

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

Kevin Sunseri,  
Appellant

vs.

The State of Nevada,  
Respondent,

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) Supreme Court Case No.: 81551

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**APPELLANT'S OPENING BRIEF**

**NEVADA DEFENSE GROUP**

Damian Sheets, Esq.

Nevada Bar No. 10755

Kelsey Bernstein, Esq.

Nevada Bar No. 13825

714 S. Fourth Street

Las Vegas, Nevada 89101

Telephone: (702) 988-2600

Facsimile: (702) 988-9500

dsheets@defendingnevada.com

Attorney for Appellant

**NRAP 26.1 DISCLOSURE**

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed.

DATED this 15 day of November, 2020.

NEVADA DEFENSE GROUP

Respectfully Submitted By:

A handwritten signature in black ink, reading "Kelsey Bernstein", is written over a horizontal line.

KELSEY BERNSTEIN, ESQ.

Attorney for Appellant

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### **JURISDICTIONAL STATEMENT**

The Nevada Supreme Court retains jurisdiction as an appeal from a judgment in a criminal case pursuant to NRS 177.015(3). A timely notice of appeal was filed on July 26, 2020, approximately 25 days after the Judgment of Conviction was filed.

### **NRAP 17 ROUTING STATEMENT**

This matter may be assigned to the Nevada Court of Appeals as an appeal from a judgment of conviction based upon a plea of guilty pursuant to NRAP 17(b)(1).

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. Statement of the Issues**

1. Is Appellant entitled to have his case dismissed from the violation of his right to a speedy trial as set forth in *Doggett v. United States*?
2. Can a violation of the Defendant's right to a speedy trial as set forth in *Doggett v. United States* be a fair and just reason to withdraw a guilty plea under the totality of circumstances?
3. Is a violation of the Defendant's right to a speedy trial as set forth in *Doggett v. United States* waived upon entering a guilty plea?

### **II. Statement of the Case and Relevant Facts**

On May 25, 2016, Appellant Kevin Sunseri began a stipulated sentence of two to five years in the Nevada Department of Corrections for charges unrelated to the instant appeal. Mr. Sunseri served his sentence in the Nevada Department of Corrections until he was released on parole on August 27, 2018 (Bates 036).

However, on that date, he was in fact not released on parole; instead, he was re-booked on an arrest warrant that had apparently issued and remained

outstanding in NCIC since July 28, 2016 – over two years prior – that initiated Las Vegas Justice Court Case 16F07251X (Bates 001).

Mr. Sunseri's arrest warrant had lingered for over two years, the entire time of which he was in custody in the Nevada Department of Corrections. He was never apprehended or informed of the warrant during the entire period that he remained in custody until *the very day* that he was scheduled to be released. The warrant was issued two months after Mr. Sunseri was sentenced and in the custody of the State (Bates 036).

Thus, instead of initiating the criminal process two years prior, Mr. Sunseri was instead presented with an entirely new criminal case when he was finally on the verge of being released from custody. The arrest warrant was formally executed on August 27, 2018 – the same day of his anticipated release (Bates 003).

On these new charges, Mr. Sunseri unconditionally waived his right to a preliminary hearing pursuant to negotiations entered in this case on September 21, 2018 (Bates 008).

At the District Court arraignment, the Court accepted Mr. Sunseri's plea to one count of Robbery and one count Ownership or Possession of a Firearm by Prohibited Person (Bates 008). However, at sentencing, his Counsel

requested a competency evaluation for Mr. Sunseri due to his disturbed and suicidal mental state (Bates 019). Shortly after entering his plea, Mr. Sunseri was found incompetent and an Order of Commitment was filed (Bates 022).

Mr. Sunseri was returned from competency commitment approximately one month later (Bates 025). His Counsel was attempting at that time to apply Mr. Sunseri to Mental Health Court, and several status checks were set for that purpose (Bates 026; 032).

However, when that proved unsuccessful, Mr. Sunseri retained new counsel, who raised the potential violation of his right to a speedy trial in violation of *Doggett v. United States*; on June 3, 2019, a Motion to Withdraw Plea was subsequently filed, asking the District Court to permit Mr. Sunseri to withdraw his plea as unknowingly entered and thereafter dismiss the case due to the *Doggett* violation (Bates 036).

Summarily, the Motion argued that Mr. Sunseri entered into the negotiations without an understanding that a legal remedy existed which could result in outright dismissal of this case. Specifically, Mr. Sunseri argued his case was eligible for dismissal based on the State's violation of Mr. Sunseri's federal right to a speedy trial under the Sixth Amendment to the United States Constitution as set forth in *Barker v. Wingo*, 407 U.S. 514, 515, 92 S.Ct. 2182



(1972) and *Doggett v. United States*, 112 S.Ct. 2686 (1992). In this case, more than two years had elapsed from the issuance of the arrest warrant to the satisfaction thereof, and Mr. Sunseri was easily reachable in the Nevada Department of Corrections during this entire period.

The State filed an Opposition on July 10, 2019 (Bates 077). After review of the pleadings, the District Court set an evidentiary hearing to determine what, if any, efforts were undertaken to inform or apprehend Mr. Sunseri on the outstanding arrest warrant while he remained in state custody (Bates 090). After some initial difficulties securing the appearance of a representative from the Las Vegas Metropolitan Police Department, who had rejected the Defense's subpoena, the evidentiary hearing was eventually held on November 20, 2019 (Bates 107; 126).

The first person to testify was the person most knowledgeable from the Las Vegas Metropolitan Police Department regarding warrant information and procedures, Simone Davis (Bates 146). However, Ms. Davis testified that her assistant, Amy Colin, had pulled all of the files relevant to Mr. Sunseri for purposes of the evidentiary hearing, so the parties next called Ms. Colin (Bates 149). She testified that after searching under the event number associated with

Mr. Sunseri's case, no information was available regarding attempts to serve or apprehend him on the warrant:

BY MR. SHEETS:

Q: So, you were ordered to produce any and all documents related to the arrest and investigation of Kevin Sunseri in connection with the above referenced case and/or relating to the Las Vegas Metropolitan Police Department, event number 151211-0017, is that correct?

A: That's correct.

Q: Okay. And you draft the letters that are responsive from Simone Davis?

A: I do.

Q: Okay. Did you come to draft the letter on September 12, 2019 indicating that there were no reports found within the Las Vegas Metropolitan Police Department Records and Fingerprint Bureau pertaining to the attempted execution of the arrest warrant?

A: that is correct, yes (Bates 153).

...

Q: You did not find anything in your database that showed an attempted execution by Metro to pick up on the arrest warrant, is that correct?

A: That is correct (Bates 160).

After the evidentiary hearing but before the District Court had rendered its decision, the Nevada Supreme Court released a published decision in *State of Nevada v. Rigoberto Inzunza*, Case No. 75662. In that case, the State appealed the dismissal of multiple felony counts against Mr. Inzunza, including sex assault on a minor under fourteen, after a request to dismiss under *Doggett v.*

*United States* had been granted by the Eighth Judicial District Court. This Court not only affirmed the dismissal, but addressed and struck down many of the State's arguments that were raised against Mr. Sunseri as well.

In response to the *Inzunza* ruling, Defense filed a Supplement to its Motion to Withdraw Plea (Bates 190). A Minute Order was issued a few days later requesting additional supplements as to how *Inzunza* and *Doggett* would relate to a request to withdraw a guilty plea (Bates 213). Defense filed an Amended Supplement on January 19, 2020 (Bates 217). The State filed a Response to the Supplemental briefs, and Defense filed a Reply (Bates 225; 235).

On February 27, 2020, the District Court issued a Minute Order denying the Motion to Withdraw Guilty Plea (Bates 239). The District Court found that “*Inzunza* does not deal with a motion to withdraw after entry of plea but an appeal of an order granting a motion to dismiss,” and therefore did not consider the *Inzunza* or *Doggett* analysis. Additionally, the District Court found that “Defendant does not allege that information was withheld from him by his attorney, that he was coerced into entering his plea, or that he entered the plea in a hasty fashion. Considering the totality of circumstances here, Defendant's

Motion is denied” (Bates 239). A Findings of Fact, Conclusions of Law and Order was filed April 1, 2020 (Bates 256).

Shortly after the Minute Order was issued and prior to sentencing, Defense filed a Motion to Dismiss pursuant to *Doggett v. United States* (Bates 241); this Motion did not seek to withdraw the plea, but rather sought outright dismissal of the case. The State filed an Opposition on April 3, 2020, arguing that Mr. Sunseri’s guilty plea had waived his claim to a speedy trial violation (Bates 266).

A Minute Order denying the Motion to Dismiss was issued on May 26, 2020, and a formal Order was filed June 1, 2020 (Bates 272; 274). The District Court found:

Defendant relies on all three cases [*Doggett*, *Barker* and *Inzunza*] to support the contention that his speedy trial rights were violated and the case should thus be dismissed. However, all three of those cases dealt with pre-trial motions to dismiss. Unlike the case at bar, none of the cases that Defendant relies on involved a Defendant who entered a valid guilty plea agreement... This Court finds that Defendant waived the right to a trial by jury when he entered into the guilty plea agreement. Accordingly, *Dogget*, *Inzunza*, and *Barker* are inapplicable. Defendant has failed to demonstrate any reason to undo the provisions of the valid guilty plea agreement, namely his waiver of right to a jury trial (Bates 272).

Sentencing went forward on June 30, 2020 (Bates 282). At sentencing, Defense Counsel requested that Mr. Sunseri receive credit for the two years that he spent in custody while the arrest warrant was outstanding; Defense argued that had the State met its obligation to bring Mr. Sunseri to face the charges, he would have more than two years of additional credit on the instant case. The District Court denied the request, and sentenced Mr. Sunseri to credit dating back only from the satisfaction of the warrant.

Mr. Sunseri was ultimately sentenced to an aggregate 66-180 months in the Nevada Department of Corrections, with 674 days credit for time served (Bates 301). A Notice of Appeal was filed thereafter (Bates 303).

### **III. Summary of the Argument**

Appellant was entitled to have his case dismissed due to the speedy trial violation as set forth in *Barker v. Wingo*, 407 U.S. 514, 515, 92 S.Ct. 2182 (1972), *Doggett v. United States*, 112 S.Ct. 2686 (1992), and *Inzunza v. State*, 135 Nev. Adv. Op. 69 (Dec. 26, 2019).

All four factors to be considered are in favor of dismissal; the delay in this case is in excess of two years and can only be attributable to State negligence because Mr. Sunseri was in State custody the entire period that the warrant

remained outstanding. Mr. Sunseri failed to assert his right to a speedy trial during the relevant time period (from issuance to execution of the arrest warrant) only because he was not aware of the existing warrant. As to the last factor, despite the State having ample opportunities to rebut the presumption of prejudice at an evidentiary hearing, the testimony affirmed that no actions were taken by the State to inform or apprehend Mr. Sunseri on the warrant for the entire two years that he was in State custody. Therefore, the State failed to overcome the presumption of prejudice and Mr. Sunseri was entitled to dismissal.

The substantial likelihood of dismissal due to the *Doggett* violation presented a fair and just reason to withdraw his plea. Mr. Sunseri's plea could not have been knowingly and intelligently entered when he was never apprised of the likelihood that, had he raised this issue, his entire case could be subject to dismissal.

Finally, entering into a guilty plea agreement does not constitute a categorical waiver of the speedy trial violation for two reasons: first, a defendant cannot knowingly and voluntarily waive a right or violation he does not know exists, and second, the prospective waiver to a trial by jury does not cure an existing violation that manifests from the time an arrest warrant is

issued to when it is executed. Otherwise, the guilty plea agreement would create a categorical exclusion that prevents a *Doggett* violation from ever being a basis to withdraw a plea, which runs afoul of this Court's previous rulings that a plea can be withdrawn for *any* fair and just reason under the totality of circumstances.

### **ARGUMENT**

The procedural posturing of this case requires Appellant to present the issues in reverse chronological order; the Motion to Withdraw was, in a sense, an analysis within an analysis – the ultimate question of whether Appellant is entitled to withdraw his plea on the premise of a *Doggett* violation by necessity first requires a determination of whether a *Doggett* violation does in fact exist.

Therefore, Appellant will address first the Motion to Dismiss based on *Doggett v. United States* to determine whether a violation of Mr. Sunseri's speedy trial rights occurred; second, Appellant will then address whether such a violation is grounds to withdraw a guilty plea; third, if a violation exists which is grounds to withdraw a plea, whether a Defendant categorically waives that violation upon entering a guilty plea and waiving his right to a trial by jury.

*I. Appellant is Entitled to Have His Case Dismissed as a Violation of His Right to a Speedy Trial*

From the time of the issuance of the warrant to the formal execution thereof, the warrant lingered while Mr. Sunseri was in custody for **760 days**, or 2 years and 30 days. Due to the excessive delay, the State has violated Mr. Sunseri's federal right to a speedy trial under the Sixth Amendment to the United States Constitution. The Sixth Amendment provides, in pertinent part, "in all criminal prosecutions, the accused that shall the right to a speedy and public trial..." The right to a speedy trial is a "fundamental right" enforced against the states through the Fourteenth Amendment. *Barker v. Wingo*, 407 U.S. 514, 515, 92 S.Ct. 2182 (1972).

The federal speedy trial right, as distinguished from Nevada's statutory 60 day rule, is primarily addressed in *Barker*. The Supreme Court articulated four factors to consider in each case when a speedy trial violation is asserted:

1. Length of delay;
2. Reason for the delay;
3. Defendant's assertion of his rights; and
4. Prejudice to the defendant.

While the factors were initially set forth in *Barker*, many of them were revisited in greater depth in *Doggett v. United States*, 112 S.Ct. 2686 (1992). The Court ultimately concluded that once the right to a speedy trial has been



violated, dismissal “is the only possible remedy.” *Barker*, 407 U.S. at 552. The Nevada Supreme Court also published a significant decision on this issue, *Inzunza v. State*, 135 Nev. Adv. Op. 69 (Dec. 26, 2019).

A. The Delay of More than 1 Year Results in “Presumptive Prejudice”

The length of delay is what ultimately triggers a speedy trial analysis. “Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.” *Barker*, 92 S.Ct. at 2192. This was further discussed in *Doggett*, which held that a one year delay was sufficient as a threshold to “mark the point at which courts deem delay unreasonable enough to trigger the *Barker* inquiry.” The Nevada Supreme Court has also applied this standard. “A post-accusation delay meets this standard as it approaches one year.” *State v. Inzunza*, 135 Nev. Adv. Op. 69, 6.

*Doggett* goes into considerable detail regarding how presumptive prejudice plays into the equation. In *Doggett*, the defendant was arrested 8 years after his indictment. The Court found that the delay was presumptively prejudicial (noting the one-year threshold), that the Government was negligent in seeking him out, and that *Doggett* asserted his rights as soon as he became aware of the charges. Since the delay was enough to create the “presumption of

prejudice,” the fourth factor was also met without a need to show actual prejudice, and the Court reversed his conviction.

In the instant case, more than double the required amount of time has elapsed from the issuance of the arrest warrant to when it was satisfied, going *well beyond* the one year threshold needed to trigger the initial inquiry and establish “presumptive prejudice.” On its face, per both U.S. and Nevada Supreme Court rulings, the extensive length of time after the issuance of the warrant establishes presumptive prejudice against him.

B. The Delay was Not Caused by the Appellant

Delays which are attributable to the State, or agencies under the power of the State, favor dismissal. The Supreme Court in *Barker* and *Doggett* set forth a spectrum to gauge how the root cause of the delay factors into the overall analysis. On one end of the spectrum is State “diligent prosecution,” and on the other end is State “bad-faith delays.” The Court in *Doggett* recognized that most delays will fall somewhere in the middle as attributable to State “negligence.”

However, even if negligence falls in the middle of the spectrum, *it nonetheless comes down in favor of the defendant for purposes of a speedy trial violation*. “A more neutral reason such as negligence or overcrowded courts

should be weighed less heavily [than bad faith] but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.” *Barker*, 92 S.Ct. at 2191.

This was subsequently reaffirmed in *Doggett*. “While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it prejudiced him.” *Doggett*, 112 S.Ct. at 2693. The Court also noted “[a]lthough negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused’s defense, *it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun.*” *Id.* (emphasis added).

The *Inzunza* case is also instructive here. In *Inzunza*, the named victim disclosed to her therapist that Inzunza had sexually assaulted her. The victim and her mother went to the police department to file a report, informing officers that Inzunza had moved out of state to New Jersey and providing leads about Inzunza’s whereabouts through Facebook. The detective unsuccessfully attempted to locate Inzunza locally and submitted the case to the District Attorney’s office to file charges. After doing so, the detective entered the

warrant into the NCIC database, but thereafter failed to take any steps to inform or apprehend him on the warrant.

The District Court classified this level of inaction as “gross negligence,” and that finding was upheld by this Court.

We conclude the district court did not abuse its discretion under factor two when it found the 26-month delay was caused entirely by the State’s ‘gross negligence.’ Though Detective Hoyt had knowledge of Inzunza’s whereabouts, he did not attempt to contact Inzunza or have him arrested during the entire 26-month period. Moreover, there was no evidence showing that Inzunza was aware of the charges before the date of his arrest. Therefore, the district court correctly found that the State was solely responsible for the delay. *Id.* at 7-8.

In this case, Mr. Sunseri was not hiding from law enforcement or in any way concealing his whereabouts because **he was in custody** in the Nevada Department of Corrections. These circumstances provide a solid point of comparison to those in *Doggett*: in that case, the government took actual affirmative efforts to locate the defendant after he had left the country, but the government’s failure to diligently pursue those efforts was negligent. *Id.* Indeed, the *Doggett* Court noted that the government could have found the defendant within minutes had its agents bothered to try, explaining that “[w]hile the government’s lethargy may have reflected no more than Doggett’s relative

unimportance in the world of drug trafficking, it was still findable negligence, and that finding stands.” *Id.*

Here, the State had far more information about Mr. Sunseri’s whereabouts than the federal government in *Doggett*, but made *far less* of an effort to secure his arrest or even inform him of the charges. Unlike Mr. Sunseri, Doggett had actually *left the country* at some point and even spent time in custody outside of the United States before returning. Federal agents made “some” efforts to try to locate and apprehend him, including sending word of his arrest warrant to all United States customs stations and updating national registries. However, in this case, the State had complete and unfettered access to Mr. Sunseri’s location; he was not out of the country like Doggett, but rather already in the custody of the State of Nevada, and yet the State still made no effort whatsoever to inform their own agencies of the warrant. Here, the State had access to Mr. Sunseri’s direct location, and yet the State of Nevada still made *no effort whatsoever* to inform him of or execute the arrest warrant (even in *Doggett*, at least “some” effort had been made).

The State had access to his location and could have found him with a bare minimum level of diligence; however, when the State does not even undertake

the simple basic step to execute an arrest warrant on someone already in State custody, they can hardly blame other parties for their “lethargy” in pursuing him.

There is little question that the State knew (or could have known with minimal diligence) Mr. Sunseri’s whereabouts, yet the State did absolutely nothing to advance the prosecution against him, resulting in more than two years of custody that could have been credited towards his case. This was affirmed at the evidentiary hearing held in the District Court, at which time the representative from the Las Vegas Metropolitan Police Department testified that she had no records relating to any attempts to apprehend or inform Mr. Sunseri of the warrant while he was in state custody.

The *Doggett* Court noted that federal agents were negligent in their pursuit because they “could have found him within minutes.” *Id.* The State’s lack of diligence in this case is far more egregious; they did not need to “find” Mr. Sunseri at all – he was already in State custody. They simply needed to type in his name. Because the delay is the product of State gross negligence, this factor favors dismissal.

### C. Mr. Sunseri Invoked his Federal Speedy Trial Right

Like Doggett before him, Mr. Sunseri did not know about this case for many years after the warrant was issued; naturally, he cannot be responsible for failing to assert his speedy trial right prior to entering his plea because, as the Court noted in *Barker*, “there are a number of situations, such as where the defendant is unaware of the charge or where the defendant is without counsel, in which it is unfair to require a demand...” *Barker*, 407 U.S. at 529. Furthermore, “a defendant has no duty to bring himself to trial, the State has that duty as well as the duty of insuring that the trial is consistent with due process.” *Id.* at 527.

The only question, therefore, is whether Mr. Sunseri’s waiver in the Guilty Plea Agreement precludes him entirely from asserting a federal constitutional violation; Defense holds it does not (see *infra*).

Even if this Court does not necessarily conclude this factor is in favor of Mr. Sunseri, at a minimum it cannot be held against him for failure to assert his rights while the arrest warrant remained outstanding because Mr. Sunseri, while in State custody, did not know of the pending warrant. “[A] defendant must know that the State has filed charges against him to have it weighed against him. Thus, the District Court did not abuse its discretion in finding the

assertion of the right was not weighed against Inzunza under *Doggett*.” *Inzunza*, 135 Nev. Adv. Op., 8 (internal citations omitted).

In summation, this factor focuses on whether the defendant asserted his speedy trial rights (which would weigh in his favor most heavily), whether he failed to assert his speedy trial rights (which cannot be used against him if he was unaware of the outstanding warrant), and whether he “acquiesced” to the delay by knowing of the warrant and failing to take any additional steps. Mr. Sunseri most likely falls into the second category, as he was unaware of the outstanding warrant and thus failed to assert his speedy trial rights prior to arrest. As a result, this factor should not be weighed negatively regardless of his conduct or waivers after arrest.

#### D. Presumed Prejudice Exists from the Delay

The Court in *Barker* articulated three facets of prejudice: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; (iii) to limit the possibility that the defense will be impaired. *Barker*, 407 U.S. at 2193.

“If witnesses die or disappear during a delay, the prejudice is obvious.” *Id.* Other aspects of prejudice include fading memories and destruction of



exculpatory evidence. Most of the *Doggett* analysis is geared towards prejudice; Doggett was not subject to pretrial detention, nor did he suffer anxiety because he was unaware of the charges (unlike Mr. Sunseri, remained in custody on the new charges). The only prejudice Doggett could claim, therefore, was that the unreasonable delay impaired his defense. The Court concluded that no precise showing of actual prejudice was necessary, and that *presumptive prejudice from the excessive delay alone satisfied this factor*:

[T]he government claims Doggett has failed to make any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence. Though Doggett did indeed come up short in this respect, the Government's argument takes it only so far: consideration of prejudice is not limited to the specifically demonstrable and, as it concedes, affirmative proof of particularized prejudice is not essential to every speedy trial claim. *Doggett*, 112 S.Ct. at 2692.

Here, like in *Doggett*, presumptive prejudice exists due to the unreasonably long delay. As noted above, the *Doggett* Court stated that presumptive prejudice will typically attach after a delay of one year, and establishes as a matter of law the presumption that a defendant's case has been impaired.

*Barker* explicitly recognized that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown'... Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. *Id.*

The Supreme Court suggested that, had the Government acted in bad faith, dismissal would be virtually automatic. Even when the State's actions are tantamount to negligence rather than bad faith, dismissal is still warranted. "Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." *Id.* at 657. Furthermore, "our toleration of such negligence varies inversely with its protractedness... and its consequent threat to the fairness of the accused's trial." *Id.*

Characterizing the Government's inaction over the course of the delay as "egregious," the Court in *Doggett* ultimately determined that the delay entitled the defendant to a legal presumption of prejudice, and thus he need not specify exactly how he was prejudiced by the delay. *Id.* Accordingly, the *Doggett* Court ordered the case dismissed. Similarly, here the delay has triggered the

presumption of prejudice, so Mr. Sunseri need not demonstrate any examples of actual prejudice.<sup>1</sup>

The *Inzunza* case further clarified how the presumption of prejudice applies to this analysis:

As *Doggett* makes clear, the prejudice factor of *Barker* may weigh in favor of the defendant even though he ‘failed to make any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence.’... When the presumption of prejudice is applied, the State is afforded the opportunity to rebut the presumption and detail how the defendant was not prejudiced by the delay. If the State is unable to rebut the presumption, the *Barker* factors will weigh in a defendant’s favor, necessitating the ‘severe remedy of dismissal’... *Id. at 9*.

Even when the accused remains at liberty during the period the warrant remains outstanding, the presumption of prejudice to the case nonetheless attaches. The remaining factors, such as the length of the delay and the reason

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<sup>1</sup> Although Appellant is not required to demonstrate actual prejudice, Appellant maintains that his Order of Commitment shortly after entering his plea in this case is an example of actual prejudice that resulted from the violation. After anticipating his release following more than two years in prison, Mr. Sunseri was instead booked on new charges rather than set free. This revelation resulted in significant mental distress, thus going to prejudice factors (i) and (ii), oppressive pretrial incarceration and the anxiety and concern of the accused. Shortly after being transported from prison to CCDC, Mr. Sunseri was placed on suicide watch prior to his ultimate commitment for similar concerns.

for the delay, likewise favor dismissal regardless of his or her custodial status. As the presumption of prejudice had attached in Mr. Sunseri's case, who remained in custody due to the charges, the burden shifted to the State to rebut that presumption.

An evidentiary hearing was held in this case specifically to provide an opportunity for the State to rebut this presumption. However, despite ample opportunities, the witnesses could identify no affirmative steps whatsoever to inform or apprehend Mr. Sunseri of the warrant, nor could they provide a legitimate explanation as to how or why a warrant remained outstanding for over two years for an individual who was already in State custody. Therefore, the State failed to rebut the presumption, and dismissal was warranted.

*II. A Doggett Violation Requiring Dismissal is a Fair and Just Reason to Withdraw a Guilty Plea*

A criminal defendant may move to withdraw his guilty plea prior to sentencing for any reason that is considered "fair and just" under the totality of circumstances. Specifically, a defendant may move to withdraw a guilty plea before sentencing pursuant to NRS 176.165, and "a district court may grant a defendant's motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just." *Stevenson v. State*,

354 P.3d 1277, 1281 (Nev. 2015). To this end, “the Nevada Supreme Court has disavowed the standard previously announced in *Crawford v. State*, 117 Nev. 718, 30 P.3d 1123 (2001), which focused exclusively on whether the plea was knowingly, voluntarily, and intelligently made, and affirmed that ‘the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea of a guilty plea would be fair and just.’” *Flores v. State*, 2016 Nev. App. LEXIS 303 (Nev. 2016) (citing *Stevenson*, 354 P.3d at 1281). What presents a “fair and just” reason is determined on a case-by-case basis.

Based on the *Doggett* analysis as set forth above and during the evidentiary hearing, Mr. Sunseri should have been permitted to withdraw his plea. He had provided such a fair and just reason in his request for dismissal pursuant to *Doggett* and *Inzunza*. The analysis of his case under *Doggett* would heavily favor outright dismissal, see *supra*, and this remedy was not properly explained nor raised to Mr. Sunseri prior to entering the plea. This lack of information created a very real prejudice to Mr. Sunseri by resulting in a plea negotiation for multiple felony charges and prison time on a matter that should have been dismissed or, at a bare minimum, initiated two years ago (and thereby giving Mr. Sunseri at least two years of additional credit).

Additionally, the burden for the defendant on a Motion to Withdraw Plea is significantly lower if raised prior to sentencing, as is the case here; under the totality of the circumstances standard, the Nevada Supreme Court expressly disavowed *Crawford*'s exclusive focus on whether a plea was freely, knowingly and voluntarily entered into. The Court specifically expanded the scope of the analysis to withdraw a guilty plea to any fair and just reason considering the totality of all applicable circumstances. As such, his instant request for, and likelihood of, dismissal based on a fundamental constitutional violation is a legitimate circumstance that may be considered by this Court as much as any other constitutional claim.

“A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and ‘a district court may grant a defendant's motion to withdraw his guilty plea before sentencing **for any reason** where permitting withdrawal would be fair and just.’ When making this determination, ‘the district court must consider the totality of the circumstances.’” *Brooks v. State*, 443 P.3d 552 (Nev. 2019) (citing *Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015)) (emphasis added).

In the instant case, it was agents of the State of Nevada who failed to act on an outstanding warrant for a substantial period of time while Mr. Sunseri

was incarcerated. He was in the custody of the Nevada Department of Corrections during the entire time the warrant remained outstanding; Mr. Sunseri could do nothing to avoid this situation, and the only party that could have taken action was too negligent to even type in his name. Appellant maintains there could be no more fair result than holding the State accountable for what can only be classified as a grossly negligent delay, rather than forcing Mr. Sunseri to remain in custody for *years* on charges that should have been initiated years ago.

It must be noted that just as Mr. Sunseri was on the precipice of his return to civilian life, *on the day of his scheduled release*, he was rebooked on these charges. Instead of being released, he was returned to CCDC. Mr. Sunseri quickly became suicidal, suddenly looking at more years in prison at the moment when he anticipated freedom, thereby necessitating the need for psychiatric treatment – all because law enforcement could did nothing to try and locate someone who was already in their control. The delay was not the fault of Mr. Sunseri. He, quite literally, could have done *nothing* to make himself easier to find in the State of Nevada.

Mr. Sunseri's entitlement to dismissal as well as the State's grossly negligent conduct are circumstances which may be considered under the

“totality of the circumstances” by the Court for purposes of his request to withdraw his plea. In view of the *Doggett* analysis that overwhelmingly favors dismissal, he had presented a fair and just reason to withdraw his plea under the totality of the circumstances.

In this case, the District Court failed to articulate why a *Doggett* violation could not form a fair and just reason to withdraw a guilty plea. The Court only concluded that Mr. Sunseri did not allege that the potential for dismissal “was withheld from him by his attorney, that he was coerced into entering his plea, or that he entered into the plea in a hasty fashion” (Bates 239).

Respectfully, simply because Mr. Sunseri’s claim does not fall within a recognized permissible basis to withdraw a plea does not mean that his constitutional claim is barred; there is no law that requires evidence be deliberately withheld from a defendant to find that a plea is not freely and voluntarily entered. To the contrary, a negligent or unintentional failure to give proper advice has been historically recognized as a basis to withdraw a plea. See generally, *Padilla v. Kentucky*, 130 S.Ct. 1473, 559 U.S. 356 (2010).

Notably, the District Court did not make a finding on whether Appellant’s *Doggett* claim had merit. Rather, both the Minute Order which denied the Motion to Withdraw Plea and the Minute Order which denied the Motion to



Dismiss instead distinguished *Doggett's* procedural history from the instant case, without reaching a decision on the merits or existence of the underlying violation. Therefore, the District Court's ruling creates a *de facto* categorical exclusion – namely, that a *Doggett* violation cannot be grounds to withdraw a plea, even if the underlying claim has merit – which would be contrary to the Supreme Court's holding that “any” fair and just reason may be considered based on the totality of circumstances. For the reasons set forth in Section I, *supra*, Appellant maintains that his *Doggett* violation is in fact meritorious, and the strong likelihood of outright dismissal presented a fair and just reason to withdraw his plea in this case.

### *III. Appellant Did Not Waive the Speedy Trial Violation by Entering Into a Guilty Plea*

Mr. Sunseri did not waive his speedy trial violation by entering into a guilty plea agreement, which contains a written waiver of several constitutional rights, including “[t]he constitutional right to a speedy and public trial by an impartial jury.”

The ultimate question is whether Mr. Sunseri's waiver in the Guilty Plea Agreement precludes him entirely from asserting a federal constitutional violation; Defense holds it does not. *Inzunza* provides strong guidance on how

Nevada views the defendant's invocation of his speedy trial rights. Under this analysis, the focus is exclusively on the Defendant's invocation of this right "*during the period of time between the filing of charges and his arrest.*" Activity that occurred subsequent to arrest, such as waiving the statutory right to a speedy trial (which occurred in *Inzunza*) or the entering of a guilty plea, is not applicable to the analysis.

*Doggett* and *Inzunza* both examine the invocation of a defendant's right to a speedy trial "*during the period of time between the filing of charges and his arrest.*" For further clarification, the District Court's ruling in *Inzunza* (which was affirmed by the Nevada Supreme Court) addresses this factor in greater detail: Inzunza had waived his 60-day right to a speedy trial. From the District Court Order:

Mr. Inzunza waived his statutory right to a trial within 60 days pursuant to NRS 178.556(2), but [argues that] he preserved his federal speedy trial rights. The State argues that Mr. Inzunza did not affirmatively assert his rights to a speedy trial. 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 (i.e. the Criminal Complaint) to Mr. Inzunza's arrest. There is no evidence in the record, nor was any presented at the evidentiary hearing, that Mr. Inzunza knew about the charges against him. Therefore, he could not have asserted his right to a speedy trial before his arrest on the warrant and this factor cannot be weighed against him.

This Court affirmed the District Court's position, focusing only on invocation of Inzunza's speedy trial rights "during the period of time between the filing of charges and his arrest." Because this analysis focuses solely on that limited time frame, activities that occurred after arrest – whether it be waiving the right to a speedy trial in *Inzunza* or waiving the right to a speedy trial in this case – this factor still favors Appellant's request for dismissal. In summation, this factor focuses on the limited time frame of warrant to arrest, and during this time period Mr. Sunseri was not aware of the violation. He further was not aware of it until well after he had entered his plea.

A defendant cannot knowingly, intelligently and voluntarily waive a material right or violation he is unaware of; second, even if the Court were to conclude that he knowingly waived his right to a speedy trial, the waiver of a prospective right does not cure an existing violation. Mr. Sunseri's waiver to a speedy trial (from the time of his plea onward) does not remedy an existing violation that occurred up until the point the warrant was satisfied. The two rights at issue are distinct and separate: the Doggett issue is concerned with the time frame of warrant to arrest, and the plea waiver is concerned with a speedy trial right from the plea hearing forward. A waiver of one is not a waiver of both.

For these reasons, entering into a guilty plea agreement wherein one waives their right to a speedy trial does not create a categorical exclusion that prevents a defendant from raising a *Doggett* challenge, especially in light of the fact that Mr. Sunseri was unaware of the violation until after the plea was entered. It is neither fair nor just to punish Mr. Sunseri with at least two more years incarceration for the State's lack of diligence in finding him when he could do little more to enable himself to be found.

### **CONCLUSION**


For these reasons, Appellant respectfully requests the matter remanded for new consideration of his Motion to Withdraw Plea in light of the *Doggett* violation or, in the alternative, remanded for dismissal.

**VERIFICATION OF KELSEY BERNSTEIN, ESQ.**

1. I am an attorney at law, admitted to practice in the State of Nevada.
2. I am the attorney handling this matter on behalf of Appellant.
3. The factual contentions contained within the Opening Brief are true and correct to the best of my knowledge.

Dated this 15 day of November, 2020.

NEVADA DEFENSE GROUP  
Respectfully Submitted By:

  
\_\_\_\_\_  
KELSEY BERNSTEIN, ESQ.  
Attorney for Appellant

### **CERTIFICATE OF COMPLIANCE**

1. I 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 2007 with 14 point, double spaced Cambria font.
2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7)(A)(ii) because it is proportionally spaced, has a monospaced typeface of 14 points or more and contains 7,390 words.
3. 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(c), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15 day of November, 2020.

NEVADA DEFENSE GROUP  
Respectfully Submitted By:

  
\_\_\_\_\_  
Damian Sheets, Esq.  
Nevada Bar No. 10755  
Kelsey Bernstein, Esq.  
Nevada Bar No. 13825  
714 S. Fourth Street  
Las Vegas, Nevada 89101  
Telephone: (702) 988-2600  
Facsimile: (702) 988-9500  
dsheets@defendingnevada.com  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

Pursuant to NRAP 25(d), I hereby certify that on the 15 day of  
November, 2020, I served a true and correct copy of the Opening Brief  
to the last known address set forth below:

Steve Wolfson  
Clark County District Attorney's Office  
200 Lewis Avenue  
Las Vegas, Nevada 89101

  
\_\_\_\_\_  
Employee of Nevada Defense Group