IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, v. RIGOBERTO INZUNZA, Respondent.	CASE NO: 75662

APPELLANT'S OPPOSITION TO MOTION TO STRIKE

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, JONATHAN E. VANBOSKERCK, and files this Opposition to Motion to Strike. This opposition is brought pursuant to Nevada Rules of Appellate Procedure (NRAP) 27 and is based on the following memorandum and all papers and pleadings on file herein.

Dated this 25th day of January, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney

ARGUMENT

The Motion to Strike ("MTS") filed by Respondent Rigoberto Inzunza ("Inzunza") alleges portions of the Appellant's Reply Brief ("ARB") should be stricken on three bases: 1) that the ARB contains arguments not raised in its opening brief; 2) the ARB engaged in *ad hominem* attacks on defense counsel; and 3) the ARB contains misrepresentations of the law. MTS at 3. As set forth below, Inzunza's allegations are without merit and his motion should be denied.

I. THE STATE DID NOT RAISE NEW ISSUES IN ITS REPLY

The State is aware that it may not raise issues in the ARB that were not presented in the lower court or the AOB—and indeed it did not. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004) (holding "[t]his ground for relief was not part of appellant's original petition for post-conviction relief and was not considered in the district court's order denying that petition. Hence, it need not be considered by this court.") As set forth in the State's Opening Brief ("AOB"), the issue on appeal is whether the district court erred in granting Inzunza's motion to dismiss. AOB at 1. All of the State's arguments within the AOB and the ARB address the multiple ways in which the District Court erred in its Order.

Objections made and oppositions filed in the lower court preserve issues for appeal; failure to file responsive oppositions waives the right to challenge those issues on appeal. Oliver v. Barrick Goldstrike Mines, 111 Nev. 1338, 1344–45,

905 P.2d 168, 172 (1995) ("The purpose for the above rule is to prevent appellants from raising new issues on appeal concerning which the prevailing party had no opportunity to respond and the district court had no chance to intelligently consider during proceedings below."). The State's Opposition to Inzunza's Motion to Dismiss, filed in the District Court, challenged Inzunza's arguments in favor of dismissal, which the court considered and ruled upon. AA at 77-83. By filing its Opposition to Inzunza's Motion to Dismiss and presenting oral argument before the District Court, the State preserved the issue for appeal that Inzunza's motion should not have been granted for all the reasons set forth in that Opposition and at oral argument. The State's Opening Brief, which echoed the arguments made in the lower court, properly preserved the following arguments in support of denying the Motion to Dismiss, which the State properly re-asserted in response to Inzunza's Answering Brief ("RAB").

A. The "third factor" arguments

The State did not concede that the District Court failed to analyze a mandatory factor of Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972). Inzunza's claim to the contrary ignores the record and the AOB. The district court properly ruled that Inzunza's assertion of his right was not a relevant factor only in the context of determining whether he had sufficiently triggered a speedy trial inquiry; such is apparent from the plain text of the Order. AA at 172-173.

The record shows Inzunza did not assert his statutory right to a speedy trial, and that the District Court failed to consider this mandatory Barker factor relevant. AA at 81, 145, 148, 177. The AOB restates that the District Court failed to consider this factor in its analysis: "[d]uring 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," and that "the time period after arrest *was not a consideration* in the district court's ruling…" (Emphasis added). AOB at 13; AA at 177. The time period after arrest necessarily included Inzunza's waiver of his speedy trial rights, which should have been considered as to their effect on his allegations of prejudice. This was argued by the State before the District Court and in the AOB, and was acknowledged by Inzunza himself.[1] AA at 158-159.

The State did not concede this issue in the AOB and its arguments in support of such in the ARB should not be stricken.

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[1] As argued in the AOB, "[t]he district court found that the State did not rebut the presumption of prejudice *because [the State] focused on Inzunza's part in causing delays after his arrest* and *not* the time period the court was concerned with." (Emphasis added). AOB 15, n.3. Even Inzunza's own Motion to Dismiss acknowledged the period during and after the invocation of his right was a mandatory factor for consideration, as the Motion "focused largely on the time period *after arrest*, arguing that he suffered prejudice due to pre-trial incarceration and anxiety." AOB 15 n.3.

B. The "period after arrest"

As argued above, the State conceded nothing in its Opening Brief. The State did not dispute that the 26-month delay in apprehending Inzunza was sufficient to trigger the analysis pursuant to Doggett v. United States, 506 U.S. 650, 651-52, 112 S.Ct 2686, 2690 (1992), as such a delay was sufficient to trigger a speedy trial inquiry as a matter of law. AOB at 6; ARB at 6. After setting forth this undisputed fact, the AOB shows the State preserved its argument that the District Court inaccurately determined the relevant length of delay for purposes of analyzing prejudice. AOB at 6. Inzunza's claim that the State conceded this was "not an appealable issue" is taken out of context. MTS at 6. Footnote 2 of the AOB refers to the District Court's decision that the 26-month delay was sufficient to trigger a speedy trial analysis, and not that the delay including that spent in custody should be considered the length of time to trigger that analysis. The fact that the 26-month delay is sufficient to trigger a speedy trial inquiry is indeed not an appealable issue.

Contrary to Inzunza's interpretation, the State's "central argument" is not that the District Court miscalculated the length of delay, but that the District Court erred as a matter of law and abused its discretion in finding prejudice sufficient to dismiss the charges against Inzunza. AOB at 5, 8, 13; ARB at 14, 22. The court did indeed miscalculate the length of delay, which impacted its prejudice analysis.

However, even assuming *arguendo* the District Court did properly calculate the length of delay for that purpose, it still erred in granting the Motion to Dismiss, as Inzunza suffered no actual prejudice during that 26-month delay. AOB at 6-8, 13-20; ARB at 19-25. There is no basis to strike the State's arguments which refer to the period after arrest in this case, especially in light of Barker's mandate that such time *must* be considered in the prejudice analysis.

C. The "Prejudice Ratio"

Section D of the ARB, "Prejudice," includes subsection 2, "The Prejudice Ratio." ARB at 17, 22. The arguments within Section D(2) all directly support the State's arguments from the lower court and the AOB that Inzunza suffered no actual prejudice sufficient to dismiss the charges against him. AA at 81, 148; AOB at 13-14. Inzunza has cited no authority that prevents the State from including sources of law in its Reply that support arguments—raised both in the lower court and in the AOB—that show the District Court abused its discretion and made an error of law. The State's argument in Section D(2) is a restatement of the argument that the District Court abused its discretion and made an error of law in finding prejudice sufficient to dismiss the charges against Inzunza, an argument stated throughout the AOB and ARB. AOB at 13-20; ARB at 17-29. The "ratio," or quantitative relation, of the minimal pretrial delay in the instant case as compared to that of Doggett was plainly set forth in the AOB. AOB at 5, 8, 15.

The State's arguments on this point in the ARB and thus not new and should not be stricken.

D. "Common sense and sensitivity"

Inzunza misunderstands the State's arguments. There is no inference, argument, or request whatsoever in the State's Brief that this Court adopt a new standard of review for Sixth Amendment claims. In context, the State asserted "[c]ourts 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.'" ARB at 27. The State later restated that "[o]ther 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." ARB at 29. This is merely a restatement of the State's argument that the District Court abused its discretion in finding prejudice sufficient to dismiss the charges against Inzunza, an argument stated throughout the AOB and ARB. AOB at 13-20; ARB at 17-29. The State's argument to this effect should not be stricken.

II. THE STATE DID NOT ENGAGE IN AD HOMINEM ATTACKS

Within Inzunza's claim that the State brought new arguments on appeal, Inzunza includes a separate claim that the State, in an "unwarranted" and "unprofessional" manner, and with "a lot of chutzpah," "audaciously accused"

Inzunza of trying to "bamboozle" this Court. MTS at 1, 5-6. Setting aside the commentary regarding the similar color of pots and kettles, the State offers clarification.

First, an *ad hominem* argument is one based on the perceived failings of an adversary rather than on the merits of the argument, e.g., "Top Gun is a terrible movie because Tom Cruise is a Scientologist." The ARB made no reference whatsoever to counsel's perceived failings to rebut his arguments. Second, as used in the AOB, to "bamboozle" means "to confuse, frustrate, or throw off thoroughly or completely." Merriam-Webster's Dictionary, "Bamboozle." ARB at 11. In the ARB, the State pointedly employed the passive voice and not the active voice, in that "the District Court may have been bamboozled," not "Inzunza's defense counsel bamboozled the District Court." ARB at 11. The subtle but important difference was meant to convey the District Court's confusion of the issues, in that it was thrown off completely from the relevant Doggett/Barker analysis and focused instead—wrongly—on the investigatory practices of the North Las Vegas Police Department ("NLVPD"). ARB at 11. Third, Inzunza had every opportunity in his Answering Brief to argue the District Court's refusal to consider the third Barker factor was proper; he chose instead to elaborate on the second Barker factor, the actions of NLVPD.

It is apparent that Inzunza's counsel was emphasizing portions of the record that best supported Inzunza's arguments, and minimizing reference to those portions that could weaken the same. Inzunza's allegations that the State somehow implied a moral or ethical failing on behalf of counsel in its exercise of diligence are unfounded. Indeed, Inzunza's attempt to paint Respondent as "unprofessional" and full of "chutzpah" is a hypocritical *ad hominem* attack. For these reasons, the State's arguments at pages 11-17 of the ALB should not be stricken.

III. THE STATE DID NOT MISREPRESENT THE LAW

The State cited State v. Jones, 148 Ohio St. 3d 167, 171, 69 N.E.3d 688, 693 (2016), for the proposition that unjustifiable delay does not violate due process unless it results in actual prejudice. ARB at 26-27. As set forth throughout the ARB, this modern, post-Doggett view was echoed in Cantu v. State, 253 S.W.3d 273, 283 (Tex. Crim. App. 2008), Ex parte Walker, 928 So. 2d 259, 269 (Ala. 2005), and a host of other cases throughout the country. This Court came to the identical conclusion well before Doggett in State v. Fain, 105 Nev. 567, 570, 779 P.2d 965, 967 (1989). Citing a case for a proposition supported by numerous other cases can hardly be characterized as a misstatement of law.

The State also cited Jones for the proposition that statutes of limitations are relevant to the Doggett/Barker prejudice analysis. ARB at 25-26. Inzunza claims that Jones does not rebut State v. Selvage, 80 Ohio St. 3d 465, 467-69, 687 N.E.2d

433, 435-36 (Ohio 1997), and that the State's claim to that effect is "patently false." MTS at 8. The State disagrees and notes the nature of the adversarial system can result in differing interpretations of law. As quoted in the MTS, "[s]tatutes 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.'" MTS at 8. At the risk of rearguing claims in the ARB, the State asserts that an irrebuttable presumption of prejudice post-expiration of the statute of limitations necessarily implies that there is a rebuttable presumption of prejudice before that point; thus, statutes of limitation are relevant to the court's prejudice analysis. Regardless, this Court determines the appropriate interpretation of the law, not Inzunza. Therefore, the State's arguments to this effect are not a misstatement of law and should not be stricken.

CONCLUSION

WHEREFORE, the State respectfully requests this Court deny the Motion to Strike.

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Dated this 25th day of January, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
P.O. Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 25, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

P. DAVID WESTBROOK
Deputy Public Defender

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

BY */s/ J. Garcia*
Employee, District Attorney's Office

JEV/Austin Beaumont/jg