IN THE SUPREME COURT OF THE STATE OF NEVADA

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

RESPONDENT'S MOTION TO STRIKE APPELLANT'S REPLY BRIEF

Comes Now Respondent, RIGOBERTO INZUNZA, by and through Chief Deputy Public Defender DEBORAH L. WESTBROOK, and moves to strike Appellant's Reply Brief, in whole or in part, because the vast majority of arguments made therein were never raised in Appellant's Opening Brief and/or directly contradict key concessions that were made by the State in its Opening Brief, because the Brief contains ad hominem attacks on defense counsel that are unwarranted and unprofessional, and because the Brief misrepresents the law.

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This motion is filed pursuant to NRAP 27 and is based on the following memorandum and all papers and pleadings on file herein.

DATED this 18 day of January, 2019.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By___*/s/ Deborah L. Westbrook*_____
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After filing a scant 20-page Opening Brief that failed to demonstrate *any* abuse of discretion by the district court, the State has now filed a 29-page Reply Brief that flouts this Court's procedural rules in an ill-conceived effort to secure a reversal. The vast majority of arguments in the State's Reply Brief were *never raised* in its Opening Brief. The State's Reply Brief even makes two lengthy arguments that *directly contradict* concessions made in its Opening Brief! To justify these new arguments, the State makes ad hominem attacks on defense counsel that are unwarranted and unprofessional. The State even misrepresents the law in order to insinuate that defense counsel has misled this Court. As set forth herein, the State's Reply Brief should be stricken, in whole or in part, as a flagrant violation of this Court's procedural rules.

II. ARGUMENT

Nevada Rule of Appellate Procedure ("NRAP") 28 provides that a reply brief "is limited to answering any new matter set forth in the opposing brief[.]" **NRAP 28**. This Court will not consider new issues that are raised for the first time in an appellant's reply brief. See **Phillips v. Mercer**, 94 Nev. 279, 283, 579 P.2d 174, 176-77 (1978). In fact, "[i]ssues not raised in

an appellant's opening brief are deemed waived." **Powell v. Liberty Mut. Fire Ins. Co.**, 127 Nev. Adv. Rep. 14, 252 P.3d 668, 672, n.3 (2011) (citing **Bongiovi v. Sullivan**, 122 Nev. 556, 570, n.5, 138 P.3d 433, 444, n.5 (2006)).

In its Opening Brief, the State argued that the district court abused its discretion when it applied "the four-part test laid out in Barker v. Wingo, which examines the '[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.'" Appellant's Opening Brief ("AOB") at 6.

However, the State's Reply Brief is replete with brand new arguments that must be stricken, not only because they are entirely new arguments, but because they flat-out contradict key concessions that were made by the State in its Opening Brief.

1. New arguments regarding the "third factor".

When analyzing the third factor – "the defendant's assertion of his right" – the State conceded in its Opening Brief that "[t]he district court **properly ruled** that Inzunza's assertion of his right was not a relevant factor". AOB at 20 (emphasis added). The State devoted a single paragraph of its Opening Brief to this factor. AOB at 12-13. In that paragraph, the State vaguely described the arguments that Mr. Inzunza made in the district court

and then summarized the district court's ruling as to the third factor. Id. However, the State did not identify **any** errors with the district court's ruling on the third factor:

> As for the third Barker factor, Inzunza did not assert his right to a speedy trial during the time frame considered by the district court. During the evidentiary hearing, the district court repeatedly stated that its ruling was based on the two year time period between the State filing the Criminal Complaint and Inzunza being arrested. AA 164. During this time frame Inzunza did not know there were criminal charges pending against him and therefore did not assert his speedy trial right. AA 145. Inzunza argued before the district court that this factor weighed in his favor because he preserved his federal speedy trial rights at arraignment. AA 56. However, because the time period after arrest was not a consideration in the district court's ruling, Inzunza cannot be said to have asserted his right during the time period in question and the district court ruled that this factor was therefore not relevant. AA 157;176-77.

AOB at 13. Because the State **conceded** that the district court correctly evaluated the third factor (AOB at 20), Mr. Inzunza (understandably) had no reason to engage in a lengthy discussion of that factor in his Answering Brief. See Respondent's Answering Brief ("RAB") at 18.

Yet, after making this concession (and after Mr. Inzunza relied on it to prepare his Answering Brief), the State disavowed it and argued for the first time in its Reply that district court erred in evaluating the third factor. See Appellant's Reply Brief ("ARB") at 11-17. To justify its brand new 7-page argument, the State audaciously accused Mr. Inzunza of trying to

"bamboozle" this Court by failing to address the third factor in his Answering Brief:

> 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 RAB 15,18. It is apparent given the robust discussion regarding the District Court's findings of gross negligence on the part of the 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**.

ARB at 11 (emphasis added). It takes a lot of chutzpah to blame Mr. Inzunza for the State's failure to advance an argument in its Opening Brief, and to do so in such an unprofessional manner. Without question, the State's argument at pages 11-17 must be stricken. See **NRAP 28**.

2. *New arguments regarding the "period after arrest".*

When analyzing the first factor – "length of delay" – the State conceded in its Opening Brief that "**the period after arrest was not a consideration for the district court when making its decision, and is therefore not an appealable issue here**." AOB at 7 and n.2 (emphasis added). Because the State conceded that post-arrest delays were not an "appealable issue here", Mr. Inzunza (again, understandably) did not address

any issues related to the post-arrest delay in his Answering Brief. See generally, RAB.

In its Reply Brief, however, the State turned this "unappealable" issue into a central argument for reversal, now claiming that the district court miscalculated the length of the delay by failing to include the *post-arrest* delay in its calculation. See ARB at 18-19. The State further relied on this "unappealable" issue by arguing that the district court's miscalculation impacted its evaluation of the third and fourth factors (assertion of the right and prejudice). See ARB at 12-22. Both of these were brand new arguments for reversal, never raised in the State's Opening Brief, and they must be stricken. See **NRAP 28**.

3. *New arguments regarding the "prejudice ratio".*

In its Reply Brief, the State argues for the first time that multiple federal decisions that were issued post-**Doggett** 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." ARB at 23-24. This is an entirely new argument that could have been made in the State's Opening Brief but was never made. It, too, must be stricken. See **NRAP 28**.

4. *Inaccurate argument that State v. Jones "roundly rebuts" State v. Selvage.*

In its Reply Brief, the State insinuates that defense counsel has somehow misled this Court by citing **State v. Selvage**, 80 Ohio St. 3d 465, 467-69, 687 N.E.2d 433, 435-36 (Ohio 1997), to explain why statutes of limitation do not impact the prejudice analysis under **Doggett**. ARB at 26-27. The State claims that **Selvage** was "roundly rebut[ted]" in 2016 by **State v. Jones**, 148 Ohio St. 3d 167, 171, 69 N.E.3d 688, 693 (Ohio 2016). However, this claim is patently false. **Jones** addressed the degree of prejudice necessary to establish an unconstitutional preindictment delay in violation of due process, which is entirely different from a "speedy trial" claim arising under the Sixth Amendment. Indeed, the very first paragraph of the **Jones** decision makes it abundantly clear that its analysis does not apply to a Sixth Amendment "speedy trial" claim:

> The Sixth Amendment to the United States Constitution guarantees the accused in a criminal prosecution "the right to a speedy and public trial." **But on its face, the Sixth Amendment provides no protection to those who have not yet been accused; it does not "require the Government to discover, investigate, and accuse any person within any particular period of time."** United States v. Marion, 404 U.S. 307, 313, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). **Statutes of limitations provide the ultimate time limit within which the government must prosecute a defendant—a definite point "beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.**" Id. at 322, 92 S.Ct. 455. See also United States v. Lovasco, 431 U.S. 783, 789, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977) (stating that statutes of limitations provide predictable limits to prevent initiation of overly stale charges). But when unjustifiable

> preindictment delay causes actual prejudice to a defendant's right to a fair trial despite the state's initiation of prosecution within the statutorily defined limitations period, the Due Process Clause affords the defendant additional protection. Id.

Id. (emphasis added). Although statutes of limitations are certainly relevant to a preindictment due process claim, the instant case involves a delay in prosecution that occurred after Mr. Inzunza was publicly accused, in violation of the Sixth Amendment. As such, **Jones** did not "roundly rebut" **Selvage**, and the State's inaccurate argument should be stricken.

5. *New argument that the **Doggett**-balancing test must be applied with "common sense and sensitivity".*

In a brand new argument on appeal, the State asks this Court to adopt the standard applied by the Court of Criminal Appeals of Texas (and allegedly employed in "other jurisdictions") and apply the **Doggett** 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." ARB at 27-29. The State never asked this Court to adopt a new standard in its Opening Brief and it is improper for the State to make such a request in its Reply Brief, particularly when the standard of review on appeal is "abuse of discretion". See **NRAP 28**.

III. CONCLUSION

The State's Reply Brief egregiously flouts Nevada's Rules of Appellate Procedure. As Chief Deputy District Attorney Jonathan E. VanBoskerck, himself, wrote in a motion to strike a defense reply brief:

> rules exist for a reason and that they cannot be ignored when it is convenient for a litigant to do so:
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> > In the words of Justice Cardozo,
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> > > Every system of laws has within it artificial devices which are deemed to promote . . . forms of public good. These devices take the shape of rules or standards to which the individual though he be careless or ignorant, must at his peril conform. If they were to be abandoned by the law whenever they had been disregarded by the litigants affected, there would be no sense in making them.
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> > Benjamin N. Cardozo, *The Paradoxes of Legal Science* 68 (1928)
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> > **Scott E. v. State**, 113 Nev. 234 239, 931 P.2d 1370, 1373 (1997)."[1]

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[1] See **Pimentel v. State**, Dkt. No. 68710, Document 2016-25472 (Motion to Strike, filed by Jonathan E. Vanboskerck) at page 4.

For all the foregoing reasons, the State's Reply Brief should be stricken, in whole or in part, as a flagrant violation of this Court's procedural rules.

DATED this 18 day of January, 2019.

DARIN F. IMLAY
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 18 day of January, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD
STEVEN S. OWENS
JONATHAN E. VANBOSKERCK
DEBORAH L. WESTBROOK
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

RIGOBERTO INZUNZA
c/o P. David Westbrook
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BY ___*/s/ Carrie M. Connolly*____
Employee, Clark County Public
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