IN THE SUPREME COURT
STATE OF WYOMING
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IN THE SUPREME COURT

STATE OF WYOMING

EDUARDO VLAHOS Appellant,	))	
v.	)	No. S-21-0290
STATE OF WYOMING Appellee.	))	

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

This is an appeal from a criminal conviction arising in the Sixth Judicial District Court before the Honorable John R. Perry. The Supreme Court shall have general appellate jurisdiction, co-extensive with the state, in both civil and criminal causes, and shall have a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law. Wyo. Const. art. V, § 2. A defendant may appeal the conviction in any criminal case in the manner provided by the Wyoming Rules of Appellate Procedure. Wyo. Stat. Ann. § 7-12-101 (West 2021). An appeal from a trial court to an appellate court shall be taken by filing the notice of appeal with the clerk of the trial court within 30 days from entry of the appealable order and concurrently serving the same in accordance with the provisions of Rule 5, Wyo. R. Civ. P., (or as provided in Wyo. R. Cr. P. 32 (c)(4)). Wyo. R. App. P. 2.01.

The *Judgment Upon Guilty Verdict of Jury* in this case was filed on July 16, 2021. (Appendix A). The *Order For Pre-Sentence Investigation* was filed on July 16, 2021. (Appendix B). The *Sentence* in this case was filed on October 4, 2021. (R. vol. 2 at 438-441) ; (Appendix C). A judgment and sentence entered is a final order when entered and is an appealable order. *Price v. State*, 716 P.2d 324, 327 (Wyo. 1986). On October 6, 2021, the *pro se* Defendant filed a timely Notice of Appeal. (R. vol. 2 at 442-445). Thereafter, newly appointed counsel also filed a timely Notice of Appeal on October 22, 2021. (R. vol. 3 at 454-467). Jurisdiction is vested in this Court.

STATEMENT OF THE ISSUES

I. **WHETHER MR. VLAHOS' RIGHT TO A SPEEDY TRIAL PURSUANT TO W.R.CR.P 48, AS WELL AS THE WYOMING AND UNITED STATES CONSTITUTIONS WAS VIOLATED WHEN HIS TRIAL COMMENCED 605 DAYS AFTER HE WAS ARRAIGNED AND 633 DAYS AFTER HIS ARREST.**

II. **WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY ALLOWING THE TRIAL TO PROCEED AFTER IT IDENTIFIED CLEAR JUROR MISCONDUCT WITHOUT REPLACING THE TAINTED JUROR WITH AN UNTAINTED ALTERNATE.**

STATEMENT OF THE CASE

The Defendant and Appellant, Mr. Edward Vlahos, was charged on November 6, 2019, by *Felony Information* with aggregated occurrences of "ticket switching" totaling the amount of $4,462.98 in violation of Wyoming Statute § 6-3-404(b)(i). (R. vol. 1 at 22-23). All acts were alleged to have occurred in Campbell County Wyoming. This *Felony Information* was later amended two additional times; once on October 31, 2019, (R. vol. 1 at 23-24) (amending date range to indicate September 3, 2019 to October 19, 2019), and once on February 2, 2021. (R. vol. 1 at 185-186) (amending "ticket switching" to "Shoplifting"). Mr. Vlahos' arraignment by the district court occurred on November 15, 2019, where at he pled not guilty. (Arraignment Hr'g Tr. 29 : 12-15).

After a substantial delay of 605 days between arraignment and trial, three attorneys, two competency hearings, and numerous *pro se* filings, a two-day jury trial commenced July 12, 2021. The posture of Mr. Vlahos' case had multiple evolutions, but eventually found its way to a jury over Mr. Vlahos' first *pro se* request for a continuance on July 9, 2021. (R. vol. 2. at 319); (Trial Day 1 Tr. 103-122) (the court indicating that at the July 9, 2021, *Faretta* hearing Mr. Vlahos indicated he was ready to proceed on July 12, 2021, without his attorney, and denying the "phone book" of *pro se* filings and exhibits, which included Mr. Vlahos' July 9, 2021, continuance request).

The jury, after having considered the evidence, returned a verdict of guilty as to the charge of shoplifting. (R. vol. 2 at 346); (Jury Trial Day 2 Tr. 166 : 1-6); (R. vol. 2 at 347-348). On September 29, 2021, the district court sentenced Mr. Vlahos, to a term of not less than five (5), nor more than ten (10) years. (Sentencing Hr'g Tr. 22 : 17-19).

Mr. Vlahos was given eighty-five (85) days of credit for time served. (Sentencing Hr'g Tr. 22 : 20-21). There were assessments of $425.00, and the district court entered a judgment against Mr. Vlahos in the amount of $4,462.98. Mr. Vlahos was found, by later filing from the district court, that he did not have the ability to pay the public defender fee of $1,000.00, and the fee was waived. (R. vol. 2 at 417). Mr. Vlahos' sentence was reduced to a *Sentence* on October 4, 2021. (R. vol. 2 at 438-441). A *pro se* notice of appeal was filed on October 6, 2021, which was marked as granted by handwritten signature of the judge. (R. vol. 2 at 442). Additionally, counsel was assigned to Mr. Vlahos once again, and a *Notice of Appeal and Certification of Record* was filed on October 22, 2021. (R. vol. 2 at 454-459). An *Order Granting Leave to Proceed on Appeal In Forma Pauperis and Appointing Counsel* was filed on October 25, 2021. (R. vol. 2 at 468).

A. Relevant Factual Background and Course of Proceedings.

a. Charging document evolution.

On October 30, 2019, the State alleged that on or between October 4, 2019, to October 19, 2019, in Campbell County, Wyoming, Mr. Vlahos did alter, deface, change or remove a price tag or marker on or about property offered for sale by a wholesale or retail store with the intent to obtain the property at less than the marked or listed price, to wit: "ticket switched" many items, totaling $4,462.98, a felony, in violation of Wyoming Statute § 6-3-404(b)(i), punishable by imprisonment of not more than ten (10) years, a fine of not more than ten thousand dollars ($10,000.00) or both. (R. vol. 1 at 22-23). The next day, the State provided its *Amended Felony Information* wherein the date range was

corrected to "on or between September 3, 2019, to October 19, 2019. (R. vol. 1 at 24-25) (first *Amended Felony Information*). The charge was then further amended by the State on February 2, 2021, wherein it exchanged "ticket switching" for "Shoplifting", a felony, in violation of Wyoming Statute § 6-3-404(b)(i). (R. vol. 1 at 185-186) (second *Amended Felony Information*).

b. Demand for speedy trial and absence of waiver.

On November 13, 2019, Mr. Vlahos filed his demand for speedy trial pursuant to Rule 48 of the Wyoming Rules of Criminal Procedure (hereafter "W.R.Cr.P."), Article 1, Section 10 of the Wyoming Constitution, and Amendment VI of the United States Constitution. (R. vol. 1 at 32 : ¶ I). Mr. Vlahos did not sign any waiver of his right to speedy trial between his date of Arraignment and his *pro se* trial. (R. vols. 1, 2, 3).

c. Defense continuances.

The first continuance potentially attributable to the defense would be from Mr. Vlahos' final counsel, Mr. Coombs, who filed a continuance on May 12, 2021, after Mr. Vlahos' second competency hearing. (R. vol. 1 at 234-235) (continuing the June 14, 2021, "(STACKED #2)" jury trial for a medical reason without objection from the State).

The context of this continuance arose during the second competency hearing of Mr. Vlahos where the court placed the matter back on the trial stack, and "set [it for] number two for June 14, behind Mills; that case may not go." (Competency Hr'g Two May 13, 2021 Tr. 30-31 : 25, 1). Counsel for the defense then interjected, "I had to file a Motion to Continue that trial. My wife has -- has her cancer checkup on the 15th in Denver--". (Competency Hr'g Two May 13, 2021 Tr. 31 : 13-16).

The court granted that continuance, which reset the second stacked jury trial of June 14, 2021, in a separate notice filed on June 14, 2021, to the July 12, 2021. *Compare* (R. vol. 1 at 236) *with* (R. vol. 1 at 239). Whether the court's docket cleared and the matter would have proceeded to trial on June 14, 2021, without the continuance, is not present in the record. (R. vols. 1, 2, 3). What is known is that Mr. Vlahos' trial was stacked second for that day, and the court was unsure if the first stacked *Mills* case was going or not. (Competency Hr'g Two May 13, 2021 Tr. 30-31 : 25, 1). Subsequently, court left the matter untouched in the record from May 14, 2021, forward. (R. vol. 1 at 239).

Additionally, Mr. Vlahos unsuccessfully attempted to continue this matter on July 9, 2021, through his own *pro se* filing after removing his third Public Defender from his case on July 9, 2021. *Compare* (R. vol. 2 at 316-319) (indicating in *pro se* filing desire to remove Mr. Coombs as counsel) *with* (Mot. to Relive Public Defender July 9, 2021 Tr. 24 : 14-16) *with* (R. vol. 2 at 359-360). In Mr. Vlahos' continuance, he provided: "time is needed [to prepare] for this trial . . . as it would unfairly put a burden on [Mr. Vlahos without him being able to investigate and communicate with witness in order to properly prepare for trial]". (R. vol. 2. at 319). However, this continuance was not granted. The court never provided a written *Order* denying Mr. Vlahos' continuance, and instead stated on the first day of trial:

> Moreover, you and I discussed on Friday when I let Mr. Coombs out, that this case was either going to go forward with you represented by the public defender or private counsel or yourself, but it was going forward today. And I understand you moved for a continuance in this matter, but I made it pretty clear on Friday that that wasn't going to happen.

(Trial Day 1 Tr. 103-104 : 20-25, 11-30).

d. Court's continuances and stacked settings.

The other continuances relevant to Mr. Vlahos' speedy trial issue rest with district court's management of its docket. W.R.Cr.P. 48(4)(b)(iii). Mr. Vlahos' first trial setting appears in the record in the court's *Criminal Case Management Order*, filed on November 19, 2019, which set Mr. Vlahos' trial for "the week of April 6, 2020 (STACKED)". (R. vol. 1 at 45-46 : ¶ 5). Both counsel submitted timely responses to the *Case Management Order* of the court, and appeared prepared to move forward with trial on April 6, 2020. (R. vol. 1 at 74-102). The court then provided *sua sponte* its *Notice of Continuance* on April 8, 2020, which continued Mr. Vlahos' jury trial to "June 1, 2020 (STACKED)". (R. vol. 1 at 103). On January 25, 2021, The court then re-set Mr. Vlahos' trial for February 8, 2021, "STACKED #3". (R. vol. 1 at 174). On May 14, 2021, the court re-set Mr. Vlahos' trial for June 14, 2021 "(STACKED #2). (R. vol. 1 at 239). And the court later adjusted the date on June 14, 2021, to finally arrive at a five day setting for a July 12, 2021, trial date. (R. vol. 1 at 246).

e. Substitution of counsel.

Counsel for Mr. Vlahos changed three times within the course of the lead up to his actual jury trial until he was allowed to proceed *pro se*. The first instance of counsel's departure occurred with Mr. Andrew Johnson, Assistant Public Defender who was assigned to Mr. Vlahos' case on November 4, 2019. (R. vol. 1 at 8). The record does not reflect what the cause of substitution to new counsel, Mr. Mitchell Damsky, was for, but Mr. Damsky was re-assigned to Mr. Vlahos' case on December 5, 2019, without issue or

delay. (R. vol. 1 at 58). As will be discussed in more context in the section six entitled "Competency hearings," Mr. Vlahos, while represented by Mr. Damsky at the time, filed his own *pro se Motion* on May 22, 2020. (R. vol. 1 at 104-107); (R. vol. 1 at 108) (indicating the court's uncertainty whether the motion was one for suppression, or a motion for additional preliminary hearing, and requesting counsel's opinions on how to proceed).

This *pro se* filing primed the State's filing for an examination of Mr. Vlahos pursuant to Wyoming Statute section 7-11-303 on June 3, 2020. (R. vol. 1 at 109-114). On June 8, 2020, the court submitted its *Order for Psychological Evaluation, Fitness to Proceed* on June 8, 2020, which suspended all proceedings against Mr. Vlahos for the first time. (R. vol. 1 at115-118); (R. vol. 1 at 131-134) (correcting its *Order for Psychological Evaluation, Fitness to Proceed* on June 18, 2020).

Mr. Vlahos did then attempt to relieve Mr. Damsky from his representation by providing the court a *pro se* filing entitled *Motion to Request New Counsel* on June 15, 2020. (R. vol. 1 at 119-120). However, the court on that same day provided a letter to Mr. Vlahos stating:

> Please understand the court does not designate which Public Defender is assigned to a particular case. By law, such matters are handled entirely within the local Public Defenders Office. Given the nature of your letter, I am forwarding the same to that office. Much as I advised you at your arraignment, you certainly have the right to hire any attorney of your choosing to represent you.
>
> You also ask the court to appoint you counsel at taxpayer expense outside of the Office of the Public Defender. The court will not do that.

(R. vol. 1 at 125).

On June 16, 2020, Mr. Vlahos again filed a *pro se* motion, *Motion to let Court Know Mitch Damsky was Fired as Counsel*, wherein he indicated his dissatisfaction with Mr. Damsky, and informed the court he was going to meet with new counsel on June 17, 2020. (R. vol. 1 at 130). The record does not indicate anything else as to Mr. Vlahos' meeting new counsel, and no other entry of appearance from anyone outside of the Public Defender's Office is present within the record relating this first requested firing of counsel. (R. vols. 1, 2, 3).

Subsequently, Mr. Vlahos' case was again re-assigned to Mr. Jefferson Coombs on August 31, 2020, due to Mr. Damsky's departure from the Public Defender's office. (R. vol. 1 at 147). As will be discussed in section six "Competency hearings", Mr. Vlahos' first competency hearing was held on September 8, 2020, and the court indicated that it would be putting Mr. Vlahos' matter back on the trial stack. (Competency Hr'g One Sept. 8, 2020, Tr. 2-3). Mr. Vlahos' second substitution of counsel occurred during the window of his first competency hearing's suspension of proceedings, and should have no negative impact on Mr. Vlahos' speedy trial time calculation as Mr. Coombs was present at the first competency hearing. (Competency Hr'g One Tr. 1) (identifying Mr. Coombs as representative for the Defendant).

The matter appeared to proceed to trial until February 22, 2021, whereat Mr. Coombs filed a *Request for Evaluation Pursuant to W.S. § 7-11-303*. (R. vol. 1 at 192-193). The court that same day filed its *Order for Psychological Evaluation, Fitness to Proceed*, wherein it again suspended the proceedings against Mr. Vlahos. (R. vol. 1 at

194-197). Additionally, on that same day, Mr. Vlahos filed a *pro se* motion to fire Mr. Coombs. (R. vol. 1 at 198-199).

Again, Mr. Vlahos' attempt to fire his counsel was denied by the court on February 25, 2021. (R. vol. 1 at 200). Much like the issue with Mr. Vlahos' attempt to fire Mr. Damsky, his attempt to fire Mr. Coombs also arose during the suspension of the proceedings due to the court's order for a competency evaluation, and should have no negative impact on Mr. Vlahos' speedy trial time calculation as the proceedings were suspended for a mental evaluation of Mr. Vlahos. (R. vol. 1 at 194-197).

On July 2, 2021, Mr. Coombs filed his *Motion to Relieve the Public Defender and Request for Setting*. (R. vol. 1 at 258-259). The court *sua sponte* reached out to counsel via e-mail on July 7, 2021. (R. vol. 2 at 356-357). In the court's e-mail, it communicated concerns regarding: (1) Mr. Coombs' motion to withdraw; (2) not yet addressing counsel's submissions on defendant's fitness to proceed; (3) the court's options for the Vlahos trial set on July 12, 2021; (4) the court's concerns if it were to allow another appointment of another lawyer; (5) and the concern of allowing Mr. Vlahos to proceed *pro se* when both counsel expressed concerns about his fitness to proceed. (R. vol. 2 at 356-357). Mr. Coombs responded to the court's e-mail that same morning and provided:

> Your Honor,
>
> 1. I am not in favor of a continuance of this trial. I believe Mr. Vlahos would consider that further evidence of a conspiracy to convict him as he did the last continuance.
> 2. My motion to withdraw was filed after consultation with Bar Counsel and I will need to address that with the Court. I do not believe the appointment

of another attorney is appropriate, he either needs to represent himself or have me.

3. I do not believe there are any issues with jury instructions.

4. I would like to begin the trial on Monday. I don't think the ruling on competency or the hearing on my withdrawing/*Faretta* hearing should take a long time. If we started at 8:15 hopefully we'd be ready to begin jury selection by 9:30 or 9:45.

(R. vol. 2 at 355).

The court then replied that same morning with: "So it shall be. We will go forward with trial on Monday. We will keep the 8:30 hearing for Friday on the calendar and try to address as much as possible." (R. vol. 2 at 355).

The court then held the hearing on the *Motion to Relieve the Public Defender* on July 9, 2021, where at the court conducted a *Faretta* hearing and examined Mr. Vlahos' desires. (Mot. to Relieve Public Defender Tr. 1-40). On that same day, the court provided via e-mail its *Order Granting Motion to Relieve the Public Defender*. (R. vol. 2 at 358). In that *Order* the court provided that during the hearing, in accordance with *Faretta v. California*, 422 U.S. 806 (1975), and Wyoming case law, (R. vol. 2 at 359 : ¶ 2), the Public Defender was relieved of representation of Mr. Vlahos. (R. vol. 2 at 360 : ¶ 5). Additionally, the court mentioned that it had "no cause to conclude [Mr. Vlahos] lacks competence to waive his right to counsel or that his waiver of counsel is anything but voluntary, knowing, and intelligent." (R. vol. 2 at 360 : ¶ 3).

f. Competency hearings.

Mr. Vlahos was subject to two inquiries into his competency, which twice suspended his speedy trial calculation under Rule 48 of W.R.Cr.P. W.R.Cr.P.

48(b)(3)(a). As provided above, Mr. Vlahos' first competency hearing came about after his *pro se* filing *Motion for a (sic) Evidentiary Hearing* as filed on May 22, 2020. (R. vol. 1 at 104-107). On May 27, 2020, the court provided an e-mail to counsel, wherein it provided the *pro se Motion* to each counsel, and indicated it was uncertain "whether this is a motion to suppress or a motion for an additional preliminary hearing." (R. vol. 1 at 108). The court in that e-mail questioned the counsel how they wished to proceed. (R. vol. 1 at 108). The State subsequently filed *State's Motion for Examination of Defendant and Suspension of Proceedings, and Response to Defendant's Pro Se Motion* on June 3, 2020. (R. vol. 1 at 109-114). On June 8, 2020, the court submitted its *Order for Psychological Evaluation, Fitness to Proceed*, which suspended all proceedings against Mr. Vlahos for the first time. (R. vol. 1 at115-118); (R. vol. 1 at 131-134) (correcting its *Order for Psychological Evaluation, Fitness to Proceed* on June 18, 2020).

On August 26, 2020, the August 7, 2020 *Forensic Evaluation – Fitness to Proceed* was filed with the district court. (Confidential File 135-145); (R. vol. 1 at 135-145). The court then filed a Notice of Setting on August 26, 2020, setting the matter for Competency Hearing on September 8, 2020. (R. vol. 1 at 146). At that hearing, the court quickly disposed of the issue of competency by simply confirming the defense was not seeking a second evaluation, then asking if the court was in a position to put Mr. Vlahos' matter back on track. (Competency Hr'g Tr. 2 : 16-21). The court then confirmed this with the State, which agreed that Mr. Vlahos' matter was ready to be put back on the trial stack, and although the recommendation was "unusual," the State had no objection. (Competency Hr'g Tr. 3 :1-3). The court then confirmed, "[t]hat's what I will do."

(Competency Hr'g Tr. 3 : 6) (indicating Mr. Vlahos' first competency suspension was lifted on September 8, 2020).

Mr. Vlahos' speedy trial clock was then resuscitated and progressed as indicated above until defense counsel, on February 22, 2021, filed its own *Request for Evaluation Pursuant to W.S. § 7-11-303*. (R. vol. 1 at 192-193). The court that same day filed its *Order for Psychological Evaluation, Fitness to Proceed*, wherein it again suspended the proceedings against Mr. Vlahos. (R. vol. 1 at 194-197) (suspending Mr. Vlahos' speedy trial clock on February 22, 2021).

On May 4, 2021, the April 23, 2021 *Forensic Evaluation –Fitness to Proceed* was filed with the district court. (Confidential File 217-230); (R. vol. 1 at 217-230). The court then filed a Notice of Setting on April 29, 2021, which set the second Competency Hearing for May 13, 2021. (R. vol. 1 at 216).

The second Competency Hearing was much more belabored than the first, but the conclusion of Forensic Evaluator from the State Hospital was the same as the previous conclusion, Mr. Vlahos was competent in the evaluator's opinion. (Competency Hr'g Tr. 1-33). The court then gave the parties the opportunity to submit responses to the Competency Hearing, and Mr. Coombs, submitted his *Response to Competency Hearing* on May 17, 2021. (R. vol. 1 at 241-242). Therein Mr. Coombs wrote: "the attorney for the Defendant will neither accept the conclusions of the examiner's evaluation nor request another evaluation but will leave the decision as to the competency of the Defendant to the discretion of the Court." (R. vol. 1 at 241).

The court then set Mr. Vlahos' matter for trial through its June 14, 2021, scheduling letter, and indicated in its July 9, 2021, *Order*, that Mr. Vlahos' trial was to occur on July 12, 2021, "[a]t this point, he shall appear *pro se* for trial on Monday, July 12, 2021[]". (R. vol. 2 at 360 : ¶ 4).

ARGUMENT I

WHETHER MR. VLAHOS' RIGHT TO A SPEEDY TRIAL PURSUANT TO W.R.CR.P. 48, AS WELL AS THE WYOMING AND UNITED STATES CONSTITUTIONS WAS VIOLATED WHEN HIS TRIAL COMMENCED 605 DAYS AFTER HE WAS ARRAIGNED AND 633 DAYS AFTER HIS ARREST?

A. Introduction.

From the perspective of a Rule 48 calculation, most, if not all, of the six hundred and five (605) days of delays are attributable to the district court and the management of its docket. As such, Mr. Vlahos' right to a speedy trial pursuant to W.R.Cr.P. 48 and the Wyoming and United States Constitutions was violated and all charges should be dismissed. From the perspective of a Constitutional speedy trial calculation, the time elapsed from Mr. Vlahos' arrest, October 19, 2019, to his conviction results in the passage of six hundred and thirty-three (633) days inclusive of the conviction date of July 13, 2021.

B. Standard of Review.

Claims of both statutory and constitutional speedy trial violations are reviewed *de novo*. *Mathewson v. State*, 2019 WY 36, ¶ 47,438 P.3d 189, 207 (Wyo. 2019). "The State has the burden to prove delays in bringing the defendant to trial are reasonable and necessary." *Id*. at ¶ 57, 438 P.3d at 209.

> We examine de novo the constitutional questions of whether a defendant has been denied a speedy trial in violation of the Sixth Amendment to the United States Constitution and Art. 1, § 10 of the Wyoming Constitution. *Humphrey v. State*, 2008 WY 7. ¶ 18, 185 P.3d 1236, 1243 (Wyo. 2008).

Crebs v. State, 2020 WY 16, ¶ 13, 474 P.3d 1136, 1142 (Wyo. 2020).

C. Argument.

a. W.R.Cr.P. 48 (b)(2)

Wyoming Rule of Criminal Procedure 48(b)(1) provides that it is "the responsibility of the court, counsel and the defendant to ensure the defendant is timely tried." In this regard, "[a] criminal charge shall be brought to trial within 180 days following arraignment unless continued as provided in this rule." W.R.Cr.P. 48 (b)(2). Criminal cases "not tried or continued as provided in this rule shall be dismissed 180 days after arraignment." W.R.Cr.P. 48(5). Wyoming Rules of Criminal Procedure 48 (b)(3), (b)(4) and (b)(6) all outline circumstances where the 180 day speedy–trial clock may be extended. Compliance with W.R.Cr.P. 48 is mandatory. *Castellanos v. State*, 2016 WY 11, ¶ 49, 366 P.3d 1279, 1294 (Wyo. 2016) (citations omitted).

Rule 48 states that "[a] criminal charge shall be brought to trial within 180 days following arraignment unless continued as provided in this rule." W.R.Cr.P. 48(b)(2). Speedy trial rights under W.R.Cr.P. 48 are analyzed by calculating the 180-day requirement, beginning with arraignment and ending with commencement of trial. *Mathewson v. State*, 2019 WY 36, ¶48, 438 P.3d 189, 207 (Wyo. 2019) (citations omitted). "Calculating the 180-day provision of Rule 48 is a simple matter of arithmetic, beginning with arraignment and ending with commencement of trial, excluding any time periods specified in the rule." *Ortiz v. State*, 2014 WY 60, ¶ 33, 326 P3d 883, 892 (Wyo. 2014) (citing *Berry v. State*, 2004 WY 81, ¶ 21, 93 P3d 222, 228 (Wyo. 2004)). The following time periods, as permitted under the Rule are excluded from the calculation:

(A) All proceedings related to the mental illness of deficiency of the defendant;
(B) Proceedings on another charge;
(C) The time between the dismissal and the refilling of the same charge; and
(D) Delay occasioned by defendant's change of counsel or application therefor.

W.R.Cr.P. 48(b)(3). In addition, the "[f]iling [of] a signed waiver of speedy trial by the defendant effectively stops the clock pursuant to W.R.Cr.P." *Ortiz v. State*, 2014 WY 60, ¶ 35, 326 P.3d 883, 892 (Wyo. 2014) (citation omitted). Rule 48 also permits continuances exceeding 180 days from the date of arraignment as follows:

(A) On motion of defendant; or
(B) On motion of the attorney for the state or the court if:
    (i) The defendant expressly consents;
    (ii) The state's evidence is unavailable and the prosecution has exercised due diligence; or
    (iii) Required in the due administration of justice and the defendant will not substantially prejudiced; and
(C) If a continuance is proposed by the state or the court, the defendant shall be notified. If the defendant objects, the defendant must show in writing how the delay may prejudice the defense.

W.R.Cr.P. 48(B)(4). "Any criminal case not tried or continued as provided in this rule shall be dismissed 180 days after arraignment." W.R.Cr.P. 48(B)(5).

i. Timeline W.R.Cr.P. 48.

On November 13, 2019, Mr. Vlahos filed his demand for speedy trial. (R. vol. 1 at 32). Mr. Vlahos' speedy trial demand was pursuant to Rule 48 of the W.R.Cr.P., Article 1, Section 10 of the Wyoming Constitution, and Amendment VI of the United States Constitution. *Id*. The record contains no signed written waiver from Mr. Vlahos as to his speedy trial right. (R. vols. 1, 2, 3).

Mr. Vlahos was arraigned on November 15, 2019 (R. vol. 1 at 31); (Nov. 15, 2019, Arraignment Tr. 1-8, 29-30). The first day of his trial began on July 12, 2021. This is 605 days between the time of the arraignment and trial, which does not include the date of the trial in the numeric calculation, nor the calculation for the exceptions, which will be discussed and totaled below.

Initially, Mr. Vlahos' trial was set by the district court for a jury trial on April 6, 2020 (Stacked). (R. vol. 1 at 45 : ¶ 5). This trial date is 143 days from his date of arraignment and does not include the end date in its calculation. *Sua sponte*, the district court filed a notice of continuance on April 8, 2020, and reset the matter for trial on June 1, 2020 (Stacked). (R. vol. 1 at 103). This trial date is 199 days from Mr. Vlahos' arraignment, and rests outside the 180 day speedy trial boundary of Rule 48. W.R.Cr.P. 48(5).

Mr. Vlahos never waived his W.R.Cr.P. Rule 48 right to speedy trial. (R. vols. 1, 2, 3). However, no objection was filed pursuant to Rule 48 (4)(c) of the W.R.Cr.P. on behalf of Mr. Vlahos by his counsel, nor was a motion to dismiss Mr. Vlahos' case for lack of speedy trial pursuant Rule 48 presented to the court after his 180 day deadline tolled. (R. vols.1, 2, 3).

Shortly thereafter, on May 22, 2020, Mr. Vlahos filed a *pro se* motion requesting an evidentiary type hearing. (R. vol. 1 at 104-107). The district court, *sua sponte,* informed counsel on May 27, 2020, of its receipt of Mr. Vlahos' motion, how the court was uncertain whether it was "a motion to suppress or a motion for an additional

preliminary hearing," and the court closed by writing, "[p]lease how do you wish us to proceed?" (R. vol. 1 at 108). This is 194 days between arraignment and trial.

On June 3, 2020, the State took it upon itself to file its own request for a competency examination of the Mr. Vlahos and a suspension of the proceedings. (R. vol. 1 at 109-114). This State action occurred 201 days between arraignment and trial, which does not include the end date in the calculation.

On June 8, 2020, the district court provided its *Order for Psychological Evaluation, Fitness to Proceed*, wherein it suspended all proceedings against Mr. Vlahos pending a determination as to his fitness to proceed, pursuant to Wyoming Statute section 7-11-303(a). (R. vol. 1 at 115-118). This court ordered suspension occurred 206 days between arraignment and Mr. Vlahos' trial, and does not include the date of June 8, 2020 in the calculation.

However, the district court later provided, on June 18, 2020, its *Corrected Order for Psychological Evaluation, Fitness to Proceed* wherein it provided distinct "x" markings in regard to the court's choice that the examination was to be on an "Outpatient" basis; the court also provided "x" marks for the appropriate distribution by the clerk of court to the following: "Court, Prosecuting Attorney, Defendant/counsel, Designated Examiner/Facility, and Entity responsible for transport (if an inpatient exam)". These items were initially left blank and incomplete in the original *Order*. Additionally, the court struck extraneous language regarding hearing for paragraph seven, which it initially just penned through in the original *Order*. *Compare* (R. vol. 1 at 115-118) *with* (R. vol. 1 at 131-134). This corrected *Order* is 216 days between Mr. Vlahos'

arraignment and trial date and does not include the date of June 18, 2020 in the calculation. Whether the first *Order* or the *Corrected Order* suspended the proceedings, is unclear from the record. But giving the benefit of doubt to the court in this matter, appellant will utilize the first *Order* as the suspension date for purposes of calculation of Rule 48's speedy trial timeline. (R. vol. 1 at 115-118) (providing 206 days passed since Mr. Vlahos' arraignment until the court suspended proceedings).

The suspension was lifted on September 8, 2020 at the first competency hearing when the court placed Mr. Vlahos' matter back on the trial stack. (Competency Hr'g Tr. 2-3 : 20-25, 1-6). From June 8, 2020, up and until September 8, 2020, 92 days were suspended toward the speedy trial calculation pursuant to Rules 48 exception. W.R.Cr.P 48(3)(a).

From September 8, 2020, to the second competency suspension on February 22, 2021, the court provided a *Notice of Setting* on September 10, 2020, which set both Criminal Case No. 9030/9136 for a Pre Trial on January 7, 2021, and the jury trial for February 8, 2021. (R. vol.1 at 148). At that Pre Trial Hearing, discussion was had in regard to the matter of Criminal Case No. 9030 being the matter called for February 8, 2021. (Pretrial Conf. Jan. 7, 2021 Tr. 2-3). The court further indicated its awareness of newly issued Corona Virus rules and how that has affected getting enough jurors empaneled for circuit court cases but not district court cases, as well as the posture that "neither of these cases is at the top of the stack yet. . . ." (Pretrial Conference January 7, 2021 Tr. 7, 11 : 16-17). Nothing else within the record appears to consider or address

any potential delays or re-settings due to the COVID 19 pandemic, and the court appears to continuously proceed with its settings on its docket. (R. vols. 1, 2, 3).

The record provides that the court assigned its scheduled trial date for Mr. Vlahos' other case, 9136, for February 8, 2021, as third stacked, on January 25, 2021, which occurred after the January 7, 2021, Pretrial Conference, where the court indicated that case 9030 would proceed on that date. (Pretrial Conference Jan. 7, 2021, Tr. 2-3: 18-25, 1-12). The handwritten correction is inconsistent with the record from the January 7, 2021, Pretrial Hearing, and is also inconsistent with the State's subsequent subpoenas which indicate Mr. Vlahos' Criminal Case No. 9030, was the matter prepared for in anticipating that the first and second stacked cases resolved on February 8, 2021. (R. vol. 1 at 175, 177, 179, 181, 183). This is 451 days between arraignment and trial not inclusive of the February 8, 2021. Taking away Rule 48's exception for the 92-day suspension results in 359 days between Mr. Vlahos's arraignment and this new trial date.

On February 22, 2021, Mr. Vlahos' counsel submitted his *Request for Evaluation Pursuant to W.S. § 7-11-303*, and on that same day the court entered its *Order for Psychological Evaluation, Fitness to Proceed*, once again suspending the proceedings. (R. vol. at 192 -197). This is 465 days between arraignment and the court's suspension of the proceedings not inclusive of the February 22, 2021 date. Taking away Rule 48's exception for the 92 days regarding Mr. Vlahos' first competency hearing, the result is 373 days between Mr. Vlahos's arraignment and his second competency suspension.

During the second suspension from February 22, 2021, through May 13, 2021, 80 days passed, which does not include the end date of May 13, 2021. Totaling the numbers

from Mr. Vlahos' arraignment and his second competency hearing, 545 days passed which does not include May 13, 2021. Subtracting the 80 days for Rule 48's exception, the total amounts for 465 days. Additionally taking away the first 92 day suspension collectively results in 376 days.

During that second competency evaluation's suspension, the court set Mr. Vlahos' second competency hearing for May 13, 2021. At that competency hearing, the court placed the matter back on the trial stack as second stacked to the *Mills* case on June 14, 2021, through June 16, 2021. As provided above, defense counsel was also at the competency hearing informed the court of the need for a continuance, which the court granted, but Mr. Vlahos' matter was still stacked against Mr. Mills' case on May 14, 2021. *Compare* (R. vol. 1 239) (indicating as of May 14, 2021, *Mills* June 14th jury trial was still first in line for trial over Mr. Vlahos) *with* (Competency Hr'g Two May 13, 2021 Tr.) *with* (R. vol. 1 at 236) (providing Order continuing Vlahos jury trial on May 13, 2021) *with* (R. vol. 1 at 234-235) (requesting continuance on May 12, 2021). Suffice to say, the speedy trial clock was innervated again on May 13, 2021 while the court continued to stack Mr. Vlahos' trial in inferior positions for its own docketing purposes. However, a continuance was still granted for the defense. Accounting at this point in the matter for the second stacked trial setting of June 14, 2021, equates to 577 days between arraignment and the courts new trial date. Taking away the suspended times of 92 days and 80 days, equates to the passage of 405 days between arraignment and this potential second stacked trial date.

On June 14, 2021, the court then provided its last scheduling order, which set Mr. Vlahos' matter for July 12, 2021. (R. vol. 1 at 246). Mr. Vlahos proceeded *pro se* at trial on July 12, 2021, which is 605 days from his date of arraignment and does not include the end date in its calculation. Taking into account the two suspensions for competency, 172 days collectively (92+80), Mr. Vlahos' trial occurred 433 days from the date of his arraignment on November 15, 2019, for purposes of Rule 48's calculation. Faulting the court for its repeated stacking, would total to the final number of 433 days. However, if the defendant's continuance is held against his favor, the final number would revert back to 405 days between arraignment and Mr. Vlahos' trial for purposes of a Rule 48's calculation. W.R.Cr.P. 48 (b)(3)(A) and (4)(A).

ii. **Mr. Vlahos' Arguments of Prejudice.**

Mr. Vlahos did attempt to argue that he was prejudiced because the ongoing trial continuances when he filed his *pro se* continuance where he indicated the need for:

> proper time [to] prepare for this case[.] [P]etitioner feels that [adequate] time is needed [to prepare] for this trial[.] I would like this court [to] consider this motion as it would unfairly put a burden on petitioner with out [the ability to] investigate and communicate with [witnesses] and properly prepare for this trial[]

(R. vol. 2 at 319).

Additionally, during the first day of trial, Mr. Vlahos mentioned that he "was trying to call some witnesses and I couldn't go to Walmart, because of my trespassing, so there's two witnesses that no longer work there." (Trial Day 1 Tr. 59 : 14-17). However, the court noted that Mr. Vlahos was required to have submitted his witness list in the pretrial statement, and if they were not listed, absent some showing of good cause, the

court would not allow the witnesses to be called. (Trial Day 1 Tr. 59-60 : 18-25, 1-6). The court subsequently went back to its records and reviewed the pretrial filings and found that the defense listed no witnesses and no exhibits. (Trial Day 1 Tr. 102 : 14-19). The court noted that it would have allowed supplementation at "virtually any reasonable point in time because of the Corona Virus restrictions and many of the other problems that – that that caused." (Trial Day 1 Tr. 102-103 : 25, 1-3). The court concluded that "Friday evening before the Monday of trial and Monday morning, that's unreasonable." (Trial Day 1 Tr. 103 : 12-14). In response, Mr. Vlahos provided that:

> [T]he fact that my attorney waited so late to file to release himself as my counsel did not give me enough time to prepare. I didn't prepare for this case. And I gave and turned over all this evidence to the public defenders from Andrew Johnson, Mitch Damsky had it and, so, they could have or, I don't know, I was just relying on them to do their jobs properly, and here I am the – these are the exact things that they've had in their possession the whole time.

(Trial Day 1 Tr. 104 : 14-25). Mr. Vlahos then argued that he was "losing an attorney that proves the – to present actual evidence that has dates and times on the bottom of these receipts." (Trial Day 1 Tr. 105-106 : 25, 1-2). Mr. Vlahos also notes that "last year. . . back in December and January and February, [I] even wrote . . . . letters and a motion to ask Mr. Coombs to withdraw . . . and they completely refused. They – the time limit that they gave me should not be -- I should not be the one being punished for it." (Trial Day 1 Tr. 106-107 : 20-25, 1-3). Mr. Vlahos argued that he was put at a disadvantage due to Mr. Coombs' withdrawing as counsel, and that Mr. Coombs "should have never told the secretaries not to file those." (Trial Day 1 Tr. 110 : 6-10).

After objection from the State on the grounds of relevance, not recognizing the witness as part of the investigation as to the witnesses listed by Mr. Vlahos in his *pro se* filings, the court walked through Mr. Vlahos' witnesses in open court. (Trial Day 1 Tr. 110-116). The court orally found that none of the reasons put forward by Mr. Vlahos constituted good cause, or were relevant in the court's view. (Trial Day 1 Tr. 228 : 4-8).

iii. W.R.Cr.P. Rule 48 Conclusion.

Giving the court all the benefits of the calculation for the Rule 48 speedy trial clock of 180 days, the postponement of Mr. Vlahos' matter is 405 days. Taking away the reasonable 180 days to bring the matter to trial, the court still postponed Mr. Vlahos' trial at the very least by an additional 225 days over the reasonable 180 days it had available to it to discharge Mr. Vlahos' matter efficiently and in line with Rule 48. W.R.Cr.P. 48(b)(1), (2) and (5) (providing it is a responsibility of the court and counsel to timely try matters within 180 days unless continued as provided, and any criminal case not tried or continued as provided in this rule *shall be dismissed 180 days after arraignment*) (emphasis added).

Nonetheless, it is the contention of Mr. Vlahos that the court delayed the matter in an even greater way through its repeated stacking of Mr. Vlahos' matter, and even though a continuance was granted for the June 14, 2021. The trial stack on the *Mills* case is clear within the record, and there is nothing within the record to insulate the conclusion that the *Mills* case proceeded as normally, and Mr. Vlahos' case would have wallowed for the additional twenty-eight days leading up to July 12, 2021.

It is clear Mr. Vlahos proceeded *pro se* at trial on July 12, 2021, which is 605 days from his date of arraignment and does not include the end date in its calculation. Taking into account the two suspensions for competency, 172 days collectively (92+80), Mr. Vlahos' trial occurred 433 days from the date of his arraignment on November 15, 2019, for purposes of Rule 48's calculation. As Mr. Vlahos entered his demand for a speedy trial, and never waived this right, the fault falls with the court for its repeated stacking. In total, 605 days minus 172 for competency hearings equals 433 days. Taking away the 180 day allowance results in Mr. Vlahos' case allowing for an additional 253 days over the reasonable 180 days the court had available to it to discharge Mr. Vlahos' matter efficiently and in line Rule 48. W.R.Cr.P. 48(b)(1), (2) and (5) (providing it is a responsibility of the court, counsel and defendant to timely try matters within 180 days unless continued as provided, and any criminal case not tried or continued as provided in this rule *shall be dismissed 180 days after arraignment*) (emphasis added).

b. Constitutional Right to Speedy Trial.

Additionally, even if Mr. Vlahos' trial took place properly under Rule 48 and its provisions for continuances, "it is possible for a defendant to be tried within the time limits of Rule 48 and still suffer a constitutional deprivation due to delay which seriously prejudices his defense. *Jennings v. State*, 4 P.3d 915, 921 (Wyo. 2000).

The Sixth Amendment of the United States Constitution, and Article 1, Section 10 of the Wyoming Constitution, and the statutory rule also guarantee a criminal defendant a right to a speedy trial. U.S. Const. amend. VI; Wyo. Const. art. 1, § 10, W.R.Cr.P. 48. The right to a prompt inquiry into criminal charges is fundamental and the duty of the

charging authority is to provide a prompt trial. *Harvey v. State*, 774 P.2d 87, 92 (Wyo. 1989) (citations omitted). It is axiomatic that a defendant has not duty to bring himself to trial. *Id*. at 96; *Berry v. State*, 2004 WY 81, ¶ 31, 93 P.3d 222, 231 (Wyo. 2004). And it is not absolutely necessary that a defendant assert his right to speedy trial. *Id*. at ¶ 45 (citation omitted). However, whether one does so is a relevant and proper factor for the Court to consider in evaluating a speedy trial claim. *Id*.

Unlike the analysis under Rule 48 of W.R.Cr.P., in the contextual analysis regarding a constitutional speedy trial issue, "the speedy trial clock begins to run at the time of arrest, information, or indictment, whoever occurs first." *Mathewson v. State*, 2019 WY 36, ¶47, 438 P.3d 189, 207 (Wyo. 2019) (quoting *Webb v. State*, 2017 WY 108, ¶ 15, 401 P.3d 914, 921 (Wyo. 2017)). The constitutional speedy trial clock "continues until the defendant is convicted, acquitted or a formal entry is made on the record of his case that he is no longer under indictment." *Id*.

So too, the Sixth Amendment of the United States Constitution, and Article 1, Section 10 of the Wyoming Constitution, and the criminal rule also guarantee a criminal defendant a right to a speedy trial. U.S. Const. amend. VI; Wyo. Const. art. 1, § 10, W.R.Cr.P. 48. The right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial. *Harvey v. State*, 774 P.2d 87, 92 (Wyo. 1989) (citations omitted). It is axiomatic that a defendant has no duty to bring himself to trial. *Id*. at 96; *Berry v. State*, 2004 WY 81, ¶ 31, 93 P.3d 222, 231 (Wyo. 2004). And it is not absolutely necessary that a defendant assert his right to speedy trial.

Berry, ¶ 45, (citation omitted). However, whether one does so is a relevant and proper factor for the Court to consider in evaluating a speedy trial claim. *Id*.

Wyoming has adopted the four-part test of *Baker v. Wingo*, 407 U.S. 514, 530-33, 92 S. Ct. 2182, 2192-93, 33 L.Ed.2d 101 (1972) to determine whether a defendant's constitutional right to a speedy trial has been violated which includes: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. *Id*. (*citing Ortiz v. State*, 2014 WY 60, ¶ 39-40, 326 P.3d 883, 893 (Wyo. 2014)).

The four-part analysis is intended 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." *Id*. In the constitutional context "no single factor is dispositive" and instead they should be considered "together and balanced in relation to all relevant circumstances." *Id.* "Constitutional speedy trial violations require reversal of a criminal defendant's conviction and dismissal of the charges." *Berry*, ¶ 50.

i. Length of Delay.

No precise length of delay automatically constitutes a violation of the right to a speedy trial. *Id*., ¶32. "The right to a speedy trial is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of the prosecution." *Boucher v. State*, 2011 WY 2, 245 P.3d 342, 348 (Wyo. 2011)(quoting *United States v. Marion*, 404 U.S. 307, 313, 92 S.Ct. 455, 459, 30 L.Ed.2d 468 (1971)). Mr. Vlahos takes issue with the length of the delay concerning his arrest date for the constitutional analysis regarding his speedy trial complaint. "[T]he

metaphorical clock for speedy trial purposes begins to tick at the time of arrest, information, or indictment, whichever occurs first." *Id.*, ¶ 8. Between Mr. Vlahos' physical arrest on October 19, 2019, and his conviction on July 14, 2021, six hundred and thirty-four (634) days elapsed.

ii. Reason for Delay.

The next factor requires the Court to determine the reasons for the delays and which party was responsible for the delays in bringing the case to trial. *Id.*, ¶13. This Court has stated:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as missing witnesses, should serve to justify appropriate delay.

Id.

Here, other than the potential delay caused by Mr. Vlahos' counsel getting the June 13, 2021 continuance for Mr. Vlahos' "Stacked #2" trial date, the delays were caused by courthouse operating procedure. (Competency Hr'g Two May 13, 2021, Tr. 30-31 : 24-25, 1) (indicating June 14, 2021, Vlahos' trial was stacked behind the *Mills* case, that "may not go"). It warrants noting that Wyoming Supreme Court orders regarding operating in light of the COVID-19 pandemic were mentioned by the district court in passing when the court indicated its awareness of newly issued Corona Virus rules and how that has affected getting enough jurors empaneled for circuit court cases

but not district court cases. (Pretrial Conf. Jan. 7, 2021 Tr. 7, 11 : 16-17). And the district court also mentioned the Corona Virus on the first day of Mr. Vlahos' trial when it noted that it would have allowed supplementation at "virtually any reasonable point in time because of the Corona Virus restrictions and many of the other problems that – that that caused." (Trial Day 1 Tr. 102-103 : 25, 1-3). However, nothing else within the record appears to consider or address any potential delays or re-settings due to the COVID-19 pandemic, and the court continued to proceed with its settings, unabated. (R. vols. 1, 2, 3); (R. vol. 1 at 45-46); (R. vol. 1 at 130); (R. vol. 1 at 148); (R. vol. 1 at 174); (R. vol. 1 at 236); (R. vol. 1 at 246).

Despite the pandemic, the Wyoming Supreme Court still said that proceedings should be held to protect criminal defendant's constitutional rights. Although the COVID-19 pandemic was an extraordinary circumstance not attributable to either the State or Mr. Vlahos, it is therefore more of a neutral reason and should not be weighed as heavily, if at all because it appears to have no bearing on Mr. Vlahos' matter. That is because Mr. Vlahos' trial date responsibility ultimately was the responsibility of the government because Mr. Vlahos could not bring himself to trial no matter how much he advocated for it and stressed the importance of it to him. So too, the record is replete with the district court's stacking of Mr. Vlahos' multiple trials in inferior positions without any explanation directly relating to any extraordinary circumstances attributable to COVID-19 other than with off-hand comments provided above.

As for Mr. Vlahos' two major counsel replacements each occurred in a window of time where the first suspension was due to the State first requesting a competency

evaluation due to Mr. Vlahos' *pro se* filing, and the second came from Mr. Vlahos' own defense counsel. Each instance, the suspensions for mental health evaluations were already active when Mr. Vlahos attempted to fire his second counsel, and his third counsel. The first substation of counsel does not appear to have prolonged any proceedings leading up to the first court ordered continuance of the jury trial. As such, no reason for delay should be attributed to Mr. Vlahos' attempt to relieve himself of counsel in either iteration.

Additionally, even if one hundred and seventy-two (172) days are deducted for the time spent while the matter was stayed for the two competency evaluations requested by the State, and the then fired counsel, four hundred and sixty-two (462) days elapsed. By either calculation, the trial date exceeded a reasonable about of time to warrant further consideration of the *Barker* factors.

Finally, Mr. Vlahos' own *pro se* motion to continue was denied outright by the court as provided above on the first day of trial on July 13, 2021, when the court addressed Mr. Vlahos directly about his "phone book" of filings. As there was no continuance, no delay occurred which would be attributable to Mr. Vlahos.

iii. Assertion of Right.

Mr. Vlahos maintains his right to a speedy trial, and it is of paramount importance to him. The multitude of delays, and what appears to be an abuse of the competency proceedings where a very competent, although somewhat difficult client, repeatedly expressed his "desire to go to trial" to the forensic examiner. (Competency Hr'g Two May 13, 2021 Tr. 13: 16-23); (*Id.* 19 :19-22); (*Id.* 24 : 21-22); (*Id.* 25 : 3-7) (providing

Defendant stated previously on July 24, 2020, his desire to go to trial and continued frustration he perceived over delays in the court proceedings). As provided above, Mr. Vlahos filed his speedy trial demand on November 12, 2019. (R. vol. 1 at 31 : ¶ I). Mr. Vlahos reiterated his desire to go to trial throughout the life of this case, and nowhere in the record does he appear to have waived this right. (R. vols. 1, 2, 3).

iv. Prejudice.

Mr. Vlahos argues that he was prejudiced because the ongoing trial continuances were outside of his control, and the first competency evaluation was "a waste of time" which eviscerated 92 days off of the 634 days the matter wallowed on the courts' docket. (Confidential File 142-143) (evaluating first competency request). Mr. Vlahos was clearly dealing with other legal matters that also needed his attention, but he felt he and counsel were not on the same page and he was requesting different counsel. (Confidential File 143-144). During the second evaluation, Mr. Vlahos was "upset that the additional evaluation . . . was ordered." (Confidential File 203). And went on to point out that he felt "the present evaluation was [a] 'pervasive waste of time because [he strongly believes he is] competent.'" (Confidential File 211). Again, under the second evaluation, Mr. Vlahos' matter had another evisceration of 80 days taken away from the 634 days the matter wallowed on the court's docket. He again indicated that he "wanted to go to trial". (Confidential File 211). And continued on to state, "on several occasions he was frustrated because of the following: 'I want to take my case to trial; Walmart is wrong as they did not follow their guidelines; I am not taking a plea because I am being wrongly accused.'" (Confidential File 212 : ¶ 1). Mr. Vlahos also stated to his

Evaluator: "I know this new attorney just wants me to take a plea and that is what [blanks] me off, I want to go to trial." (Confidential File 211: ¶ 2).

> [T]he kinds of prejudice produced by long delays may be substantial even if the defendant's ability to defend himself is not impaired. The defendant's social relations, freedom of movement, and anxiety over public accusation are seriously affected when the delay is prolonged. These effects are precisely the kinds of prejudice that would be difficult for a defendant to demonstrate if he had the burden of proving prejudice

Caton v. State, 709 P.2d 1260, 1266 (Wyo. 1985).

The United State Supreme Court has said, lengthy delay

> may seriously interfere with the defendant's liberty, whether he is free on bail or not, and ... may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty.

Berry, ¶ 46 (quoting *Moore v. Arizona*, 414 U.S. 25, 26-27, 94 S.Ct. 188 (1973)).

Here, Mr. Vlahos suffered anxiety as a result of this case as it was a continuation of the hassles he relayed to his evaluator twice over. Additionally, Mr. Vlahos was out on bond, and had restrictions to his travel, while he also faced prosecution for other alleged crimes. It is clear from the record that Mr. Vlahos' fiancé relayed that Mr. Vlahos was the sole provider for their home, who provided for their ten-month-old son, disabled uncle and herself. (R. vol. 2 at 384-385). Additionally, they were expecting a second child, *Id*., which would have contributed to any of the pre-trial anxiety Mr. Vlahos

suffered as a result of the odyssey-like approach to his trial and conviction 634 days after his initial arrest.

In Mr. Vlahos' case, the *Barker* facts should conclude that a speedy trial violation occurred in this case. Constitutional speedy trial violations require reversal of a criminal defendant's conviction and dismissal of the charges. *Rodiak v. State*, 2002 WY 137, ¶10, 55 P.3d 1, 3 (Wyo. 2002).

ARGUMENT II

WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY ALLOWING THE TRIAL TO PROCEED AFTER IT IDENTIFIED CLEAR JUROR MISCONDUCT?

The jury, passing on the prisoner's life, May in the sworn twelve have a thief or two Guiltier than him they try.[1]

A. Introduction.

Trial by jury is a cornerstone of the American judicial system where in the right to trial by a jury is one that is guaranteed by federal and state constitutions, statues, and court rules. 47 Am. Jur. 2d, Jury §§ 7-11. Moreover, a citizen's right to a jury trial means the right to a trial by a fair and impartial jury. United States Constitution, Amendment 6; Wyoming Constitution, art. 1, § 10. The constitutional right to due process of law guarantees a criminal defendant the right to an impartial jury. *Miller v. State,* 904 P.2d 344, 352 (Wyo.1995). "An impartial jury consists of those jurors who will conscientiously apply the law and find the facts." *Id.,* citing *Wainwright v. Witt,* 469 U.S. 412, 423, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). *See also, Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982). But specifically, when one or more of those juror members acts improperly and in such a manner as to impair their impartiality, the right to a fair trial is put into question, and the Rubicon protecting a party's right to fair trial, once crossed, deserves adequate review from the courts for the improper actions that create a crises. *Eaton v. State*, 2008 WY 97, ¶¶ 85-91, 192 P.3d 36, 75-76 (Wyo. 2008). As is apparent from this case, at least one juror stepped outside of

[1] William. Shakespeare, Measure for Measure, act 2, sc. 1.

the court's clear directions and investigated facts and evidence outside of court's oversight.

The record reflects the jurors in Mr. Vlahos' trial were presented clear admonishment by the court to refrain from conducting one's own investigation:

> Fourth, you must confine yourself to the evidence presented in court. Do not conduct your own investigation. This means that during the trial you must not conduct any independent research about this case, the matters in the case, or the individuals or other entities involved in the case. In other words, *you shall not* . . . search the internet via any search engine or website, or use any other electronic tools to obtain information about this case or to help you decide the case. You must not consider information you or other jurors may have received outside of the trial room any source, including but not limited to radio, television, newspaper, internet or third parties. Not following these instructions may make a new trial necessary.

(R. vol. 2 at 331-332 : ¶¶ 6, 1).

Additionally, the jurors were presented in the same instruction that they, "must accept and follow the law as instructed, even though [they] may disagree with it." (*Id*. at 332 : ¶ 5). Jury instruction number four also clearly delineated that the jurors had a "duty to follow the law as stated in these instructions. . . ." (R. vol. 2 at 336 : ¶ 1). The court additionally read these instructions to the sworn jury panel on the first day of trial. (Trial Day 1 July 12, 2021, Tr. 66-69).

However, it became apparent on day two of the trial that a juror (hereafter referred to as "Juror OH") disobeyed the jury instructions:

> [THE COURT] I'm required to ask if any of you have seen any type of publication or if you've seen any broadcasts or any social media postings pertaining to these – this trial, this ongoing case, anyplace; newspaper, television, radio, particularly the internet? If you have seen that, even by mistake, please raise your hand.

…

[Juror OH is identified]

THE COURT: All right. Very good. Then, ladies and gentlemen of the jury, I'm going to ask that you go back into the jury room.

[Juror OH] I'm going to ask you please remain. I have a few questions I need to ask of you.

…
Please, [Juror OH] tell us what you saw.

JUROR [OH]: Just the description of the receipts and that, just a description of what was going on a little bit. I didn't watch the whole thing. I mean, I didn't – it just popped up on my web thing. I'm usually on there looking for car parts and stuff like that to buy, and it just popped up.

THE COURT: And what was it?

JUROR [OH] : It was – it was on the – I think it was Gillette Classified, I think it was.

THE COURT: All right. Was it a broadcast or just a news blurb? What was it?

…
JUROR [OH] It was the defendant on there. He's just describing his receipts and that, just saying he was innocent all that, is what he was saying on that. I didn't -- it didn't bother me, I didn't watch the whole thing, I just --

THE COURT: How much of it did you watch?

JUROR [OH]: Probably a couple of minutes . . . .

(Trial Day Two July 14, 2021, Tr. 10-12).

The State, was given an opportunity to question the juror, where in the State was given the opportunity to rehabilitate the juror by asking if they could set the information aside and weigh only information presented in the courtroom. (Trial Day Two July 13,

2021, Tr. 12 : 16-25). The juror answered in the affirmative. (Trial Day Two July 13, 2021, Tr. 13 : 1). After providing Mr. Vlahos the opportunity to question the juror, which he denied, the court also questioned the juror as to the juror's ability to set aside the information watched, disregard it and decide the case solely on the facts seen and heard in the courtroom. (Trial Day Two July 13, 2021, Tr. 13 : 5-14). The juror again answered in the affirmative. (Trial Day Two July 13, 2021, Tr. 13 : 15).

During the court's following twenty-minute break, Juror OH was requested to remain in the courtroom. (Trial Day Two July 13, 2021, Tr. 41 : 13). The court then addressed Juror OH stating, "I forgot to mention to you . . . please don't discuss what you saw or refer to it in any way in the course of this matter. Can you give me that commitment?" (Trial Day Two July 13, 2021, Tr. 41-42 : 23-25, 1-2). Juror OH answered in the affirmative. (Trial Day Two July 13, 2021, Tr. 42 : 3).

The trial continued, and the court then announced the alternate juror after the close of the State's rebuttal. Juror OH was not listed as an alternate, but instead Juror KM was selected as the alternate. (Trial Day 2 July 13, 2019 Tr. 162: 2-8).

B. Standard of Review.

Deciding whether juror misconduct occurred and whether it affected the verdict are matters for the discretion of the trial court, and will not be reversed on appeal unless the court abused its discretion. 75B Am. Jur. 2d Trial § 1419 (West 2022); *U.S. v. Day*, 830 F.2d 1099, 23 Fed. R. Evid. Ser.1271 (10th Cir. 1987); *Gosney v. Fireman's Fund Insurance Company*, 3 Wash.App. 2d 828, 419P.3d 447 (Div. 1 2018).

> We have described the standard of an abuse of discretion as reaching the question of the reasonableness of the trial court's choice. Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria. It also means exercising sound judgment with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. In the absence of an abuse of discretion, we will not disturb the trial court's determination. The burden is on the defendant to establish such abuse.

Eaton v. State, 2008 WY 97, ¶ 92, 192 P.3d 36, 76 (Wyo. 2008) (citation omitted).

C. Argument.

The law is well settled, it is improper for a juror to have any out-of-court communications with witnesses, the court, parties, or counsel concerning a case. *Distad v. Cubin*, 633 P.2 167, 182 (Wyo. 1981). Nor can a juror make any attempt to obtain additional evidence other than what is presented in the courtroom. *Id*.

> There are many obvious reasons for not allowing juror to supplement the knowledge of the subject-matter of investigation obtained in court from the evidence produces, by pursuing personal and private investigation out of the presence of the court; during the trial….This would not only be irregular, but it would necessarily result in permitting the inquiry by jurors to go beyond the control of the court and beyond the established rules of evidence, and into irrelevant and immaterial matters.

Skinner v. State, 2001 WY 102, ¶12, 33 P.3d 758 (Wyo. 2001) (quoting *McCoy v. Clegg*, 36 Wyo. 473, 257 P. 484, 498 (1927)). And although defendants are not entitled to a "perfect trial", they are entitled to a fair trial. *Eaton*, ¶85. Wyoming has addressed juror misconduct previously in the midst of trial, before a post-verdict investigation under W.R.E. 606(b) occurs. *Id.*, ¶¶ 85-91 (replacing juror that investigated evidence outside of trial with alternate where other jurors expressed concern).

As *Eaton* provides, district courts have been given the capability to surmount crises that jurors bring back to the court through their improper investigations and evidence gathering missions by properly replace tainted jurors with alternates to ensure the defendant's right to a fair trial. *Id*.

Wyoming has also addressed juror misconduct in post-conviction hearings, specifically after a verdict, but before sentencing. *Peña v. State*, 2013 WY 4, ¶ 52, 294 P.3d 13, 24 (Wyo. 2013) (providing trial judge may have been able to salvage trial by replacing an affected juror with an alternate if information was sufficiently prejudicial). Although *Peña* is not directly on point, the matter in *Peña* is close enough to the circumstances regarding juror misconduct occurring during Mr. Vlahos' trial, that *Peña* provides guidance.

Peña is a felony larceny case regarding the taking of a pickup truck without the owner's permission. After the verdict was returned and accepted, but before sentencing, Mr. Peña moved for a new trial alleging that members of the venire and/or jury overheard conversations between the State's witnesses, and the information they were exposed to tainted and prejudiced them. Mr. Peña's motion was denied, and he appealed on his challenge to the ruling for a new trial and that the evidence was insufficient. In *Peña* the district court did not find explicitly whether the conversations took place as claimed by Mr. Peña, or whether they did not as suggested by the State. This Court then went on to discuss the following:

> A review of federal precedent reveals a clear majority rule as to waiver of the right to a new trial in cases of juror misconduct…. *Requiring a litigant who knows of an impropriety related to the jury to bring it to the trial*

> *court's attention assures that the trial judge has a chance to determine what has occurred, assess its impact, and perhaps replace a juror with an alternate, thus avoiding a costly mistrial.* Any other rule might "allow defendants to sandbag the court by remaining silent and gambling on a favorable verdict, knowing that if the verdict went against them, they could always obtain a new trial by later raising the issue of juror misconduct." *United States v. Costa,* 890 F.2d 480, 482 (1st Cir.1989) (citation omitted).
>
> [*Pena* was not] a case of juror misconduct, but rather a question of whether jurors or potential jurors may have been exposed to information which could have improperly influenced them. *There is no reason to apply a different rule than that employed in juror misconduct cases. If the impropriety becomes known to a litigant or to his attorney during trial, the trial court should have an opportunity to determine what has occurred and to address it appropriately.* We therefore hold that if a defendant or his counsel knows of potential impropriety in connection with the jury during trial, and fails to object before the return of the verdict, he waives any right to a new trial based on that impropriety.
>
> …
>
> *If the trial judge learned of the alleged event after the jury was sworn, he might still have been able to salvage the trial by replacing an affected juror with an alternate if the information was sufficiently prejudicial*. If a mistrial had to be declared, it would have benefitted the litigants and witnesses to have the court do so before the trial concluded. Requiring such challenges to be raised during trial allows counsel and the court to investigate occurrences while memories are fresh, and also minimizes the possibility that claims of improper influence have been fabricated after an unfavorable outcome. It also avoids the possibility of inconveniencing jurors who have been discharged by requiring them to return to court to be interrogated weeks after they have completed their service.

Peña v. State, 2013 WY 4, ¶¶ 49-52, 294 P.3d 13, 23–24 (Wyo. 2013) (emphasis added).

Here, much like *Peña* proposes, the jury was empaneled and sat with an alternate. Unlike *Peña,* this is a case of juror misconduct, but the comparison is the same because as this Court stated, "[t]here is no reason to apply a different rule than that employed in juror misconduct cases". *Id.* And as this Court observed, when a trial judge learns of an

alleged event of misconduct, after the jury is sworn, a judge might still be able to salvage the trial by replacing an affected juror with an alternate if the information was sufficiently prejudicial. *Id.*

D. Abuse of Discretion and Prejudice

The immediate question, drawing from objective criteria, is whether the trial court's choice was reasonable and right under the circumstances without broaching results that are arbitrary or capricious. *Eaton*, ¶ 92.

Both the State and a judge, cloaked in garbs of authority, asked Juror OH to completely ignore Mr. Vlahos' out of court description of what the juror saw: "[i]t was the defendant on there. He's just describing his receipts and that, just saying he was innocent all that, is what he was saying on that. . . ." (Trial Day Two July 13, 2021 Tr. 12: 2-5). In response to this, it can be objectively pointed to in the record that the State asked a juror who sat on the panel and judged the guilt of Mr. Vlahos to ignore Mr. Vlahos' innocence, and theory of his defense:

> [The State]: Your observation of that video, could you – since it wasn't in a courtroom, and pursuant to Criminal Rules of Procedure, can you set that information aside and if specifically told to disregard it, could you only weigh what's in the courtroom here today, what you heard yesterday, and what you may continue to hear and just consider that when you render a verdict?

(Trial Day Two July 13, 2021 Tr. 12 : 16-25).

It can also objectively be seen from the record that the district court judge asked a juror who sat on the panel that decides Mr. Vlahos' guilt to ignore Mr. Vlahos' innocence, and his theory of his defense:

> THE COURT: All right. [Juror OH], let me ask one more time, and I realize these things happen from time to time, I need to make a record. And I very much appreciate the fact that you were forthright, that you told me this happened and, again, just – just to satisfy myself, would you be able to set that aside, totally disregard it and decide this case solely on the fact that you see and hear in the courtroom?

(Trial Day Two July 13, 2021 Tr. 13 : 4-14).

In all, the court and the State sent a fox into the hen house of the jury box. By coaxing a suspect juror—one who was unable to initially follow the rules the court and the State provided the juror—each commanded the Juror OH to ignore Mr. Vlahos' proclamation of innocence, and a theory of his defense.

The definition of arbitrary in part delineates the following: "of, relating to, or involving a determination made *without consideration* of or regard for facts, circumstances, *fixed rules*, or procedures". *Arbitrary*, Black's Law Dictionary (10th ed. 2014) (emphasis added). So too, the definition of capricious rests in the following: "1. (Of a person) characterized by or guided by unpredictable or impulsive behavior; likely to change one's mind suddenly or to behave in unexpected ways. 2. (Of a decree) *contrary to* the evidence or *established rules of law*". *Capricious*, Black's Law Dictionary (10th ed. 2014) (emphasis added).

It is clear the court ordered the juror to do two separate things. In jury instruction number one, the court ordered:

> Every presumption of law is in favor of the defendant's innocence.
>
> The presumption of innocence is not merely a matter of form that the jury may disregard. It is part of the law of the land and it is a right guaranteed to every person accused of any crime. The presumption of innocence

> continues with a defendant through all stages of a trial and until the case is decided by the jury. . .
>
> A defendant is never required to prove his or her innocence.

(R. vol. 2 at 328).

In jury instruction number three, the court states, "[d]o not make up your mind until you have heard all the evidence . . ." (R. vol. 2 at 331) In instruction number five, the court states:

> The presumption of innocence is not merely a matter of form which the jury may disregard. It is part of the law of the land and it is a right guaranteed to every person accused of any crime. The presumption of innocence continues with a defendant through all stages of a trial and until the case is decided by the jury.

(R. vol. 2 at 338).

However, during the court's impromptu investigation with Juror OH for the juror's malfeasance, as discussed above, it ordered Juror OH to ignore Mr. Vlahos' innocence, and a theory of his defense. This is directly in line with what amount to a court acting in an arbitrary and capricious manner.

In total, Mr. Vlahos' guarantee of a fair trial was usurped by the court and the State's investigation into Juror OH's misconduct. The court failed to remedy and/or salvage the trial by utilizing the untainted alternate Juror KM, which would be in line with the case law of *Peña* and *Eaton* as provided above.

CONCLUSION.

Mr. Vlahos' right to a speedy trial was violated and his conviction should be reversed and dismissed. Furthermore, the record supports a finding that Juror OH broke a clear rule, and the court abused its discretion when it could have simply utilized the alternate Juror KM in Juror OH's stead. If this Court finds Mr. Vlahos' speedy trial right was not violated and that matter is not to be reversed and dismissed in total, then the matter should be deemed a mistrial and remanded for further proceedings. This would allow Mr. Vlahos to proceed to trial with his choice of counsel, or remain *pro se* and file his necessary documents in accordance with the dictates of district court's scheduling orders. For the preceding reasons, Mr. Vlahos respectfully requests his conviction be reversed.

Respectfully submitted this March 3, 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 3, 2022, a true and correct copy of the foregoing was served electronically via the Wyoming Supreme Court C-Track Electronic Filing System, addressed as follows:

Joshua Eames
Supervising Attorney General
109 State Capitol
Cheyenne, WY 82002

The undersigned also certifies that all required privacy redactions have been made and, with the exception of any required redactions, this document is an exact copy of the written document filed with the Clerk. Furthermore, this document has been scanned for viruses and is free of viruses.

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APPENDIX A

Judgment Upon Guilty Verdict of Jury

APPENDIX B

Order for Presentence Investigation Report

APPENDIX C

Sentence