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Sep 08 2020 08:42 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

8 **EIGHTH JUDICIAL DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 RAMON MURIL DORADO,

11 Petitioner,

12 vs.

13 THE STATE OF NEVADA,

14 Respondent.

) Case No.: C-17-323098-1

) Dept No.: XXIX

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16 **BENCH MEMO ON LEGAL STANDARD TO ASSESS CLAIM OF**
17 **UNCONSTITUTIONAL PRE-INDICTMENT DELAY IN CHARGING**

18 In its Order of Limited Remand, filed August 17, 2020, the Nevada Supreme
19 Court directed the parties to address the alleged discrepancy between *Wyman v. State*,
20 125 Nev. 592, 601 (2009) and the federal authorities cited by Dorado in his pleadings
21 regarding the test for determining the existence of a due process violation grounded in
22 pre-indictment delay in bringing criminal charges. This bench memo follows.
23

24 Dorado asks that the charges against him be dismissed because his due process
25 rights were violated when he was forced to trial over 17 years after the alleged
26 criminal conduct on April 24, 1999.
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A. Intent to Delay to Gain a Tactical Advantage Should Not Be Required

Dorado acknowledges the split in the federal and state courts regarding whether a defendant must show bad faith (i.e., whether the State delayed filing charges in order to gain a tactical advantage) in order to show a due process violation for pre-indictment delay. The Ninth and Fourth Circuits do not require such a showing, instead holding that bad faith is just one factor among many when balancing the reasons for the delay against prejudice to the accused. See, e.g., *United States v. Ross*, 123 F.3d 1181, 1185 (9th Cir. 1997) and *Howell v. Barker*, 904 F.2d at 889, 895 (4th Cir. 1990). As shown below, United States Supreme Court jurisprudence concerning due process compels this result. Furthermore, the Ninth Circuit's decision in *Ross* is persuasive authority. *Executive Mgmt. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (recognizing that federal decisions involving the federal civil procedure rules are persuasive authority when this court examines its equivalent rules).¹

B. United States Supreme Court Jurisprudence

The United States Supreme Court has never required a showing of bad faith or intentional delay. *United States v. Lovasco* (1977) 431 U.S. 783, 788-90 held that to show a Due Process violation for pre-indictment delay, a defendant must demonstrate (1) he or she suffered actual prejudice and (2) when weighed against the reasons for the delay, the delay offends "those fundamental conceptions of justice which lie at the base

¹ The Nevada Supreme Court does not seem to have a case directly on point regarding the persuasive authority of federal court decisions on constitutional questions. See *Jaeger v. State*, 113 Nev. 1275, 1282 (1997) (assuming without explicitly deciding that Ninth Circuit precedent is persuasive by quoting a federal case.) The Court of Appeal is more explicit. See, e.g., *Olivera v. State*, 2016 WL 3213565 at *3 fn. 9 (No. 68398, May 31, 2016) ("We note *Manning* was published after Olivera's trial ended. While Nevada case law on this topic did not exist at trial, Ninth Circuit cases would have been persuasive authority.");

1 of our civil and political institutions.” The Court did not require a showing of bad faith
2 and instead stated that it “could not determine in the abstract the circumstances in
3 which preaccusation delay would require dismissing prosecutions.” 431 U.S. at pp. 795,
4 796–797. Similarly, *United States v. Marion* (1971) 404 U.S. 307, 324–325 stated that
5 “we need not, and could not now, determine when and in what circumstances actual
6 prejudice resulting from pre-accusation delays requires dismissal.” 404 U.S. at 324.
7

8 Requiring a showing of bad faith would offend “those fundamental conceptions of
9 justice which lie at the base of our civil and political institutions” and which animate
10 due process jurisprudence. As articulated in another jurisdiction, “Our sense of fair
11 play is properly offended when, with little or no justification, the government waits
12 decades to bring a prosecution and that delay has demonstrably placed the defense at a
13 profound and perhaps fatal disadvantage. It is inconceivable that even the total loss of
14 a defendant’s ability to defend is constitutionally irrelevant unless it can be shown that
15 the delay was undertaken to gain tactical advantage.” *People v. Boysen*, 165
16 Cal.App.4th 761, 774 (adopting balancing test with bad faith just one factor to be
17 considered).
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20 In the instant case and as shown more fully below, the delay was the result of
21 negligence or recklessness because the State did almost nothing to investigate the case.
22 Dorado was prejudiced because the State destroyed all of the physical evidence except
23 the DNA a mere eight months after the events in question. 9 AA 856. Lost was the
24 complaining witness’ clothing, the audiotape of her statement to police, the original
25 911 call, and the testimony of the SANE nurse who conducted the initial examination.
26 Furthermore, the State frankly admitted that at the time of the alleged crimes Metro
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1 simply didn't have the money to conduct DNA testing. In 2015, they received a grant.
2 3 AA 203. On the State's logic, Dorado could have been prosecuted in 2040 if that was
3 the earliest Metro received funding. Due Process is not subject to the vicissitudes of
4 Clark County's fisc. Requiring Dorado to stand trial almost 17 years after the alleged
5 criminal conduct offends those fundamental conceptions of justice which lie at the base
6 of our civil and political institutions.
7

8 **C. Ninth Circuit Jurisprudence**

9 The Ninth Circuit does not require a showing of intent to gain a tactical
10 advantage by delaying the filing of criminal charges; this is just one factor of many to
11 be considered in a balancing test. *United States v. Ross*, 123 F.3d 1181, 1184-1185 (9th
12 Cir. 1997) held that:
13

14 Preindictment delay that results from negligence or worse may violate
15 due process. See *United States v. Swacker*, 628 F.2d 1250, 1254 n. 5 (9th
16 Cir.1980) (some government culpability must be shown to prove a
17 deprivation of due process). Whether due process has been violated is
18 decided under a balancing test and "[i]f mere negligent conduct by the
19 prosecutors is asserted, then obviously the delay and/or prejudice suffered
20 by the defendant will have to be greater." *United States v. Moran*, 759
21 F.2d 777, 782 (9th Cir.1985) (as amended).

22 In *United States v. Moran*, 759 F.2d 777 (9th Cir. 1985), the government
23 asserted that language from *United States v. Lovasco*, supra, 431 U.S. at p. 795, fn. 17,
24 as well as from *United States v. Marion* (1971) 404 U.S. 307, 324, required that the
25 defendant "prove that the government intentionally delayed the indictment to gain a
26 tactical advantage or delayed it in reckless disregard of the circumstances indicating
27 an appreciable risk of harm to the defense." *Moran*, supra, 759 F.2d at p. 781. That
28 contention was rejected by the Ninth Circuit:

The language from these two cases merely acknowledges governmental

1 concessions that intentional or reckless conduct would or might be
2 considered violations of the due process clause if actual prejudice has been
3 shown. The *Lovasco* court did not set intent or recklessness as required
4 standards of fault. In fact, in both the *Marion* and *Lovasco* cases, the
5 Court stated that it ‘could not determine in the abstract the circumstances
6 in which preaccusation delay would require dismissing prosecutions.’
7 *Lovasco*, 431 U.S. at 796.

8 *Moran, supra*, 759 F.2d at p. 781. *Moran* then quoted the concluding statement from
9 *Lovasco*: “We therefore leave to the lower courts, in the first instance, the task of
10 applying the settled principles of due process that we have discussed to the particular
11 circumstances of individual cases. We simply hold that in this case the lower courts
12 erred in dismissing the indictment.” *Moran, supra*, 759 F.2d at p. 781, quoting *United*
13 *States v. Lovasco, supra*, 431 U.S. at p. 797.

14 Thus, *Moran, supra*, 759 F.2d at p. 782, held that whether pre-indictment delay
15 has violated due process is decided under a balancing test, with bad faith by the
16 government one factor of many to be considered. Thus, due process violation may
17 result from “mere negligent conduct by the prosecutors,” although “the delay and/or
18 prejudice suffered by the defendant will have to be greater than that in cases where
19 recklessness or intentional governmental conduct is alleged.” *Ibid*.

20 **D. Fourth Circuit Jurisprudence**

21 The Fourth Circuit has a similar rule. *Howell v. Barker*, 904 F.2d at 889, 895
22 (4th Cir. 1990) explained that “in both *Lovasco* and *Marion*, the Supreme Court made
23 it clear that the administration of justice, vis-a-vis a defendant’s right to a fair trial
24 necessitated a case-by-case inquiry based on the circumstances of each case. Rather
25 than establishing a black-letter test for determining unconstitutional preindictment
26 delay, the Court examined the facts in conjunction with the basic due process inquiry:
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1 'whether the action complained of . . . violates those "fundamental conceptions of
2 justice which lie at the base of our civil and political institutions" . . . and which define
3 "the community's sense of fair play and decency.'" *Ibid.*, quoting *United States v.*
4 *Lovasco, supra*, 431 U.S. at p. 790.

5
6 In light of the foregoing, the Fourth Circuit did not require a showing of an
7 improper prosecutorial motive in addition to establishing prejudice. "Taking this
8 position to its logical conclusion would mean that no matter how egregious the
9 prejudice to a defendant, and no matter how long the preindictment delay, if a
10 defendant cannot prove improper prosecutorial motive, then no due process violation
11 has occurred. This conclusion on its face, would violate fundamental conceptions of
12 justice, as well as the community's sense of fair play. Moreover, this conclusion does
13 not contemplate the difficulty defendants either have encountered or will encounter in
14 attempting to prove improper prosecutorial motive." *Ibid.*

15 16 **E. Other Authority**

17
18 Many federal and state courts are in accord because requiring a showing of bad
19 faith offends concerns of fundamental fairness which animate the Due Process clause.
20 See, e.g., *Saurez v. Sherman*, 2018 WL 4810773 *7 (C.D. Cal., Jan. 15, 1999) (adopting
21 balancing test and citing *Ross, United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir.
22 1992), and *United States v. Krasn*, 614 F.2d 1229, 1235 (9th Cir. 1980)); *United States*
23 *v. Liersch*, 2006 WL 6469421 *17 (S.D. Cal., June 26, 2006) (citing *Ross* and adopting
24 balancing test); *Gantt v. Roe*, 1999 WL 34868006 *23 (C.D. Cal., Jan. 15, 1999) (citing
25 *Ross* and adopting balancing test); *State v. Knickerbocker*, 152 N.H. 467, 470; 880 A.2d
26 419, 423 (2005) (citing *Ross* and adopting balancing test); *State ex rel. Knotts v.*
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1 *Facemire*, 223 W.Va. 594, 602; 678 S.E.2d 847, 855 (2009) (adopting *Howell's* balancing
2 test, where the State's bad faith is just one factor to be considered upon the rationale
3 that "[o]nly by eliminating the burden imposed on a defendant to demonstrate that the
4 State gained an advantage through preindictment delay, will the overarching concern
5 of fundamental fairness that undergirds the Due Process Clause be furthered.");
6 *Ventura v. People*, 2016 WL 2604525 *8; 64 V.I. 589, 609 (2016) ("Because we believe
7 that requiring the defendant to prove the reason behind the government's decision to
8 delay charging him with a crime would be nearly impossible, [would render] the rule
9 defunct, see *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir.1990) . . .").
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12 For all of the foregoing reasons, an intent to gain tactical advantage should not
13 be a prerequisite to a finding of a due process violation for pre-indictment delay.

14 **F. Nevada Jurisprudence**

15 *Wyman v. State*, 125 Nev. 592, 601 (2009) conflicts with the foregoing
16 authorities by requiring a defendant to show "that the prosecution intentionally
17 delayed bringing the charges in order to gain a tactical advantage over the accused, or
18 that the prosecution delayed in bad faith." As shown above, the United States
19 Supreme Court has never required a showing of bad faith or intentional delay. See
20 *United States v. Lovasco*, *supra*, 431 U.S. at pp. 795, 796–797 and *United States v.*
21 *Marion*, *supra*, 404 U.S. at 324–325.
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24 *Wyman*, 125 Nev. at 601 erroneously cited to *United States v. DeGeorge*, 380
25 F.3d 1204, 1210–11 (9th 2004) for the proposition that appellant must show an
26 intentional delay. Instead, *DeGeorge* found no prejudice and so had no need to analyze
27 the reasons for the delay. Instead, it articulated a balancing test:
28

1 DeGeorge must satisfy a two-part test in order to establish that pre-
2 indictment delay has violated his due process rights: 1) he must prove
3 that he suffered actual, non-speculative prejudice from the delay; and 2)
4 he must show that the delay, when balanced against the government's
5 reasons for it, " 'offends those fundamental conceptions of justice which lie
6 at the base of our civil and political institutions.' " *United States v. Doe*,
7 149 F.3d 945, 948 (9th Cir.1998) (quoting *United States v. Sherlock*, 962
8 F.2d 1349, 1353-54 (9th Cir.1989)).

9 *DeGeorge, supra*, 380 F.3d at 1210-11.

10 *Wyman*, 125 Nev. at 601, also erroneously cited *United States v. Sherlock*, 962
11 F.2d 1349 (9th Cir. 1986), which similarly has no intent requirement. *Sherlock, supra*,
12 962 F.2d at 1353-54, stated:

13 The Fifth Amendment guarantees that defendants will not be denied due
14 process as a result of excessive preindictment delay. We scrutinize a
15 violation of this guarantee under a two-pronged test. First, *Sherlock* and
16 *Charley* must prove they suffered actual, non-speculative prejudice from
17 the delay. *United States v. Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2044,
18 2048, 52 L.Ed.2d 752 (1977); *United States v. Moran*, 759 F.2d 777, 782
19 (9th Cir.1985), cert. denied, 474 U.S. 1102, 106 S.Ct. 885, 88 L.Ed.2d 920
20 (1986). Second, they must show that the delay, when balanced against the
21 prosecution's reasons for it, offends those "fundamental conceptions of
22 justice which lie at the base of our civil and political institutions." See
23 *Lovasco*, 431 U.S. at 790, 97 S.Ct. at 2049 (quoting *Mooney v. Holohan*,
24 294 U.S. 103, 112, 55 S.Ct. 340, 341, 79 L.Ed. 791 (1935)); *Moran*, 759
25 F.2d at 781-82.

26 Thus, *Wyman* was mistaken regarding the sources of its rule—the cases do not
27 stand for the propositions for which they were cited. *Wyman* should be overruled
28 because it conflicts with United States Supreme Court, and Ninth Circuit,
jurisprudence, as well as that of many other federal and state courts. As shown above,
requiring a bad faith requirement offends "those fundamental conceptions of justice
which lie at the base of our civil and political institutions" and which animate due
process. *Lovasco, supra*, 431 U.S. at 788-90. This Court should hold that a defendant
need not show that the government intentionally delayed filing charges to gain a

1 tactical advantage. Instead, this is just one factor to be balanced against the prejudice
2 to the defendant.

3 **G. Dorado's Case**

4 Dorado's due process rights were violated when he was forced to trial over 17
5 years after the alleged criminal conduct on April 24, 1999 because the State lost or
6 destroyed physical evidence and documentation of law enforcement's investigation. On
7 balancing the State's reason for the delay against the prejudice to Dorado, it is clear
8 dismissal is required under the balancing test articulated in *United States v. Ross*,
9 *supra*, 123 F.3d at 1185.
10

11 Trial counsel filed a "Motion to Dismiss for Pre-Indictment Delay and Lack of
12 Jurisdiction." 1 AA 61 et seq; Exh. A. Trial counsel argued that there was no
13 legitimate reason for the delay because the government had all of the information it
14 needed to prosecute the case in 1999. Lehr told the police that the alleged assailant
15 was a Latino named Raymond (aka Ray) who was 5'6" and approximately 180 pounds,
16 wearing light shirt, black pants, a black tie, and cowboy boots. He was a member of
17 the band playing in the Silver Saddle on April 23, 1999. Lehr drove Ray to 2101
18 Surprise Avenue and entered an apartment on the downstairs right side of the orange
19 building with a pool. She told police that another Hispanic man in his 20s was in the
20 apartment before and after the alleged attack.
21

22 Despite this wealth of information regarding the suspect's identity, the
23 government failed to adequately follow up on this case. They contacted Silver Saddle
24 and were told that the Ray in question was Ramon, the band's accordion player. Yet
25 the police made no attempt to contact Ramon or follow up on any leads. Even though
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1 Lehr drove with the police to the specific apartment, Metro never searched there for
2 Dorado. Nor did Metro return to the Silver Saddle to interview the bartender, security
3 guards and other band members or to search for Ray, as did Lehr's friend Maria Perez,
4 who was also not interviewed by the police. 9 AA 819. Metro also failed to speak to the
5 three people Lehr identified at the apartment complex: the young man in the
6 apartment and two women who Lehr passed as she left. See Exh. B, Case Review and
7 Analysis of Trial Defense Expert Robert Bub.

9 As trial counsel pointed out, "Instead, the case was cleared by Detective Barry
10 Jensen (PN 3662) on June 8, 1999, just weeks after the alleged incident. On January
11 5, 2000, Detective Jensen signed the Evidence Disposition Order for the items related
12 to the case." Exh. A. Trial counsel concluded that there was no legitimate reason for
13 the delay and that the detectives exhibited both negligence and recklessness by
14 ordering the destruction of the physical evidence, including the clothing Ms. Lehr was
15 wearing.
16

18 Even if the State's actions were merely negligent and not reckless, reversal is
19 required because Dorado was significantly prejudiced. The SANE nurse, who had a
20 chance to observe the alleged victim's demeanor and who concluded the injuries were
21 minimal, died in 2011. 1 AA 71. Furthermore, at trial, Detective Cody enumerated the
22 physical and documentary evidence that was lost. 9 AA 865, 867. All that remained
23 was the DNA, the poor transcript of Lehr's voluntary statement, and law enforcement's
24 continuation report but not the original police report. 2 AA 114 et seq.; 9 AA 865, 867.
25 Lost to time were the original tape recording of Lehr's statement to the detective, her
26 clothing on the night of the crime (2 AA 115; 9 AA 865, 867), the 911 call (2 AA 158),
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1 and any business records of 2101 Sunrise, which had been torn down in the
2 intervening years (1 AA 94).

3 Because the police destroyed Lehr's clothing (9 AA 865), her statement that the
4 pantyhose were ripped and that she stabbed Dorado could not be challenged by the
5 defense. Since she was the only percipient witnesses to testify, any evidence that
6 would have impeached her testimony was critical to Dorado's defense. As well, the loss
7 of the 911 call prejudiced Dorado because such calls are un-rehearsed and often more
8 truthful than a complaining witness' later statement. Metro's destruction of evidence
9 hindered truth-finding in other ways. Because the audiotape of Lehr's statement to
10 the detective was destroyed and because of the passage of time, there were critical gaps
11 in her trial testimony. When asked if she told the Detective that her pantyhose were
12 ripped, Lehr testified, "According to the statement, yes, that I took. I cannot recall
13 everything I said back then. There's a lot of edits on that statement and blank spots
14 from --" 8 AA 722. "Whoever transcribed that or did the typing on that did not get all
15 of my words in there." 8 AA 725. As another example: "I mean that's when he started
16 unbuckling his pants, just threw my legs up and that's when I blanked out. And I
17 remember _____." 1 AA 48. An audio would have filled in the gaps and
18 impeached Lehr's testimony.

19 Because the reason for the delay was negligence or recklessness, resulting in the
20 loss of evidence critical to defense which would have impeached Lehr's testimony, the
21 charges against Dorado should be dismissed. Forcing Dorado to defend himself 17
22 years after the alleged crime, when critical evidence was destroyed, would violate Due
23 Process because it would offend those fundamental conceptions of justice which lie at
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1 the base of our civil and political institutions.

2
3 Respectfully Submitted,

4
5 /s/ Michael Lasher

6 **MICHAEL LASHER, ESQ**

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11 (510) 507-2869

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CERTIFICATE OF SERVICE

The undersigned hereby declares that on September 8, 2020 a copy of the foregoing

**BENCH MEMO ON LEGAL STANDARD TO ASSESS CLAIM OF
UNCONSTITUTIONAL PRE-INDICTMENT DELAY IN CHARGING**

was delivered to the following:

Via Electronic Filing

STEVEN WOLFSON, ESQ.
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NEVADA SUPREME COURT

Via U.S. Mail

RAMON MURIL DORADO
Inmate ID No.: 77774
High Desert State Prison
P. O. Box 650
Indian Springs, NV 89070

/s/ Michael Lasher
MICHAEL LASHER, ESQ.
Nevada Bar No. 13805

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Exhibit A

Steven D. Grierson

MTN
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**IN THE DISTRICT COURT OF
CLARK COUNTY, NEVADA**

* * *

STATE OF NEVADA

Plaintiff

v.

RAMON DORADO

Defendant

Case No: 17-C323098-1

Dept: XVIII

MOTION TO DISMISS
FOR PRE-INDICTMENT DELAY
AND LACK OF JURISIDITION

MOTION TO DISMISS INDICTMENT

COMES NOW the defendant, RAMON DORADO, by and through his attorney of record, Thomas F. Pitaro, Esq., and Dustin R. Marcello, Esq. of the law firm, Pitaro & Fumo, Chtd. who moves this court for immediate dismissal of the indictment.

///

///

1 This motion is based on the attached Memorandum of Points and Authorities together
2 with the pleadings and papers on file herein and any argument, testimony and evidence that may
3 be presented at the hearing on this Motion.
4

5 DATED: 10/19/2018

6 s/ Thomas Pitaro
7 THOMAS F. PITARO ESQ
8 Nevada Bar No. 1332

9 **NOTICE OF MOTION**

10
11 TO: THE STATE OF NEVADA, Plaintiff; and

12 TO: STEVE WOLFSON, DISTRICT ATTORNEY, by and through
13 his Deputy District Attorney.

14 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing
15 Motion on for hearing on the 30 day of October, 2018 at 8:30 A.M., or as
16 soon thereafter as counsel may be heard, in the above-entitled Court.
17

18 DATED: 10/19/2018

19 s/ Thomas Pitaro
20 THOMAS F. PITARO ESQ
21 Nevada Bar No. 1332
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1 Despite the wealth of information provided by Ms. Lehr, LVMPD and the District
2 Attorney's office failed to adequately follow up of the case. The LVMPD Case Monitoring
3 and Closure form indicates that detectives spoke with the victim again approximately a week
4 after the assault. They then contacted the Silver Saddle Saloon and were told that the Ray in
5 question was Ramon, the accordion player from the band. There are no other notes in the file
6 to indicate that detectives followed up on this lead or made any attempts to contact Ray.
7 Moreover, there is nothing to indicate that detectives followed up on any other leads including
8 the apartment address provided by Lehr. Instead, the case was cleared by Detective Barry
9 Jensen (PN 3662) on June 8, 1999. On January 5, 2000, Detective Jensen signed the Evidence
10 Disposition Order for the items related to the case.
11

12 There were no attempts to indict Mr. Dorado for over 17 years, until there was a
13 political push to process a large number of untested Nevada rape kits in 2016. Ms. Lehr's
14 sexual assault kit was among those tested. The DNA in that kit was a match to the defendant,
15 Ramon Dorado. Mr. Dorado's DNA was in the system from a previous, unrelated charge. Due
16 to the matching DNA, the District Attorney's office filed charges against Mr. Dorado, despite
17 the incident having occurred 17 years previously.
18

19 On the night in question, Mr. Dorado and Lehr engaged in consensual sexual activity
20 after enjoying the evening together at the bar. Lehr agreed to leave the bar with him and
21 willingly went to his house to engage in sexual activity. Despite Lehr's timely reports to the
22 police, the police chose not to indict Mr. Dorado, not for failure of knowing his identity. The
23 newly found DNA matching Mr. Dorado does not provide the police with new evidence
24 against Mr. Dorado, as his identity was never in question. There exists the same amount of
25 evidence against Mr. Dorado as existed when Lehr accused him of sexual assault, and the
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1 state chose not to pursue indictment. However, due to the huge delay between the incident and
2 the indictment, Mr. Dorado is severely disadvantaged in his attempts to clear his name of this
3 heinous charge.
4

5 ARGUMENT

6 **THE COURT LACKS JURISDICTION BECAUSE THE STATUTE OF** 7 **LIMITATIONS BARS PROSECUTION IN THIS CASE**

8 **Statute of Limitations**

9 NRS 171.085 (1) provides a four year statute of limitations for filing a criminal
10 complaint based on an allegation of sexual assault.¹
11

12 The allegations in this case are stated in the Information to have occurred in 1999. A
13 complaint was required to have been filed sometime prior to 2003. This case was filed in 2016,
14 well outside the statute of limitations. Accordingly, the Court does not have jurisdiction and
15 must dismiss the case against Dorado.
16

17 **NRS 171.083**

18 NRS 171.083 essentially exempts sexual assault allegations from any statute of
19 limitations if a person “files with a law enforcement officer a written report” concerning a
20 sexual assault. Specially the statute
21

22 NRS 171.083(1) states in relevant part:

23 If, at any time during the period of limitation prescribed in NRS 171.085 and
24 171.095, a victim of sexual assault. . . files with a law enforcement officer a
25 written report concerning the sexual assault or sex trafficking, the period of
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27 ¹ A recent amendment(2015 Nev. AB 212) has expanded the time period to 20 years, but only if
28 the act occurred prior to October 1, 2015, if the applicable statute of limitations has commenced
but has not yet expired on October 1, 2015. Neither condition applies in this case.

1 limitation prescribed in NRS 171.085 and 171.095 is removed and there is no
2 limitation of time within which a prosecution for the sexual assault of sex
3 trafficking must be commenced.

4 Under this statute, an allegation can be made and charges can be filed after all witnesses
5 have passed or disappeared and all evidence of innocence or guilt has long expired. The only
6 protection of an accused is that the allegation and/or investigation may have been memorialized
7 and allow for at least some ability to investigate and possibly gather evidence to prove
8 innocence.

9
10 However, in the present case, there isn't a memorialization. The State claims-but cannot
11 produce a police report from 1999. Given that NRS 171.083 specially requires a "written report"
12 and no such report exists, the statute of limitations applies and the case must be dismissed for
13 lack of jurisdiction.

14
15 **THE STATE'S PRE-INDICTMENT DELAY IN CHARGING DORADO**
16 **VIOLATES DUE PROCESS AND HAS EFFECTIVELY PRECLUDED HIM**
17 **FROM PRESENTING A DEFENSE**

18 "The Fifth Amendment guarantees that defendants will not be denied due process as a
19 result of excessive preindictment delay." *United States v. Sherlock*, 962 F.2d 1349, 1353 (9th
20 Cir. 1989). Statutes of limitations are the primary protection against prosecutorial delay. *Id.* By
21 enumerating a specific amount of time that the government has to charge an individual, a statute
22 of limitations protects the defendant against the possibility of prejudice due to the prosecution of
23 overly stale criminal charges." *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992).
24 Further, the United States Supreme Court has stated that statutes of limitations are said to
25 represent legislative assessments of the relative interests of the government and the defendant in
26 administering and receiving criminal justice and to protect the defendant against possible, as
27
28

1 opposed to actual, prejudice from the prosecution of overly stale criminal charges. *United*
2 *States v. Marion*, 404 U.S. 307, 322 (1971). Still, even when prosecution is instituted within the
3 statute of limitations, the Due Process Clause still protects a defendant from prejudice resulting
4 from government delay. *Id.* Specifically, the court *must* dismiss the charges if the pre-indictment
5 delay prejudices the defendant and violates the Due Process Clause of the Fifth Amendment.
6 *United States v. De Jesus Corona-Verbera*, 509 F.3d 1105, 1109 (9th Cir. 2007).

7
8 The allegations in this case are that Dorado and the complaining witness engaged in
9 sexual activity and that she did not consent. According to the State's theory, Dorado met the
10 woman at the club he was performing at as a jazz musician. The pair went to an apartment one
11 evening and had sex. The woman claims it was not consensual.

12
13 The complaint was filed some 17-years after the alleged incident. According to the
14 information provided by the State, police were aware of Dorado's place of employment, that he
15 was a musician for the club and his name. No attempt was made to speak to Dorado and no
16 attempt was made to bring this case against him until 17-years later.

17
18 Witnesses are now gone or can't be located. Evidence lost to time. Under the State's
19 theory this case is one of consent. It would be necessary to present witnesses who were present
20 when the couple were at the club, how they interacted that may have shown the encounter was
21 consensual, people who were talked to later, individuals that may have been present in the
22 apartment where it took place, patrons who saw their interactions and basically any witnesses at
23 all other than who the State wishes to call.

24
25 Most shocking, under NRS 171.083, there is no requirement that police inform an
26 individual that they are a suspect of a crime. This ensures that the suspects will not have the
27 chance to memorialize any witness statements or collect any evidence of their own. This further
28

1 violates the rights of the truly innocent suspect, who has no reason to think that he or she might
2 need to collect evidence or memorialize their alibi.

3
4 NRS 171.083 cannot stand. As written, it legalizes prosecutorial prejudice in clear
5 violation of the Fifth Amendment and interferes with a defendant's right to call their own
6 witnesses in violation of the Sixth Amendment.

7 **Actual Prejudice**

8
9 Another purpose of statutes of limitations is to limit pre-indictment delays by forcing
10 prosecutors to either file or abandon charges against crime suspects. *United States v. De Jesus*
11 *Corona-Verbera*, 509 F.3d 1105, 1109 (9th Cir. 2007). Even when an indictment is brought
12 within the statute of limitations, the court must dismiss the charges if the pre-indictment delay
13 prejudices the defendant and violates the Due Process Clause of the Fifth Amendment. *Id.*

14
15 In order to show a due process violation, a defendant need only show that (1) he has
16 suffered prejudice as a result of the delay; and (2) when weighted against the reasons for the
17 delay, the delay offends "those fundamental conceptions of justice which lie at the base of our
18 civil and political institutions." *United States v. Lovasco*, 431 U.S. 783, 788-90 (1977). The
19 actual prejudice which must be shown "will inevitably be the loss of witnesses and/or physical
20 evidence or the impairment of their use, e.g., dimming of the witness's memory." *United States*
21 *v. Mays*, 549 F.2d 670, 677 (9th Cir. 1977). The longer the delay, the more likely it is to be
22 prejudicial. *United States v. De Jesus Corona-Verbera*, 509 F.3d 1105, 1109 (9th Cir. 2007).

23
24 The determination of whether a pre-indictment delay has violated due process is
25 essentially decided under a balancing test. *United States v. Moran*, 759 F.2d 777, 779 (9th Cir.
26 1985). A defendant need not show that the government intentionally or recklessly delayed the
27 indictment. *Id.* On the contrary, a defendant need only show the government acted negligently in
28

1 delaying the case and that the delay prejudiced the defendant. *Id.* Ultimately, the court must
2 balance the length of the delay against the reasons for it and inquire “whether the Government’s
3 action in prosecuting after substantial delay violates ‘fundamental conceptions of justice’ or ‘the
4 community’s sense of fair play and decency.’” *Lovasco*, 431 U.S. at 790. Furthermore, reckless
5 delay with disregard for the likelihood that a defendant will suffer prejudice, will violate due
6 process, regardless of the length of the delay, so long as actual prejudice has been proved. *Id.* at
7 789-90.
8

9
10 Here, it is obvious that a due-process violation has occurred. Using the factors
11 articulated by the Supreme Court in *Lovasco*, the defendant has been prejudiced as a result of
12 the delay by the state, and the reasons for the delay offend fundamental conceptions of justice.
13 The state waited 18 years to indict Mr. Dorado, during which time, the majority of the physical
14 evidence was destroyed, the defense’s key eyewitness died, and most of the witnesses moved
15 away and were lost. Furthermore, the original investigators on the case have all since retired and
16 the police report from that night was lost. All of which could have been avoided but for the
17 state’s negligence and reckless disregard for the defendant’s rights.
18

19 These witnesses would have exonerated Dorado by showing his interactions with the
20 witness were consensual and that her actions before, during, and after showed that the entire
21 encounter was consensual in nature. The witnesses 15-years ago would have testified as to the
22 interactions between Dorado and the witness the night in question, that she indicated she was
23 leaving to go home with Dorado and that later when she expressed anger to them when he did
24 not wish to have a relationship with her.
25
26

27 The pendulum has swung, it is no longer sufficient to simply say I am innocent.
28 Individuals charged with sexual assault are charged by society with the burden of showing

1 evidence of consent. As all acts in this case occurred between the individuals, the only people
2 that can provide evidence of consent are those that were at the club or at the apartment the night
3 in question. Because of the significant delay – solely at the discretion of Metro to close the
4 matter in 2000 – the Defendant is precluded from finding or presenting these witnesses to show
5 consent.
6

7 LVMPD had more than enough information to find not only Mr. Dorado, but several
8 other witnesses during their original 1999 investigation. Rather than finding those witnesses and
9 memorializing their statements, police negligently chose not to pursue the case. Their
10 negligence should not be Dorado's downfall. *See, State v. Autry*, 103 Nev. 552 (1987).
11

12 However, the fact that detectives at the time did not believe the victim and chose not to
13 pursue the case does not indemnify the prosecution from dismissal for pre-indictment delay. On
14 the contrary, the government's possession of the necessary information to find key witnesses is
15 analogous to cases where illegal aliens were "found" in by U.S. law enforcement years prior to
16 their indictment by immigration officials. Several circuit courts have held that the statute of
17 limitations in those cases begins to run not at the point when the alien was actually found, but at
18 the point where the government should have found them. *See United States v. Gomez*, 38 F.3d
19 1031, 1037 (8th Cir. 1994) (statute of limitations begins when immigration could have
20 discovered the violation, using diligence typical of law enforcement authorities); and *United*
21 *States v. Clarke*, 312 F.3d 1343, 134748 (11th Cir. 2002) (statute of limitations starts when
22 immigration authorities could have discovered alien's illegal presence). Similarly here, the fact
23 that the government had the information necessary to find Mr. Dorado and other key witnesses
24 yet did nothing with it was negligence at best. Furthermore, it demonstrates a reckless disregard
25 for the likelihood that a defendant will suffer prejudice as a result of the delay.
26
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1 It is well known that many sexual assault cases hinge on eyewitness testimony and
2 hearsay evidence. In the present case, there were no fewer than four eyewitnesses who saw the
3 defendant and Ms. Lehr interacting on the night in question. Had they been interviewed by
4 detectives, these individuals would have testified that Ms. Lehr and the defendant were flirting
5 all evening; that the two had kissed, held hands, and displayed affection all night; and that Ms.
6 Lehr left the club with the defendant willingly and expressed her intention to have sex with him.
7 However, the police were negligent in their investigation and chose not to interview those
8 individuals or to memorialize their testimony in any way. Now, eighteen years following the
9 incident, three of those eyewitnesses have moved and cannot be located. This is an unacceptable
10 prejudice against the defendant.

13 Furthermore, the witness with the most exculpatory evidence for the defendant has died.
14 Mariam Adams was the nurse who performed the sexual assault examination on Ms. Lehr.
15 Unfortunately, Ms. Adams died in 2011. Her death precludes cross examination regarding her
16 observations during the examination. Specifically, she told detectives that "the victim had little
17 bruising...and that it was *not* definitive for sexual assault." The fact that the defense can no
18 longer call a key witness due to the negligence of the state is a violation of Mr. Dorado's Fifth
19 and Sixth Amendment rights.

22 Further, the detectives exhibited both negligence and recklessness by ordering the
23 destruction of the physical evidence from that evening, including the clothing Ms. Lehr was
24 wearing. As a result of the detectives' misconduct, Mr. Dorado has been denied the opportunity
25 for an unbiased, expert witness to analyze some of the most crucial evidence in the case. The
26 destruction of the victim's clothing and other personal effects irreconcilably prejudices the
27
28

1 defense. Allowing the charges against Mr. Dorado to move forward despite the state's actions
2 would clearly violate the notions fair play and substantial justice.

3
4 There is little doubt that Mr. Dorado has suffered prejudice as a result of the state's delay
5 in this case. Some of the most crucial evidence to his exoneration was destroyed and his key
6 eyewitness have died. Furthermore, the government cannot provide any legitimate reason for the
7 delay. This is not a case where key information was unavailable to the state, on the contrary,
8 their failure to follow up on key information shows negligence on the part of LVMPD and a
9 reckless disregard for Mr. Dorado's rights. NRS 171.083 cannot indemnify the state from the
10 consequences of their actions. The only solution that conforms with fairness and justice is to
11 dismiss the charges with prejudice.
12

13
14 **CONCLUSION**

15
16 Based on the foregoing, memo requests that he be released from custody and that the
17 Indictment be dismissed.

18 DATED: 10/19/2018

19 s/ Thomas Pitaro
20 THOMAS F. PITARO ESQ
21 Nevada Bar No. 1332
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