IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, v. RIGOBERTO INZUNZA, Respondent.	Case No. 75662

APPELLANT'S REPLY BRIEF

Appeal From Grant of Motion to Dismiss
Eighth Judicial District Court, Clark County

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STATEMENT OF THE FACTS

ARGUMENT

THE DISTRICT COURT ERRED IN GRANTING INZUNZA'S MOTION TO DISMISS

In the District Court, Inzunza claimed that his Sixth Amendment speedy trial rights were violated. AA49. The right to a speedy trial is "necessarily relative" and "depends upon circumstances." United States v. Ewell, 383 U.S. 116, 120, 86 S.Ct. 773, 776 (1966). Under Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972), the court must examine four factors to determine if a speedy trial right violation has occurred:

> A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, *we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.*

A speedy trial protects three interests of the defendant: freedom from oppressive pretrial incarceration, mitigation of the anxiety and concern accompanying public accusation, and avoidance of impairment to the accused's defense. Barker, 407 U.S. at 532, 92 S.Ct. 2182; Ewell, 383 U.S. at 120, 86 S.Ct. 773.

As a point of clarification, Inzunza's Answering Brief alleges the State has set forth false information in its Opening Brief, to wit: "the district court did not address anything more than the threshold question," "the district court did not address the length of the delay beyond the triggering factor," and "the district court failed to address the length of delay beyond the threshold question." See Respondent's Answering Brief ("RAB") 16, 17. To the contrary, the plain language of the Order supports the State's allegations. As set forth in the Order,

> *Here, the Court has focused primarily on the delay between the date of the filing of the first charging document (i.e. the Criminal Complaint) and the defendant's arrest.* The Court specifically found that the delays of the trial date following his indictment were occasioned by the defendant, who waived his State right to trial within 60 days of arraignment, and by subsequent requests to continue made by the defense. However, *the Court cannot ignore the approximately 26 month delay between the date of the*

> *original charging document and his arrest on those charges*. Trial has not yet commenced. The nature of Mr. Inzunza's charges is serious, but they are not complex, nor are the charges ones that carry the death penalty. Moreover, in the cases considering the complexity of the matter as a factor in trial delay, these were usually delays which occurred after the defendant was brought before the court following arrest. *Even without considering the time of delay after arrest, a delay of nearly two years and three months is sufficient to trigger the speedy trial inquiry.*

AA172-173 (emphasis added).

The Order briefly mentions post-arrest events, then immediately backtracks its analysis regarding anything that occurred after the triggering event of Inzunza's arrest. AA173. Thus, while the District Court paid lip service to the full Doggett/Barker analysis, it focused myopically on only the threshold analysis regarding the length of delay. As explained *infra*, the failure to adequately analyze all the necessary Barker factors and wholesale misunderstanding of the holding of Doggett warrants reversal.

Further, Inzunza's answering brief misstates the findings within the District Court's Order. RAB17 ("the district court addressed each and every one of the Barker factors . . . and found that they all weighed in favor of dismissal"). Instead, the District Court found Inzunza "could not have asserted his right to a speedy trial before his arrest on the warrant and this factor cannot be weighed against him." AA177. That is not a finding "in favor" of a dismissal. Again, as will be set forth in

detail *infra*, the failure to analyze and apply the third Barker factor warrants reversal and remand.

The Order shows that when pressed to examine all Barker factors, the District Court failed to do so, instead issuing an Order analyzing only three of the Barker factors. AA168-180. The District Court examined the first Barker factor, the length of delay; then examined the testimony presented regarding the second Barker factor, the reason for that delay; then determined the third Barker factor was not relevant, thus improperly proceeding to the fourth factor, where it found Inzunza had suffered prejudice pursuant to Doggett v. United States, 506 U.S. 650, 651-52, 112 S.Ct 2686, 2690 (1992). AA177. Under Doggett, "to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptive prejudicial delay." Id. The State agrees that, pursuant to Doggett, Inzunza properly alleged that the interval between his accusation and his trial had crossed the threshold from ordinary to presumptive prejudicial delay. AOB7.

However, dismissal of eleven counts of Sexual Assault Against A Minor Under Fourteen and five counts of Lewdness With A Minor Under Fourteen requires more than a finding of delay and a presumption of prejudice; the Barker factors require the District Court consider *all* of the circumstances surrounding the delay, as no single element is necessary or sufficient. Moore v. Arizona, 414 U.S. 25, 26, 94

S.Ct. 188, 189 (1973). As detailed *infra* in Section I(D), multiple jurisdictions have examined cases similar to the instant case and found that despite Doggett's presumption of prejudice when the State is responsible for delay beyond one year, presumed prejudice alone is not enough to establish a Sixth Amendment violation. As the District Court based its Order upon that presumed prejudice without properly considering either Inzunza's own actions, the lack of any actual prejudice suffered, nor the general policy reasons not to dismiss such charges, that Order was an abuse of discretion and an error of law.

A. Length of Delay

The relevant timeline regarding delay is as follows. On or about November 6, 2014, NLVPD Officer Mark Hoyt was assigned to a case of sexual assault on victim E. J.. AA104. On November 28, 2014, a Crime Report was issued, indicating E.J. had been sexually assaulted by two men, Inzunza and Darrington Rivers. AA62, 64. On or about December 5, 2014, the State filed the Criminal Complaint and a warrant for Inzunza's arrest, the "accusation" under Doggett. AA1, 169. On or about January 29, 2017, Inzunza was arrested, what the District Court found to be the "triggering date" for a Doggett inquiry. AA173.

On March 20, 2017, Inzunza was arraigned and waived his statutory right to a speedy trial within sixty days, but reserved his right to speedy trial under the Sixth

Amendment. AA45. The Court set trial for December 4, 2017. AA45. Inzunza did not object to this date, nor did he request an earlier setting. AA45, 169.

On November 29, 2017, Inzunza moved for a continuance to have an expert review discovery that was provided within 30 days of trial. AA169. The trial date was moved to February 5, 2018; the record does not reflect that Inzunza made any reference to his right to a speedy trial. AA169.

On January 29, 2018, Inzunza was not ready for trial and again requested a trial continuance to "further investigate the case." AA169. The trial date was moved to April 23, 2018. Again, the record does not reflect that Inzunza made any reference to his right to a speedy trial. AA169. After the trial was reset at Inzunza's request for the second time, Inzunza moved to dismiss on March 2, 2018. AA49.

Despite the delays in bringing the case to trial due to Inzunza's own inactions, the District Court found that for purposes of the Doggett analysis, the twenty-six (26) month delay from the filing of the Criminal Complaint to Inzunza's arrest was sufficient to trigger the speedy trial analysis. AA172. As stated in the Opening Brief, the State does not dispute that this delay was sufficient *only to trigger the analysis* under Doggett; however, upon review of the totality of the circumstances, the 26-month delay in this case is not sufficient to warrant dismissal of Inzunza's charges. AOB7.

For the purposes of a Doggett/Barker analysis, the court must consider the length of delay as well as the resultant prejudice to the defendant; this analysis goes hand-in-hand, as length of delay affects the resultant prejudice to a defendant. Doggett, 505 U.S. at 655–56, 112 S. Ct. at 2693. Indeed, the court cannot find that a defendant suffered prejudice sufficient to dismiss the charges against him merely due to the finding of a Doggett triggering event. Id ("While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other Barker criteria, see Loud Hawk, supra, at 315, 106 S.Ct., at 656, it is part of the mix of relevant facts, and *its importance increases with the length of delay.*") (emphasis added).

When Doggett was published in 1992, it noted that at the time, courts had generally found delay "presumptively prejudicial" as it approaches the one-year mark. Id. at 652, fn. l. This one-year mark "does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the Barker enquiry." Id. In other words, the one-year mark is the "bare minimum" delay necessary to trigger a Doggett analysis; once that bare minimum delay is established, the "court must then consider, as one factor among several, the extent to which the delay stretches *beyond the bare minimum* needed to trigger judicial examination of the claim." Id. at 52, 112 S. Ct. at 2691 (emphasis added). It is of critical importance to highlight that Doggett "*did not*,

however, establish a bright-line rule for the length of delay caused by governmental negligence that will warrant a finding of presumed prejudice under the fourth Barker factor." Ex parte Walker, 928 So. 2d 259, 270 (Ala. 2005) (emphasis added).

Per the District Court's Order, Inzunza suffered "presumptive prejudice" for only fourteen (14) months after the bare minimum delay pursuant to Doggett.[1] As set forth in the State's analysis regarding prejudice to Inzunza *infra* at Section I(D), not only did the District Court fail to analyze how long the relevant delay stretched beyond the bare minimum pursuant to Doggett, this length of delay is insufficient to find presumptive prejudice under the fourth Barker factor. AA178.

As a second point of clarification, while Inzunza's Answering Brief inaccurately alleges that "the State also makes the brand new argument on appeal that Mr. Inzunza could not have been prejudiced by the 26-month delay," the record shows this argument was properly raised in the lower court and preserved, as it was raised in the State's written Opposition to the Motion to Dismiss and during argument on the motion. RAB35; AA81, 144-145. Though the prosecutor attempted to expand on the reasons why the 26-month delay was insufficient to prejudice Inzunza, the District Court refused to entertain such argument:

[1] AA172. ("the Court cannot ignore the approximately 26 month delay between the date of the original charging document and his arrest on those charges.") 26 months minus the one-year "bare minimum" per Doggett is 14 months.

> MR. VILLANI: Now it was 2, 2½ years later, but he was picked up and we're still within the statute of limitations. *Which I think is the ultimate guide* --
>
> THE COURT: *Don't go there* this -- the cases have already said the statute of limitations has no bearing on this inquiry.
>
> MR. VILLANI: But the --
>
> THE COURT: And that a Court erred when it used that argument.
>
> MR. VILLANI: But the seminal case on this was 8½ years. And we are at most at 2½ years. And like I said before, there was no invocation of a speedy right. I mean, that is one of four elements that has to fall our way on this test.

AA144-145.

Thus, the District Court precluded the State from presenting its full argument that while a 26-month delay was sufficient to trigger an analysis, it was not sufficient to prejudice the defendant. Id. Inzunza takes issue with the State's argument on appeal that "two years and two months is not a sufficient time to cause a reasonable person to think that would not still be liable for sexually assaulting a child" as that specific phrase does not appear in the written or oral record. RAB35. However, as detailed *infra* at Section I(D), that argument is encapsulated within the State's arguments regarding how the relevant statutes of limitations ("SOL") can affect the prejudice to a defendant under a Doggett/Barker analysis. For the reasons set forth *infra* in Sections I(C) and (D), the length of delay was both calculated inaccurately and is insufficient to establish prejudice sufficient to dismiss the charges.

B. Reason For Delay

The Opening Brief detailed the findings made by the District Court regarding NLVPD's negligence; for the sake of brevity, the State re-incorporates its arguments from the AOB that Detective Hoyt was merely negligent and not grossly negligent as found by the District Court. AOB9-12; AA176.

However, the RAB expends a considerable number of words re-arguing a finding that the District Court concluded weighed in his favor. RAB19-26. The reason for this is apparent upon a review of the totality of the Order; as the Order misinterpreted the holding of Doggett regarding the relevant length of delay and evaded analysis of the third Barker factor, the only way the District Court could have found prejudice sufficient to dismiss Inzunza's charges was to give excessive weight to the reason for the State's delay. AA168-180.

Regardless of whether NLVPD's actions constituted simple or gross negligence, a finding of negligence by the State without actual prejudice to the defendant is not sufficient to conclude that a defendant's Sixth Amendment rights were violated. See United States v. Oliva, 909 F.3d 1292, 1304 (11th Cir. 2018) (despite the District Court's findings of gross negligence by the Government, such findings did not weigh heavily against the Government, and noting that with a relevant delay of twenty-three months, courts have consistently rejected defendants' arguments that similar delays excuse them from proving actual prejudice); State v.

Wood, 924 S.W.2d 342, 348 (Tenn. 1996); (despite a finding of gross negligence by the State, "[i]n the balancing analysis, the fourth factor is entitled to the greatest weight. Accordingly, we conclude that the defendant was not deprived of his right to a speedy trial under federal or state constitutional principles.").

As stated succinctly by the Tennessee Supreme Court, the fourth Barker factor is entitled to the greatest weight. Wood, 924 S.W.2d at 348. It is apparent given the length of analysis set forth in both the Order and the RAB that far too much weight was given to NLVPD's actions. AA173-176; RAB19-26. In this aspect, the District Court missed the forest for the trees.

C. Assertion of Right

Inzunza's Answering Brief gives short shrift to the absence of the District Court's analysis regarding the third Barker factor, devoting only two brief paragraphs to reference the Order granting his Motion to Dismiss. See RAB15, 18. It is apparent given the robust discussion regarding the District Court's findings of gross negligence on the part of NLVPD that Inzunza is attempting to pull the same wool over this Court's eyes as he did in the lower court. While the District Court may have been bamboozled into focusing too intently on the actions of the NLVPD, the third Barker factor demands Inzunza's actions be considered as to whether he was sufficiently prejudiced to warrant dismissal of his charges.

Regardless of the District Court's determinations regarding the efficacy or propriety of the standard investigatory practices of the NLVPD, its decision not to address the mandatory third Barker factor was an abuse of discretion and an error of law. This Court recently—and repeatedly—has reversed the decisions of the lower courts for failing to properly analyze constitutional issues of law presented to it. Williams v. State, 134 Nev. __, __, 429 P.3d 301, 306 (2018) ("[w]e have repeatedly implored district courts to adhere to this three-step analysis and clearly spell out their reasoning and determinations. Yet district courts continue to shortchange Batson challenges and scrimp on the analysis and findings necessary to support their Batson determinations. We take this opportunity to, yet again, urge district courts to follow the three-step Batson procedure.")

While Nevada lacks a robust body of law on post-Doggett/Barker analyses as to how a defendant's assertion of his speedy trial right affects the propriety of his case for dismissal, other jurisdictions provide persuasive authority. Texas has determined that in assessing the weight of the third Barker factor, courts should consider whether and how a defendant asserts his speedy trial right. Cantu v. State, 253 S.W.3d 273, 283 (Tex. Crim. App. 2008). Cantu set forth that filing for a dismissal of charges instead of requesting a speedy trial "will generally weaken a speedy-trial claim because it shows a desire to have no trial instead of a speedy one." Id. To that end, "[r]epeated requests for a speedy trial weigh heavily in favor of the

defendant, while the failure to make such requests supports an inference that the defendant does not really want a trial, he wants only a dismissal." Id. Texas suggests a wary scrutiny on those who would seek to delay their trial, only to later cry foul regarding their speedy trial rights: "[i]ndeed, the failure to diligently seek a speedy trial supports the hoary lawyer's adage, 'Never tried, never convicted.'" Id.

In Cantu, the State appealed the Texas Appellate Court's review of the trial court's findings regarding the third and fourth Barker factors. Id at 282. Because Cantu never asked for a speedy trial—he asked only for a dismissal—the Court held that it was "incumbent upon him to show that he had tried to get the case into court so that he could go to trial in a timely manner . . . . Under Barker, appellant's failure to diligently and vigorously seek a rapid resolution is entitled to 'strong evidentiary weight.'" Id. This is because, as recognized in United States v. Palmer, "the point at which the defendant asserts his right is important because it may reflect the seriousness of the personal prejudice he is experiencing." 537 F.2d 1287, 1288 (5th Cir. 1976) (finding "the tepid nature of the government's conduct, the tardiness of appellant's complaint, and the lack of substantial personal or defense prejudice resulting from the government's negligence convince us that the lengthy delay here, though certainly not inconsiderable, nonetheless did not deny appellant his sixth-amendment right to a speedy trial.")

The Cantu court noted the trial judge gave "little credence" to the assertions by Cantu's attorney about his attempts to talk to the District Attorney's Office about filing charges more rapidly, citing the "paucity" of evidence regarding his requests for a speedy trial. Cantu, 253 S.W.3d at 284, 285. Thus, the trial court concluded that the "assertion of the right" factor weighed against Cantu. Id.

As to Cantu's claims of prejudice under the fourth Barker factor, just as in Palmer, the Cantu court agreed with the trial court's determination that "one could conclude that appellant did not really want a speedy trial; he wanted only a dismissal…" Id at 286. While Cantu complained of ulcers during the pendency of the case, Cantu put forth no evidence to suggest that his ulcers were caused by any anxiety associated with the case; indeed, the trial judge believed his ulcers were due to his drinking and not to his alleged anxiety. Id at 285. On appeal from the trial court, the court of appeals credited Cantu's testimony that he suffered "anxiety" because the State did not specifically challenge this testimony. The Court of Criminal Appeals disagreed, holding that "evidence of generalized anxiety, though relevant, *is not sufficient proof of prejudice under the Barker test*, especially when it is no greater anxiety or concern beyond the level normally associated with a criminal charge or investigation." Id at 286 (emphasis added).

Cantu's failure to establish diligent attempts to resolve his case, coupled with his claims of "generalized anxiety," was insufficient to establish that Cantu suffered

prejudice sufficient to establish a Sixth Amendment violation. Id at 287. The Cantu court ultimately concluded that, as "a matter of law, appellant was not denied his Sixth Amendment right to a speedy trial." Id.

The District Court ignored the circumstances surrounding Inzunza's assertion of his right, stating "the Court is not considering what events may have happened after Mr. Inzunza's arrest and is instead focusing on the delay from the first official accusation." AA177. This was an abuse of discretion and an error of law. The ultimate question the court must determine in deciding whether a defendant's Sixth Amendment rights have been violated is *whether the defendant has suffered prejudice*, which the court cannot adequately determine without a thorough examination of *all four* Barker factors. Barker, 407 U.S. at 532, 92 S.Ct. 2182.

Had the District Court properly examined the third Barker factor, it would have found that, just like in Parker and Cantu, Inzunza's own failure to diligently resolve his case weighed heavily against the conclusion that he suffered prejudice sufficient to establish a Sixth Amendment violation. Just like in Cantu, Inzunza's failure to make any requests for a speedy trial supports the inference that he did not really want a trial, he wanted only a dismissal. As the record shows, Inzunza waived his statutory speedy trial rights. AA45. He did not object to an initial trial date set beyond the standard speedy trial date. AA45, 169. At his first calendar call, when the State was ready for trial, Inzunza moved for a continuance to have an expert

review discovery; he neither pressed for nor requested a speedy trial. AA169. At his second calendar call, when the State was ready for trial, Inzunza again moved for a continuance to "further investigate the case;" again, he neither pressed for nor request a speedy trial. AA169. After the trial was reset—at Inzunza's request—for the second time, only then did Inzunza move to dismiss, on March 2, 2018, just beyond the one-year anniversary of his arrest. AA49; AA173. This one-year mark is, conveniently, the "bare minimum" time necessary to presume prejudice under Doggett and justify a Sixth Amendment Doggett/Barker motion. Doggett at 52, 112 S. Ct. at 2691.

A review of the record strongly supports the inference that Inzunza didn't want a trial; he only wanted a dismissal. From the day of his arraignment, Inzunza's counsel expressed that despite Inzunza's desire to waive his statutory speedy trial rights, Inzunza maintained his Sixth Amendment speedy trial right. AA45. The State has never argued that Inzunza is not entitled to Sixth Amendment protection. Instead, despite the protection the Sixth Amendment affords, the court *must* examine whether Inzunza actually ever asked for a speedy trial under Barker, as his lack of diligence in pursuing a speedy trial heavily influences the prejudice analysis under Barker. AA81, AA99, AA145, AOB12. Had the District Court analyzed this issue, it would have found Inzunza's inaction weighed heavily against him.

The District Court's rejection of its duty to analyze the constitutional issues before it regarding the third Barker factor renders invalid its entire determination that Inzunza's Sixth Amendment rights were violated. Thus, the District Court's Order granting Inzunza's Motion to Dismiss should be reversed.

D. Prejudice

As argued in the AOB, this Court has ruled that when faced with similar facts, the State's delay did not violate a defendant's Sixth Amendment rights, reasoning that "the absence of significant prejudice to the defense, and the serious nature of the crime sought to be prosecuted, outweigh the admittedly substantial delay in prosecution." State v. Fain, 105 Nev. 567, 570, 779 P.2d 965, 967 (1989); AOB18. Despite Inzunza's argument that Doggett set forth a new rule that requires the State to persuasively rebut a presumption of prejudice, Fain is still good law post-Doggett. Like many post-Doggett courts have concluded, Doggett merely indicated a one-year delay can trigger a Sixth Amendment/Barker analysis; it did not, however, preclude a court from finding that a defendant suffered no actual prejudice in spite of the "presumptive prejudice" that comes from a one-year delay. See Section I(D)(1); RAB28. The proposition set forth in Fain was that even when the State is responsible for a delay in prosecution, the court can find that the absence of significant prejudice to a defendant, coupled with the gravity of serious charges, is insufficient to establish a Sixth Amendment violation. Fain, 105 Nev. at 570, 779

P.2d 967. Despite Inzunza's argument that Doggett precludes the court from finding no actual prejudice despite the presence of "presumptive prejudice," Fain is precedent, and this Court is "loath to depart from the doctrine of stare decisis" absent a compelling reason. City of Reno v. Howard, 130 Nev. 110, 114, 318 P.3d 1063, 1065 (2014).

The District Court misunderstood the delay analysis set forth in Doggett, which affected its prejudice analysis; as referenced *supra* in Section I(A) and (C), the District Court erred in determining the actual length of delay was sufficient to prejudice Inzunza for two reasons. First, the actual length of the delay for purposes of determining whether a defendant is prejudiced by the State's delay is measured by the time of accusation to trial; an analysis of this "actual delay" necessarily involves a consideration of a defendant's own actions under the third Barker factor. Doggett v. U.S., 505 U.S. at 647, 112 S.Ct. at 2686 ("an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay"). As set forth *supra* in Section I(C), the time of delay considered by the District Court excluded over a year of events affecting the Barker prejudice analysis, therefore its findings of prejudice were not based on substantial evidence.

Second, even assuming the District Court accurately limited the actual delay time to 26 months as calculated in the Order granting Inzunza's Motion to Dismiss,

that length of time was insufficient to prejudice Inzunza, nor did Inzunza suffer any actual prejudice sufficient to establish a Sixth Amendment violation.

The District Court's Order stated twice that "the Court cannot ignore the approximately 26 month delay between the date of the original charging document and his arrest on those charges . . . . Again, the Court is not considering what events may have happened after Mr. Inzunza's arrest and is instead focusing on the delay from the first official accusation . . . . " AA172, 177. As set forth in Doggett, the one-year mark after the accusation is the "bare minimum" delay necessary to trigger a Barker analysis; once that bare minimum delay is established, the "court must then consider, as one factor among several, the extent to which the delay stretches *beyond the bare minimum* needed to trigger judicial examination of the claim." Doggett, 505 U.S. at 652, 112 S. Ct. at 2691 (emphasis added). From the plain language of Doggett, the District Court errby considering the wrong period of delay in regards to Inzunza's claims of prejudice.

1. The Actual Delay Did Not Prejudice Inzunza

As referenced *supra* in Section I(A), the District Court wrongly concluded that the relevant delay was the 26-month period between the filing of charges and Inzunza's arrest. AA178. The court could not determine whether Inzunza was prejudiced without an analysis of whether Inzunza ever effectively asserted his rights, which could not be examined without considering the events that occurred

during the year after Inzunza's arrest. Barker, 407 U.S. at 532, 92 S.Ct. 2182. Thus, the relevant, actual period of delay for analyzing prejudice under Doggett/Barker was forty (40) months, as the Complaint was filed December 5, 2014, and Inzunza filed his Motion to Dismiss on March 2, 2018. AA49.

In his Motion to Dismiss, Inzunza alleged that his delay had crossed the line to "presumptively prejudicial," however, the District Court inaccurately concluded that as his delay had passed the prejudicial threshold, and the State was solely responsible for the delay, Inzunza did not need to show prejudice to establish a Sixth Amendment violation. AA173, 177. Inzunza's thesis was that if the State was responsible for a "presumptively prejudicial" one-year delay in his case, no matter the charges he's facing, and regardless of his own attempts to delay his case, and without a showing that he cannot adequately defend himself, such a delay should result in a dismissal of any and all charges against him. AA49-60. As set forth in Palmer, Cantu, and numerous post-Doggett cases, such a position is ludicrous.

The speedy-trial right was designed to prevent oppressive pretrial incarceration, to minimize the accused's anxiety and concern, and to limit the possibility that the accused's defense will be impaired. Barker, 407 U.S. at 532, 92 S.Ct. 2182. As to the oppressive pretrial incarceration concern, the District Court based its conclusion that Inzunza was not prejudiced on a time frame that included *zero* time spent in pretrial incarceration, as Inzunza was not in custody from the time

the Complaint was filed to the date he was arrested. AA177. Further, all of Inzunza's claims of "anxiety and concern" were raised post-incarceration, which occurred after the District Court had ended its analysis regarding time of delay. AA58. Even at the first step of examining Inzunza's allegations of prejudice, the District Court erred in its analysis; had it analyzed the facts and law correctly, it would have found that zero time spent in custody weighed against a finding of prejudice.

As to the "minimization of anxiety and concern" issue, Inzunza alleged only a generalized "anxiety and concern" from pretrial confinement. AA89. As held in Cantu, "evidence of generalized anxiety, though relevant, is not sufficient proof of prejudice under the Barker test, especially when it is no greater anxiety or concern beyond the level normally associated with a criminal charge or investigation." 253 S.W.3d at 286. Just as in Cantu, Inzunza's generalized, unsupported anxiety complaints are insufficient to establish prejudice. Again, the District Court failed to consider this, just as it failed to examine the time Inzunza actually spent in custody. AA177.

As to whether Inzunza's defense would be impaired, again Inzunza alleged vaguely and generally that his defense would be impaired by the delay, in that "tracking down witnesses" would be more difficult, the "value" of those witnesses would be diminished, and that it would now be "impossible" to present an alibi

defense as Inzunza could not reliably account for his whereabouts during that period. AA90. First, a review of the record shows that prior to moving for dismissal, Inzunza never asserted a basis for an alibi defense; his lack of affidavits or evidence based on his first-hand experiences to support that assertion infers that such a defense was unavailable regardless of the delay. Second, just as with his alleged alibi defense, the defense identifies no potential witnesses nor the scope of what they would have testified to but for the delay; yet another generalized, unsupported allegation that should bear no weight in the prejudice analysis. AA90.

Inzunza has shown that *zero* of the three concerns related to speedy trial rights weighed in his favor. As the District Court failed to analyze these concerns due to its error of law regarding the relevant delay timeline, the resultant Order was an error of law and an abuse of discretion. Further, as explained below, even if the District Court correctly determined the prejudice analysis was limited to the events in the 26-month period between the filing of the Criminal Complaint and Inzunza's arrest, the modern post-Doggett view is that the length of delay beyond the "bare minimum" threshold is insufficient to warrant a finding of presumptive prejudice as a matter of law.

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2. The Prejudice Ratio

Post-Doggett, courts have used the comparison of Doggett's eight-and-a-half-year actual delay as applied to the "bare minimum" time frame of one year to develop a ratio as a metric to determine presumptive prejudice:

> …the ratio in Doggett of the length of the actual delay to the one-year presumptively prejudicial delay was about 8 to 1. By contrast, Walker's case involves a ratio of about 4 to 1, the actual delay being about four years and two months . . . *most courts have refused to presume prejudice solely on the basis of negligent delay unless the length of delay is five years or more—a ratio of 5 to 1.*

Ex parte Walker, 928 So. 2d 259, 269 (Ala. 2005) (emphasis added); see also United States v. Serna-Villarreal, 352 F.3d 225, 232 (5th Cir. 2003) (refusing to presume prejudice under the fourth Barker factor in a case in which prosecutorial negligence delayed the accused's trial for three years and nine months) United States v. Bergfeld, 280 F.3d 486, 489–91 (5th Cir. 2002) (presuming prejudice after a five-year-and-three-month delay caused by the government's negligence, but noting that "[h]ad the delay been considerably shorter, [the accused] might well have been properly required to demonstrate prejudice"); United States v. Cardona, 302 F.3d 494, 498–99 (5th Cir. 2002) (presuming prejudice where governmental negligence resulted in a delay of more than five years); United States v. Brown, 169 F.3d 344, 349–51 (6th Cir. 1999) (presuming prejudice where governmental negligence resulted in a five-and-a-half delay); United States v. Shell, 974 F.2d 1035, 1036 (9th

Cir.1992) (presuming prejudice where governmental negligence resulted in a six-year delay).

Unlike the standard post-Doggett ratio that does not presume prejudice before a ratio of five-to-one (5:1), Inzunza's Prejudice Ratio is a mere one-and-one-sixth to one (1 1/6:1).[2] Under the modern Prejudice Ratio calculus, Inzunza's delay does not even establish 25% of the prejudice necessary under a post-Doggett analysis to warrant a finding of presumptive prejudice. As the District Court failed to analyze and calculate the applicable period of delay pursuant to Doggett, it erred in finding that Inzunza was presumptively prejudiced.

This Court employed a post-Doggett analysis of "presumptive prejudice" over a decade prior to the modern trend, which recognizes that a presumption of prejudice has no real effect if there is *no actual prejudice*, especially when that lack of prejudice is weighed against serious charges:

> Prejudice to the accused is a paramount concern in speedy trial cases. Sheriff v. Berman, 99 Nev. 102, 107, 659 P.2d 298, 301 (1983). "Bare allegations of impairment of memory, witness unavailability, or anxiety, unsupported by affidavits or other offers of proof, do not demonstrate a reasonable possibility that the defense will be impaired at trial or that defendants have suffered other significant prejudice." Id. *Respondent has failed to demonstrate significant prejudice or to support his allegations with evidentiary proof. He has not identified any specific witnesses who could have been interviewed or indicated how their testimony would have helped the defense*. Respondent

[2] 14 months post-"bare minimum" divided by the 12 month "bare minimum" set forth in Doggett.

> alleges that he has been deprived of a possible defense of insanity or mental incompetence. The record before this court, however, does not contain any factual support for this allegation such as affidavits from psychologists or psychiatrists or records of any treatment for mental illness. Respondent contends that he was prejudiced by the delay in that he lost the possibility of serving concurrent sentences. Considering the brutal nature of Rutledge's murder, and given respondent's previous conviction for another murder, it is extremely unlikely that respondent would receive a concurrent sentence for this crime. We conclude that respondent has failed to demonstrate significant prejudice from the delay in prosecution.

Fain, 105 Nev. at 570-571, 779 P.2d at 967-968 (emphasis added).

Reversing the District Court's Order for Inzunza's failure to demonstrate any actual prejudice would be consistent with Nevada precedent and the modern post-Doggett analysis. Just as in Fain, Inzunza failed to demonstrate significant prejudice, nor did he support his allegations with evidence beyond the self-serving declaration of counsel, which merely indicated that counsel believed Inzunza was experiencing generalized "anxiety and concern" while in custody. AA50. Also, just as Fain's case involved a "brutal" Category A felony, this case involves *sixteen* serious, Category A felony sexual crimes perpetrated against a child under the age of fourteen. AA1-4. Weighing the utter lack of prejudice suffered by Inzunza against the seriousness of the crimes, the District Court's finding of such prejudice sufficient to dismiss the charges was an abuse of discretion.

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3. Statutes of Limitations

Inzunza cites State v. Selvage, 80 Ohio St. 3d 465, 467-468, 687 N.E.2d 433, 435-36 (Ohio 1997), for the convoluted proposition that because a crime's SOL does not preclude a speedy trial right from being asserted before the expiration of that SOL, the court cannot consider SOLs as part of a prejudice analysis under Barker. RAB34-35. Inzunza's position is fundamentally flawed.

First, it is interesting that Inzunza chose to cite Ohio law from 1997 in support of his allegations,[3] as Ohio law from 2016 roundly rebuts his allegations regarding the prejudice analysis:

> As to the appropriate test and the shifting burden of proof that applies to a claim of preindictment delay, the dissent got it right. It aptly noted that *unjustifiable delay does not violate due process unless it results in actual prejudice.* Id. at ¶ 51 (S. Gallagher, J., dissenting), citing Luck, 15 Ohio St.3d 150, 472 N.E.2d 1097, at paragraph two of the syllabus. Accordingly, the dissent reasoned, because Jones failed to carry his burden of establishing actual prejudice, the *state had no obligation to present evidence justifying the delay in this case*, see Adams, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, at ¶ 107 (denying relief on claim of unconstitutional preindictment delay without considering reasons for delay when defendant failed to establish prejudice).

State v. Jones, 148 Ohio St. 3d 167, 171, 69 N.E.3d 688, 693 (emphasis added).

Contrary to Inzunza's allegations that he may rest on his laurels once "presumptive prejudice" is established and wait for the State to "persuasively *rebut*[]

[3] RAB at 35.

a presumption of prejudice," post-Doggett courts, including those from Inzunza's cherry-picked foreign jurisdiction, recognize that "unjustifiable delay does not violate due process unless it results in actual prejudice." Jones, 148 Ohio St. 3d at 171, 69 N.E.3d at 693. Just as in Jones, Cantu, and Fain, Inzunza failed to demonstrate significant prejudice or to support his allegations with evidentiary proof. AA89-90. He has not identified any specific witnesses who could have been interviewed or indicated how their testimony would have helped the defense. Further, any issues regarding witness impeachment are preserved by way of the testimony at the grand jury and the police investigation. AA6-37. Inzunza did not put forth substantial evidence upon which to find prejudice sufficient to dismiss the charges against him; absent such evidence, the District Court's Order was arbitrary and capricious.

The SOL as to Inzunza's *eleven counts* of sexual assault against a minor under the age of fourteen is *extremely* relevant as to the prejudice analysis, as argued in the AOB. AOB15-17. Justice O'Connor noted in the Doggett dissent that "[i]n general, the graver the offense, the longer the limitations period; indeed, many serious offenses, such as murder, typically carry no limitations period at all." Doggett, 505 U.S. at 668, 112 S. Ct. 2699, 120 L. Ed. 2d 520. Courts must apply the Barker balancing test with "common sense and sensitivity to ensure that charges are dismissed only when the evidence shows that a defendant's actual and asserted

interest in a speedy trial has been infringed. The constitutional right is that of a speedy trial, not dismissal of the charges." Cantu, 253 S.W.3d at 282.

It is within the context of "common sense and sensitivity" that the SOL for crimes such as sexual assault against minors becomes relevant; not that the SOL precludes a speedy trial claim, but that lengthy SOL are generally associated with grave offenses. The State has set forth that, as a crime with a significant SOL, child sexual assault charges are exceptionally grave and thus, these crimes should receive considerable weight when weighed against speedy trial claims. AOB16. Had the District Court not precluded the State from making this argument, the distinction between considering the SOL for the gravity of the crime versus the timing of bringing a speedy trial claim would have been made clear. AA144.

Post-Doggett courts recognize that even when police negligence is the cause for delay, as the District Court found here, a defendant can still suffer no actual prejudice from that delay. Cantu, 253 S.W.3d at 277. Courts must balance the dismissal of *all* charges against a defendant—a "radical remedy"—against the defendant's right to a speedy trial, while recognizing that "pretrial delay is often both inevitable and wholly justifiable." Cantu, 253 S.W.3d at 281; Doggett, 505 U.S. at 656, 112 S.Ct. 2686, 120 L.Ed.2d 520.

As argued by the State and referenced by the District Court, granting Inzunza's motion on these facts sets a "dangerous precedent". AA149, 179. The

State strenuously asserts that upholding the District Court's Order on these facts would cause significant disruption to the investigative process and the Nevada criminal justice system. Defendants would be gifted a "get out of jail free" card if a District Court judge decides that he or she is dissatisfied with the State's failure to apprehend a suspect—one that experienced no prejudice whatsoever during the time that he was not in the state's custody—within a year. This was not and cannot be the Supreme Court's intention in Doggett. Other jurisdictions have employed the "common sense and sensitivity" required upon review of Sixth Amendment claims post-Doggett; the State implores this Court to do the same by reversing the District Court's Order dismissing the charges.

CONCLUSION

For the above reasons, the State requests this Court reverse the District Court's Order.

Dated this 10th day of January, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 6,931 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 10th day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 10th day of January, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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