to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). A petitioner must articulate his claim in a way that clearly alerts the reviewing court to the federal nature of the claim. *Baldwin v. Reese,* 541 U.S. 27, 29 (2004).

> "Fair presentation" requires more than presenting all the facts necessary to support the federal claim to the state court or articulating a somewhat similar state-law claim. "Fair presentation" means that the petitioner has raised the substance of the federal claim in state court. The petitioner need not cite book and verse on the federal constitution, but the petitioner cannot assert entirely different arguments from those raised before the state court.

Bland v. Sirmons, 459 F.3d at 1011 (internal quotations and citations omitted); *see also Duncan v. Henry,* 513 U.S. 364, 366 (1995) ("mere similarity of claims is insufficient" for exhaustion).

As a general rule, an unexhausted claim is dismissed without prejudice, to allow a petitioner an opportunity to pursue available state-court remedies. If the court to which those claims must be presented would deem those claims to be procedurally barred, however, "there is a procedural default for the purposes of federal habeas review." *Bland v. Sirmons*, 459 F.3d at 1012, quoting *Dulin v. Cook*, 957 F.2d 758, 759 (10th Cir.1992).

> [A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. We therefore require a prisoner to demonstrate cause for his state-court default of *any* federal claim, and prejudice therefrom, before the federal habeas court will consider the merits of that claim. The one exception to that rule, not at issue here, is the circumstance in which the habeas petitioner can demonstrate a sufficient probability that our failure to review his federal claim will result in a fundamental miscarriage of justice.

Edwards v. Carpenter, 529 U.S. 446, 451 (2000) (internal quotation marks and citations omitted) (emphasis in original).

A review of Petitioner's claims reveals several that were never presented to the Wyoming Supreme Court and thus are not properly exhausted. Other claims were never raised at all in any state court. These claims all are now procedurally barred, because Wyoming law does not permit Petitioner to pursue a second claim for post-conviction relief. Wyo. Stat. § 7-14-103(a)(ii). Claims that are procedurally barred are procedurally defaulted for the purpose of federal habeas corpus review. *Bland v. Sirmons*, 459 F.3d at 1012.

Under Wyoming law, any claim of trial level constitutional error must be brought on direct appeal because issues which have or could have been raised on appeal are procedurally barred

from being raised on a petition for post-conviction relief. *Murray v. State*, 776 P.2d 206, 208 (Wyo. 1989). Wyoming's post-conviction relief statute also procedurally bars any claim that was decided on the merits on direct appeal. Wyo. Stat. Ann. 7-14-103(a)(iii). The remedy available in post-conviction relief proceedings is "strictly limited to the statutory parameters set out by statute or case law." *Harlow v. State*, 105 P.3d 1049, 1056-57 (Wyo. 2005). The Wyoming Supreme Court has stated that the "intent of the statute is to limit a criminal defendant to 'one bite at the apple' when presenting claims on appeal." *Schreibvogel v. State*, 269 P.3d 1098, 1103 (Wyo. 2012).

Federal habeas relief is also barred where "a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). A federal court will presume the state court's findings on the state procedural requirement are correct because a "federal habeas court does not have license to question a state court's finding of procedural default or to question whether the state court properly applied its own law." *Fuller v. Pacheco*, 531 F. App'x 864, 868 (10th Cir. 2013) (*quoting Sharpe v. Bell*, 593 F.3d 372, 377 (4th Cir. 2010)).

Claim I – Denial of right to a speedy trial. In his first claim, Petitioner alleges a "violation of his Fifth and Fourteenth Amendment rights to due process by the Wyoming Supreme Court's interpretation and application of Wyoming Rule of Criminal Procedure 48, and a concomitant violation of his Sixth Amendment right to a speedy trial." As noted above, to the extent Petitioner alleges constitutional violations arising from the Wyoming Supreme Court's analysis of the Wyoming Rules of Criminal Procedure, that is a state law question, and the determination of the state court is binding on this Court.

What remains of Petitioner's first claim is an allegation of the denial of the Sixth Amendment right to a speedy trial. This was analyzed separately by the Wyoming Supreme Court,

looking at the four factors set forth by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *Webb v. State*, 401 P.3d at 921-925 [Doc. 1, pp. 29-30].

However, Petitioner did not raise a Sixth Amendment claim in either his petition for post-conviction relief, or in his petition for writ of certiorari/review. In his post-conviction petition, Petitioner alleged the Wyoming Supreme Court violated his right to due process by inconsistently interpreting the law on speedy trial. His petition contained thirty-three pages of argument about the ways in which the Wyoming Supreme Court's application of Rule 48 violated the Fifth and Fourteenth Amendments – but not one word about the Sixth Amendment. (Petition at 105-138; *see* Doc. 19-4.) Similarly, the petition contained forty-five pages of argument outlining the alleged denial of his equal protection rights, because, Petitioner argued, the cases upon which the Wyoming Supreme Court relied in applying the *Barker* factors to his case were factually distinguishable. (Petition at 138-183; *see* Doc. 19-4). Again, he did not base his argument on the Sixth Amendment.

In his petition for writ of certiorari/review before the Wyoming Supreme Court, Petitioner again argued only due process and equal protection claims, and only in the context of objecting to the district court's application of the procedural bar rule under the state post-conviction act. [Doc. 19-6, pp. 2, 5-18.] He did not raise a Sixth Amendment speedy trial issue.

Petitioner's recurring efforts to clothe his speedy trial claim in ever-changing constitutional language has only served to solidify the procedural bar to its consideration in this Court. This portion of his speedy trial claim is deemed exhausted but procedurally defaulted for the purpose of federal habeas review. *Bland v. Sirmons*, 459 F.3d at 1012.

Claim II – Right to appellate counsel. Petitioner alleges a denial of his Sixth Amendment right to effective assistance of appellate counsel as guaranteed by the Fourteenth Amendment

because of a conflict of interest between appellate and trial counsel. While he argued he was denied effective assistance of counsel due to a conflict of interest both in his petition for post-conviction relief and the subsequent petition for writ of certiorari/review, he never alleged a violation of the Fourteenth Amendment. [Doc. 19-4, pp. 183-191; 19-6, pp. 2, 18-22.] Petitioner referenced many cases from different jurisdictions which discussed the effective assistance of counsel, and he quoted the Wyoming Rules of Professional Conduct for Attorneys at Law, but he did not argue nor provide legal support for a stated claim of a violation of the Fourteenth Amendment. Most of his argument consisted of reiterating the many items of evidence he believed should have been introduced at trial – and castigating appellate counsel's failure to address that evidence in the context of a claim of ineffective assistance of trial counsel.

Petitioner cannot now raise this issue in another post-conviction petition. Wyo. Stat. § 7-14-103(a)(ii). This claim is deemed exhausted but procedurally defaulted for the purpose of federal habeas review. *Bland v. Sirmons*, 459 F.3d at 1012.

Claim III – Denial of right to counsel due to State's use of privileged attorney-client communication. In his third claim in this habeas petition, Petitioner alleges a violation of his Sixth Amendment right to counsel and the Due Process clause of the Fourteenth Amendment by the State's intrusion into and use of privileged attorney-client communication.

Petitioner did not raise this issue on direct appeal, so it was not considered by the Wyoming Supreme Court. [Doc. 19-1.] He did raise it in his petition for post-conviction relief. [Doc. 19-4, pp. 260-275.] While Wyoming law normally does not allow a petitioner to raise trial level errors for the first time in post-conviction relief proceedings, an exception exists when ineffective assistance of appellate counsel is alleged as the cause of the failure to raise the issue on appeal. Wyo. Stat. Ann. § 7-14-103(b)(ii). This is "statutorily recognized as the 'portal' through which

otherwise waived claims of trial-level error may be reached." *Schreibvogel v. State*, 269 P.3d at 1102 (quoting *Keats v. State*, 115 P.3d 1110, 1115 (Wyo. 2005)); Wyo. Stat. Ann. § 7-14-103(a)(i) and (b)(ii).

In reviewing this claim, the state district court noted that what was at issue was a letter Petitioner wrote to his attorneys but mailed to his mother. Petitioner admitted he knew the letter might be reviewed by the jail. Furthermore, he did not provide evidence the prosecution actually obtained the letter or in any way utilized any information contained therein to alter its case against Petitioner. Finally, the court noted the letter was not a privileged communication because while it was addressed to his attorneys, Petitioner himself provided the document directly to a third party – his mother. The court quoted *Dobbins v. State*, 483 P.2d 255, 260 (Wyo. 1971), in noting that a confidential communication overheard by a third person is not privileged. [Doc. 19-5, pp. 9-10.] The court found Petitioner waived any privilege by voluntarily disclosing the communication. [*Id.*] The court concluded "[t]he statute only permits this Court to review appellate counsel's performance for failing to assert a claim that was likely to result in a reversal of the petitioner's conviction or sentence on his direct appeal. Wyo. Stat. Ann. §7-14-201(b)(ii)." Petitioner failed to state a claim for relief. [*Id.* at 11.]

In his petition for writ of certiorari/review filed before the Wyoming Supreme Court, Petitioner alleged the district court abused its discretion in dismissing the claim of "prosecutorial misconduct for their intrusion into the privileged attorney-client communication." [Doc. 19-6, pp. 36-37.] He waxed eloquent about the way in which the prosecution used information from the letter to revise the testimony of their crash analysis expert witness, by orchestrating recantation of witness testimony, and alter the facts of the crash. He challenged the ruling of the state district

court, but he did not actually raise the issue of denial of the right to counsel by the prosecution's supposed use of privileged information.

Thus, with respect to this third claim, Petitioner did not exhaust this claim. Wyo. Stat. §7-14-103(a)(1) and (b)(ii). He can no longer appeal the issue to the Wyoming Supreme Court because he was required to appeal the denial of his petition for post-conviction relief within 15 days. W.R.A.P. Rule 13.03. This claim is now procedurally defaulted.

Claim IV – Denial of Sixth Amendment right to the effective assistance of counsel and Fourteenth Amendment right to due process. In his fourth claim, Petitioner alleges constitutional violations due to his trial counsel's failure to engage in eleven pre-trial investigations and trial actions that Petitioner cites as constituting ineffective assistance of counsel:

1. Interview any witnesses;
2. Failure to present evidence of innocence;
3. Failure to impeach witnesses with recanted testimonies;
4. Failure to independently investigate the damage to the vehicles;
5. Failure to independently investigate the tire marks;
6. Failure to investigate the distance from Derrington Avenue to the driveway;
7. Failure to independently investigate the Suburban;
8. Failure to investigate Petitioner's line of sight;
9. Failure to investigate the rock causing Petitioner to sideswipe the Caravan;
10. Failure to present heat of passion evidence or request instruction; and
11. Failure to present the State's use of privileged communications to revise the evidence. [Doc. 1, pp. 21-27.]

Respondents contend the procedural default applied to claims 4 and 6 through 11, as they were raised in the petition for post-conviction relief, but not in the petition for certiorari/review filed before the Wyoming Supreme Court. [Doc. 21, p. 14.] This Court agrees that these issues were not presented in the petition for certiorari/review. [Doc. 19-

6, pp. 2-3.] However, based upon a review of the petition for post-conviction relief, this Court finds that all eleven of the articulated sub-claims were presented to the state district court [Doc. 19-4, pp. 190-219, 230-242, 260-275]. Petitioner combined those issues into six arguments, as outlined in the district court's order. [Doc. 19-5, p. 3.] The district court ruled on these issues, noting first that Petitioner did in fact raise the issue of effective assistance of counsel on appeal, alleging his trial counsel was ineffective for not requesting a jury instruction on accident. *Webb v. State*, 401 P.3d at 926-928; *see also* Doc. 19-5, pp. 4-5 ("[Petitioner] cannot bring the issue of ineffective assistance of trial counsel both on appeal and in a post-conviction relief proceeding, even if on different grounds. Ineffective assistance of counsel is a single claim, and because the claim of ineffective assistance of counsel was raised in the direct appeal, and was decided against the Petitioner, he is barred by the provisions of Wyo. Stat. Ann. § 7-14-103(a)(iii) from raising that claim again in a post-conviction relief petition.")(internal citations omitted). The district court then found each of Petitioner's claims regarding the effective assistance of counsel to be procedurally barred. [Doc. 19-5, pp. 5-6.]

The Tenth Circuit recently underscored the requirement for a petitioner to precisely state claims before all reviewing courts, particularly in the context of claims alleging ineffective assistance of counsel. In *Davis v. Sharp,* 943 F.3d 1290 (10th Cir. 2019), the Court analyzed a §2254 petition which alleged both that trial counsel was ineffective for failing to investigate and present certain evidence, and that appellate counsel was similarly ineffective on appeal. The district court ruled the claims were unexhausted and subject to a procedural bar, a decision with which the Tenth Circuit agreed. *Id.* at 1296. The Court noted that a "fair presentation" to the state

court of the claims asserted on federal habeas review required far more than merely mentioning a concept or concern in a previous proceeding. *Id.* ("[T]he mere appearance of the word 'depression' in a report that Davis submitted to support an IAC [ineffective assistance of counsel] claim about PTSD was insufficient to exhaust IAC claims about depression that did not appear in Davis's postconviction application.")

Petitioner has repeatedly raised the issue of the effectiveness of his trial and appellate counsel. Altering the language he uses in each new iteration of the issue does not avoid the procedural bar nor bring him closer to the relief he seeks. This claim is deemed exhausted but procedurally defaulted for the purpose of federal habeas review. *Bland v. Sirmons*, 459 F.3d at 1012.

Claim V – Denial of right to a speedy trial

In his final claim, Petitioner returns to the topic of speedy trial, alleging a denial of his right to a speedy trial under the Sixth Amendment and his equal protection right under the Fourteenth Amendment by the Wyoming Supreme Court's application of speedy trial law. [Doc. 1, pp. 29-33.] Petitioner raised the Sixth Amendment issue on direct appeal [Doc. 19-1, pp. 18-24; *Webb. V. State*, 921-26], and the equal protection issue in his petition for post-conviction relief [Doc. 19-4, pp. 140-186.], and the petition for writ of certiorari/review. [Doc. 19-6, pp. 15-18.]

The Wyoming Supreme Court ruled against Petitioner on direct appeal with respect to his speedy trial claim. On post-conviction, Petitioner argued the Wyoming Supreme Court violated his right to equal protection in the way it applied precedent in determining his Sixth Amendment speedy trial claim. The state district court found the equal protection issue was procedurally barred by the statute because the substance of his claim, a violation of his speedy trial right, was previously determined on the merits.

Although the Wyoming Supreme Court denied Petitioner's petition for writ of certiorari/review without comment, without comment, the United States Supreme Court has held, "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Thus, the district court's reasoning is imputed to the higher court. *Id.* Because state procedural rules barred this equal protection claim, this claim is procedurally defaulted for federal habeas review.

Overcoming the procedural bar

All of Petitioner's claims are procedurally barred. The only manner in which this Court can consider any of the claims is for Petitioner to demonstrate both cause and prejudice. The United States Supreme Court ruled, "We therefore require a prisoner to demonstrate cause for his state-court default of *any* federal claim, and prejudice therefrom, before the federal habeas court will consider the merits of that claim. The one exception to that rule, not at issue here, is the circumstance in which the habeas petitioner can demonstrate a sufficient probability that our failure to review his federal claim will result in a fundamental miscarriage of justice." *Edwards v. Carpenter,* 529 U.S. at 451 (emphasis in original). Petitioner has failed to demonstrate – or in most cases even argue – either cause or prejudice. He does argue that certain alleged errors amount to a miscarriage of justice, but cannot support those contentions in a manner sufficient to overcome the bar.

No cause to be excused from procedural bar

The existence of "cause" to excuse a procedural default usually requires that "something *external* to the petitioner, something that cannot fairly be attributed to him[,] . . .impeded [his] efforts to comply with the [s]tate's procedural rule." *Davis v. Sharp*, 943 F.3d at 1298 (internal

quotations omitted). *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The Court gave as examples "a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable, would constitute cause under this standard." *Murray v. Carrier*, 477 U.S. at 488 (internal citations and quotation marks omitted).

Petitioner does not allege cause for his failure to present certain arguments with respect to most of his claims. For example, in his second ground for relief, Petitioner claims a violation of his right to counsel under the Sixth and Fourteenth Amendments. [Doc. 1, p. 12.] He did not assert the Fourteenth Amendment violation in any state court and does not now allege nor demonstrate any cause for his failure to do so.

Similarly, Petitioner did not argue or demonstrate cause for his failure, in his third ground for relief, to properly raise the issue of a violation of his Sixth Amendment right to counsel and Fourteenth Amendment right to a fair trial under the due process clause. [Doc. 1, p. 16.] He provides no explanation, much less cause, for his failure to comply with the procedural rule that required he present trial level errors through the portal of ineffective assistance of appellate counsel. [Doc. 1, pp. 16-20; Doc. 2, pp. 43-54.].

In his fourth ground for relief, Petitioner alleged eleven claims of ineffective assistance of trial counsel and argued ineffective assistance of appellate counsel as the cause for not bringing these claims on direct appeal. [Doc. 1, pp. 21, 27-28.] He did not raise these issues before the Wyoming Supreme Court in his petition for writ of certiorari/review. [Doc. 19-4, pp. 190-191; 19-6, pp. 23-27.] Again, Petitioner does not assert any cause for his failure to present these claims before the appropriate court.

Petitioner's fifth and final ground for relief contains a Fourteenth Amendment claim of a

violation of his right to equal protection. [Doc. 1, pp. 29-30.] Petitioner presented this claim for the first time in his petition for post-conviction relief, and the state district court found it was procedurally barred because it was simply different grounds for a claim already determined on the merits on appeal. [Doc. 19-4, pp. 138-8; 19-6, p. 7.] Again, Petitioner does not assert any cause for not bringing the Fourteenth Amendment claim on direct appeal with the related Sixth Amendment claim.

Prejudice

The United States Supreme Court requires a petitioner to demonstrate both cause "and prejudice therefrom, before the federal habeas court will consider the merits of that claim." *Edwards v. Carpenter*, 529 U.S. at 451. Petitioner did not argue cause with respect to any of his claims, nor did he argue – much less demonstrate – prejudice. He has failed to carry his burden in this regard.

No miscarriage of justice

If a petitioner has been unable to establish "cause and prejudice" sufficient to overcome a procedural bar, he may obtain review "only if he falls within the 'narrow class of cases ... implicating a fundamental miscarriage of justice.'" *Schlup v. Delo*, 513 U.S. 298, 314–15 (1995), *quoting McCleskey v. Zant*, 499 U.S. 467, 493-494 (1991).

> [A] substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful . . . To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. The petitioner thus is required to make a stronger showing than that needed to establish prejudice.

Schlup v. Delo, 513 U.S. at 324, 327 (internal citation omitted).

The Tenth Circuit has noted that federal courts have only a "limited license" to reach back "into the sacrosanct arena of the jury's guilt or innocence determination." *Parks v. Reynolds*, 958 F. 989, 995 (10th Cir. 1992).

> [W]here the defendant shows no cause for failing to raise these claims earlier, the defendant must show—at the threshold—both a constitutional violation and a colorable showing of factual innocence. Factual innocence must mean *at least* sufficient claims and facts that—had the jury considered them—probably would have convinced the jury that the defendant was *factually innocent*.

Id. (emphasis in original).

Petitioner asserts a miscarriage of justice relating to his second claim for relief, a violation of the right to effective assistance of counsel due to a conflict of interest between appellate and trial counsel. [Doc. 1, p. 12; Doc. 2, pp. 40-41, 57-58.] The constitutional standard, however, requires Petitioner to demonstrate that but for appellate counsel's alleged conflict of interest, "it is more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. at 327. Appellate counsel's conflict, even if proven, could in no way have affected the jury's finding of guilt because it occurred after the trial. This issue, quite simply, does not present the sort of "miscarriage of justice" contemplated by the courts to avoid a procedural default.

Petitioner also alleges a miscarriage of justice related to his fourth ground for relief, in which he lists eleven instances of ineffective assistance of trial counsel. [Doc. 1, pp. 21-27; Doc. 2, pp. 57-58.] His argument, condensed from the hundreds of pages he has presented in several courts, distills down to this: if only the jury had heard or seen this evidence, he would surely be a free man today. However, Petitioner fails to carry his burden of demonstrating a miscarriage of justice because of his trial counsel's conduct in representing him at trial.

The United States Supreme Court articulated the governing law on effective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). There, the Court held to prevail on a

claim that counsel was ineffective, a defendant must show both the counsel performance "fell below an objective standard of reasonableness" and "the deficient performance prejudiced the defense." *Id.* at 687-88. Failure to establish either prong is dispositive of the claim. *Byrd v. Workman,* 645 F.3d 1159, 1168 (10th Cir. 2011). A court's review of counsel's performance is "highly deferential," and counsel is presumed "to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (internal quotations and citations omitted). Furthermore, "[c]ounsel [i]s entitled to formulate a strategy that [i]s reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Ellis v. Raemisch*, 872 F.3d 1064, 1084 (10th Cir. 2017) (internal quotations and citation omitted.) Petitioner has not overcome the presumption of counsel's competence, and thus has failed in his burden to demonstrate a miscarriage of justice to avoid procedural default.

Petitioner lists eleven actions – or failures – on the part of his trial counsel, which he claims violate his right to effective assistance of counsel.

1. Interview any witnesses;
2. Failure to present evidence of innocence;
3. Failure to impeach witnesses with recanted testimonies;
4. Failure to independently investigate the damage to the vehicles;
5. Failure to independently investigate the tire marks;
6. Failure to investigate the distance from Derrington Avenue to the driveway;
7. Failure to independently investigate the Suburban;
8. Failure to investigate Petitioner's line of sight;
9. Failure to investigate the rock causing Petitioner to sideswipe the Caravan;
10. Failure to present heat of passion evidence or request instruction; and
11. Failure to present the State's use of privileged communications to revise the evidence. [Doc. 1, pp. 21-27.]

Petitioner's allegations, no matter how frequently or vociferously stated, do not demonstrate a miscarriage of justice. The claim of ineffective assistance of counsel in his direct

appeal was decided against him. *Webb v. State*, 401 P.3d at 926-927. His efforts to revise the claim, into one of ineffective assistance of appellate counsel for failing to raise the issue of the effectiveness of trial counsel, was similarly unavailing. The state district court cited *Schreibvogel v. State*, 269 P.3d at 1103, for the concept that ineffective assistance of counsel is a single claim, and once it was decided against Petitioner on direct appeal, he was barred from raising it in a post-conviction petition. [Doc. 19-5, p. 5.] The Wyoming Supreme Court rejected his repeated efforts to raise this claim in his petition for writ of certiorari/review.

Now, he separates the claim into eleven instances, although his arguments flow one into the other and become simply Petitioner's argument as to his version of events. For example, with respect to his first assertion, trial counsel's failure to "interview *any* witnesses," he identifies only one, Ms. Szeto. [Doc. 2, p. 55.]

His second through ninth assertions seem to be related, and stem from his allegation that his estranged wife hit his car, and not the other way around. [Doc. 2, pp. 54-69.] He argues at length about the vehicle inspection, which – his fourth assertion notwithstanding – did in fact occur. His own memorandum and exhibits show trial counsel ordered a crash analysis, the results of which were not favorable to Petitioner's defense. [Doc. 2, pp. 56, 59-60; Doc. 2-1, pp. 98-99, 103-104.] He included as exhibits many photos of the vehicles involved in the collision [Doc. 2-1, pp. 51-62], including several with handwritten notes purportedly containing the opinions of body shop technicians as to the cause of the damage depicted in the photos [Doc. 2-1, pp. 59-62], but he failed to specify how the photos were used in the trial, or which ones should have been introduced but were not. In addition, Petitioner provides a portion of a document from the Casper Police Department, entitled "Follow-up Investigation," which touched on the questions of visibility, distance to Derrington Avenue, and the possible speed at which Petitioner's vehicle was

traveling. [Doc. 2-1, p. 64.] Again, Petitioner does not specify how or whether this evidence was used at his trial, but it does demonstrate that third-party information available to the prosecution and defense counsel cast doubt on Petitioner's version of events.

In his tenth allegation, Petitioner alleges his trial counsel was ineffective for failing to present evidence that he acted in the heat of passion. But "to demonstrate a fundamental miscarriage of justice, a defendant must make a showing of factual innocence, not legal innocence." *Black v. Workman,* 682 F.3d 880, 915 (10th Cir. 2012). The miscarriage of justice exception does not apply to a heat of passion claim because that is an assertion of legal innocence, not factual innocence. *Ellis v. Hargett*, 302 F.3d 1182, 1186 n.1 (10th Cir. 2002). Petitioner cannot avoid procedural default on this claim.

Petitioner's eleventh claim is not based on the facts of what occurred at trial, as analyzed by the state district court in the petition for post-conviction relief. Petitioner alleges his trial counsel was ineffective for failing to challenge the State's use of privileged communications to revise the evidence it presented in its case. The district court's ruling on this issue notes that there was no privileged communication: Petitioner voluntarily sent a letter to his mother, although he addressed it to his attorneys. Petitioner knew the letter might be searched by the jail. Furthermore, he could not demonstrate any facts indicating the prosecution saw the letter or used it in any way to alter the presentation of its case. [Doc. 19-5, pp. 9-11.]

Petitioner failed to make a claim for ineffective assistance of trial counsel on post-conviction relief. He could not show his trial counsel's performance was deficient with respect to this claim. *Ellis v. Hargett*, 872 F.3d 1186-87. Thus, he has failed to satisfy the first prong of a constitutional violation to show a miscarriage of justice, and therefore he does not meet the miscarriage of justice exception to procedural default. *Parks v. Reynolds*, 958 F.2d at 995.

The words of the Tenth Circuit Court of Appeals come to mind in summing up this review of Petitioner's exhaustively-argued litany of claims against his counsel: "Pages and pages of facts are no substitute for citations to clearly established law. Nor can they meet [Petitioner's] burden . . .." *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 532 (10th Cir. 1998).

CONCLUSION

Petitioner's claims are dismissed with prejudice. Petitioner's first claim, challenging the Wyoming Supreme Court's application of a rule of Wyoming Criminal Procedure, is not cognizable in federal habeas corpus. To the extent he attempted to raise a Sixth Amendment issue, it is unexhausted, but procedurally defaulted from review.

His second claim, alleging a denial of his right to appellate counsel, is deemed exhausted but procedurally defaulted for the purpose of federal habeas review.

Petitioner's third claim, alleging the denial of right to counsel due to the prosecution's sue of privileged attorney-client communications, is not exhausted. He can no longer appeal this issue and so this claim is now procedurally defaulted.

Petitioner's fourth claim, alleging a plethora of ways in which he was denied the effective assistance of counsel, is exhausted and procedurally defaulted.

The fifth and final claim, asserting a denial of his right to a speedy trial, is also exhausted and procedurally defaulted.

Petitioner failed to demonstrate either cause or prejudice to avoid the procedural bar. Similarly, he failed to carry his burden of demonstrating a miscarriage of justice.

IT IS THEREFORE ORDERED Respondents' Motion to Partially Dismiss the Petition [Doc. 20] is GRANTED:

IT IS FURTHER ORDERED that all claims set forth in the Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus [Doc. 1] are DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, a Certificate of Appealability (COA) SHALL NOT ISSUE. When a habeas petition is denied on procedural grounds, a petitioner is entitled to a COA only if he demonstrates that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner Webb cannot make such a showing.

Dated this 14th day of April, 2020.

Alan B. Johnson
United States District Judge

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

CLINT RAYMOND WEBB – PETITIONER

vs.

WYOMING DEPARTMENT OF CORRECTIONS

MEDIUM INSTITUTION WARDEN, ET AL – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX C

Decision of State Supreme Court for Writ of Certiorari / Review

IN THE SUPREME COURT, STATE OF WYOMING

October Term, A.D. 2018

CLINT RAYMOND WEBB,

Petitioner,

v.

THE STATE OF WYOMING; EDDIE WILSON, Wyoming Medium Correctional Institution Warden, and PETER K. MICHAEL, Wyoming Attorney General

Respondents.

S-18-0291

IN THE SUPREME COURT
STATE OF WYOMING
FILED

JAN 17 2019

PATRICIA BENNETT, CLERK

ORDER DENYING PETITION FOR WRIT OF CERTIORARI / REVIEW

This matter came before the Court upon a "Petition for Writ of Certiorari / Review," filed herein December 14, 2018. After a careful review of the petition, the materials attached thereto, and the file, this Court finds that the petition should be denied. It is, therefore,

ORDERED that Petitioner, Clint Raymond Webb, be allowed to proceed in this matter *in forma pauperis*; and it is further

ORDERED that the Petition for Writ of Certiorari / Review, filed herein December 14, 2018, be and hereby is, denied.

DATED this 17th day of January, 2019.

BY THE COURT:

MICHAEL K. DAVIS
Chief Justice

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

CLINT RAYMOND WEBB – PETITIONER

vs.

WYOMING DEPARTMENT OF CORRECTIONS

MEDIUM INSTITUTION WARDEN, ET AL – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX D

Decision of State District Court for Post-Conviction Relief

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STATE OF WYOMING	)	IN THE DISTRICT COURT
	)	
COUNTY OF NATRONA	)	SEVENTH JUDICIAL DISTRICT

STATE OF WYOMING, Plaintiff (Respondent), vs. CLINT WEBB, Defendant (Petitioner).	)	Case No. 19965-A

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS PETITION FOR POST-CONVICTION RELIEF

THIS MATTER came before the Court upon the motion of Respondent, the State of Wyoming, to dismiss the petition for post-conviction relief filed by Petitioner Clint Webb. The Court, having read the petition, the motion, and the file, and being fully advised in the premises therein, finds, concludes, and orders as follows:

I. Findings of Fact

1. On July 1, 2014, the State charged Mr. Webb with one count of aggravated assault and battery with a deadly weapon in violation of Wyo. Stat. Ann. § 6-2-502(a)(ii) and (a)(iii). On July 31, 2014, the State dismissed the Information. The State filed a new Information the same day and added an additional count of aggravated assault and battery with a deadly weapon and one count of felony property destruction in violation of Wyo. Stat. Ann. §§ 6-3-201(a) and (b)(iii). The case was bound over to the district court; but on October 23, 2014, the State filed a

new Information that added a count of attempted second degree murder, in violation of Wyo. Stat. Ann. §§ 6-1-301(a)(i) and 6-2-104.

2. The week-long trial began on July 27, 2015, and the jury found Mr. Webb guilty of all counts. The district court sentenced him to serve concurrent terms of five to seven years for each count of aggravated assault and battery with a deadly weapon, a concurrent term of one to three years for the felony property destruction, and a consecutive term of thirty to forty-five years for the attempted second degree murder.

3. Mr. Webb appealed his conviction and raised six issues on appeal, specifically:

> I. Was [Wyoming Rule of Criminal Procedure] 48 violated when [Mr. Webb] was prosecuted for the same charges after dismissal, when [he] had filed a demand for speedy trial?
>
> II. Was [Mr. Webb] denied his constitutional right to a speedy trial?
>
> III. Did the prosecutor commit misconduct in closing argument when he mischaracterized the role of the defense expert witness, Dr. Loftus?
>
> IV. Was trial counsel ineffective for failing to offer an accident instruction?
>
> V. Did plain error occur[] when the trial court gave an inference of malice instruction?
>
> VI. Should this Court reconsider its holding in *Jones v. State*, 2016 WY 110, [384 P.3d 260] (Wyo. 2016) as this Court did not analyze the legislative history of Wyo. Stat. Ann. §§ 6-2-502(a)(ii) and 6-2-104 and determine that the legislature expressly intended the result reached in *Jones*?

Webb v. State, 2017 WY 108, ¶ 2, 401 P3d 914, 919-20 (Wyo. 2017).

4. On September 15, 2017, the Wyoming Supreme Court affirmed Mr. Webb's conviction and sentence in all regards. *Id.* ¶¶ 48-49, 401 P.3d at 929. He then filed the present petition for post-conviction relief making ten claims:

> I. The Wyoming Supreme Court violated his right to due process by inconsistently interpreting the law on speedy trial, (Petition at 104);
>
> II. The Supreme Court violated his right to equal protection by applying speedy trial precedent from cases that are factually distinguishable from his case, (*Id.* at 138);

III. Appellate counsel was ineffective due to a conflict of interest, (*Id.* at 187);

IV. Appellate counsel was ineffective for not raising trial counsel's ineffectiveness in interviewing witnesses, (*Id.* at 191-92);

V. Appellate counsel was ineffective for not raising trial counsel's ineffectiveness for failing to present evidence showing his innocence, (*Id.* at 197-98);

VI. Appellate counsel was ineffective for not raising trial counsel's ineffectiveness in impeaching witnesses, (*Id.* at 209);

VII. Appellate counsel was ineffective for not asserting constructive denial of counsel, (*Id.* at 220);

VIII. Appellate counsel was ineffective for not raising trial counsel's ineffectiveness in investigating tire marks, (*Id.* at 237);

IX. Appellate counsel was ineffective for not raising *Brady* violations, (*Id.* at 242);

X. Appellate counsel was ineffective for not alleging prosecutorial misconduct. (*Id.* at 261).

II. Conclusions of Law

5. Post-conviction relief in Wyoming is a "strictly confined statutory remedy." *Schreibvogel v. State*, 2012 WY 15, ¶ 10, 269 P.3d 1098, 1101 (Wyo. 2012) (citations omitted). Wyoming Statutes §§ 7-14-101 through -108 govern post-conviction relief. In Wyoming Statute § 7-14-101(b), the Wyoming Legislature limited post-conviction relief to claims made by persons serving sentences in Wyoming penal institutions setting forth specific violations of constitutional rights that occurred in the proceedings resulting in their felony convictions or sentence. Wyo. Stat. Ann. § 7-14-101(b). Wyoming Statute § 7-14-103(a) further narrows the category of claims for which post-conviction relief is available and procedurally bars any claim that:

> (i) Could have been raised but was not raised in a direct appeal from the proceeding which resulted in the petitioner's conviction;
> (ii) Was not raised in the original or an amendment to the original petition under this act; or
> (iii) Was decided on its merits or on procedural grounds in any previous proceeding which has become final.

Wyo. Stat. Ann. § 7-14-103(a).

6. The Wyoming Supreme Court "has taken a disciplined approach to post-conviction relief, pointing out that it is not a substitute for the right of review upon appeal from a conviction, nor is it to be treated as an appeal." *Campbell v. State*, 772 P.2d 543, 544 (Wyo. 1989) (citation omitted).

7. Additionally, petitions under this statute are not a civil complaint and are a continuation of the criminal case. *Harlow v. State*, 2005 WY 12, ¶ 7, 105 P.3d 1049, 1059 (Wyo. 2005). Notice pleading is not sufficient and this Court does not need to consider as true the facts alleged in a post-conviction petition. *Id.*; *see also Schreibvogel v. State*, 2012 WY 15, ¶ 8, 269 P.3d 1098, 1101 (Wyo. 2012).

8. Mr. Webb presents several claims of ineffective assistance of trial counsel. Although ineffective assistance of trail counsel claims are normally raised on appeal, § 7-14-103(b) provides a caveat to the bar on claims that could have been raised on appeal, allowing this Court to hear a petition if it "finds from a review of the trial and appellate records that the petitioner's appellate counsel provided constitutionally ineffective assistance by failing to assert a claim that was likely to result in a reversal of the petitioner's conviction or sentence on his direct appeal." Wyo. Stat. Ann. § 7-14-103(b)(ii). In post-conviction relief, "claims of ineffective assistance of appellate counsel are statutorily recognized as the 'portal' through which otherwise waived claims of trial-level error may be reached." *Schreibvogel*, ¶ 12, 269 P.3d at 1102 (quoting *Keats v. State*, 2005 WY 81, ¶ 12, 115 P.3d 1110, 1115 (Wyo. 2005)).

9. To make a claim of ineffective assistance of appellate counsel, Mr. Webb must: 1) show "by reference to the record of the original trial without resort to speculation or equivocal inference, what occurred at that trial," 2) "identify a clear and unequivocal rule of law which those facts demonstrate was transgressed in a clear and obvious, not merely arguable, way," and 3) "show the adverse effect upon a substantial right." *Schreibvogel*, ¶ 12, 269 P.3d at 1103 (citation omitted). "The adverse effect upon a substantial right . . . is shown by demonstrating a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

10. Nevertheless, Mr. Webb cannot bring the issue of ineffective assistance of trial counsel both on appeal and in a post-conviction relief proceeding, even if on different grounds. *Id.* ¶ 13, 269 P.3d at 1103. Ineffective assistance of counsel is a single claim, and "[because the claim of ineffective assistance of counsel was raised in the direct appeal, and was decided against the [Petitioner], he is barred by the provisions of Wyo. Stat. Ann. § 7-14-103(a)(iii) from raising that claim again in a post-conviction relief petition." *Id.* ¶ 11, 269 P.3d at 1102; *Webb,* ¶ 2, 401 P.3d at 919-20.

11. The majority of Mr. Webb's claims are resolved by this rule. Mr. Webb claims ineffective assistance of appellate counsel for not raising trial counsel's ineffectiveness for: not interviewing witnesses (Claim IV), omitting evidence (Claim V), failure to impeach witnesses (Claim VI), and failure to investigate tire marks (Claim VIII). Mr. Webb raised ineffective assistance of trial counsel on appeal, and it was decided on the merits. *Webb*, ¶¶ 33-38, 48, 401 P.3d at 926-27, 929. Therefore, these claims are procedurally barred.

12. Claim VII is also procedurally barred. In this claim, Mr. Webb faults his appellate counsel for not asserting constructive denial of counsel. (Petition at 220). Mr. Webb claims that a breakdown in communication with his trial counsel led to a constructive denial of counsel. (*Id.* at 221). He claims that the breakdown amounted to an irreconcilable conflict. (*Id.* at 228). He concedes this claim is based in ineffective assistance of trial counsel. (*Id.* at 234).

13. Constructive denial of counsel occurs "when the lawyer lacks the requisite statutory qualifications, has a conflict of interest, or has completely abandoned the client." *Martel v. Clair*, 565 U.S. 648, 658 (2012). "An irreconcilable conflict in violation of the Sixth Amendment occurs only where there is a complete breakdown in communication between the attorney and client, and the breakdown **prevents effective assistance of counsel**." *Stenson v. Lambert*, 504 F.3d 873, 886 (9th Cir. 2007) (emphasis added).

14 A constructive denial of counsel claim based in an irreconcilable conflict is really a claim for ineffective assistance of trial counsel. *See id.*; *see also Daniels v. Woodford*, 428 F.3d 1181, 1196-97 (9th Cir. 2005). Mr. Webb raised ineffective assistance of trial counsel on appeal, and it was decided on the merits. *Webb*, ¶¶ 33-38, 48, 401 P.3d at 926-27, 929. Therefore, this claim is procedurally barred.

15. Claim III and IX also contain claims that trial counsel was ineffective, but are intertwined with other issues. In claim IX Mr. Webb asserts a *Brady* violation, but also complains, "The State's public defenders denied Mr. Webb effective assistance of counsel by not compelling the prosecution to produce the 2005 Nissan Murano, despite Mr. Webb's many requests to the State's public defenders to have the Murano inspected for a crash analysis." (*Id.* at 244-45). Insofar as Mr. Webb asserts ineffective assistance of trial counsel, that claim is procedurally barred.

16. In claim III, Mr. Webb asserts that appellate counsel was ineffective based on a conflict of interest. (Petition at 187). He argues that appellate and trial counsel both work for the Office of the State Public Defender. (*Id.*). He argues that he was harmed because appellate counsel ignored meritorious claims of ineffective assistance to protect trial counsel. (*Id.* at 188). Mr. Webb claims that he would have prevailed on appeal had appellate counsel raised ineffective assistance of trial counsel on different grounds. (*Id.* at 190).

17. The statute only permits this Court to review appellate counsel's performance for failing to assert a claim that was likely to result in a reversal of the petitioner's conviction or sentence on his direct appeal. Wyo. Stat. Ann. § 7-14-103(b)(ii). The allegedly meritorious claim Webb asserts trial counsel did not raise was the ineffective assistance of trial counsel. (Petition at 185). But, appellate counsel raised ineffective assistance of trial counsel on direct appeal, ineffective assistance of counsel is a single claim or issue, and claims already addressed on the merits are procedurally barred. *See Schreibvogel*, ¶ 11, 269 P.3d at 1102; *Webb*, ¶¶ 33-38, 401 P.3d at 926-27.

18. In Claim III, Webb also fails to make a claim that this Court can review under the statute. The statute provides relief only for errors "in the proceedings which resulted in

his conviction or sentence." Wyo. Stat. Ann. § 7-14-101. The claim for conflict of interest of appellate counsel arises from a proceeding that occurred after his conviction and sentence—the appeal. The statute does not permit stand-alone claims against appellate counsel, and claims of ineffective assistance of appellate counsel for something other than failing to assert a trial level error are not statutorily authorized. *See Schreibvogel*, ¶ 17, 269 P.3d at 1104.

19. Mr. Webb's Claim I and II are also procedurally barred. In these claims, he alleges that the Wyoming Supreme Court violated his rights to due process and equal protection in its decision on his direct appeal. (Petition at 104, 138). He asserts that the Court violated his right to due process by inconsistently interpreting and applying the law on speedy trial. (*Id.* at 105). He also claims it violated his right to equal protection because the speedy trial cases it cited can be factually distinguished from his case. (*Id.* at 138). In both arguments, Mr. Webb wrongly treats this petition as an appeal, arguing that the Wyoming Supreme Court erred in applying the law to his case and arguing the substance of his speedy trial claims.

20. Although Webb phrases the claims as something new, the substance is still his assertion that his speedy trial rights were violated. (Petition 137-38, 183). The Supreme Court has already determined those rights were not violated. *Webb*, ¶ 48, 401 P.3d at 929. Claims previously decided on the merits are procedurally barred for post-conviction relief, and this Court lacks jurisdiction to hear them. Wyo. Stat. Ann. § 7-14-103(a) and (a)(iii).

21. The remainder of Mr. Webb's claims go to appellate counsel's performance for not raising trial level errors. He fails to state a claim on which relief can be granted in each issue.

22. In claim IX, Mr. Webb alleges ineffective assistance of appellate counsel for failing to address two *Brady* violations. (Petition at 242). In the first claim, he alleges that the State suppressed exculpatory evidence by releasing the victim's 2005 Nissan Murano back to her. (*Id.* at 243). He complains that it was released without allowing him the opportunity to inspect it. (*Id.*). Webb also acknowledges he requested his trial counsel to inspect the vehicle, but trial counsel did not. (*Id.* at 244-45).

23. Webb does not show ineffective assistance of appellate counsel because he does not show a violation of a clear and unequivocal rule of law. "In order to establish a *Brady* violation, a defendant must demonstrate that the prosecution suppressed evidence, the evidence was favorable to the defendant, and the evidence was material." *Lawson v. State*, 2010 WY 145, ¶ 21, 242 P.3d 993, 1000 (Wyo. 2010). There is no *Brady* violation as long as the exculpatory or impeachment evidence was made available to the defendant before it is too late to use. *See Pearson v. State*, 2017 WY 19, ¶¶ 35-37, 389 P.3d 794, 801-02 (Wyo. 2017). "*Brady* is not violated when the material is available to the defendant during trial. The essence of *Brady* is the discovery of information *after the trial*, which was known to the prosecution but unknown to the defense during the trial." *Id.* ¶ 37, 389 P.3d at 802 (quoting *Thomas v. State*, 2006 WY 34, ¶ 16, 131 P.3d 348, 353 (Wyo. 2006)) (emphasis in original).

24. Mr. Webb does not show that the State suppressed evidence which was then discovered after the trial. Mr. Webb concedes he and his counsel knew about the car before trial because he asked his trial counsel to demand to inspect it. (Petition at 244-45).

25. Mr. Webb must produce to this Court, with citations to the record, the facts underlying the issue that appellate counsel failed to raise. *Schreibvogel*, ¶ 12, 269 P.3d at 1102. The facts he presents do not show the State suppressed evidence. Those facts show that his counsel did not request to inspect the car. Mr. Webb fails to state a claim for relief because he has not shown facts that establish a clear violation of law. The facts he has pleaded show there was no *Brady* violation. (*See* Petition at 244-45). Mr. Webb has not shown his appellate counsel was ineffective by failing to assert a meritorious *Brady* claim because the facts Mr. Webb asserts do not support this claim.

26. For the second *Brady* violation, Mr. Webb asserts a *Brady/Giglio* error occurred when the State knowingly used perjured testimony to convict him. (Petition at 247). He compares witnesses' trial testimony to their initial statements to police, and he alleges the variations amount to perjury. (*Id.* at 247-52).

27. Mr. Webb's facts do not demonstrate a claim for a *Brady/Giglio* violation. *Giglio* extended the duty under *Brady* for the prosecutor to disclosed favorable evidence

from exculpatory evidence to include impeachment evidence as well. *United States v. Bagley*, 473 U.S. 667, 676 (1985) (citing *Giglio* v. *United States*, 405 U.S. 150, 154 (1972)). Mr. Webb concedes a "*Giglio* error is a species of *Brady* error that occurs when 'the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury.'" (Petition at 246) (citing *United States v. Agurs*, 427 U.S. 97, 103 (1976)).

28. Mr. Webb fails to allege, let alone show in the record, evidence that was not disclosed to him or his counsel. He complains about the difference between witnesses' statements at trial compared to the police reports. (Petition at 247-52). He also indicates that these witnesses' prior statements were disclosed in discovery. (*Id.*). Mr. Webb never shows evidence that the State did not disclose to him. Mr. Webb fails to allege a *Brady/Giglio* violation, and therefore he fails to make a claim that his appellate counsel neglected to raise a meritorious issue.

29. Claim X, Mr. Webb's last, alleges ineffective assistance of appellate counsel for not asserting prosecutorial misconduct on appeal. (Petition at 261). Prosecutorial misconduct is "[a] prosecutor's improper or illegal act (or failure to act), esp. involving an attempt to persuade the jury to wrongly convict a defendant or assess an unjustified punishment." *Craft v. State*, 2013 WY 41, ¶ 13, 298 P.3d 825, 829 (Wyo. 2013) (citation omitted). Allegations of prosecutorial misconduct "hinge on whether a defendant's case has been so prejudiced as to constitute denial of a fair trial." *Mazurek v. State*, 10 P.3d 531, 542 (Wyo. 2000) (quoting *English v. State*, 982 P.2d 139, 143 (Wyo. 1999)).

30. Mr. Webb alleges that the State obtained a letter he wrote to his trial attorneys and that the State used this information to strengthen its case. (Petition at 261). Mr. Webb asserts that the letter was confidential communication protected by attorney-client privilege. (*Id.* at 261-62). Mr. Webb admits he did not send the letter to his attorneys but to his mother. (*Id.* at 264). He directed her to send it on to his attorneys. (*Id.*). Mr. Webb admits that he knew the letter might be searched by the jail. (*Id.*).

31. Mr. Webb has failed to plead a claim for relief under the statute. Mr. Webb has the burden to show in the record, "without resort to speculation or equivocal inference"

what occurred and the facts supporting his claim. *Schreibvogel*, ¶ 12, 269 P.3d at 1102. Mr. Webb does not meet this burden. He does not show evidence that the State actually obtained the letter. Mr. Webb merely speculates the State obtained the letter. Even though Mr. Webb alleges the State obtained the letter, this Court does not need to consider as true the facts alleged in a post-conviction petition. *Schreibvogel*, ¶ 8, 269 P.3d at 1101.

32. Mr. Webb also does not present a clear transgression of the law. He asserts that the letter was privileged and the State violated that privilege. The letter was not a privileged communication. "It is academic [sic] that a confidential communication between an attorney and his client overheard by a third person is not privileged." *Dobbins v. State*, 483 P.2d 255, 260 (Wyo. 1971). "Because confidentiality is critical to the privilege, it will be 'lost if the client discloses the substance of an otherwise privileged communication to a third party.'" *United States v. Ary*, 518 F.3d 775, 782 (10th Cir. 2008) (internal citations omitted). Mr. Webb had the responsibility to jealously guard the confidentiality of his communication or the privilege is waived. *Id.* Also, "[w]here disclosure to a third party is voluntary, the privilege is waived." *Id.* These requirements apply to oral as well as written communication. *See Hedquist v. Patterson*, 215 F. Supp. 3d 1237, 1245–46 (D. Wyo. 2016).

33. Mr. Webb admits he did not jealously guard the confidentiality of his letter. (*See* Petition at 264). Mr. Webb could have sent his letter to his attorneys and marked it as legal mail. He claims that he did not do this because he wanted a copy sent to each attorney and that he needed his mother to make the copies. (*Id.*). He does not explain why his attorneys could not copy or circulate the letter. He admits that he sent his communication to a third party in such a manner that another third party could easily and legally obtain it. (*See id.*) He understood this method of communication was not confidential. (*See id.*). If the State obtained the letter as Mr. Webb's theorizes, then the State obtained the letter because Mr. Webb did not guard the confidentiality of the letter and provided it to jail staff subject to their inspection prior to mailing. Mr. Webb had the responsibility to protect the confidentiality of his communication and did not. If the letter ever was a privileged

communication, Mr. Webb waived that privilege by voluntarily disclosing it to third parties.

34. Mr. Webb fails to make a claim for ineffective assistance of appellate counsel for not alleging prosecutorial misconduct. He does not show facts that form the basis of a transgression of the law. Instead, he presents speculation, and even that speculation does not show a clear violation of a rule of law. The statute only permits this Court to review appellate counsel's performance for failing to assert a claim that was likely to result in a reversal of the petitioner's conviction or sentence on his direct appeal. Wyo. Stat. Ann. § 7-14-103(b)(ii). This claim that lacks merit. Thus, Mr. Webb fails to state a claim for relief on this issue.

III. Order

Mr. Webb's claims are either procedurally barred by operation of Wyoming Statute § 7-14-103(a)(iii) or he fails to make a claim cognizable under the post-conviction relief statute. Therefore, this Court lacks jurisdiction to further consider them. The Court must dismiss Mr. Webb's claims with prejudice and deny his petition.

IT IS THEREFORE ORDERED that Respondent's Motion to dismiss is **GRANTED**; and further

ORDERED that Mr. Webb's Petition is **DISMISSED WITH PREJUDICE**; and further

ORDERED that any matter not addressed in this **ORDER** is **DENIED AS MOOT**.

DATED this 27 day of Nov 2018

HON. DAN FORGEY
DISTRICT COURT JUDGE

cc: Clint Webb #30342
WMCI
7076 Road 55f
Torrington, WY 82240

Russell Farr, Wyoming Attorney General's Office

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

CLINT RAYMOND WEBB – PETITIONER

vs.

WYOMING DEPARTMENT OF CORRECTIONS

MEDIUM INSTITUTION WARDEN, ET AL – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX E

Decision of State Supreme Court for Direct Appeal

IN THE SUPREME COURT, STATE OF WYOMING

2017 WY 108

APRIL TERM, A.D. 2017

September 15, 2017

CLINT RAYMOND WEBB, Appellant (Defendant), v. THE STATE OF WYOMING, Appellee (Plaintiff).	S-16-0081

Appeal from the District Court of Natrona County
The Honorable Daniel L. Forgey, Judge

Representing Appellant:
Office of the Public Defender: Diane M. Lozano, State Public Defender; Tina N. Olson, Chief Appellate Counsel. Argument by Ms. Olson.

Representing Appellee:
Peter K. Michael, Wyoming Attorney General; David L. Delicath, Deputy Attorney General; Christyne M. Martens, Senior Assistant Attorney General; Joshua C. Eames, Assistant Attorney General. Argument by Mr. Eames.

Before BURKE, C.J., and HILL, DAVIS, FOX, and KAUTZ, JJ.

KAUTZ, Justice, delivers the opinion of the Court; FOX, Justice, files a concurring in part and dissenting in part opinion, in which BURKE, Chief Justice, joins.

KAUTZ, Justice.

[¶1] A jury convicted Appellant, Clint Raymond Webb, of two counts of aggravated assault and battery with a deadly weapon, one count of felony property destruction, and one count of attempted second degree murder. On appeal, Mr. Webb argues his convictions should be reversed because the State did not bring his case to trial in a speedy manner, two of his convictions violated the Fifth Amendment to the United States Constitution, and there were various errors that occurred during his trial. We affirm.

ISSUES

[¶2] Mr. Webb raises six issues in this appeal:

> I. Was [Wyoming Rule of Criminal Procedure] 48 violated when [Mr. Webb] was prosecuted for the same charges after dismissal, when [he] had filed a demand for speedy trial?
>
> II. Was [Mr. Webb] denied his constitutional right to a speedy trial?
>
> III. Did the prosecutor commit misconduct in closing argument when he mischaracterized the role of the defense expert witness, Dr. Loftus?
>
> IV. Was trial counsel ineffective for failing to offer an accident instruction?
>
> V. Did plain error occur[] when the trial court gave an inference of malice instruction?
>
> VI. Should this Court reconsider its holding in *Jones v. State*, 2016 WY 110, [384 P.3d 260] (Wyo. 2016) as this Court did not analyze the legislative history of Wyo. Stat. Ann. §§ 6-2-502(a)(ii) and 6-2-104 and determine that the legislature expressly intended the result reached in *Jones*?

FACTS

[¶3] On June 30, 2014, Julie Webb was driving her Nissan Murano in Casper, Wyoming. As she was stopped at the intersection of Walsh and Second Street, she saw her estranged husband, Mr. Webb, in his Honda Ridgeline. Ms. Webb testified that as the two passed each other in the intersection, Mr. Webb yelled a profanity at her, but Ms.

Webb ignored him and continued driving. A couple of blocks later, when Ms. Webb approached the intersection of 12th Street and Payne, she saw Mr. Webb approach a nearby stop sign and then begin to drive directly towards her car. Ms. Webb swerved in an attempt to avoid a collision but was unsuccessful. Mr. Webb hit the Murano with enough force that the airbags deployed and a number of car parts scattered across the road. Mr. Webb fled the area, and Ms. Webb exited her car and attempted to call 911.

[¶4] Before Ms. Webb could connect with the 911 operator, she heard "car engines revving up." When she looked up, she saw the Honda Ridgeline turn the corner. She ran into a nearby yard and Mr. Webb drove his vehicle quickly from the roadway, onto a sidewalk, and toward Ms. Webb. Ms. Webb was able to jump out of the Ridgeline's path and, with the help of a Good Samaritan, sought refuge in the basement of the Samaritan's home. Again, Mr. Webb fled the scene, striking a parked vehicle in the process. After abandoning the Ridgeline and taking his mother's car, Mr. Webb drove to Las Vegas, Nevada, and turned himself into the authorities three days later.

[¶5] On July 1, 2014, the State charged Mr. Webb with one count of aggravated assault and battery with a deadly weapon in violation of Wyo. Stat. Ann. § 6-2-502(a)(ii) and (a)(iii) (LexisNexis 2013).[1] On July 31, 2014, the State dismissed the Information. The State filed a new Information the same day and added an additional count of aggravated assault and battery with a deadly weapon and one count of felony property destruction. The case was bound over to the district court, but on October 23, 2014, the State filed a new Information that added a count of attempted second degree murder, in violation of Wyo. Stat. Ann. §§ 6-1-301(a)(i) and 6-2-104 (LexisNexis 2013).[2]

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[1] **§ 6-2-502. Aggravated assault and battery; penalty.**

(a) A person is guilty of aggravated assault and battery if he:

. . . .

(ii) Attempts to cause, or intentionally or knowingly causes bodily injury to another with a deadly weapon;

(iii) Threatens to use a drawn deadly weapon on another unless reasonably necessary in defense of his person, property or abode or to prevent serious bodily injury to another[.]

[2] **§ 6-1-301. Attempt; renunciation of criminal intention.**

(a) A person is guilty of an attempt to commit a crime if:

(i) With the intent to commit the crime, he does any act which is a substantial step towards commission of the crime. A "substantial step" is conduct which is strongly corroborative of the firmness of the person's intention to complete the commission of the crime[.]

§ 6-2-104. Murder in the second degree; penalty.

Except as provided in W.S. 6-2-109, whoever purposely and maliciously, but without premeditation, kills any human being is guilty of murder in the second degree, and shall be imprisoned in the penitentiary for any term not less than twenty (20) years, or during life.

[¶6] Before the charges alleged in the new Information were bound over to the district court, Mr. Webb's counsel requested that he receive a competency evaluation. The circuit court granted the motion, and after an evaluation was conducted at the Wyoming State Hospital, the circuit court deemed Mr. Webb competent to proceed. The case was bound over to the district court and proceeded to trial.

[¶7] The week-long trial began on July 27, 2015, and the jury found Mr. Webb guilty of all counts. The district court sentenced him to serve concurrent terms of five to seven years for each count of aggravated assault and battery with a deadly weapon, a concurrent term of one to three years for the felony property destruction, and a consecutive term of thirty to forty-five years for the attempted second degree murder.

DISCUSSION

Wyoming Rule of Criminal Procedure 48

[¶8] Mr. Webb contends the State violated his right to a speedy trial under W.R.Cr.P. 48. We review speedy trial claims *de novo*. *Rhodes v. State*, 2015 WY 60, ¶ 9, 348 P.3d 404, 407 (Wyo. 2015). The State originally charged Mr. Webb with one count of aggravated assault and battery with a deadly weapon on July 1, 2014. On July 31, 2014, the State dismissed the charge but filed a new Information charging Mr. Webb with two counts of aggravated assault and battery with a deadly weapon and one count of felony property destruction. On August 15, 2014, Mr. Webb filed a written demand for a speedy trial. On October 23, 2014, the State filed a new Information in an entirely new docket number that contained the previous three charges and added one count of attempted second degree murder. The State then moved to dismiss the July 31 Information. Mr. Webb argues that because he had filed a demand for a speedy trial before the State dismissed the July 31 Information and filed the October 23 Information, the State violated his speedy trial right under Rule 48(b)(7).

[¶9] The relevant portions of Rule 48 state:

> **Rule 48. Dismissal; speedy trial.**
>
> (a) *By attorney for the state.* — The attorney for the state may, by leave of court, file a dismissal of an indictment, information or citation, and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.
>
> (b) *Speedy trial.* —

> (1) It is the responsibility of the court, counsel and the defendant to insure that the defendant is timely tried.
>
> (2) A criminal charge shall be brought to trial within 180 days following arraignment unless continued as provided in this rule.
>
> . . . .
>
> (5) Any criminal case not tried or continued as provided in this rule shall be dismissed 180 days after arraignment.
>
> . . . .
>
> (7) A dismissal for lack of speedy trial under this rule shall not bar the state from again prosecuting the defendant for the same offense unless the defendant made a written demand for a speedy trial or can demonstrate prejudice from the delay.

[¶10] A plain reading of Rule 48(b)(7) makes it clear that Mr. Webb's speedy trial demand can affect the re-filing of charges only if the previous charges were dismissed due to a lack of speedy trial. W.R.Cr.P. 48(b)(7). That was not the case here. The State chose to file a new Information that included the second degree murder charge and then voluntarily dismissed the Information that had been filed on July 31, 2014. The dismissal could not have been based on a speedy trial violation because only ninety-two days had elapsed between the filing of the July 31 Information and its subsequent dismissal—approximately half of the 180 days allowed under Rule 48(b)(2).

[¶11] Mr. Webb relies on *Hall v. State*, 911 P.2d 1364 (Wyo. 1996), for his assertion that, so long as a defendant has filed a demand for a speedy trial, the State is barred from re-filing charges after the original charges are dismissed for any reason. This is a gross misinterpretation of *Hall*. In *Hall*, the district court dismissed the original charge of concealing or disposing of stolen property at the prosecution's request. The prosecution then re-filed the charge, and the district court later dismissed the charge because more than 120 days had elapsed since Hall's arraignment.[3] The State filed the charge a third time and Hall was convicted. *Id.* at 1367. On appeal, Hall argued the charge should have been dismissed because almost two years had elapsed between the State's first filing of the charge and Hall's trial. *Id.* at 1370.

[¶12] The Court explained that Rule 48 implies that the 120-day period will begin anew when the State dismisses the original charge and re-files. *Id.* Therefore, the only

[3] At the time of Hall's prosecution, Rule 48 required the State to bring defendants to trial within 120 days of arraignment. W.R.Cr.P. 48(B)(6) (LexisNexis 1991).

arraignment relevant for the purposes of Rule 48 was the arraignment that followed the third filing of the charge. Significantly, the Court acknowledged that the third filing was appropriate because Hall had not filed a written demand for a speedy trial before the second dismissal of the charge, which was due to a Rule 48 violation. *Id.* Thus, *Hall* is readily distinguishable from this case, as Mr. Webb's charges were never dismissed for a Rule 48 violation.

[¶13] Mr. Webb also claims the State violated Rule 48 because it acted in bad faith when it dismissed the July 31, 2014 Information. However, the basis of this argument is meager, to say the least. Mr. Webb cites to the motion to dismiss he filed in the district court, wherein his counsel apparently quoted language from the State's motion to dismiss the July 31 Information.[4] Mr. Webb asserted that the State explained the need for the new Information was because the "State has filed a new case more accurately reflecting the charges in this matter and adding an additional count." Mr. Webb argues this is inconsistent with the prosecutor's verbal assertion at the motion hearing when he explained he made the decision to dismiss and re-file the Information after Mr. Webb chose not to accept a plea agreement. We do not find these assertions inconsistent with one another. While the assertions are not identical, they are not in conflict. Further, to the extent they arguably could be said to be inconsistent, Mr. Webb has provided no authority that stands for the conclusion that the statements demonstrate bad faith. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364-65, 98 S.Ct. 663, 668-69, 54 L.Ed.2d 604 (1978) (due process is not offended when a state prosecutor carries out a threat to indict the defendant on a more serious charge after the defendant does not plead guilty to the original charge). Because Mr. Webb has failed to present any evidence or authority to persuade this Court that the State acted in bad faith when it dismissed the July 31 Information, and because Rule 48(b)(7) is not applicable, we conclude the State did not violate Mr. Webb's speedy trial rights under Rule 48.[5]

Constitutional Right to a Speedy Trial

[¶14] Mr. Webb also argues that his speedy trial rights under the Sixth Amendment to the United States Constitution and Article 1, Section 10 of the Wyoming Constitution were violated. Again, we review this claim *de novo*. *Rhodes*, ¶ 9, 348 P.3d at 407.

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[4] The State's motion to dismiss the July 31 Information is not included in the record on appeal.

[5] The dissent argues for a new requirement under Rule 48 requiring the State to "demonstrate it did not dismiss and refile in order to avoid the speedy trial deadline" before the 180 day time limit is reset. We have not previously found such a requirement in the rule. Attorneys and judges in pending cases likely have relied on the rule without such a requirement. If such a requirement is to be added to Rule 48, that requirement should be accomplished by an amendment to the rule, with advance notice to the bar and to trial courts, and not by this Court suddenly changing its interpretation of the rule.

[¶15] When analyzing a constitutional speedy trial claim, we look at the four factors established by the United States Supreme Court in *Barker v. Wingo*: "(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant." *Id.*, ¶ 17, 348 P.3d at 410 (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972)). The purpose of this analysis is to determine "'whether the delay in bringing the accused to trial was unreasonable, that is, whether it substantially impaired the right of the accused to a fair trial.'" *Rhodes*, ¶ 17, 348 P.3d at 411 (quoting *Warner v. State*, 2001 WY 67, ¶ 10, 28 P.3d 21, 26 (Wyo. 2001)). Unlike our analysis under Rule 48, "the 'speedy trial clock begins to run at the time of arrest, information, or indictment, whichever occurs first.'" *Rhodes*, ¶ 17, 348 P.3d at 411 (quoting *Ortiz v. State*, 2014 WY 60, ¶ 40, 326 P.3d 883, 893 (Wyo. 2014)). Further, a dismissal of a charge that is replaced with another does not affect the speedy trial clock. *Id.* "[T]he periods of formal charge by a single sovereign for the same criminal act are tacked [together] even if the charges are different." *Mascarenas v. State*, 2013 WY 163, ¶ 11, 315 P.3d 656, 661 (Wyo. 2013) (quoting *Strandlien v. State*, 2007 WY 66, ¶ 8, 156 P.3d 986, 990 (Wyo. 2007)).

[¶16] Turning to the length of the delay, this Court has never held that a specific length of delay is sufficient to constitute an automatic speedy trial violation. *Mascarenas*, ¶ 12, 315 P.3d at 661. However, the length of the delay is a threshold factor that will determine whether further analysis of the remaining *Barker* factors is necessary. *See Tate v. State*, 2016 WY 102, ¶ 26, 382 P.3d 762, 768 (Wyo. 2016). Delays approaching one year will generally trigger consideration of all of the speedy trial factors. *Id.*, ¶ 29, 382 P.3d at 769. The State first filed charges against Mr. Webb on July 1, 2014, and he was convicted on July 31, 2015, an elapsed time period of 396 days. Because this exceeds a year, we will evaluate the other *Barker* factors. However, although we will consider the other factors, we do not find the length of delay in this circumstance weighs in Mr. Webb's favor. Mr. Webb was convicted of multiple serious felony offenses, and the trial concluded only thirty-one days after the one-year anniversary of the State filing the first Information. *See id.*, ¶ 31, 382 P.3d at 769 (Tate's 387 day delay "barely crosses the 'bare minimum needed to trigger judicial examination of the claim'" and, therefore, the first factor does not weigh in his favor).

[¶17] The second *Barker* factor requires us to consider the reasons for the delay in bringing Mr. Webb to trial. *Rhodes*, ¶ 17, 348 P.3d at 410. "We weigh the delays caused by the State against those caused by the defendant, keeping in mind it is the State's burden to bring a defendant to trial in a timely manner and it must show that the delays were reasonable and necessary." *Durkee v. State*, 2015 WY 123, ¶ 16, 357 P.3d 1106, 1112 (Wyo. 2015). Delays caused by a defendant, such as requests for continuances, changes in defense counsel, and defendant filed pre-trial motions, may disentitle a defendant to speedy trial safeguards. *Castellanos v. State*, 2016 WY 11, ¶ 73, 366 P.3d 1279, 1300 (Wyo. 2016). With respect to delays attributable to the State, deliberate

attempts to delay the trial in order to impede the defense should be weighed heavily against the State. *Durkee*, ¶ 16, 357 P.3d at 1112. However, circumstances such as overcrowded courts and their schedules are more neutral reasons for delay, and should not be weighed as heavily against the State. *Id.* Further, "[d]elays attributable to competency evaluations fall into the 'neutral' category in the *Barker* balancing test." *Castellanos*, ¶ 72, 366 P.3d at 1300.

[¶18] Mr. Webb argues that, with the exception of the delay caused by the competency evaluation, the entirety of the delay in Mr. Webb's trial was caused by the State. Certainly, some delay is attributable to the State and its decision to twice dismiss and re-file the Information. However, Mr. Webb was also responsible for some of the delay. As the State points out, Mr. Webb fled to Las Vegas immediately after commission of the crime. He turned himself in to the Las Vegas police on July 3, 2014, and arrived in Wyoming to face the charges against him on July 23, 2014. Therefore, while the State had filed charges on July 1, 2014, Mr. Webb's decision to flee the jurisdiction delayed any progress in the proceedings by twenty-three days.

[¶19] Further, Mr. Webb is also partially responsible for choosing the date in which his trial began. At a scheduling conference, the district court offered a proposed trial date in early July.[6] However, Mr. Webb's attorneys requested a different trial date because the proposed date would allow for only four and a half days of trial instead of the five days Mr. Webb had requested. The district court proposed the trial begin on July 27, 2015, and Mr. Webb's attorneys consented to that trial date. Because Mr. Webb's attorneys did not want the earlier trial date, the trial was delayed an additional twenty-one days.

[¶20] Finally, the trial was delayed seventy-five days so that Mr. Webb could undergo a competency evaluation. Delays attributable to competency evaluations are considered a neutral factor in the analysis. *Castellanos*, ¶ 72, 366 P.3d at 1300. When we deduct the neutral delays and the delays attributable to Mr. Webb, there was a 277 day delay that can be attributed to the State's decision to twice dismiss and re-file the Information, in addition to the usual course of a case making its way to trial. This delay is far less than a year and is not an unusual amount of time to prepare for a trial in this type of case. Further, the record does not disclose any facts that would support a finding that the State dismissed the first two Informations in an attempt to thwart Mr. Webb's defense. *See*

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[6] The State asserts the record indicates the court offered a trial setting that began on June 29, 2015. However, the record does not clearly reflect that date. Instead, this Court is able to glean the proposed date only from a statement made by the prosecutor: "Would it be more advantageous - - my trial calendar doesn't go that far; but I'm assuming you have a stack around the first part of July, around the 5th, if my math is accurate." The district court responded: "We do; however, on that day, we run into the parade day issue, which prevents us from going the full five." At no point in the transcript does the court or the parties identify the exact date being discussed. July 5, 2015, fell on a Sunday, so it is possible the proposed trial date was July 6. Due to the ambiguity in the record, we will give Mr. Webb the benefit of the doubt and proceed as if the proposed trial date was July 6.

Mascarenas, ¶ 19, 315 P.3d at 662. Since both Mr. Webb and the State are responsible for some delay and the substantial delay from the competency evaluation is neutral, we find this factor to be neutral in the overall speedy trial analysis.

[¶21] Next, we must consider whether Mr. Webb asserted his right to a speedy trial. *Rhodes*, ¶ 17, 348 P.3d at 410. "Although a defendant is not required to assert his right to a speedy trial, the vigor with which the defendant asserted his right is an important consideration in determining the reasonableness of any delay." *Griggs v. State*, 2016 WY 16, ¶ 68, 367 P.3d 1108, 1130 (Wyo. 2016). The record is clear that Mr. Webb filed formal demands for a speedy trial on two occasions. Further, Mr. Webb filed a motion to dismiss the charges against him on the basis of a speedy trial violation.

[¶22] However, despite these assertions, a week before the trial was scheduled to commence, Mr. Webb's counsel requested that Mr. Webb undergo a second competency evaluation. Further, Mr. Webb wrote a letter to the district court approximately two weeks before the commencement of trial, requesting that the district court appoint him new counsel. At the hearing on the matter, Mr. Webb specifically requested new counsel and a continuance of the trial date so that his new counsel could prepare for trial. While the district court ultimately denied both of these requests, making these requests in the first instance is inconsistent with one vigorously asserting his right to a speedy trial. Therefore, this factor weighs slightly in Mr. Webb's favor, but is given little weight in the overall speedy trial analysis. *Lafferty v. State*, 2016 WY 52, ¶¶ 57-58, 374 P.3d 1244, 1254 (Wyo. 2106) (although the defendant filed a demand for speedy trial, his conduct caused substantial delays; thus, this factor weighs only slightly in his favor); *Humphrey v. State*, 2008 WY 67, ¶ 27, 185 P.3d 1236, 1245 (Wyo. 2008) (defendant's assertion of her right to speedy trial only weighs slightly in her favor due to her various waivers of speedy preliminary hearings, requests for continuances, numerous pre-trial motions, and request for a stay in the proceedings); *Campbell v. State*, 999 P.2d 649, 656 (Wyo. 2000) ("Because less than vigorous assertions of the right to a speedy trial are given little weight, this factor too, weights against a speedy trial claim.").

[¶23] The final factor in the *Barker* analysis requires us to consider the prejudice Mr. Webb suffered as a result of the delay in his trial. *Rhodes*, ¶ 17, 348 P.3d at 410. We consider three categories within prejudice:

> "(1) lengthy pretrial incarceration; (2) pretrial anxiety; and (3) impairment of the defense." *Ortiz*, ¶ 59, 326 P.3d at 896 (quoting *Berry*, ¶ 46, 93 P.3d at 237)). "Pretrial anxiety 'is the least significant' factor and because a 'certain amount of pretrial anxiety naturally exists,' an appellant must demonstrate that he suffered 'extraordinary or unusual' pretrial anxiety." *Potter v. State*, 2007 WY 83, ¶ 41, 158 P.3d 656, 666 (Wyo. 2007) (quoting *Whitney v. State*, 2004 WY

> 118, ¶ 54, 99 P.3d 457, 475 (Wyo. 2004)). "The impairment of defense factor is the most serious because it impacts the defendant's ability to prepare his case and skews the fairness of the entire system." *Durkee,* ¶ 37, 357 P.3d at 1116.

Castellanos, ¶ 88, 366 P.3d at 1303. A defendant is not required to establish prejudice in order to prevail on a speedy trial claim; however prejudice, or the lack thereof, must be considered within the *Barker* analysis. *Lafferty*, ¶ 60, 374 P.3d at 1254. Additionally, if a defendant claims prejudice, he has the burden to demonstrate and substantiate the prejudice. *Tate*, ¶ 38, 382 P.3d at 770 (citing *Jackson v. Ray*, 390 F.3d 1254, 1264 (10th Cir. 2004)). If the defendant fails to demonstrate prejudice, the other three *Barker* factors must weigh heavily in his favor to establish a speedy trial violation. *Id.*

[¶24] As stated above, 396 days elapsed between the date the State filed the first Information against Mr. Webb and the conclusion of his trial. We recognize that Mr. Webb likely experienced pretrial anxiety regarding finances, employment, and ability to associate with family, just as most defendants experience in that situation. *Tate*, ¶ 40, 382 P.3d at 771; *Lafferty*, ¶ 63, 374 P.3d at 1255; *Rhodes*, ¶ 20, 348 P.3d at 411-12; *Mascarenas*, ¶ 22, 315 P.3d at 663; *Boucher*, ¶ 19, 245 P.3d at 351. However, Mr. Webb's blanket statement that he lost his liberty, home, relationship with his children, missed his daughter's wedding, suffered financial harm, was unable to adequately respond to divorce and child support proceedings, and suffered degradation and anxiety, is insufficient to establish the extraordinary or unusual pretrial anxiety required to show prejudice. *Lafferty*, ¶ 63, 374 P.3d at 1255. While these consequences are certainly undesirable, they are not extraordinary or unusual when it comes to pre-trial incarceration, and do not weigh in favor of a finding of prejudice.

[¶25] Mr. Webb also argues he suffered prejudice because the delay impaired his defense. When reviewing whether the delay impaired the defense, we consider "whether the delay resulted in a loss of evidence or impaired the defense by the 'death, disappearance, or memory loss of witnesses for the defense.'" *Castellanos*, ¶ 90, 366 P.3d at 1303. Mr. Webb first argues the delay prevented his attorneys from inspecting Ms. Webb's vehicle because the police had already returned it to Ms. Webb by the time they were preparing for trial. Mr. Webb's assertion is wholly unsupported by the record. At the motion to dismiss hearing, the following exchange occurred between the district court and Mr. Webb's counsel:

> THE COURT: And then what's your understanding of the time line on the vehicle that you've discussed?
>
> . . . .
>
> [DEFENSE COUNSEL]: Your Honor, it's my understanding from [co-counsel] that the Murano was never

taken into evidence. In fact, it was just released back to the victim.

THE COURT: So how does the delay impact that if it never was taken into evidence?

[DEFENSE COUNSEL]: I don't believe a delay impacts that, but a prejudice to Mr. Webb in that we could not have Mr. - - that we could not inspect that.

THE COURT: That would - - the condition would have existed even if there was a timely trial in the first filing; correct?

[DEFENSE COUNSEL]: Under this scenario, yes. Yes.

The record is clear that the delay in bringing this case to trial had no impact whatsoever on the defense's ability to access the vehicle as it was never in the State's possession.

[¶26] Mr. Webb further argues he was prejudiced when "witness recollections changed as a result of the passage of time, and not in Mr. Webb's favor." This allegation, however, is not supported by anything more than Mr. Webb's bare assertions. Neither Mr. Webb's brief nor the record show that any of the changes in the witnesses' statements were due to any sort of memory loss. Instead, it appears to simply be a case of inconsistent statements and testimony, and Mr. Webb had the opportunity to cross-examine each of those witnesses about the inconsistencies. For this reason, we find Mr. Webb's defense was not hindered by the delay and this factor does not weigh in his favor.

[¶27] When we balance all of the *Barker* factors, we conclude that Mr. Webb's right to a speedy trial was not violated. The reason for the delay is a neutral factor, while Mr. Webb's assertion of his speedy trial right weighs only slightly in his favor. The prejudice factor weights heavily in the State's favor, as Mr. Webb has failed to provide any facts or argument, other than general assertions, that he was in any way prejudiced.

Prosecutorial Misconduct

[¶28] Mr. Webb argues the prosecutor committed misconduct in his closing argument when he discussed the defense's eyewitness expert. The parties agree that Mr. Webb did not object to the prosecutor's closing statement and, therefore, our review is limited to a search for plain error. To succeed on plain error review, Mr. Webb must demonstrate that: (1) the record clearly reflects the error; (2) the alleged error violated a clear and unequivocal rule of law; and (3) the alleged error caused Mr. Webb material prejudice.

Anderson v. State, 2014 WY 74, ¶ 40, 327 P.3d 89, 99 (Wyo. 2014). This Court is hesitant to find plain error in a closing argument because it is "reluctant to place the trial court in a position of having to *sua sponte* challenge remarks of counsel when there is otherwise no objection thereto." *Solis v. State*, 2013 WY 152, ¶ 40, 315 P.3d 622, 632 (Wyo. 2013). While prosecutors are given wide latitude in closing arguments, there are some boundaries. *Carroll v. State*, 2015 WY 87, ¶ 32, 352 P.3d 251, 259 (Wyo. 2015). When determining whether those boundaries have been crossed, we consider the entire argument, and not simply sentences and phrases that may be out of context. *Id.*

[¶29] We recite the paragraph containing the offending statement in its entirety to give full context to the prosecutor's argument:

> We heard testimony yesterday from Dr. Loftus. He talked a lot of generalities about people's memories. Ladies and gentlemen, the important thing I think to take away from Dr. Loftus's testimony was that he's testified 380 times prior, one time for the prosecution. Pretty fat check, 7,500 bucks. **But he generally didn't talk about this case.** He also said physical evidence will corroborate eyewitnesses. Ladies and gentlemen, you have that physical evidence. You have the photos. You got the tire tracks through the yard. You got the path of travel, where the eyewitnesses put Ms. Webb. You have the defendant's vehicle. You have photos of Julie's vehicle. You get to judge by the instructions what weight to give testimony. That is the role of the jury. You can determine that. But you also have to look at all of the evidence. Mr. Loftus said, you know, I didn't look at photographs; I didn't listen to the 911 tape, or the police reports, some of the witness interviews. You have far more evidence before you folks than Dr. Loftus had. It is the little things that you look for. Look at the tire tracks. Do they comport with what the witnesses said? Does it comport with what Julie said? If you look at the rim marks and the gouges across Payne, does that comport with what Officer Rockwell said about his speed? Greg George, who said he had a Ford and just passed him on the right-hand side of the road? It does, ladies and gentlemen.

(emphasis added). Mr. Webb objects to the emphasized sentence in the prosecutor's closing argument cited above. Therefore, the alleged error is clearly reflected in the record and Mr. Webb has satisfied the first part of the plain error analysis.

[¶30] Mr. Webb argues this statement was a misstatement of the law because it implied to the jury that Dr. Loftus should have testified about the specifics of the case, although established case law would have prohibited such testimony. Wyoming law is clear that juries "are extended the responsibility to resolve the factual issues, judge the credibility of witnesses, and ultimately determine whether the accused is guilty or innocent." *Martin v. State*, 2007 WY 76, ¶ 38, 157 P.3d 923, 932 (Wyo. 2007). Expert testimony that opines on the guilt of the defendant or the credibility of a witness invades the province of the jury and is impermissible. *Id.*; *see also Seward v. State*, 2003 WY 116, ¶ 19, 76 P.3d 805, 814 (Wyo. 2003). However, even with admissible expert testimony, the jury "may give whatever weight and credence it may to the expert testimony as well as all the evidence in reaching a verdict." *Martin*, ¶ 38, 157 P.3d at 932.

[¶31] Upon review of the prosecutor's statement in the context of the entire closing argument, we conclude the prosecutor did not attempt to mislead the jury into believing Dr. Loftus should have testified about matters the law would not allow. While the prosecutor commented that Dr. Loftus spoke in generalities and did not talk about this particular case, the prosecutor also stated that Dr. Loftus testified that the "physical evidence will corroborate eyewitnesses." The prosecutor then discussed the evidence presented, how that evidence was consistent with witness testimony, and encouraged the jury to look at all of the evidence presented. Thus, the prosecutor was using a statement made by Dr. Loftus to shift the jury's focus back to the evidence presented, as opposed to focusing on Dr. Loftus' extensive and general testimony about the reliability of eyewitness testimony. This is not improper and Mr. Webb has failed to demonstrate a violation of a clear and unequivocal rule of law.

[¶32] Finally, Mr. Webb has failed to demonstrate that the result of the trial would have been different if the prosecutor had not made the statement in question. *Anderson*, ¶ 40, 327 P.3d at 99. The statement was isolated and consisted of only one sentence in a closing argument that consumes fifteen pages of transcript. *See Talley v. State*, 2007 WY 37, ¶ 24, 153 P.3d 256, 264 (Wyo. 2007) (no prejudice in closing argument when the comment was fleeting); *Trujillo v. State*, 2002 WY 51, ¶ 15, 44 P.3d 22, 28 (Wyo. 2002) (isolated remark in closing was not prejudicial). Further, to the extent the prosecutor's isolated statement could have made inappropriate suggestions to the jury, the jury was instructed multiple times by the district court that the jury is the sole judge of credibility of all witnesses, including experts, and that statements by counsel are not facts or evidence. We presume the jury followed the instructions. *Bruce v. State*, 2015 WY 46, ¶ 75, 346 P.3d 909, 931 (Wyo. 2015). Thus, Mr. Webb has failed to establish that the prosecutor's statement in closing argument amounted to plain error.

Ineffective Assistance of Counsel

[¶33] Mr. Webb asserts that he received ineffective assistance of trial counsel when his counsel did not request a jury instruction on accident. He argues that without an

instruction, there was no way the jury could have acquitted him of the aggravated assault and battery charge or the attempted second degree murder charge. "Claims of ineffective assistance of counsel involve mixed questions of law and fact and are reviewed *de novo*." *Starr v. State*, 2017 WY 61, ¶ 3, 395 P.3d 180, 181 (Wyo. 2017).

[¶34] In order to prevail on an ineffective assistance of counsel claim, Mr. Webb must satisfy the two-part test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984): First, Mr. Webb must show that counsel's performance was deficient, and second, he must show that he was prejudiced by the deficient performance. *Starr*, ¶ 4, 395 P.3d at 181-82. An attorney performs deficiently when he or she "fail[s] to render such assistance as would have been offered by a reasonably competent attorney." *Bloomer v. State*, 2010 WY 88, ¶ 18, 233 P.3d 97, 976 (Wyo. 2010). In order to show prejudice, Mr. Webb must demonstrate a reasonable probability exists that, absent counsel's deficient performance, the outcome of his trial would have been different. *Galbreath v. State*, 2015 WY 49, ¶ 5, 346 P.3d 16, 18 (Wyo. 2015). Mr. Webb has the burden of proving both parts of this analysis, and failure to demonstrate either is fatal to his claim on appeal. *Id.* For this reason, "[a]n ineffectiveness claim may be disposed of solely on the ground of lack of sufficient prejudice." *Dettloff v. State*, 2007 WY 29, ¶ 19, 152 P.3d 376, 382 (Wyo. 2007).

[¶35] Here, we need not determine whether counsel was deficient because Mr. Webb has failed to demonstrate that the outcome of the trial would have been different had the jury received an accident instruction. Mr. Webb spends a significant amount of his argument explaining why an accident instruction would have been appropriate in these circumstances, but provides only a conclusory basis that the lack of the instruction was prejudicial. Additionally, Mr. Webb has not given this Court any indication of what an accident instruction in this case should look like, leaving us to speculate about what trial counsel should have suggested. *See Duke v. State*, 2004 WY 120, ¶ 78, 99 P.3d 928, 952 (Wyo. 2004) ("[Duke] contends that some sort of accident instruction should have been given in defense of the murder charges but has failed to explain what such an instruction would have entailed under the facts of this case.")

[¶36] Even assuming defense counsel had requested an accident instruction and the district court had granted the request, it would not have changed the outcome of the proceeding. Mr. Webb does not argue the district court failed to properly instruct the jury about the elements of aggravated assault and battery and attempted second degree murder. As other courts have recognized, if the element instructions given to the jury were otherwise correct, it is unlikely that omitting an accident instruction would ever satisfy a test that requires an appellant demonstrate a different outcome at trial. *State v. Crawford*, 73 N.E.3d 1110, 1114 (Ohio Ct. App. 2016); *see also Ruiz v. W.L. Montgomery*, No. SA CV 13-11641 BRO, 2015 WL 4720504, at *2 (C.D. Cal. June 30, 2015); *Com. v. Tembe*, 954 N.E.2d 74, *1 (Mass. App. Ct. 2011); *Auten v. Gomez*, 162 F.3d 1167, *1 (9th Cir. 1998). This is significant because "the defense of accident is not

an excuse or justification for the admitted act; it is a complete denial that an unlawful act was committed because the defendant did not have the requisite mens rea." *Crawford*, 73 N.E.3d at 1115. Therefore, an accident instruction serves simply to remind the jury that evidence of an accident may negate the defendant's criminal intent. *Id.*

[¶37] Here, the district court properly instructed the jury that in order to convict Mr. Webb of aggravated assault and battery, the jury had to determine beyond a reasonable doubt that Mr. Webb either "attempted to cause bodily injury to another person with a deadly weapon" or "threatened to use a drawn deadly weapon . . . ." The jury was also instructed that "[a] 'threat' is an expression of an intention to inflict pain, injury or punishment." With respect to attempted second degree murder, the court instructed the jury it must find beyond a reasonable doubt that Mr. Webb intended to commit the crime of second degree murder, and the elements of second degree murder require that Mr. Webb purposely and maliciously acted. The jury was informed "purposely" means intentionally and that "malice" means "the act constituting the offense as done recklessly under circumstances manifesting an extreme indifference to the value of human life. . . ." Mr. Webb was not precluded from arguing the events at issue were the product of an accident and the jury was certainly at liberty to consider that argument. However, because the jury determined Mr. Webb was guilty of aggravated assault and battery and attempted second degree murder, it necessarily determined Mr. Webb's actions were intentional and not due to an accident. *See id.* ("If the jury believes the defendant's accident argument, it would be required to find the defendant not guilty pursuant to the court's general instructions."), *Tembe*, 954 N.E.2d 74, *1 ("As both crimes require proof of specific intent, the jury could not have found the defendant guilty of either crime if [it] believed, as defense counsel argued in his closing, that the event was an accident."), *Auten*, 162 F.3d 1167, *1 (the jury's finding of malice precluded a finding of accidental killing).

[¶38] Mr. Webb has failed to demonstrate that the outcome of his trial would have been different had counsel requested an accident instruction and, therefore, has failed to prove prejudice. Consequently, Mr. Webb has failed to demonstrate that he received ineffective assistance of trial counsel.

Inference of Malice Instruction

[¶39] Mr. Webb claims his right to a fair trial was denied when the district court provided the following instruction to the jury:

> You are instructed that you may, but are not required to, infer malice from the use of a deadly weapon. The existence of malice, as well as each and every element of the charge of Attempt to Commit Second Degree Murder, must be proved beyond a reasonable doubt.

Mr. Webb claims that, while this Court has previously approved of this exact instruction, it is no longer appropriate due to the new definition of "malice" in homicide cases. Mr. Webb did not object to this instruction at trial; therefore, our review is again limited to a search for plain error. *Anderson*, ¶ 40, 327 P.3d at 99.

[¶40] The instruction is clearly reflected in the record; however, Mr. Webb cannot demonstrate the district court violated a clear and unequivocal rule of law in a clear and obvious, and not merely arguable, way when it gave the jury this instruction. *See Jealous v. State*, 2011 WY 171, ¶ 11, 267 P.3d 1101, 1104 (Wyo. 2001). In fact, Mr. Webb acknowledges that this Court has previously approved instructions such as this, most recently in *Hereford v. State*, 2015 WY 17, ¶¶ 21, 22, 26, 342 P.3d 1201, 1207-08 (Wyo. 2015). In *Hereford*, we concluded "where a defendant's state of mind is at issue in a criminal case like this one, and if the facts and circumstances allow, our precedent permits a judge to instruct the jury that is may presume or infer malice by the use of a deadly weapon." *Id.*, ¶ 26, 342 P.3d at 1208.

[¶41] Further, this Court's approval of this instruction in *Hereford* occurred approximately three months *after* we refined the definition of "malice" in *Wilkerson v. State*, 2014 WY 136, 336 P.3d 1188 (Wyo. 2014) and approximately six months before Mr. Webb's trial. Granted, the appellant in *Hereford* was convicted using the definition of malice in effect before *Wilkerson*. However, we did not make any suggestion in *Hereford* that would lead one to believe this type of jury instruction would be inapplicable under the new definition of malice. Therefore, we cannot say the district court violated a clear and unequivocal rule of law in a clear and unequivocal, and not merely arguable, way when it gave an instruction that was identical to one this court had affirmatively approved in a second degree murder case only a short time before trial. Mr. Webb has failed to carry his burden of showing plain error.

Double Jeopardy

[¶42] In his final argument, Mr. Webb claims that his convictions for aggravated assault and battery with a deadly weapon and attempted second degree murder—that were both premised upon him driving his vehicle through the yard and almost striking Ms. Webb—violated the United States Constitution's prohibition against double jeopardy. Mr. Webb did not raise a double jeopardy claim in the district court, thereby limiting our review of his claim to one for plain error. *Bowlsby v. State*, 2013 WY 72, ¶ 6, 302 P.3d 913, 915-16 (Wyo. 2013).

[¶43] The record is clear that Mr. Webb was convicted and sentenced separately for the aggravated assault and battery and the attempted second degree murder, satisfying the first part of the plain error test. Mr. Webb, however, cannot demonstrate the district court violated a clear and unequivocal rule of law when it entered convictions and sentenced

him for both crimes. He acknowledges that this Court found contrary to his position on this precise issue less than one year ago in *Jones v. State*, 2016 WY 110, 384 P.3d 260 (Wyo. 2016); however, he asserts the *Jones* opinion fails to take into account the United States Supreme Court's decision in *Ball v. United States*, 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985).

[¶44] In *Jones*, this Court held that under the *Blockburger* "same elements" test, convictions for aggravated assault and battery with a deadly weapon and attempted second degree murder, do not run afoul of the United States Constitution's prohibition against double jeopardy, even though both charges stem from the exact same factual premise. *Jones*, ¶ 22, 384 P.3d at 266; *see also Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The basis of this conclusion was that each crime required an element the other did not. Attempted second degree murder requires the presence of malice, while aggravated assault and battery with a deadly weapon requires the use of a deadly weapon. We explained:

> We do not concern ourselves with how those elements are proven in that defendant's case—that is, we look to what the legislature says must be proven, not the facts or evidence used in a particular case to establish that ultimate fact. Nor is it of any moment that such facts or evidence incidentally may also tend to prove an element of another crime with which the defendant is charged.

Jones, ¶ 12, 384 P.3d at 264 (citations omitted).

[¶45] Although *Jones* was published almost a year after Mr. Webb had been sentenced, it did not overrule any precedent that would have supported a conclusion that Mr. Webb's convictions and sentences violated the prohibition against double jeopardy. Instead, it simply reaffirmed our decision in *Sweets v. State*, 2013 WY 98, 307 P.3d 860 (Wyo. 2013). In *Sweets*, this Court accepted the *Blockburger* same elements test as the exclusive analysis used in Wyoming when determining whether convictions and sentences should merge to comply with double jeopardy requirements. *Id.*, ¶ 49, 307 P.3d at 875. In doing so, we joined the United States Supreme Court by disavowing the use of an analysis that focused on the facts and evidence relied upon by the State in proving multiple crimes, known as the same facts or evidence test. *Id.* (overruling *Bilderback v. State*, 13 P.3d 249 (Wyo. 2000)); *United States v. Dixon*, 509 U.S. 688, 704-09, 113 S.Ct. 2849, 2860-63, 125 L.Ed. 2d 556 (1993) (overruling *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990)). While Mr. Webb's double jeopardy claim may have arguably had merit using the same facts or evidence test, that test had been relegated to the historical archives of our jurisprudence two years before his trial began. Therefore, the district court properly applied the clearly established law that applied at the time of Mr. Webb's trial and sentencing.

[¶46] Further, we are not persuaded that our decision in *Jones* is affected by the United States Supreme Court's decision in *Ball*. In *Ball*, the defendant was charged and convicted of receiving a firearm shipped in interstate commerce in violation of 18 U.S.C. §§ 922(h)(1) and 924(a), and for possessing that same firearm in violation of 18 U.S.C.App § 1202(a)(1). *Ball*, 470 U.S. at 857, 105 S.Ct. at 1669. Utilizing the *Blockburger* same elements test, the Court concluded that Congress did not intend to subject the defendant to two convictions because "proof of illegal receipt of a firearm *necessarily* includes proof of illegal possession of that weapon." *Id.*, 470 U.S. at 862, 105 S.Ct. at 1672 (emphasis in original).

[¶47] The elements in question here are malice (attempted second degree murder) and use of a deadly weapon (aggravated assault and battery with a deadly weapon). Unlike the relationship between the elements of receipt and possession in *Ball*, malice (and the second degree murder statute in general) does not *necessarily* include proof of use of a deadly weapon. As we explained in *Jones*, there are many ways an individual can attempt to kill another that does not include the use of a deadly weapon. *Jones*, ¶ 19, 384 P.3d at 265. Using the straightforward *Blockburger* same elements test, as used in *Ball*, we are led to the same conclusion we reached in *Jones*—convictions for attempted second degree murder and aggravated assault and battery with a deadly weapon do not violate the Constitution's prohibition against double jeopardy.

CONCLUSION

[¶48] Mr. Webb received a speedy trial as required by W.R.Cr.P. 48 and the United States and Wyoming Constitutions. The prosecutor did not commit misconduct in his closing argument when he discussed Dr. Loftus, and Mr. Webb received the effective assistance of trial counsel. Further, the district court properly instructed the jury that it may infer malice from Mr. Webb's use of a deadly weapon. Finally, the district court did not violate Mr. Webb's constitutional protection against double jeopardy when it imposed separate sentences for aggravated assault and battery with a deadly weapon and attempted second degree murder.

[¶49] Affirmed.

FOX, Justice, concurring in part, and dissenting in part, in which **BURKE, Chief Justice,** joins.

[¶50] I concur in most of the majority opinion, but I write separately on one issue upon which I fear that the Court has proceeded down a technically correct trail of precedent to arrive at a rule of law whose application yields a result that is contrary to the spirit and purpose of the original rule. Our acquiescence in the State's repeated circumvention of the speedy trial rule by dismissing and refiling to start the clock anew[7] has the effect of eviscerating W.R.Cr.P. 48. The doctrine of *stare decisis* supports the majority's analysis. And while I recognize the importance of that doctrine to further the "evenhanded, predictable, and consistent development of legal principles, foster[] reliance on judicial decisions, and contribute[] to the actual and perceived integrity of the judicial process," *Brown v. City of Casper*, 2011 WY 35, ¶ 43, 248 P.3d 1136, 1146 (Wyo. 2011) (quoting *State ex rel. Wyo. Worker's Comp. Div. v. Barker*, 978 P.2d 1156, 1161 (Wyo. 1999)), I believe this is one of those times that "we should be willing to depart from precedent [because] it is necessary 'to vindicate plain, obvious principles of law and remedy continued injustice.'" *Id.* (internal citation omitted). For these reasons, I concur in part, and dissent on the speedy trial issue.

W.R.Cr.P. Rule 48

[¶51] "A fundamental purpose of the speedy trial statute and rule is to prevent unnecessary prosecutorial and judicial delays to a pending criminal proceeding. The public interest and the interest of the accused require an expeditious determination of guilt or innocence so that the guilty can be sentenced and the innocent exonerated." *People v. Moye*, 635 P.2d 194, 195 (Colo. 1981) (citations omitted). "The purpose of the rule ensures not only a criminal defendant's constitutional right to a speedy trial, but also furthers important judicial policy considerations of relief of trial court congestion, prompt processing of all cases reaching the courts and advancement of the efficiency of criminal justice process." *State v. Wells*, 443 A.2d 60, 63 (Me. 1982).

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[7] We have seen numerous appeals in the last ten years where the State has filed, dismissed, and refiled charges, resulting in more than 180 days from the initial arraignment to trial. *See, e.g., Tate v. State*, 2016 WY 102, 382 P.3d 762 (Wyo. 2016); *Rhodes v. State*, 2015 WY 60, 348 P.3d 404 (Wyo. 2015); *Anderson v. State*, 2014 WY 74, 327 P.3d 89 (Wyo. 2014); *Ortiz v. State*, 2014 WY 60, 326 P.3d 883 (Wyo. 2014); *Seteren v. State*, 2007 WY 144, 167 P.3d 20 (Wyo. 2007). *See also State v. Bridger*, No. S-14-0161, Order Granting State's Expedited Petition for Writ of Review/Certiorari and Remanding for Further Consideration (Wyo. S.Ct. June 17, 2014).

[¶52] Allowing the State to restart the speedy trial clock by dismissing and refiling charges defeats the purpose of the rule.[8] I would adopt the rule applied in other jurisdictions where the speedy trial period begins anew when charges are refiled, and recognize an exception where the intent of the dismissal is to avoid the application of the speedy trial rule. As we noted in *Rhodes v. State*, 2015 WY 60, ¶ 15, 348 P.3d 404, 409 (Wyo. 2015): "In light of our precedent holding that the speedy trial period begins anew when charges are re-filed against a defendant, there is merit to an exception for cases in which the dismissal and re-filing of charges is intended or clearly operates to circumvent the requirements of Rule 48." *See also People v. Walker*, 252 P.3d 551, 552 (Colo. App. 2011); *People v. Van Schoyck*, 904 N.E.2d 29, 34 (Ill. 2009) ("State may not avoid a speedy-trial demand by dismissing a charge only to refile the identical charge for the identical offense based on the identical acts."); *State v. Goss*, 777 P.2d 781, 784 (Kan. 1989) ("State cannot dismiss and refile charges solely to set the statutory clock back to zero."). We observed in *Rhodes* that, while we have not yet sanctioned such an exception, it "would be consistent with Wyoming precedent interpreting W.R.Cr.P. 48(a), which permits the State to dismiss charges against a defendant by 'leave of court'" and "would give meaning to W.R.Cr.P. 48(b)(3)(C), as that provision would operate to toll the time between dismissal and re-filing in those cases where the exception applies." 2015 WY 60, ¶ 15, 348 P.3d at 410.

[¶53] A rule that would allow the speedy trial clock to restart only where the intent of the dismissal was not to avoid the application of the speedy trial rule would not only breathe some life back into the purpose of Rule 48, it would also be the correct statutory interpretation. It would no longer require us to ignore the language of Rule 48(b)(3)(C), which provides that the "The time between the dismissal and the refiling of the same charge" shall be excluded in computing the time for trial. The majority and our precedent hold that "Rule 48 implies that the 120-day period will begin anew when the State dismisses the original charge and re-files," *see* majority opinion at ¶ 12.[9] Under this approach, there is no conceivable application of tolling the time between dismissal and refiling, because the time would start over upon refiling. *See also Rhodes*, 2015 WY 60, ¶ 13, 348 P.3d at 409; *Hall v. State*, 911 P.2d 1364, 1370 (Wyo. 1996). We will not interpret a statute or a rule in a way which renders any portion of it meaningless. *See Adekale v. State*, 2015 WY 30, ¶ 13, 344 P.3d 761, 765 (Wyo. 2015); *Story v. State*, 755 P.2d 228, 231-32 (Wyo. 1988). *See also United States v. Young*, 528 F.3d 1294, 1296

[8] Federal courts applying the Speedy Trial Act, 18 U.S.C. § 3161(c)(1), have recognized this. *See e.g., United States v. Rojas-Contreras*, 474 U.S. 231, 239, 106 S.Ct. 555, 559, 88 L.Ed.2d 537 (1985) (Blackmun, J., concurring in the judgment, recognizing the reason federal law does not permit the clock to restart when the government dismisses and refiles is to "protect[] against governmental circumvention of the speedy-trial guarantee"); *United States v. Hoslett*, 998 F.2d 648, 658 n.12 (9th Cir. 1993) ("If the clock began anew, the government could circumvent the limitations of the Speedy Trial Act by repeatedly dismissing and refiling charges against a defendant.").

[9] This paragraph cites *Hall v. State*, 911 P.2d 1364 (Wyo. 1996), which relied upon an earlier version of the rule providing a 120-day speedy trial period.

(11th Cir. 2008) ("Indeed, the exclusion of the period of time between the dismissal of an indictment and the filing of a new indictment under § 3161(h)(6), as well as the Speedy Trial Act more generally, would make little sense if the government could reset the speedy-trial clock at will and effectively 'circumvent[ ] the speedy trial guarantee through the simple expedient of obtaining superseding indictments with minor corrections.'" (quoting *United States v. Bermea*, 30 F.3d 1539, 1567 (5th Cir. 1994))).

[¶54] Some courts adopting exceptions to resetting the speedy trial clock require a showing of bad faith on the part of the State or prejudice to the defendant before the exception applies. *See State v. Rose*, 589 P.2d 5, 11 (Ariz. 1978) ("[S]peedy trial time limits begin anew, absent a showing of bad faith on the part of the prosecution or prejudice to the accused."); *Curley v. State*, 474 A.2d 502, 507 (Md. 1984) ("[P]rosecution must be acting in 'good faith' or so as to not 'evade' or 'circumvent' the requirements of the statute or rule setting a deadline for trial."):

[¶55] Other courts take a different approach. As the New Mexico Supreme Court explained, the right protected by the rule

> is a criminal defendant's right, not that of the State, the courts, or any other party; it is not a tool to punish the State for dismissing and refiling cases in bad faith, nor should its diminution be a reward for the State's good behavior. Viewed in that light, the cases in which courts have conducted a "good faith-bad faith" analysis regarding the State's reasons for dismissing and refiling a case in order to determine if a new six-month time period should be granted are misguided. Instead, any inquiry into the State's reasons for dismissing and refiling in district court should be done within the context of any speedy trial challenge the defendant may raise after the case is refiled in district court.

State v. Savedra, 236 P.3d 20, 23 (N.M. 2010).

[¶56] The better-reasoned approach places the burden on the State to establish that it has been prosecuting the matter diligently and that it dismissed and refiled charges for proper reasons and not to evade the speedy trial deadline set forth in the rule. For example, in New Mexico, "the burden is cast upon the state to show that any delay in prosecution resulting from a dismissal of charges was occasioned for proper reasons . . . ." *State v. Aragon*, 656 P.2d 240, 242 (N.M. Ct. App. 1982), *cert. denied*, 656 P.2d 889 (1983). Similarly, in Kansas, "[d]ismissals and refilings when the statutory period is about to expire are suspect and a showing of necessity must be made." *Goss*, 777 P.2d at 784. *See also Carter v. State*, 655 S.W.2d 379, 379 (Ark. 1983) (requiring evidence that State sought to evade speedy trial requirement and finding that the State had good cause for

dismissal and refiling); *State v. Washington*, 617 S.W.2d 3, 5 (Ark. 1981) (same); *People v. Sanders*, 407 N.E.2d 951, 960 (Ill. App. Ct. 1980) ("[T]he real issue, when a charge against a defendant is dismissed and he is later re-indicted on the same offense, may be whether the circumstances suggest that the State is seeking to evade the consequences of the 120 day rule . . . ." (internal citation omitted)).

[¶57] In the instant case whether the speedy trial calculation begins anew on the refiling of charges should depend on whether the State refiled to avoid running the speedy clock timeline or whether it had a proper purpose. There is a suggestion in the record that the State explained that it filed a new case because Mr. Webb failed to accept a plea agreement and because the new charges were more accurate. I would remand the case so that the trial court could make a determination whether the State met its burden to demonstrate it did not dismiss and refile in order to avoid the speedy trial deadline.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

CLINT RAYMOND WEBB – PETITIONER

vs.

WYOMING DEPARTMENT OF CORRECTIONS

MEDIUM INSTITUTION WARDEN, ET AL – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX F

Transcript of Motions Hearing, June 29, 2015, pg. 23

basis I'll operate on there.

I am, I guess, a little confused but ultimately not persuaded that there is a sufficient basis under Rule 48 that there was a speedy trial violation in this case. I think we're really discussing the constitutional right to a speedy trial under the circumstances; and that's the real legitimate issue here. Certainly, in this case, 19965, we're within Rule 48's requirements, even based on the scheduling conference that we had and the discussions that we had in that conference as to why we ended up with this trial date.

As far as generally, regarding the constitutional right to a speedy trial, I will paraphrase without quotation or citation from the *Rhodes* case, 2015 WY 60; start with the paragraph 17.

The right to a speedy trial is guaranteed under the Sixth Amendment to the United States Constitution. The factors that must be considered in a constitutional speedy trial analysis are, one, the length of the delay; two, the reason for the delay; three, the defendant's assertion of his right; and, four, the prejudice to the defendant. The ultimate inquiry is whether the delay in