

IN THE SUPREME COURT OF THE STATE OF NEVADA

Kevin Sunseri,
Appellant

VS.

The State of Nevada,
Respondent,

) Supreme Court Case No.: 81551

Electronically Filed
Nov 15 2020 03:01 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S APPENDIX INDEX

) Vol. I

) **Pages 001-125**

Appendix Index (Alphabetical)

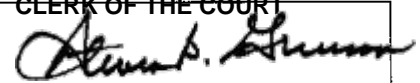
<u>Document Name</u>	<u>Date</u>	<u>Bates No.</u>
Amended Supplement in Support of Motion to Withdraw Guilty Plea	01/19/2020	217-224
Findings of Fact, Conclusions of Law and Order Denying Motion to Withdraw Guilty Plea	04/01/2020	256-265
Guilty Plea Agreement	09/21/2018	008-015
Judgment of Conviction	07/01/2020	301-302
Minute Order Denying Motion to Dismiss Pursuant to Doggett v. United States	05/26/2020	272-273
Minute Order Denying Motion to Withdraw Guilty Plea	02/27/2020	239-240
Minute Order Re: Supplemental Briefing	01/13/2020	213-213
Minutes, Competency Return	03/05/2019	025-025
Minutes, Evidentiary Hearing	08/23/2019	107-107
Minutes, Evidentiary Hearing	11/20/2019	125-125
Minutes, Motion to Withdraw Plea	07/25/2019	090-090
Minutes, Sentencing	12/11/2018	018-018
Minutes, Sentencing	06/30/2020	281-281
Motion to Dismiss Pursuant to Doggett v. United States	03/25/2020	241-255
Motion to Withdraw Plea	06/03/2019	036-071
Notice of Appeal	07/26/2020	303-304

Order Denying Motion to Dismiss Pursuant to Doggett v. United States	06/01/2020	274-276
Order of Commitment	01/09/2019	022-024
Reply in Support of Supplement to Motion to Withdraw Guilty Plea	02/26/2020	235-238
State's Opposition to Motion to Dismiss Pursuant to Doggett v. United States	04/03/2020	266-271
State's Opposition to Motion to Withdraw Plea	07/10/2019	077-084
State's Response to Supplements to Motion to Withdraw Guilty Plea	01/27/2020	225-234
Supplement to Motion to Withdraw Guilty Plea	01/09/2020	190-212
Transcripts, Evidentiary Hearing	08/23/2019	108-119
Transcripts, Evidentiary Hearing	10/18/2019	120-124
Transcripts, Evidentiary Hearing	11/20/2019	126-189
Transcripts, Justice Court Arraignment	08/29/2018	001-007
Transcripts, Motion to Withdraw Ple	07/25/2019	091-106
Transcripts, Motion to Withdraw Plea	07/18/2019	085-089
Transcripts, Sentencing	11/06/2018	016-017
Transcripts, Sentencing	12/11/2018	019-021
Transcripts, Sentencing	06/25/2020	277-280
Transcripts, Sentencing	06/30/2020	282-300
Transcripts, Sentencing/Motion to Withdraw Plea	06/25/2019	072-076
Transcripts, Status Check Mental Health Application	04/16/2019	026-031
Transcripts, Status Check Mental Health Application	05/30/2019	032-035
Transcripts, Status Check Status of Case	01/16/2020	214-216

Appendix Index (Chronological)

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Transcripts, Justice Court Arraignment	08/29/2018	001-007
Guilty Plea Agreement	09/21/2018	008-015
Transcripts, Sentencing	11/06/2018	016-017
Minutes, Sentencing	12/11/2018	018-018
Transcripts, Sentencing	12/11/2018	019-021
Order of Commitment	01/09/2019	022-024
Minutes, Competency Return	03/05/2019	025-025
Transcripts, Status Check Mental Health Application	04/16/2019	026-031
Transcripts, Status Check Mental Health Application	05/30/2019	032-035
Motion to Withdraw Plea	06/03/2019	036-071
Transcripts, Sentencing/Motion to Withdraw Plea	06/25/2019	072-076
State's Opposition to Motion to Withdraw Plea	07/10/2019	077-084
Transcripts, Motion to Withdraw Plea	07/18/2019	085-089
Minutes, Motion to Withdraw Plea	07/25/2019	090-090
Transcripts, Motion to Withdraw Plea	07/25/2019	091-106
Minutes, Evidentiary Hearing	08/23/2019	107-107
Transcripts, Evidentiary Hearing	08/23/2019	108-119
Transcripts, Evidentiary Hearing	10/18/2019	120-124
Minutes, Evidentiary Hearing	11/20/2019	125-125
Transcripts, Evidentiary Hearing	11/20/2019	126-189
Supplement to Motion to Withdraw Guilty Plea	01/09/2020	190-212
Minute Order Re: Supplemental Briefing	01/13/2020	213-213
Transcripts, Status Check Status of Case	01/16/2020	214-216
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Transcripts, Sentencing	06/25/2020	277-280
Minutes, Sentencing	06/30/2020	281-281
Transcripts, Sentencing	06/30/2020	282-300
Judgment of Conviction	07/01/2020	301-302
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1 CASE NO. C-18-334808-1

2 IN THE JUSTICE COURT OF LAS VEGAS TOWNSHIP

3 COUNTY OF CLARK, STATE OF NEVADA

4 -oOo-

5
6 THE STATE OF NEVADA,)

7 Plaintiff,)

8 vs.)

CASE NO. 16F07251X

9 KEVIN SUNSERI,)

10 Defendant.)

11
12 REPORTER'S TRANSCRIPT OF PROCEEDINGS

13
14 BEFORE THE HON. JAMES MILLER

15 JUSTICE OF THE PEACE PRO TEM

16 Wednesday, August 29, 2018

17 8:10 A.M.

18
19 APPEARANCES:

20 For the State: BRANDON ALBRIGHT, ESQ.
Deputy District Attorney

21 For the Defendant: KARA SIMMONS, ESQ.
22 Deputy Public Defender

23
24
25 Reported by: SHAWN E. OTT, CCR NO. 577

1 LAS VEGAS, CLARK COUNTY, NV, WED., AUG. 29, 2018

2 8:10 A.M.

3 -oOo-

4 P R O C E E D I N G S

5 THE COURT: Kevin Sunseri, 16F07251X,
6 present in custody.

7 Sir, do you have a copy of the criminal
8 complaint?

9 THE DEFENDANT: I do.

10 THE COURT: And have you had a chance to
11 read it over?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Did you understand what you
14 are charged with?

15 THE DEFENDANT: I do.

16 THE COURT: You have your own attorney,
17 sir?

18 THE DEFENDANT: No, I don't, sir.

19 THE COURT: Can you afford your own
20 attorney?

21 THE DEFENDANT: No, sir.

22 THE COURT: The Court's going to appoint
23 the public defender to represent you at this point.

24 MS. SIMMONS: I would be asking for a
25 preliminary hearing within 15 days, Your Honor.

1 THE COURT: That will be the order.

2 MS. SIMMONS: Your Honor, he did want me
3 to discuss his custody status. If we can approach.

4 (Whereupon, counsel approached
5 the bench and a discussion
6 was had out of the hearing of the
7 reporter.)

8 THE DEFENDANT: Your Honor, I wanted to
9 let you -- I mean, I'm not a perfect guy or nothing.
10 I am far from that, but I just had a book published.
11 I just got my certification as a certified personal
12 trainer. I am trying hard, you know.

13 THE COURT: Counsel, you want to add
14 anything?

15 MS. SIMMONS: Your Honor, just based on
16 what we said up at the stand, obviously he has an
17 extensive record and it is not in his favor, but
18 time linewise this case -- the date of incident is
19 from December of 2015. This obviously was filed back
20 on July 25th, 2016. Mr. Sunseri has been in custody
21 since then on another case that arose around the same
22 period of time. So he actually just recently on
23 Monday expired his sentence in that case and then was
24 brought here immediately.

25 I think based on the fact that he's been

1 in custody the last year this is obviously something
2 that should have been dealt with when he was in
3 custody.

4 I do think \$90,000 is excessive.
5 Obviously the charges are serious. His history is
6 extensive, but the age of this case and the fact that
7 it should have been dealt with sooner, I do think
8 indicate -- and the fact that he did successfully
9 expire from his sentence, I think at this point a
10 reduction in bail would be appropriate.

11 MR. ALBRIGHT: Your Honor, the defendant
12 is a 24-time felon. 23 of those felonies happened
13 out of this state, 22 of which in Florida, across the
14 country, showing the Court and the State he's a
15 flight risk because he obviously has ties to
16 Florida. 14 misdemeanors, four of which are DUIs.
17 And then we also have the fact that he has two other
18 fugitive felony cases in screening, possible warrants
19 in two states, Florida and Mississippi.

20 On his SCOPE he has 38 akas, 12 dates of
21 birth and nine Social Security numbers, showing that
22 at any time he can disappear under any of those
23 aliases and we might not find him again.

24 So this is a robbery with a deadly weapon
25 and a first degree kidnapping. He saw a man that had

1 cashed his check at a bar, put a gun to his neck,
2 forced him into the car, took his money and drove him
3 away where he wouldn't be able to tell his story. It
4 kind of checks the boxes of both robbery with a
5 deadly weapon and a very disturbing kidnapping in the
6 first degree.

7 So we would argue that \$90,000 is very
8 appropriate.

9 MS. SIMMONS: Your Honor, and just to
10 briefly address the flight risk issue. Obviously he
11 does have prior history from Florida. He lived in
12 Florida for a period of time. However he has been in
13 Las Vegas for the last five years. He does have
14 friends and family here. His fiance is in the
15 courtroom with him today.

16 If he were to be released -- a bail
17 reduction plus monitoring would ensure that he can't
18 leave Clark County, and so that is what I would be
19 asking for today.

20 THE DEFENDANT: Sir, may I say one last
21 thing, just a brief explanation. All those names --
22 I haven't had a driver's license in 25 years. A lot
23 of my convictions are driver's license related, and
24 I'm not trying to minimize anything because it's very
25 punishable by very serious infractions in Florida.

1 That is why. Those warrants are in state only. I'm
2 giving you my word. Those are in-state pickups
3 only. I'm not running.

4 MR. ALBRIGHT: I would add, Your Honor,
5 that previous convictions include burglary, robbery,
6 robbery, robbery, so he's violent habitual eligible
7 meaning he could serve life in prison at this time.

8 THE COURT: Sir, a big issue for me is,
9 nothing has been updated since the arrest warrant was
10 originally approved back in 2016. So as the file
11 sits here, \$90,000 looks pretty -- it's actually
12 pretty low to the Court. I can tell you that in
13 addition to the seriousness of the charges the fact
14 that you have 24 other felony convictions is a
15 hindrance to any bail reduction, perhaps it would be
16 more likely to be a bail increase.

17 I did note that there is an active
18 fugitive case set for tomorrow morning that you will
19 be addressed on, and that indicates to me that you
20 are not a good candidate for a bail reduction because
21 you have to handle this case before you can go off to
22 another state to resolve that case.

23 So I am going to leave it at \$90,000.
24 That doesn't mean that your counsel cannot submit
25 another written request for an O.R. motion based on

1 new facts that may have come up.

2 So we are going to set the preliminary
3 hearing within 15 days and try to get your
4 preliminary heard or get it resolved.

5 THE CLERK: September 12, 9 o'clock.

6

7 -oOo-


8

9 ATTEST: FULL, TRUE, ACCURATE AND CERTIFIED
10 TRANSCRIPT OF PROCEEDINGS.

11

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13


Shawn E. Ott, CCR No. 577

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GPA
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
RACHEL O'HALLORAN
Deputy District Attorney
Nevada Bar #012840
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

SEP 21 2018

BY, Dara Yorke
DARA YORKE, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

KEVIN SUNSERI,
#8266913

Defendant.

CASE NO: C-18-334808-1

DEPT NO: XVII

GUILTY PLEA AGREEMENT

I hereby agree to plead guilty to: **COUNT 1 - ROBBERY (Category B Felony - NRS 200.380 - NOC 50137)** and **COUNT 2 - OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony - NRS 202.360 - NOC 51460)**, as more fully alleged in the charging document attached hereto as Exhibit "1".

My decision to plead guilty is based upon the plea agreement in this case which is as follows:

The State retains the right to argue. The State will have no opposition to concurrent time between counts. *The State agrees not to seek habitual treatment.*

I agree to the forfeiture of any and all weapons or any interest in any weapons seized and/or impounded in connection with the instant case and/or any other case negotiated in whole or in part in conjunction with this plea agreement.

I understand and agree that, if I fail to interview with the Department of Parole and Probation, fail to appear at any subsequent hearings in this case, or an independent magistrate,

C-18-334808-1
GPA
Guilty Plea Agreement
4781896



1 by affidavit review, confirms probable cause against me for new criminal charges including
2 reckless driving or DUI, but excluding minor traffic violations, the State will have the
3 unqualified right to argue for any legal sentence and term of confinement allowable for the
4 crime(s) to which I am pleading guilty, including the use of any prior convictions I may have
5 to increase my sentence as an habitual criminal to five (5) to twenty (20) years, life without
6 the possibility of parole, life with the possibility of parole after ten (10) years, or a definite
7 twenty-five (25) year term with the possibility of parole after ten (10) years.

8 Otherwise I am entitled to receive the benefits of these negotiations as stated in this
9 plea agreement.

10 CONSEQUENCES OF THE PLEA

11 I understand that by pleading guilty I admit the facts which support all the elements of
12 the offense(s) to which I now plead as set forth in Exhibit "1".

13 **As to Count 1**, I understand that as a consequence of my plea of guilty the Court must
14 sentence me to imprisonment in the Nevada Department of Corrections for a minimum term
15 of not less than TWO (2) years and a maximum term of not more than FIFTEEN (15) years.
16 The minimum term of imprisonment may not exceed forty percent (40%) of the maximum
17 term of imprisonment. I understand that the law requires me to pay an Administrative
18 Assessment Fee.

19 **As to Count 2**, the Court must sentence me to imprisonment in the Nevada Department
20 of Corrections for a minimum term of not less than ONE (1) year and a maximum term of not
21 more than SIX (6) years. The minimum term of imprisonment may not exceed forty percent
22 (40%) of the maximum term of imprisonment. I understand that I may also be fined up to
23 \$5,000.00.

24 I understand that, if appropriate, I will be ordered to make restitution to the victim of
25 the offense(s) to which I am pleading guilty and to the victim of any related offense which is
26 being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to
27 reimburse the State of Nevada for any expenses related to my extradition, if any.

28 //

1 **As to Counts 1 and 2**, I understand that I am eligible for probation for the offense to
2 which I am pleading guilty. I understand that, except as otherwise provided by statute, the
3 question of whether I receive probation is in the discretion of the sentencing judge.

4 I understand that I must submit to blood and/or saliva tests under the Direction of the
5 Division of Parole and Probation to determine genetic markers and/or secretor status.

6 I understand that if I am pleading guilty to charges of Burglary, Invasion of the Home,
7 Possession of a Controlled Substance with Intent to Sell, Sale of a Controlled Substance, or
8 Gaming Crimes, for which I have prior felony conviction(s), I will not be eligible for probation
9 and may receive a higher sentencing range.

10 I understand that if more than one sentence of imprisonment is imposed and I am
11 eligible to serve the sentences concurrently, the sentencing judge has the discretion to order
12 the sentences served concurrently or consecutively.

13 I understand that information regarding charges not filed, dismissed charges, or charges
14 to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

15 I have not been promised or guaranteed any particular sentence by anyone. I know that
16 my sentence is to be determined by the Court within the limits prescribed by statute.

17 I understand that if my attorney or the State of Nevada or both recommend any specific
18 punishment to the Court, the Court is not obligated to accept the recommendation.

19 I understand that if the offense(s) to which I am pleading guilty was committed while I
20 was incarcerated on another charge or while I was on probation or parole that I am not eligible
21 for credit for time served toward the instant offense(s).

22 I understand that if I am not a United States citizen, any criminal conviction will likely
23 result in serious negative immigration consequences including but not limited to:

- 24 1. The removal from the United States through deportation;
- 25 2. An inability to reenter the United States;
- 26 3. The inability to gain United States citizenship or legal residency;
- 27 4. An inability to renew and/or retain any legal residency status; and/or
- 28 5. An indeterminate term of confinement, with the United States Federal

Government based on my conviction and immigration status.

Regardless of what I have been told by any attorney, no one can promise me that this conviction will not result in negative immigration consequences and/or impact my ability to become a United States citizen and/or a legal resident.

I understand that the Division of Parole and Probation will prepare a report for the sentencing judge prior to sentencing. This report will include matters relevant to the issue of sentencing, including my criminal history. This report may contain hearsay information regarding my background and criminal history. My attorney and I will each have the opportunity to comment on the information contained in the report at the time of sentencing. Unless the District Attorney has specifically agreed otherwise, the District Attorney may also comment on this report.

WAIVER OF RIGHTS

By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges:

1. The constitutional privilege against self-incrimination, including the right to refuse to testify at trial, in which event the prosecution would not be allowed to comment to the jury about my refusal to testify.
2. The constitutional right to a speedy and public trial by an impartial jury, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial the State would bear the burden of proving beyond a reasonable doubt each element of the offense(s) charged.
3. The constitutional right to confront and cross-examine any witnesses who would testify against me.
4. The constitutional right to subpoena witnesses to testify on my behalf.
5. The constitutional right to testify in my own defense.
6. The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34.

//

VOLUNTARINESS OF PLEA

I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.

I understand that the State would have to prove each element of the charge(s) against me at trial.

I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.

All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.

I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

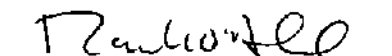
My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

DATED this 21 day of September, 2018.



KEVIN SUNSERI
Defendant

AGREED TO BY:



RACHEL O'HALLORAN
Deputy District Attorney
Nevada Bar #012840

1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorney for the Defendant named herein and as an officer of the court
3 hereby certify that:

- 4 1. I have fully explained to the Defendant the allegations contained in the
5 charge(s) to which guilty pleas are being entered.
- 6 2. I have advised the Defendant of the penalties for each charge and the restitution
7 that the Defendant may be ordered to pay.
- 8 3. I have inquired of Defendant facts concerning Defendant's immigration status
9 and explained to Defendant that if Defendant is not a United States citizen any
10 criminal conviction will most likely result in serious negative immigration
11 consequences including but not limited to:
- 12 a. The removal from the United States through deportation;
 - 13 b. An inability to reenter the United States;
 - 14 c. The inability to gain United States citizenship or legal residency;
 - 15 d. An inability to renew and/or retain any legal residency status; and/or
 - 16 e. An indeterminate term of confinement, by with United States Federal
17 Government based on the conviction and immigration status.
- 18 Moreover, I have explained that regardless of what Defendant may have been
19 told by any attorney, no one can promise Defendant that this conviction will not
20 result in negative immigration consequences and/or impact Defendant's ability
21 to become a United States citizen and/or legal resident.
- 22 4. All pleas of guilty offered by the Defendant pursuant to this agreement are
23 consistent with the facts known to me and are made with my advice to the
24 Defendant.
- 25 5. To the best of my knowledge and belief, the Defendant:
- 26 a. Is competent and understands the charges and the consequences of
27 pleading guilty as provided in this agreement,
 - 28 b. Executed this agreement and will enter all guilty pleas pursuant hereto
voluntarily, and
 - c. Was not under the influence of intoxicating liquor, a controlled
substance or other drug at the time I consulted with the Defendant as
certified in paragraphs 1 and 2 above.

Dated: This 20th day of September, 2018.


ATTORNEY FOR DEFENDANT

16F07251X/rmj/L-3

1 **INFM**

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

5 RACHEL O'HALLORAN

6 Deputy District Attorney

7 Nevada Bar #012840

8 200 Lewis Avenue

9 Las Vegas, Nevada 89155-2212

10 (702) 671-2500

11 Attorney for Plaintiff

12 I.A. 9/14/18

13 10:00 A.M.

14 KANG

DISTRICT COURT
CLARK COUNTY, NEVADA

15 THE STATE OF NEVADA,

16 Plaintiff,

17 -vs-

18 KEVIN SUNSERI,
19 #8266913

20 Defendant.

CASE NO: C-18-334808-1

DEPT NO: XVII

INFORMATION

21 STATE OF NEVADA

22 COUNTY OF CLARK

} ss.

23 STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State
24 of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

25 That KEVIN SUNSERI, the Defendant(s) above named, having committed the crimes
26 of **ROBBERY (Category B Felony - NRS 200.380 - NOC 50137) and OWNERSHIP OR**
27 **POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony - NRS**
28 **202.360 - NOC 51460)**, on or about the 10th day of December, 2015, within the County of
Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made
and provided, and against the peace and dignity of the State of Nevada,

COUNT 1 - ROBBERY

did willfully, unlawfully, and feloniously take personal property, to wit: lawful money
of the United States, from the person of DENNIS REDOUTEY, or in his presence, by means


EXHIBIT "1"

1 of force or violence, or fear of injury to, and without the consent and against the will of
2 DENNIS REDOUTEY.

3 COUNT 2 - OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON

4 did willfully, unlawfully, and feloniously own, or have in his possession and/or under
5 his custody or control, a firearm, to wit: a semi-automatic firearm, the Defendant being a
6 convicted felon, having in 2016, been convicted of Robbery, in Case No. C-16-312626-1, in
7 the Eighth Judicial District Court, Clark County, a felony under the laws of the State of
8 Nevada.

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

10
11 BY 
12 RACHEL O'HALLORAN
Deputy District Attorney
13 Nevada Bar #012840
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27 16F07251X/rmj
28 LVMPD EV#1512110017
(TK14)

Case Number: C-18-334808-1

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Las Vegas, Nevada, Tuesday, November 6, 2018

[Hearing begins at 9:05 a.m.]

THE COURT: Sir, have you been in touch with Mr. Kang?

THE DEFENDANT: I saw him yesterday, sir. He's not –
apparently, he's not here today.

THE COURT: All right. Thank you, sir.

[Matter trailed at 9:05 a.m.]

[Matter recalled at 9:06 a.m.]

THE COURT: Page 7, Kevin Sunseri. Is he here?

THE DEFENDANT: Yes, sir. I'm sorry, I apologize, --

THE COURT: It's not --

THE DEFENDANT: -- [indiscernible].

THE COURT: -- your fault, sir.

[Colloquy between Court and Court Clerk]

THE COURT: All right, we'll continue this to Thursday, sir.

THE DEFENDANT: Thank you.


THE COURT: All right. We'll contact your attorney's office.

THE COURT CLERK: November 8th, at 8:30.

[Hearing concludes at 9:06 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the
audio/video recording in the above-entitled case to the best of my ability.


CYNTHIA GEORGILAS
DC 17, Court Transcriber

Felony/Gross Misdemeanor

COURT MINUTES

December 11, 2018

C-18-334808-1 State of Nevada
 vs
 Kevin Sunseri

December 11, 2018 08:30 AM Sentencing

HEARD BY: Villani, Michael COURTROOM: RJC Courtroom 11A

COURT CLERK: Pannullo, Haly; Watkins, April

RECORDER: Georgilas, Cynthia

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

Mr. Kang requested a competency evaluation. COURT SO ORDERED, matter REFERRED to competency; Further Proceedings SET.

CUSTODY (COC)

01/04/19 9:00 AM FURTHER PROCEEDINGS - COMPETENCY (DEPT 9)

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THE STATE OF NEVADA,
Plaintiff,
vs.
KEVIN SUNSERI,
Defendant.

CASE: C-18-334808-1

DEPT. XVII

**RECORDER'S TRANSCRIPT OF HEARING:
SENTENCING**

APPEARANCES:

For the Defendant: DOWON S. KANG, ESQ.

Recorded by: CYNTHIA GEORGILAS, COURT RECORDER

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Las Vegas, Nevada, Tuesday, December 11, 2018

[Hearing begins at 9:22 a.m.]

THE COURT: 21 is Kevin Sunseri. Mr. Kang, time set for sentencing. Can we go forward?

MR. KANG: Your Honor, I can't go forward. I forwarded to chambers last week my request for a competency evaluation and in thereby expressed the basis for my concerns.

THE COURT: All right. Is there a date for that? I mean have you submitted that through the court system?

MR. KANG: Have I – I submitted it to your law clerk by email.

[Colloquy between Court, Defense Counsel and Court Clerk]

THE COURT: You need an actual application.

THE COURT CLERK: Here you go.

THE COURT: We have a form here, Counsel, if you can fill it out.

MR. KANG: Judge, I do have one. I should have the original. May I approach?

THE COURT: Yes, please.

MR. STANTON: Your Honor, also, I have an email in the file from Defense Counsel about contesting aspects of the PSI.

THE COURT: Okay.

MR. STANTON: And so, if that – if I heard Counsel correct there is a concern of competency?

THE COURT: Yes.

MR. STANTON: Okay. Well, I would suggest a concurrent

1 assessment through the division of -- the challenge is to P&P. Now, I've
2 normally seen that where defense counsel writes the author of the report
3 outlining with specificity what is challenged, and in the email there is --

4 [Colloquy between State and Defense Counsel]

5 MR. STANTON: I'll withdraw that. Counsel says he's resolved
6 it and that there are no Stockmeier issues with the PSI.

7 THE COURT: All right. I've signed the order for evaluation of
8 competency court.

9 [Colloquy between Court and Court Clerk]

10 THE COURT CLERK: It's going to be on January 4th, at 9:00
11 a.m. in Department 9, and then they'll send it back to us, Judge.


12 MR. KANG: Thank you very much, Your Honor.

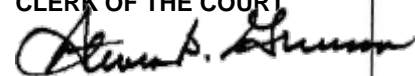
13 THE COURT: All right. Thank you. And then we'll see if it gets
14 sent back. Thank you.

15 [Hearing concludes at 9:24 a.m.]

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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio/video recording in the above-entitled case to the best of my ability.

23 
24 CYNTHIA GEORGILAS
25 Court Recorder/Transcriber
District Court Dept. XVII



1 OCNRS
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 CHRISTOPHER J. LALLI
6 Assistant District Attorney
7 Nevada Bar #005398
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 KEVIN SUNSERI,
13 #8266913

14 Defendant.

CASE NO: C-18-334808-1

DEPT NO: VII

15 ORDER OF COMMITMENT

16 THIS MATTER came before the Court on the 4th day of January, 2019, when doubt
17 arose as to competence of the Defendant, the Defendant being present with counsel, DOWON
18 S. KANG, ESQ., the State being represented by STEVEN B. WOLFSON, District Attorney,
19 through GLEN O'BRIEN, his Deputy, and the Court having considered the reports of Doctors
20 Mark Chambers and C. Phillip Colosimo, licensed and practicing psychologists and/or
21 psychiatrists in the State of Nevada, finds the Defendant incompetent, and that he is dangerous
22 to himself and to society and that commitment is required for a determination of his ability to
23 receive treatment to competency and to attain competence, and good cause appearing, it is
24 hereby

25 ORDERED that, pursuant to NRS 178.425(1), the Sheriff and/or a designee(s) of the
26 Division of Public and Behavioral Health of the Department of Health and Human Services,
27 shall convey the Defendant forthwith, together with a copy of the complaint, the commitment
28 and the physicians' certificate, if any, into the custody of the Administrator of the Division of

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1 Public and Behavioral Health of the Department of Health and Human Services or his or her
2 designee for detention and treatment at a secure facility operated by that Division; and, it is

3 FURTHER ORDERED that, pursuant to NRS 433A.165, before the defendant may be
4 transported to a public or private mental health facility he must:

5 1. First be examined by a licensed physician or physician assistant or an
6 advanced practitioner of nursing to determine whether the person has a medical problem, other
7 than a psychiatric problem, which requires immediate treatment; and

8 2. If such treatment is required, be admitted to a hospital for the appropriate
9 medical care; and, it is

10 FURTHER ORDERED that the Defendant is required to submit to said medical
11 examination which may include, but is not limited to, chest x-rays and blood work; and, it is

12 FURTHER ORDERED that the cost of the examination must be paid by Clark County,
13 unless the cost is voluntarily paid by the Defendant or on his behalf, by his insurer or by a state
14 or federal program of medical assistance; and, it is

15 FURTHER ORDERED that, pursuant to NRS 178.425(2), the Defendant must be held
16 in such custody until a court orders his release or until he is returned for trial or judgment as
17 provided in NRS 178.450, 178.455 and 178.460; and, it is

18 FURTHER ORDERED that, pursuant to NRS 178.425(4), these proceedings against
19 the Defendant are suspended until the Administrator or his or her designee finds him capable
20 of standing trial as provided in NRS 178.400; and, it is

21 FURTHER ORDERED that, pursuant to NRS 178.435, the expenses of the examination
22 and of the transportation of the Defendant to and from the custody of the Administrator of the
23 Division of Public and Behavioral Health of the Department of Health and Human Services or
24 his or her designee are chargeable to Clark County; and, it is

25 FURTHER ORDERED that the Administrator of the Division of Public and Behavioral
26 Health of the Department of Health and Human Services or his or her designee shall keep the
27 Defendant under observation and evaluated periodically; and, it is

28 //

1 FURTHER ORDERED that the Administrator or his or her designee shall report in
2 writing to this Court and the Clark County District Attorney whether, in his opinion, upon
3 medical consultation, the Defendant is of sufficient mentality to be able to understand the
4 nature of the criminal charge against him and, by reason thereof, is able to aid and assist his
5 counsel in the defense interposed upon the trial or against the pronouncement of the judgment
6 thereafter. The administrator or his or her designee shall submit such a report within 6 months
7 after this order and at 6 month intervals thereafter. If the opinion of the Administrator or his
8 or her designee about the Defendant is that he is not of sufficient mentality to understand the
9 nature of the charge against him and assist his own defense, the Administrator or his or her
10 designee shall also include in the report his opinion whether:

11 1. There is a substantial probability that the Defendant can receive treatment
12 to competency and will attain competency to stand trial or receive pronouncement of judgment
13 in the foreseeable future; and

14 2. The Defendant is at that time a danger to himself or to society.

15 DATED this 8 day of January, 2019.



16
17
18 DISTRICT JUDGE

19 STEVEN B. WOLFSON
20 District Attorney
21 Nevada Bar #001565

22 BY


23 CHRISTOPHER J. LALLI
24 Assistant District Attorney
25 Nevada Bar #005398
26
27
28

mc

Felony/Gross Misdemeanor

COURT MINUTES

March 05, 2019

C-18-334808-1 State of Nevada
 vs
 Kevin Sunseri

March 05, 2019 08:30 AM Further Proceedings: Return from Competency Court

HEARD BY: Villani, Michael COURTROOM: RJC Courtroom 11A

COURT CLERK: Black, Olivia

RECORDER: Georgilas, Cynthia

REPORTER:

PARTIES PRESENT:

Ann Marie Dunn	Attorney for Plaintiff
Dowon S. Kang	Attorney for Defendant
Kevin Sunseri	Defendant
State of Nevada	Plaintiff

JOURNAL ENTRIES

Deputy Public Defender, Erika Ballou present on behalf of Defendant.

CONFERENCE AT BENCH. Pursuant to discussions at the bench, Court noted counsel was attempting to get Defendant accepted into the Mental Health program and getting records to submit the application. COURT ORDERED, Status Check SET for Defendant's mental health application.

MATTER RECALLED. All parties present as before. Ms. Ballou now present. Mr. Kang requested to address Defendant's bail bond being reinstated. Colloquy regarding Defendant's custody status. Ms. Ballou noted Defendant had been taken from parole and booked into custody on this charge. Ms. Dunn requested the bail motion be in writing. COURT FURTHER ORDERED, Defendant's oral request DENIED; Mr. Kang was free to make a written request.

CUSTODY

04/16/19 8:30 AM STATUS CHECK: MENTAL HEALTH APPLICATION

DISTRICT COURT
CLARK COUNTY, NEVADA

CASE: C-18-334808-1
DEPT. XVII

**RECORDER'S TRANSCRIPT OF HEARING:
STATUS CHECK: MENTAL HEALTH APPLICATION**

For the Defendant: DOWON S. KANG, ESQ.

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Las Vegas, Nevada, Tuesday, April 16, 2019

[Hearing begins at 8:39 a.m.]

THE COURT: Sunseri.

THE DEFENDANT: Yes, ma'am.

THE COURT: Mr. Sunseri is present in custody.

Ms. Clowers is here on behalf of the State. Sir, who is your lawyer? Is it Dowon Kang?

THE DEFENDANT: Dowon Kang, he's privately – there's no appointed –

THE COURT: You retained him?

THE DEFENDANT: Yes, I retained him privately.

THE COURT: Okay. So, he's your lawyer. He doesn't represent the bail company?

THE DEFENDANT: No, ma'am.

THE COURT: All right.

THE DEFENDANT: He's my lawyer.

THE COURT: Does he know about this date?

MS. CLOWERS: He does.

THE DEFENDANT: I'm hoping so.

THE COURT: Okay.

MS. CLOWERS: I text him.

THE COURT: Okay. All right, so I'll –

MR. BERKLEY: And –

THE COURT: -- recall you when he gets here.

[Matter trailed at 8:39 a.m.]

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[Matter recalled at 8:47 a.m.]

THE COURT: C344808, State of Nevada versus Kevin Sunseri. Mr. Sunseri is present in custody. Mr. Kang is here on his behalf. Ms. Clowers is here on behalf of the State.

Mr. Kang, this is on for status check on a Mental Health Court application or mental health application. It doesn't indicate if it's Mental Health Court or what's going on.

MR. KANG: Your Honor, we were going to submit an application for the Mental Health Court and –

THE COURT: Okay.

MR. KANG: -- Judge Villani had allowed us 45 days to try to get some medical records. We have some. The ones that I'm having difficulty getting are from Department of Corrections from Florida, but I think we're making progress on those. And I think we finally come to agreement on which medical [indiscernible] they can accept and I was able to get it notarized. So, we submitted that. I expect it shortly. I'm going to ask for 45 days, if we could please.

MS. CLOWERS: And, Judge, the only issue is I don't want it set for sentencing, only because the victim needs to be present –

THE COURT: Okay.

MS. CLOWERS: -- so I want a firm sentencing date after we get those records.

THE COURT: Okay, so you want a 45 day date for the records?

MR. KANG: 45 days for a status on –

1 THE COURT: Check.

2 MR. KANG: -- an application.

3 THE COURT: Status check on the Mental Health Court
4 application in 45 days; that date is.

5 THE COURT CLERK: May 30th, 8:30 a.m.

6 MR. KANG: 8:30.

7 THE COURT: And you guys have a hearing on April 23rd in
8 regards to his bail.

9 MR. KANG: Judge, can we hear that today?

10 MS. CLOWERS: And I don't mind, Judge, because here's the
11 deal.

12 THE COURT: I don't know anything about it.

13 MS. CLOWERS: Oh, okay.

14 THE COURT: I didn't read it. It's not on calendar today. I didn't
15 read it. This is Judge Villani's case so I don't know anything about it so
16 I'm not in a position to make any decisions on his bail. I don't know
17 anything about why he's in custody. I know nothing about any of that.

18 MR. KANG: Judge, can we approach?

19 THE COURT: Yes.

20 [Bench conference begins – transcribed as follows:]

21 MR. KANG: Judge, you don't need to know anything about it.
22 Here's the thing is when he went to competency they threw out his bail.
23 So it was ninety thousand dollars before and then it was zero and he
24 came back. When they restored his competency and they didn't reset
25 the bail at ninety. That's all I'm asking. He's not really going anywhere

1 because he has a governor warrant out of Florida. But what is weird –
2 MS. CLOWERS: Gov-na.
3 MR. KANG: What?
4 MS. CLOWERS: Gov-na.
5 MR. KANG: So, --
6 THE COURT: What's your position [indiscernible]?
7 MS. CLOWERS: I don't care. Why does Judge Bell make it no
8 bail?
9 THE COURT: I don't know.
10 MS. CLOWERS: Because if that's actually the case, I mean
11 bail was set at ninety grand –
12 THE COURT: We'll reset –
13 MS. CLOWERS: -- originally.
14 THE COURT: -- at ninety thousand. You --
15 MR. KANG: [Indiscernible].
16 THE COURT: -- have no opposition of putting it back to ninety
17 thousand?
18 MR. KANG: [Indiscernible] –
19 MS. CLOWERS: No, 'cause I don't think –
20 THE COURT: No, I'll do that.
21 MR. KANG: [Indiscernible] --
22 MS. CLOWERS: -- he can be held without.
23 THE COURT: [Indiscernible] the original motion. I thought you
24 asked me for an O.R. I know nothing about what you're talking about.
25 MR. KANG: No, he ain't going anywhere. It's just, the worse

1 thing that he – he won't get credit in his Florida case if there's no bail set
2 here. I don't know if that's true, but Florida's strange.

3 THE COURT: If [indiscernible], I'll [indiscernible].

4 MR. KANG: All right.

5 MS. CLOWERS: I'm fine with that.

6 THE COURT: All right?

7 MR. KANG: Okay, Judge.

8 THE COURT: Okay.

9 [Bench conference ends]

10 THE COURT: Okay, so in regards to his bail setting, the Court
11 is going to reset the Defendant's bail at ninety thousand dollars and
12 vacate the April 23rd hearing date.


13 MS. CLOWERS: Thank you.

14 MR. KANG: Thanks, Judge.

15 [Hearing concludes at 8:50 a.m.]

16 * * * * *

17 ATTEST: I do hereby certify that I have truly and correctly transcribed the
18 audio/video recording in the above-entitled case to the best of my ability.

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20 CYNTHIA GEORGILAS
21 Court Recorder/Transcriber
22 District Court Dept. XVII
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CASE: C-18-334808-1
DEPT. XVII

THURSDAY, MAY 30, 2019

APPEARANCES:

For the Defendant: **DAMIAN SHEETS, ESQ.**

Recorded by: PATTI SLATTERY, COURT RECORDER

1 Las Vegas, Nevada, Thursday, May 30, 2019

2 [Hearing begins at 9:06 a.m.]

3 THE COURT: C334808, State of Nevada versus Kevin
4 Sunseri. The record should reflect the presence of Mr. Sheets for
5 Mr. Kang, I believe. Mr. Sunseri is present in custody. Ms. Cole for the
6 State. Time set status check mental health application.

7 My minutes – my notes reflect Mr. Kang’s trying to get records
8 out of Florida. It looks like Mr. Sunseri has had – has been to Lakes
9 Crossing. We have a current bail set at ninety and a PSI in the file. It
10 looks like the PSI’s been available since October of 2018, so I mean
11 we’re just waiting to sentence, right?

12 MR. SHEETS: If I could, Your Honor, I just got the – we’re
13 actually going to be substituting for Mr. Kang today. We’ve been –

14 THE COURT: Oh, so you’re substituting in?

15 MR. SHEETS: We are, Your Honor. And – so I just received
16 the file from Mr. Kang this morning. He provided it to me outside. And we
17 advised him last week -- and we communicated, he and I last week, that
18 we –

19 THE COURT: So, we can –

20 MR. SHEETS: -- would be coming in.

21 THE COURT: -- identify you as counsel of record?

22 MR. SHEETS: Yes, please.

23 THE COURT: [Indiscernible].

24 MR. SHEETS: I was going to ask for 30 days, Your Honor.
25 Based on our review of the file, and so far in our discussions with

1 Mr. Kang and our discussions with our client, I do believe we have a
2 valid basis to withdraw the guilty plea. And so, it was our intention to file
3 a motion to a withdraw guilty plea and then we were going to be filing a –

4 THE COURT: Okay.

5 MR. SHEETS: -- substantive dispositive motion that we don't
6 think was filed in this matter.

7 THE COURT: If you're successful in –

8 MR. SHEETS: Correct.

9 THE COURT: -- withdraw?

10 MR. SHEETS: Yes.

11 THE COURT: So, you're requesting a status check 30 days?

12 MR. SHEETS: Yes, please.

13 THE COURT: 30 days.

14 THE COURT CLERK: June 25th, 8:30 a.m. And the status
15 check is for?

16 THE COURT: Status check is for – right now it would be for
17 sentencing and/or Defense motion to withdraw a plea because the next
18 stop in the process right now is sentencing unless something happens in
19 the meantime.

20 MR. SHEETS: Yes, Your Honor. And I know that it is our
21 intention to file, so.

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THE COURT: Very good.

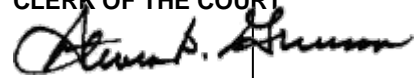
MR. SHEETS: Thank you, Your Honor.

[Hearing concludes at 9:07 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.


CYNTHIA GEORGILAS
Court Recorder/Transcriber
District Court Dept. XVII



MOT
MAYFIELD GRUBER & SHEETS
Damian Sheets, Esq.
Nevada Bar No. 10755
Kelsey Bernstein, Esq.
Nevada Bar No. 13825
726 S. Casino Center Blvd.
Las Vegas, Nevada 89101
Telephone: (702) 598-1299
Facsimile: (702) 598-1266
dsheets@defendingnevada.com
Attorney for Defendant
Kevin Sunseri

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

State of Nevada,)	Case No.: C-18-334808-1
Plaintiff)	Dept. No: XVII
)	
vs.)	MOTION TO WITHDRAW GUILTY PLEA
)	
Kevin Sunseri,)	Date of Hearing: June 25, 2019
Defendant)	Time of Hearing: 8:30am
)	

COMES NOW, Defendant Kevin Sunseri, by and through his attorney of record,
DAMIAN SHEETS, ESQ. of the firm Mayfield Gruber & Sheets, hereby submits this
Defendant's Motion to Withdraw Guilty Plea.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2

3 **I. Statement of the Case**

4 On January 21, 2016, Kevin Sunseri was arraigned in Henderson Justice Court on
5 unrelated felony charges, which were subsequently bound over to the Eighth Judicial
6 District Court on February 9, 2016 (C-16-312626-1). Ten days later, he pled guilty
7 pursuant to a plea agreement with a stipulated sentence of two to five years in the Nevada
8 Department of Corrections. He was sentenced on May 25, 2016 in accordance with the plea
9 agreement. Mr. Sunseri served his sentence in the Nevada Department of Corrections until
10 he was released on parole on August 27, 2018.
11

12 However, on that date, he was in fact not released on parole; instead, he was re-
13 booked on an arrest warrant that had apparently remained outstanding in NCIC since July
14 28, 2016 – over two years ago – that initiated the instant case. He was never apprehended
15 or informed of the warrant the entire period that he remained in custody until *the very day*
16 that he was scheduled to be released, despite the warrant being issued two months after
17 Mr. Sunseri was sentenced and in the custody of the State. Thus, instead of initiating the
18 criminal process two years ago and likely reaching a speedy resolution to run a sentence
19 concurrent with his existing 2-5 year stipulated sentence, Mr. Sunseri was instead
20 presented with an entirely new criminal case when he was finally on the verge of being
21 released from custody. The arrest warrant was formally executed on August 27, 2018, the
22 same day of his anticipated release.
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1 On these new charges, Mr. Sunseri unconditionally waived his right to a preliminary
2 hearing pursuant to negotiations entered in this case on September 21, 2018. His
3 sentencing has not yet taken place.

4
5 Mr. Sunseri hereby respectfully requests this Court allow him to withdraw his plea
6 in the instant matter, as there is a genuine likelihood that this case may be subject to
7 dismissal pursuant to *Doggett v. United States*. As sentencing has not yet occurred, the
8 proper vehicle for relief is a Motion to Withdraw Plea, which carries a substantially lower
9 burden than the same request made after sentencing by way of a writ petition.
10

11 **II. Standard to Withdraw Guilty Plea**

12
13 To summarize, a criminal defendant may move to withdraw his guilty plea prior to
14 sentencing for any reason that is considered “fair and just” under the totality of
15 circumstances. Specifically, a defendant may move to withdraw a guilty plea before
16 sentencing pursuant to NRS 176.165, and “a district court may grant a defendant's motion
17 to withdraw his guilty plea before sentencing for any reason where permitting withdrawal
18 would be fair and just.” *Stevenson v. State*, 354 P.3d 1277, 1281 (Nev. 2015). To this end,
19 “the Nevada Supreme Court has disavowed the standard previously announced in *Crawford*
20 *v. State*, 117 Nev. 718, 30 P.3d 1123 (2001), which focused exclusively on whether the plea
21 was knowingly, voluntarily, and intelligently made, and affirmed that ‘the district court
22 must consider the totality of the circumstances to determine whether permitting
23 withdrawal of a guilty plea of a guilty plea would be fair and just.’” *Flores v. State*, 2016 Nev.
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1 App. LEXIS 303 (Nev. 2016) (citing *Stevenson*, 354 P.3d at 1281). What presents a “fair and
2 just” reason is determined on a case-by-case basis.

3 4 **III. Request to Withdraw Plea**

5
6 In this case, with due respect to Mr. Sunseri’s prior counsel, it would appear that Mr.
7 Sunseri entered into the negotiations without an understanding that a legal remedy existed
8 which could result in outright dismissal of this case.

9
10 Specifically, this case is eligible for dismissal based on the State’s violation of Mr.
11 Sunseri’s federal right to a speedy trial under the Sixth Amendment to the United States
12 Constitution. The Sixth Amendment provides, in pertinent part, “in all criminal
13 prosecutions, the accused that shall the right to a speedy and public trial...” The right to a
14 speedy trial is a “fundamental right” enforced against the states through the Fourteenth
15 Amendment. *Barker v. Wingo*, 407 U.S. 514, 515, 92 S.Ct. 2182 (1972).

16
17 The federal speedy trial right, as distinguished from Nevada’s statutory 60 day rule,
18 is primarily addressed in *Barker*. The Supreme Court articulated 4 factors to consider in
19 each case when a speedy trial violation is asserted:

- 20
21 1. Length of delay;
22 2. Reason for the delay;
23 3. Defendant’s assertion of his rights; and
24 4. Prejudice to the defendant.

25 While the factors were initially set forth in *Barker*, many of them were revisited in
26 greater depth in *Doggett v. United States*, 112 S.Ct. 2686 (1992). The U.S. Supreme Court
27 ultimately concluded that, while it may be difficult to swallow, once the right to a speedy
28

trial has been violated, outright dismissal “is the only possible remedy.” *Barker*, 407 U.S. at 552.

A. *The Delay of More than Two Years 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.” *Doggett*, 112 S.Ct. at n.1.

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 this case, more than **two years** elapsed from the arrest warrant to Mr. Sunseri’s actual arrest date – more than double the one year threshold needed to trigger the inquiry and establish “presumptive prejudice.”¹ On its face, the extensive length of time between

¹ Specifically, the arrest warrant was issued on July 28, 2016 and executed on August 29, 2018 – a difference of **762 days**, or 2 years, 1 month and 1 day.

1 issuance of the warrant and Mr. Sunseri's arrest establishes presumptive prejudice against
2 him.

3
4 *B. The Delay was Not Caused by the Defendant*

5
6 Delays which are wholly or primarily attributable to the State, or agencies under the
7 power of the State, favor dismissal. The Supreme Court in *Barker* and *Doggett* set forth a
8 type of spectrum to gauge how the root cause of the delay factors into the overall analysis.
9 On one end of the spectrum is the State's "diligent prosecution," and on the other end is the
10 State's "bad-faith delays." The Court in *Doggett* recognized that most delays will fall
11 somewhere in the middle as attributable to State "negligence" not amounting to bad faith.
12

13 However, even if negligence falls in the middle of the delay-cause spectrum, *under*
14 *federal law it nonetheless comes down in favor of dismissal for purposes of a speedy trial*
15 *violation*. "A more neutral reason such as negligence or overcrowded courts should be
16 weighed less heavily [than bad faith] but nevertheless should be considered since the
17 ultimate responsibility for such circumstances must rest with the government rather than
18 with the defendant." *Barker*, 92 S.Ct. at 2191.
19

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

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

14 Here, the State had far more information about Mr. Sunseri’s whereabouts than the
15 federal government in *Doggett*, but made *far less* of an effort to secure his arrest or even
16 inform him of the charges. Unlike Mr. Sunseri, Doggett had actually *left the country* at some
17 point and even spent time in custody outside of the United States before returning. Federal
18 agents made “some” efforts to try to locate and apprehend him, including sending word of
19 his arrest warrant to all United States customs stations and updating national registries.
20 However, in this case, the State had complete and unfettered access to Mr. Sunseri’s
21 location; he was not out of the country like Doggett, but rather already in the custody of the
22 State of Nevada, and yet the State still made no effort whatsoever to inform their own
23 agencies of the warrant. Here, the State had access to Mr. Sunseri’s direct location, he never
24 left the country and was in the custody of the State, and yet the State of Nevada still made
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1 *no effort whatsoever* to inform him of or execute the arrest warrant (even in *Doggett*, at
2 least “some” effort had been made).

3 The State had access to his location and could have found him with a bare minimum
4 level of diligence; however, when the State does not even undertake the simple basic step
5 to execute an arrest warrant on someone already in State custody, they can hardly blame
6 other parties for their “lethargy” in pursuing him.
7

8 There is absolutely no question that the State knew (or could have with even
9 minimal diligence) Mr. Sunseri’s whereabouts, yet the State did absolutely nothing to
10 advance the prosecution against him, resulting in more than two years of custody that
11 could have been credited towards the instant case. The *Doggett* Court noted that federal
12 agents were negligent in their pursuit because they “could have found him within minutes.”
13 *Id.* The State’s lack of diligence in this case is far more egregious; they did not need to “find”
14 Mr. Sunseri at all – he was already in State custody. They simply needed to type in his
15 name. Because the delay is the product of State negligence, this factor favors dismissal.
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19 *C. Mr. Sunseri Would have Invoked his Federal Speedy Trial Right had this Remedy been*
20 *Made Available to Him*

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

3 Mr. Sunseri was unable to invoke his federal speedy trial rights at his arraignment in
4 District Court due to the previously arranged plea agreement, but had this remedy been
5 made available to him, he would invoke this right all available avenues. His invocation of
6 these rights is “entitled to strong evidentiary weight in determining whether the defendant
7 is being deprived of the right.” *Doggett*, 112 S.Ct. at 2693. This factor also favors dismissal.
8

9
10 *D. The Delay Creates a “Presumption of Prejudice” Without the Need to Show Actual*
11 *Harm*

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

15 “If witnesses die or disappear during a delay, the prejudice is obvious.” *Id.* Other
16 aspects of prejudice include fading memories and destruction of exculpatory evidence.
17 Most of the *Doggett* analysis is geared towards prejudice; *Doggett* was not subject to
18 pretrial detention, nor did he suffer anxiety because he was unaware of the charges (much
19 like Mr. Sunseri). The only prejudice he could claim, therefore, was that the unreasonable
20 delay impaired his defense. The Court concluded that no precise showing of actual
21 prejudice was necessary, and that *presumptive prejudice from the excessive delay alone*
22 *satisfied this factor:*
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1 [T]he government claims Doggett has failed to make any affirmative
2 showing that the delay weakened his ability to raise specific defenses,
3 elicit specific testimony, or produce specific items of evidence. Though
4 Doggett did indeed come up short in this respect, the Government's
5 argument takes it only so far: consideration of prejudice is not limited
6 to the specifically demonstrable and, as it concedes, affirmative proof of
7 particularized prejudice is not essential to every speedy trial claim.
8 *Doggett*, 112 S.Ct. at 2692.

9 Here, like in *Doggett*, presumptive prejudice exists due to the unreasonably long
10 delay. As noted above, the *Doggett* Court stated that presumptive prejudice will typically
11 attach after a delay of one year. Here, the delay has been more than **double** that length. In
12 *Doggett*, the one year delay was enough to create the "presumption of prejudice," and
13 therefore his conviction was reversed without a need to show actual harm. Here, the delay
14 was over twice that required in *Doggett*, and therefore, no actual prejudice is necessary to
15 find that Mr. Sunseri's Sixth Amendment rights were being violated.

16 The Supreme Court suggested that, had the Government acted in bad faith, dismissal
17 would be nearly automatic. However, even when the State's actions are tantamount to
18 negligence rather than bad faith, dismissal is still warranted. "Although negligence is
19 obviously to be weighed more lightly than a deliberate intent to harm the accused's
20 defense, it still falls on the wrong side of the divide between acceptable and unacceptable
21 reasons for delaying a criminal prosecution once it has begun." *Doggett*, 112 S.Ct. at 657.
22 Furthermore, "our toleration of such negligence varies inversely with its protractedness...
23 and its consequent threat to the fairness of the accused's trial." *Id.*

24 Characterizing the Government's inaction over the course of the delay as
25 "egregious," the Court in *Doggett* determined that the delay entitled the defendant to a
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1 presumption of prejudice and he need not specify exactly how he was prejudiced by the
2 delay. *Id.* Accordingly, the *Doggett* Court ordered the case dismissed.

3 As of this writing, **over 1,268 days** have elapsed from the offense date. Because the
4 excessive delay creates a strong presumption of prejudice against Mr. Sunseri, this factor
5 likewise favors dismissal.
6

7 In summation, a Sixth Amendment speedy trial analysis under *Doggett/Barker*
8 require only four factors: length, reason, assertion of rights, and prejudice. The “length”
9 requirement is satisfied by the two year gap between warrant and arrest, and furthermore
10 the sheer length of the delay alone triggers a strong “presumption of prejudice,” *Shell*, 974
11 F.2d at 1036; the reason is entirely attributable to the negligence of the State, who failed to
12 conduct *any* investigation whatsoever or attempt to find or inform him despite his location
13 being a matter of public record for several years and his immediate availability due to his
14 incarceration in the Nevada Department of Corrections; Mr. Sunseri has not had an
15 opportunity to invoke his speedy trial rights, but will do so in the event that he is permitted
16 to withdraw his plea. The last prong is prejudice which, again, is already presumed by
17 virtue of the excessive delay. Thus, all factors favor dismissal under the Sixth Amendment.
18

19 Finally, several recent Eighth Judicial District Court decisions on this exact issue
20 may provide additional guidance. On April 11, 2018 the District Court *granted* a Motion to
21 Dismiss pursuant to *Doggett v. United States* on facts that were similar but significantly less
22 egregious than they are here (see **Exhibit 1**, Order, attached hereto). In the case *State of*
23 *Nevada v. Rigoberto Inzunza*, C-17-321860-1, there had been a delay of 2 years and 2
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1 months from warrant to arrest. Mr. Inzunza was charged with Sexual Assault with a Minor
2 Under Fourteen Years of Age and Lewdness with a Child Under Fourteen.

3 Mr. Inzunza had moved from Nevada to New Jersey, where he lived as a private
4 citizen and operated a landscaping business. The detective who requested the warrant
5 admitted that he had information about Mr. Inzunza's whereabouts, but "could not recall
6 whether he made any effort to locate the defendant (during his investigation) with that
7 information" *Id.* (3: 16). He had submitted the warrant to the District Attorney's Office and
8 took no further action on the "hope that a suspect would eventually be arrested on a
9 warrant entered in NCIC" (3: 23). Mr. Inzunza maintained that he had no knowledge of the
10 arrest warrant until he was in fact arrested, and the State provided no evidence to the
11 contrary. Mr. Inzunza's Facebook that advertised his activities was "open to the public" and
12 "he was not in hiding" (4: 7).

13 In its substantive ruling, the District Court addressed each of the *Doggett/Barker*
14 factors. First, the District Court held that the 818 day delay triggered presumptive
15 prejudice, since it was past the one year. As to the second factor, the District Court
16 concluded that the State was also primarily responsible for the delay because the detective
17 could have determined his whereabouts via publicly available information, yet he "did not
18 attempt to call law enforcement in New Jersey about Mr. Inzunza," nor did he attempt to
19 contact Mr. Inzunza using that public information (8: 10). The warrant was placed in NCIC,
20 but the detective "did not conduct any further investigation after submitting the case to the
21 State" (8: 16). In fact, "the only step taken to apprehend Mr. Inzunza was putting the arrest
22 warrant in NCIC. The Court finds that this does not equal due diligence on behalf of the
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1 State and that the State's gross negligence caused the delay of over two years" (8: 22).
2 Notably, the District Court qualified Inzunza's case as "gross negligence" by the State for
3 taking just that one step.
4

5 On the third factor, Mr. Inzunza had actually *waived* his "speedy trial right" in his
6 District Court arraignment. Mr. Inzunza argued that he had waived his state statutory
7 speedy trial right, but not the Sixth Amendment speedy trial right. The District Court
8 agreed, and found that he did not waive his federal right.

9 Finally, on the prejudice factor, the District Court reaffirmed that "proof of
10 particularized prejudice is not essential to every speedy trial claim" (10: 20). Most
11 interestingly, the State in Inzunza argued that he created the delay himself by moving out of
12 state. However, the District Court found this did not rebut the presumption of prejudice:
13

14 Additionally, the State did not address prejudice in its Opposition to
15 Defendant's Motion to Dismiss regarding the period of delay between
16 the complaint and Mr. Inzunza's arrest. **The State's argument is that**
17 **Mr. Inzunza caused any prejudice himself. This does not**
18 **persuasively rebut the presumptive prejudice in the delay from**
19 **the filing of the complaint to arrest.** Therefore, Mr. Inzunza does not
20 need to make a showing of actual prejudice... This Court takes no
21 pleasure in ruling in a manner that results in the dismissal of such
22 serious charges before a trial, but nonetheless must apply the
23 precedent already set by the United States Supreme Court (12: 2)
24 (emphasis added).

25 The District Court ultimately dismissed the case against him, which included
26 charges of Lewdness and Sexual Assault on a Minor Under Fourteen.
27

28 More recently, in September 2018 another District Court department similarly
dismissed a case under the same *Doggett* analysis in *State of Nevada v. Dequincy Mitchell*, C-
18-332002-1 (see **Exhibit 2**, Order, attached hereto). In *Mitchell*, the District Court found

1 that a period of approximately five years had elapsed from the issuance of an arrest
2 warrant to its execution, and in that time period the only action undertaken by the State to
3 find Mr. Mitchell was placing a phone call to a relative. The defendant had actually been
4 arrested and incarcerated in the State of California for two years, and was released without
5 being informed of the warrant. The State again argued that his own actions prevented them
6 from finding and apprehending Mr. Mitchell on the warrant, and that argument was again
7 unpersuasive.
8

9 After analyzing the same four *Doggett* factors, the District Court dismissed the case
10 in its entirety, which included charges of Burglary, Robbery, Battery Constituting Domestic
11 Violence with Use of a Deadly Weapon Resulting in Substantial Bodily Harm, and Battery
12 Constituting Domestic Violence Resulting in Substantial Bodily Harm.
13

14 Although dismissing a criminal case is a difficult remedy to swallow, the law
15 provides for no alternative; using the *Inzunza* and *Mitchell* cases as guidance, dismissal is
16 warranted in this case as well. The facts of this case, including the lapse of time from
17 issuance to execution of the warrant, are very close to those presented in *Inzunza*, and yet
18 this case is even more egregious because Mr. Sunseri was actually in the custody of the
19 Nevada Department of Corrections, and thus could have truly been served at *any* time in
20 the last two years.
21

22 For these reasons, Mr. Sunseri should be permitted to withdraw his plea. The
23 analysis of his case under *Doggett* would heavily favor outright dismissal, and this remedy
24 was not properly explained nor raised to Mr. Sunseri prior to entering the plea. This lack of
25 information created a very real prejudice to Mr. Sunseri by resulting in a plea negotiation
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1 for multiple felony charges and possible prison time on a matter that should actually be
2 dismissed or, at a bare minimum, initiated two years ago (and thereby giving Mr. Sunseri at
3 least two years of credit). Finally, as noted above, the burden for the defendant on a Motion
4 to Withdraw plea is significantly lower if raised prior to sentencing, as is the case here; Mr.
5 Sunseri need only present any fair and just reason under the circumstances, and Defense
6 submits that the high likelihood of *outright dismissal* of the underlying charges is such a
7 reason.
8

9
10 Therefore, Mr. Sunseri respectfully requests this Court permit him to withdraw his
11 plea.

12 DATED this 3 day of June, 2019.

13
14 By:
15 MAYFIELD GRUBER & SHEETS

16 By: /s/ Damian Sheets
17 Damian Sheets, Esq.
18 Nevada Bar No. 10755
19 726 S. Casino Center Blvd.
20 Las Vegas, Nevada 89101
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1 **CERTIFICATE OF SERVICE**

2

3 I HEREBY CERTIFY that on the 3 day of June, 2019 I served a true and correct copy

4 of the foregoing MOTION, upon each of the parties by electronic service through Wiznet,

5 the Eighth Judicial District Court's e-filing/e-service system, pursuant to N.E.F.C.R.9; and by

6 depositing a copy of the same in a sealed envelope in the United States mail, Postage Pre-

7 Paid, addressed as follows:

8 Clark County District Attorney's Office

9 200 Lewis Ave., 3rd Floor

10 Las Vegas, NV 89155

11 motions@clarkcountyda.com

12 pdmotions@clarkcountyda.com

13 /s/ Kelsey Bernstein

14 An Employee of Mayfield Gruber & Sheets

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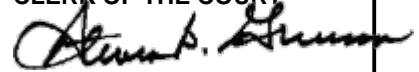
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EXHIBIT 1



1 **ORDR**

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4 THE STATE OF NEVADA,

5 *Plaintiff,*

6 -vs-

7 RIGOBERTO INZUNZA,

8 *Defendant.*

CASE NO: C-17-321860-1

DEPT NO: V

9
10 **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**

11 This matter first came on for hearing before the above-entitled Court on the 19th day
12 of March, 2018, on Defendant's "Motion to Dismiss, Pursuant to *Doggett v. United States*,
13 for Violation of State and Federal Constitutional Rights", with Plaintiff represented by
14 Jacob Villani, Chief Deputy District Attorney, and the defendant present in custody with his
15 attorney P. David Westbrook, Chief Deputy Public Defender. The Court ordered that an
16 evidentiary hearing be held to determine a factual basis for the Court to undergo the legal
17 analysis required by *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)
18 and *Middleton v. State*, 114 Nev. 1089, 968 P.2d 296 (1998). Specifically, the Court
19 indicated that it wished to hear evidence as to the cause of the delay between the filing of
20 the Criminal Complaint until the date of the defendant's arrest and whether or not the
21 defendant was aware of the charges against him prior to his arrest. The evidentiary hearing
22 commenced on the 4th day of April, 2018 with Plaintiff represented by Jacob Villani, Chief
23 Deputy District Attorney, and the defendant present in custody with is attorney P. David
24 Westbrook, Chief Deputy Public Defender.

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1 **FACTUAL BACKGROUND**

2 A Criminal Complaint was filed on December 5, 2014 charging Mr. Inzunza with
3 fifteen charges, including Sexual Assault with a Minor Under Fourteen Years of Age and
4 Lewdness with a Child Under the Age of Fourteen. An arrest warrant was also issued for
5 Mr. Inzunza on December 5, 2014 on the strength of an affidavit for arrest submitted by
6 North Las Vegas Police Detective Mark Hoyt, who was the investigating detective. It is
7 unclear when Mr. Inzunza was arrested on the warrant. Mr. Inzunza asserts that he was
8 arrested on the warrant in New Jersey on January 29, 2017. The North Las Vegas Justice
9 Court case search indicates that the arrest warrant was served on February 11, 2017.
10 Apparently, the defendant was extradited from the State of New Jersey to Nevada.
11 Thereafter, at the time set for preliminary hearing in Justice Court on the Criminal
12 Complaint, the District Attorney notified the North Las Vegas Justice Court that Mr.
13 Inzunza had been indicted on the charges and the case pending in Justice Court was
14 dismissed.

15 The Indictment was filed March 9, 2017. At the District Court arraignment on March 20,
16 2017, Mr. Inzunza waived his Nevada right to a trial within sixty days, but specifically,
17 through counsel, stated that he was not waiving his right to speedy trial under the 6th
18 Amendment to the United States Constitution. The Court set trial for December 4, 2017.
19 Defense did not object to this date, nor did the defense request an earlier setting. At calendar
20 call on November 29, 2017, the defense objected to discovery (i.e. a video of the detective's
21 interview with the child and a police report) produced later than 30 days before trial, and so
22 the Court granted a trial continuance to February 5, 2018 because defense counsel
23 represented he could not proceed to trial as scheduled due to his need to have a defense
24 expert review the video.

25 At the calendar call on January 29, 2018, the defense again requested a continuance to
26 further investigate the case and trial was set for April 23, 2018. Mr. Inzunza filed the instant
27 Motion to Dismiss on March 2, 2018. The State filed its Opposition on March 13, 2018.
28 Defense filed its reply on March 15, 2018.

1 At the evidentiary hearing, Detective Mark Hoyt testified that after doing his
2 investigation, he submitted the case to the District Attorney's office and did nothing further
3 with the matter until he was later contacted by the District Attorney's office following the
4 defendant's arrest in New Jersey. He stated that this was his practice because under the
5 procedures in place at the North Las Vegas Police Department, the practice was to hope that
6 a suspect would eventually be arrested on the warrant which would be entered into NCIC.
7 He stated that although the records department of the North Las Vegas Police Department
8 would be notified as to the acceptance of the case for prosecution and the granting of an
9 arrest warrant, there was no procedure in place to notify him that the warrant had issued and
10 the Complaint filed. Rather, the records department would enter the warrant into NCIC. He
11 made no affirmative inquiry of the D.A. as to the status of his case submission because he
12 had a very heavy case load and this case was just a typical or "ordinary" sexual assault case.
13 Although he had been given information as to the potential whereabouts of the defendant in
14 the State of New Jersey, as well as the name of the defendant's landscaping business, the
15 telephone number of the business and information concerning the defendant's Facebook
16 page and its contents, he could not recall whether he made any effort to locate the defendant
17 (during his investigation) with that information. In fact, Detective Hoyt's testimony was
18 that he would only attempt to locate a suspect who was within Nevada; that he discounted
19 the Facebook information because Facebook pages can be opened with false information;
20 and that in any event, he did nothing to locate the defendant following the issuance of the
21 arrest warrant because he did not know about the warrant due to his normal practice of
22 making no further inquiries once the case was submitted to the D.A. The detective reiterated
23 that the practice of the North Las Vegas Police Department was to hope that a suspect
24 would eventually be arrested on a warrant entered in NCIC.

25 The State submitted no witness or evidence that the defendant had any knowledge of the
26 charges filed against him until he was arrested approximately two (2) years and two (2)
27 months after the filing of the Criminal Complaint. Detective Hoyt admitted that he had
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1 never interviewed or spoken to the defendant. The defendant, via the declaration of defense
2 counsel attached to the moving papers, maintained that he first learned of the existence of
3 the warrant for his arrest on January 29, 2017 when he was arrested on said warrant. He
4 also maintained that his city of residence and place of work appeared on his Facebook
5 profile under his own name; that his Facebook profile was open to the public, and that the
6 information was accurate between November 3, 2014 and the date of his arrest on the
7 warrant—he was not in hiding.

8 Although given an opportunity to present any evidence to rebut a presumption of
9 prejudice, the State offered nothing.

10 DISCUSSION

11 I. Legal Standards

12 The Sixth Amendment to the United States Constitution provide that “[i]n all
13 criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” *U.S.*
14 *Const. amnd. VI*. The United States Supreme Court has established that the right to a speedy
15 trial is a fundamental right, which is imposed upon the states through the Due Process
16 Clause of the Fourteenth Amendment. *Barker v. Wingo*, 407 U.S. 514, 515, 92 S.Ct. 2182
17 (1972). In *Barker v. Wingo*, the Court established a four-part balancing test to determine
18 whether a defendant’s right to a speedy trial has been violated. The four factors to consider
19 are: length of delay, the reason for the delay, the defendant’s assertion of his right, and
20 prejudice to the defendant. *Id.* at 530.

21 In order to trigger a speedy trial analysis, “an accused must allege that the interval
22 between accusation and trial has crossed the threshold dividing ordinary from
23 ‘presumptively prejudicial’ delay.” *Doggett v. U.S.*, 505 U.S. 647, 112 S.Ct. 2686 (1992).
24 Courts have generally found delay “presumptively prejudicial” as it approaches the one year
25 mark. *Id.* at 652, fn. 1.

26 Before analyzing the last three factors, Mr. Inzunza must first show that the delay in
27 his case between the complaint and trial triggers the speedy trial analysis.

28 //

1 **II. Analysis**

2 a. The length of delay from the filing of the Criminal Complaint to trial is sufficient to
3 trigger the speedy trial analysis.

4 Mr. Inzunza argues that the delay in his case meets the standard for “presumptively
5 prejudicial.” The State argues that the length of delay in this case is considerably less than
6 the delay in *Doggett*. In *Doggett*, the Court found that eight and a half years between
7 indictment and arrest clearly triggered the speedy trial inquiry. *Doggett*, 505 U.S. at 652.
8 Other courts have found shorter delays sufficient to trigger the analysis. For example, in
9 *U.S. v. Shell*, 974 F.2d 1035, 1036 (9th Cir. 1992), the court determined that a five year
10 delay created a strong presumption of prejudice. The Nevada Supreme Court held that a
11 delay of almost two and a half years necessitates further inquiry. *Middleton v. State*, 114
12 Nev. 1089, 1110, 968 P.2d 296 (Nev. 1998). The Ninth Circuit also found that a delay of
13 fourteen and a half months from the date of arrest to the start of trial did not “exceed the
14 threshold needed to trigger judicial examination” because of the nature and seriousness of
15 the charges and because the case potentially involved the death penalty. *U.S. v. Tanh Huu*
16 *Lam*, 251 F.3d 852 (9th Cir. 2001). As a guideline, the Court noted in *Doggett* that delays
17 approaching one year are “presumptively prejudicial.” *Doggett*, 505 U.S. at 652, fn. 1.
18 However, this inquiry also depends on the nature of the charges. *Id.*

19 Here, the Court has focused primarily on the delay between the date of the filing of
20 the first charging document (i.e. the Criminal Complaint) and the defendant’s arrest. The
21 Court specifically found that the delays of the trial date following his indictment were
22 occasioned by the defendant, who waived his State right to trial within 60 days of
23 arraignment, and by subsequent requests to continue made by the defense. However, the
24 Court cannot ignore the approximately 26 month delay between the date of the original
25 charging document and his arrest on those charges. Trial has not yet commenced. The
26 nature of Mr. Inzunza’s charges is serious, but they are not complex, nor are the charges
27 ones that carry the death penalty. Moreover, in the cases considering the complexity of the
28 matter as a factor in trial delay, these were usually delays which occurred after the

1 defendant was brought before the court following arrest. Even without considering the time
2 of delay after arrest, a delay of nearly two years and three months is sufficient to trigger the
3 speedy trial inquiry.

4 b. The State is primarily responsible for the delay.

5 Once the speedy trial analysis has been triggered, the next factor to consider is the
6 reason(s) for the delay. The inquiry is whether the government or the criminal defendant is
7 more to blame for that delay. *Doggett*, 505 U.S. at 651. The reasons for delay should be
8 assigned weight. For example, an intentional attempt by the State to delay trial in order to
9 hamper the defense should be weighted heavily. *Barker*, 407 U.S. at 531. Neutral reasons
10 such as negligence or overcrowded courts should be weighted less heavily, but should still
11 be considered “since the ultimate responsibility for such circumstances must rest with the
12 government rather than with the defendant.” *Id.* Lastly, valid reasons, such as a missing
13 witness, should justify appropriate delays. *Id.*

14 The Court should determine which party is primarily responsible for the delay. In
15 *Doggett*, the government made no serious effort to locate Doggett abroad. *Doggett*, 505
16 U.S. at 652. Doggett had a warrant for his arrest and the government gave notice of his
17 warrant to all United States Customs stations and to other law enforcement organizations, in
18 addition to putting Doggett’s name in the National Crime Information Center (NCIC) and
19 the Treasury Enforcement Communication System. *Id.* at 649. Eventually, Doggett returned
20 to the United States where he married, earned a college degree, and lived under his own
21 name. *Id.* Doggett was arrested almost six years after he returned to the United States and
22 eight and a half years after his indictment. *Id.* at 650. The Court did not reject the district
23 court’s finding that the government was negligent in pursuing Doggett. *Id.* at 647.

24 Further, the Ninth Circuit has also addressed reasons for delay. In *U.S. v. Shell*, 974
25 F.2d 1035, 1036 (1992), the government lost the defendant’s file in 1984 and did not
26 resume its search for him until 1989. The government’s mishandling of the file created a
27 five year delay. *Id.* After addressing other factors, the court went on to affirm the dismissal
28 of the indictment. *Id.* In *U.S. v. Reynolds*, 231 Fed. Appx. 629, 631 (9th Cir. 2007)

1 (unpublished decision), the government presented evidence of attempts to apprehend
2 Reynolds for only six of the fifty six months of delay, and during the other fifty months,
3 Reynold's warrant was listed in the NCIC database. The court found that the actions of the
4 government did not constitute diligence, and "because the government did not explain fifty
5 months of delay in Reynold's case and there [was] no evidence that Reynolds knew of the
6 indictment or was in any way responsible for the delay, the district court erred in not
7 weighing the second *Barker* factor in Reynold's favor. *Id.* In *U.S. Corona-Verbera*, 509
8 F.3d 1105, 1115 (9th Cir. 2007), the government put Corona-Verbera's name into NCIC,
9 into the border computer system, and also contacted Unsolved Mysteries and America's
10 Most Wanted, both of which aired segments on the defendant. The Court found that with
11 those efforts the government exercised due diligence. *Id.*

12 However, courts have held that if the delays are due to the defendant's actions, this
13 factor should weigh against the defendant. In *U.S. v. Tanh Huu Lam*, 251 F.3d 852, 857 (9th
14 Cir. 2001), the court agreed with the district court's finding that the second *Barker* factor
15 weighed heavily against Lam because every continuance was asked for by Lam's counsel.
16 In *Farmer v. State*, 405 P.3d 114, 123 (Nev. 2017), the Court held that the second *Barker*
17 factor weighed against Farmer because almost all of the delay was attributable to the
18 defense. In *Middleton v. State*, 114 Nev. 1089, 1110, 968 P.2d 296 (1998), Middleton's trial
19 was delayed due to a petition for a writ of habeas corpus, a motion to reconsider the petition
20 after denial, a motion to sever, and a motion to dismiss. There was also an appeal after the
21 district court granted Middleton's pretrial habeas petition. *Id.* The Court concluded that the
22 delay was more Middleton's actions than the state's actions. *Id.*

23 Another component to consider when analyzing the reasons for delay is whether or
24 not the defendant was aware of the case against him or her. This also closely relates to
25 *Barker* factor three. The defendant "is in the best position to stop the clock and avoid the
26 damage." *U.S. v. Aguirre*, 994 F.2d 1454, 1458 (9th Cir. 1993). In *Aguirre*, the court held
27 that where "the government diligently pursues the defendant and the defendant is aware the
28 government is trying to find him, even severe prejudice would still not be enough to tip the

1 balance in [the defendant's] favor." *Id.* In *Reynolds*, 231 Fed. Appx. at 631, the court noted
2 that "without knowledge of the indictment, Reynolds could not have acquiesced in the
3 delay."

4 At the evidentiary hearing in the present case, the State called Detective Hoyt as a
5 witness. Detective Hoyt was the detective assigned to Mr. Inzunza's case and his testimony
6 included the general procedures of the North Las Vegas Police Department (NLVPD) and
7 his specific inquiries in the instant case. The alleged victim's mother provided Detective
8 Hoyt with Mr. Inzunza's phone number and address, which she apparently retrieved from
9 Mr. Inzunza's public Facebook profile. Detective Hoyt testified that he could not locate Mr.
10 Inzunza locally and that Mr. Inzunza resided in New Jersey. Detective Hoyt did not attempt
11 to call law enforcement in New Jersey about Mr. Inzunza, nor did he attempt to contact Mr.
12 Inzunza with the information from the alleged victim's mother. According to his testimony,
13 Detective Hoyt submitted the case to the State. At this point, the case was out of Detective
14 Hoyt's hands. After the Criminal Complaint and arrest warrant were filed, the records
15 department of NLVPD placed the warrant in NCIC.

16 Detective Hoyt testified that he did not conduct any further investigation after
17 submitting the case to the State. Due to heavy workloads, detectives at NLVPD do not
18 typically look at cases once they are submitted to the State, unless and until a defendant is
19 arrested on the warrant. Here, the complaint and warrant were filed December 5, 2014. The
20 arrest warrant was not served until January 29, 2017. The State dismissed the Criminal
21 Complaint and filed an Indictment on March 9, 2017. However, from December 5, 2014 to
22 January 29, 2017, the only step taken to apprehend Mr. Inzunza was putting the arrest
23 warrant in NCIC. The Court finds that this does not equal due diligence on behalf of the
24 State and that the State's gross negligence caused the delay of over two years.

25 Additionally, there is no evidence that Mr. Inzunza was aware of the charges against
26 him. When the Court ordered the evidentiary hearing, it was very specific about what
27 information it was looking for. The Court wanted to know what steps NLVPD took to track
28 down and extradite the defendant and whether or not the defendant was aware of the

1 charges against him. Detective Hoyt testified that he had no contact with Mr. Inzunza.
2 Further, the State presented no evidence that Mr. Inzunza was aware of the charges. As the
3 government was grossly negligent in causing the delay between the filing of the Criminal
4 Complaint and the arrest of Mr. Inzunza, and because Mr. Inzunza was not aware of the
5 charges against him, the Court finds that the State is solely responsible for the delay.

6 It should be noted that trial has not yet commenced and that Mr. Inzunza has
7 contributed to the delay between the time of arrest and the pending trial. Mr. Inzunza was
8 arraigned in District Court on March 20, 2017. The Court set the first trial setting for
9 December 4, 2017. Mr. Inzunza did not object to this date, nor did he request an earlier
10 setting. At calendar call on November 29, 2017, defense counsel raised a complaint about
11 discovery so the Court granted a trial continuance to February 5, 2018. At calendar call on
12 January 29, 2018, the defense again requested a continuance to further investigate the case.
13 However, the Court is not considering the time after Mr. Inzunza's arrest, and is instead
14 concerned with the delay from the first formal accusation (the Criminal Complaint) until the
15 time of arrest.

16 c. Mr. Inzunza did not waive his Sixth Amendment right to a speedy trial.

17 The third *Barker* factor to consider is invocation of the right to a speedy trial. The
18 right to a speedy trial "primarily protects those who assert their rights, not those who
19 acquiesce in the delay- perhaps hoping the government will change its mind or lose critical
20 evidence." *Aguirre*, 994 F.2d at 1457. "Failure to assert the right will make it difficult for a
21 defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532. However, a
22 defendant "is not to be taxed for invoking his speedy trial right only after his arrest."
23 *Doggett*, 505 U.S. at 654. In *Reynolds*, the court stated that without "knowledge of the
24 indictment, Reynolds could not have acquiesced in the delay." 231 Fed. Appx. at 631.
25 Further, in *U.S. v. Salgado-Ramiro*, 2017 WL 6507854, 2 (unpublished opinion), the court
26 stated that there was no evidence that Salgado-Ramiro asserted his right to a speedy trial
27 during the delay, and held that he "cannot be required to assert a right that he is totally
28 unaware has accrued."

1 Here, the defense argues that Mr. Inzunza waived his statutory right to a trial within
2 60 days pursuant to NRS 178.556(2), but that he preserved his federal speedy trial rights.
3 The State argues that Mr. Inzunza did not affirmatively assert his right to a speedy trial.
4 Again, the Court is not considering what events may have happened after Mr. Inzunza's
5 arrest and is instead focusing on the delay from the first official accusation (i.e. the Criminal
6 Complaint) to Mr. Inzunza's arrest. There is no evidence in the record, nor was any
7 presented at the evidentiary hearing, that Mr. Inzunza knew about the charges against him.
8 Therefore, he could not have asserted his right to a speedy trial before his arrest on the
9 warrant and this factor cannot be weighed against him.

10 d. Because the State was solely responsible for the delay, Mr. Inzunza does not need to
11 show prejudice and the State did not rebut the presumptive prejudice.

12 The speedy trial right is to protect the defendant and prejudice should be assessed in
13 light of the interests of the defendant. *Barker*, 407 U.S. at 532. The Court should address the
14 following three interests when determining prejudice to a defendant: 1) to prevent
15 oppressive pretrial incarceration; 2) to minimize anxiety and concern of the accused; and 3)
16 to limit the possibility that the defense will be impaired. *Id.* The last of these is most serious
17 because "the inability of a defendant to adequately prepare his case skews the fairness of the
18 entire system." *Id.* Some possible impairments include the unavailability of witnesses or if
19 defense witnesses are unable to recall events of the distant past. *Id.* However, there are
20 circumstances that give rise to presumptive prejudice. "[A]ffirmative proof of particularized
21 prejudice is not essential to every speedy trial claim." *Doggett*, 505 U.S. at 655. The Court
22 in *Doggett* noted that "negligence [is not] automatically tolerable simply because the
23 accused cannot demonstrate exactly how it has prejudiced him." 505 U.S. at 657. Although
24 negligence should be weighted less than a deliberate intent to harm the defense, it still "falls
25 on the wrong side of the divide between acceptable and unacceptable reasons for delaying a
26 criminal prosecution once it has begun." *Id.* The government is afforded the opportunity to
27 persuasively rebut presumptive prejudice. *Id.* at 658.

28 //

1 The Nevada Supreme Court addressed the *Barker* factors and presumptive prejudice
2 in *Middleton v. State*, 114 Nev. 1089, 968 P.2d 296 (1998). The Court found in *Middleton*
3 that a delay of “less than two and a half years did not give rise to such presumptive
4 prejudice, especially since Middleton was responsible for most of the delay.” *Middleton* 114
5 Nev. at 1110. In *Middleton*, the Court required a showing of actual prejudice because the
6 delay was much more attributable to Middleton rather than the State due to his extensive
7 pretrial litigation and because Middleton did not assert his right to a speedy trial. *Id.*

8 Here, Mr. Inzunza argues that, according to *Doggett*, he is not required to show
9 actual prejudice. The State argues only that none of the four *Barker* factors favor Mr.
10 Inzunza and that any prejudice suffered by him is of his own making. The delay in this case
11 is far less than the delay in *Doggett*. *Doggett* faced a delay of nearly eight and a half years,
12 while Mr. Inzunza’s delay from the Criminal Complaint to his arrest was roughly twenty six
13 months. This is approximately six years less than the delay in *Doggett*. The delay is actually
14 slightly less than the delay in *Middleton*, where the court found that Middleton was required
15 to show prejudice on a delay of less than two and a half years. However, this case is
16 distinguishable from *Middleton* because in *Middleton*, factors two and three of the *Barker*
17 criteria weighed against Middleton. Middleton was primarily responsible for the delay and
18 he did not assert his right to a speedy trial when he knew about the charges against him.
19 Here, the 26 month delay was solely due to the State’s gross negligence and Mr. Inzunza
20 did not assert his right to a speedy trial because he was unaware of the charges against him.

21 While it is true that when weighing *Barker* factor number two, negligence should
22 receive less weight than intentional hampering of the defense, the Court finds that the
23 government’s lack of diligence in apprehending Mr. Inzunza is grossly negligent. Therefore,
24 more weight is applied to factor number two than mere negligence.¹ This is yet another
25 distinction between the instant case and *Middleton*.

26
27 ¹ The defense argued, at the time of the evidentiary hearing that the Detective’s testimony supported a finding of
28 intentional delay. However, case law suggests that intentional delay would require evidence demonstrating a specific
intent to hamper the defense so as to amount to bad faith. While the Court found Detective Hoyt’s testimony to be
shocking, it did not feel that the delay was intended to prejudice and hamper the defense, but rather was the result of
willful neglect due to ignorance on the part of the detective as to the possible ramifications of such neglect.

1 Further, the State has not persuasively rebutted the presumptive prejudice in this
2 case. The State offered no rebuttal evidence at the evidentiary hearing. Additionally, the
3 State did not address prejudice in its Opposition to Defendant's Motion to Dismiss
4 regarding the period of delay between the complaint and Mr. Inzunza's arrest. The State's
5 argument is that Mr. Inzunza caused any prejudice himself. This does not persuasively rebut
6 the presumptive prejudice in the delay from the filing of the complaint to arrest. Therefore,
7 Mr. Inzunza does not need to make a showing of actual prejudice. The State also suggested,
8 at the time of the evidentiary hearing, that to grant the defendant's motion would "set a
9 dangerous precedent." This Court takes no pleasure in ruling in a manner that results in the
10 dismissal of such serious charges before a trial, but nonetheless must apply the precedent
11 already set by the United States Supreme Court.²

12 CONCLUSION

13 Based on the foregoing, then, the Court finds that Mr. Inzunza's Sixth Amendment
14 right to speedy trial was violated by the delay between the filing of the Criminal Complaint
15 and his arrest on those charges some 26 months later.

16 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendant's
17 Motion to Dismiss, Pursuant to *Doggett v. United States*, for Violation of State and Federal
18 Constitutional Rights is **GRANTED**. The Defendant shall be released from custody unless
19 a stay is granted by the appellate court.

20 DATED this 11th day of April, 2018.

21 
22 CAROLYN ELLSWORTH
23 DISTRICT JUDGE
24
25
26

27 ² It is interesting to note that Justice Thomas' dissenting opinion quoted the old saying of "bad facts make bad law" and
28 decreed that "so too odd facts make odd law" *Supra* at 505 U.S. 659, in his dissent from the majority's decision in
Doggett. But *Doggett* is precedent followed by many courts in the intervening 26 years since its publication, which this
court likewise feels obliged to follow.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th of April, 2018 she served the foregoing Order Regarding Defendant's Motion to Dismiss, Pursuant to Doggett v. United States, for Violation of State and Federal Constitutional Rights by faxing, mailing, or electronically serving a copy to counsel as listed below:

Jacob J. Villani, Chief Deputy District Attorney
200 Lewis Ave.
Las Vegas, Nevada 89155

P. David Westbrook, Chief Deputy Public Defender
309 South Third St. Suite 226
Las Vegas, Nevada 89155
2300 W. Sahara Ave, Suite 680 Box 32
Las Vegas, Nevada 89102


Shelby Lopaze, Judicial Executive Assistant

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EXHIBIT 2

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) Case No.: C-18-332002-1
) Dept. No: XXIX

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS

MOTION TO DISMISS

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1 THE COURT HEREBY FINDS that under the Sixth and Fourteenth Amendments to
2 the United States Constitution, a criminal defendant is entitled to a speedy trial as a
3 fundamental right;

4
5 THE COURT HEREBY FINDS that the United States Supreme Court set forth the test
6 to determine whether a defendant's right to a speedy trial has been violated in the cases
7 *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972) and *Doggett v. United States*, 505 U.S.
8 647, 112 S. Ct. 2686 (1992);

9
10 THE COURT HEREBY FINDS that pursuant to *Barker* and *Doggett*, when a defendant
11 asserts a speedy trial violation, the Court must consider four discrete factors: the length of
12 the delay, the reason for the delay, the defendant's assertion of his speedy trial rights, and
13 prejudice resulting from the delay;

14
15 THE COURT HEREBY FINDS that pursuant to *Barker* and *Doggett*, whenever a
16 speedy trial violation has been established, the only available remedy is outright dismissal;

17
18 THE COURT HEREBY FINDS that as to the first factor, a delay of one year or more
19 triggers an inquiry into a claimed speedy trial violation and creates a presumption of
20 prejudice in favor of dismissal;

21
22 THE COURT HEREBY FINDS that under *United States v. Shell*, 974 F.2d 1035 (9th Cir.
23 1992), a delay of five years or more creates a "strong" presumption of prejudice in favor of
24 dismissal;

25
26 THE COURT HEREBY FINDS that as to the second factor, both bad-faith delays by the
27 State in bringing a matter to trial as well as delays tantamount to negligence favor
28 dismissal;

1 THE COURT HEREBY FINDS that as to the third factor, assertion of a defendant's
2 right to a speedy trial under either the Nevada or Federal Constitution is entitled to great
3 weight in favor of dismissal;

4
5 THE COURT HEREBY FINDS that as to the fourth factor, a presumption of prejudice
6 resulting from a delay of one year or more is sufficient to favor dismissal without having to
7 provide affirmative proof of particularized prejudice;

8 THE COURT HEREBY FINDS that in this matter, a "strong" presumption of prejudice
9 attached because over 1,900 days, or 5 years, 2 months and 15 days, elapsed from the
10 issuance of an arrest warrant to the date of arrest;

11
12 THE COURT HEREBY FINDS that in this matter, the State provided evidence that law
13 enforcement made one phone call shortly after the warrant was issued to the Defendant's
14 relative, but no further action was taken to find or inform the Defendant of his outstanding
15 arrest warrant;

16
17 THE COURT HEREBY FINDS that in this matter, the delays taken by law
18 enforcement, by law attributable to the State, constitute negligent delay not amounting to
19 bad faith;

20 THE COURT HEREBY FINDS that in this matter, the Defendant asserted his right to a
21 speedy trial at his arraignment on May 15, 2018;

22
23 THE COURT HEREBY FINDS that in this matter, the State attempted to rebut the
24 presumption of prejudice by claiming the Defendant fled the jurisdiction and was
25 temporarily incarcerated in another State, thereby causing the delays himself;

1 THE COURT HEREBY FINDS that in this matter, the State failed to rebut the
2 presumption of prejudice;

3 THE COURT HEREBY FINDS that because the five year delay was sufficient to trigger
4 a speedy trial inquiry and create a presumption of prejudice, the delay was primarily the
5 result of State negligence, the defendant asserted his right to a speedy trial, and the State
6 failed to rebut the presumption of prejudice, under precedent as set forth in *Barker* and
7 *Doggett*, this Court is compelled to dismiss the case;

8
9 THE COURT HEREBY FINDS that in this matter, the prejudice is too great to warrant
10 a denial of the Defendant's Motion to Dismiss;

11
12 THE COURT HEREBY FINDS that the remaining issues presented in the Defendant's
13 Motion to Dismiss are rendered moot;

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THEREFORE, THE COURT HEREBY ORDERS Defendant's Motion to Dismiss is hereby **GRANTED** as a result of the speedy trial violation under the Sixth and Fourteenth Amendments;

THE COURT FURTHER ORDERS that the Defendant be immediately released from custody in this matter forthwith;

THE COURT HEREBY ORDERS Plaintiff's case is **DISMISSED with prejudice.**

DATED this 4 day of Sept., 2018.

~~DISTRICT COURT JUDGE~~

Respectfully Submitted By:

~~Damian Sheets, Esq.
Nevada Bar No. 10755
726 S. Casino Center Blvd.
Las Vegas, Nevada 89101
Telephone: (702) 598-1299
dsheets@defendingnevada.com
Attorney for Defendant~~

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CASE: C-18-334808-1
DEPT. XVII

**RECORDER'S TRANSCRIPT OF HEARING:
STATUS CHECK: MOTION TO WITHDRAW PLEA/SENTENCING**

For the State: BRANDON B. ALBRIGHT, ESQ.
Deputy District Attorney

For the Defendant: DAMIAN SHEETS, ESQ.

Bates 072

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Las Vegas, Nevada, Tuesday, June 25, 2019

[Hearing begins at 10:07 a.m.]

THE COURT: Kevin Sunseri.

MR. SHEETS: Good morning, Your Honor, Damian Sheets on behalf of Mr. Sunseri.

THE COURT: This is a status check on your motion to withdraw a plea; is that correct?

MR. SHEETS: Yes. I believe it was filed, Your Honor.

[Colloquy between Court and Law Clerk]

THE COURT: What happened was a new rule with the Clerk's office, you need to have a request for a hearing and they're just – they're accepting the filing and not setting a hearing.

MR. ALBRIGHT: Okay.

THE COURT: So, they used to set a hearing and now they're not.

MR. ALBRIGHT: So, they set it as a –

THE COURT: Nothing.

MR. ALBRIGHT: Oh.

THE LAW CLERK: It's just filed.

THE COURT: It's just filed.

MR. ALBRIGHT: Oh. Okay.

THE COURT CLERK: He can do a notice of motion [indiscernible].

THE COURT: Right. So, --

MR. SHEETS: Oh, I guess we assumed it was on for

1 argument today.

2 THE COURT: No. It was just the – it's a status check and
3 that's why we – because that's the new policy –

4 MR. ALBRIGHT: Okay.

5 THE COURT: -- down there. So, you have to have the notice
6 of motion but also on the front page you have to hearing -- request it.

7 MR. ALBRIGHT: Oh, okay. That's what – okay.

8 THE COURT: Even though –

9 MR. ALBRIGHT: Because most of ours, when we file it, it
10 says –

11 THE COURT: I know, even though you have --

12 MR. ALBRIGHT: -- notice of motion and motion.

13 THE COURT: -- notice of motion, they're not accepting – I
14 mean they're not setting one or it's a hit and miss.

15 MR. SHEETS: Got you.

16 THE COURT: So, if you can just –

17 [Colloquy between Law Clerk and Court Clerk]

18 THE COURT: We can just set a hearing –

19 MR. SHEETS: That'd be great.

20 THE COURT: -- on that.

21 MR. ALBRIGHT: Okay.

22 THE COURT: Let's go a couple of weeks out so I can –

23 MR. ALBRIGHT: And then we'll –

24 THE COURT: -- review it.

25 MR. ALBRIGHT: -- just file an opposition in the interim?

1 THE COURT: Right.
2 MR. ALBRIGHT: Okay.
3 MR. SHEETS: You can feel free not to file an opposition
4 [laughter].
5 THE COURT: And, Mr. --
6 THE COURT CLERK: July --
7 THE COURT: -- Sheets, --
8 MR. ALBRIGHT: I'll take that under consideration.
9 THE COURT: -- if you can spread the word of the new policy.
10 MR. SHEETS: I will, Your Honor.
11 THE COURT: I appreciate it. Thank you.
12 THE COURT CLERK: July 11th, 8:30 a.m.
13 THE MARSHAL: 26.
14 MR. SHEETS: Oh, can we do one week later? I'm out of the
15 jurisdiction the 4th.
16 THE COURT CLERK: July 18th, --
17 THE COURT: Sure.
18 THE COURT CLERK: -- 8:30 a.m.
19 MR. SHEETS: Perfect.
20 MR. ALBRIGHT: July 18.
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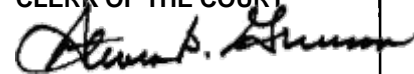
THE COURT: All right, we'll see you back then.

[Hearing concludes at 10:09 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.


CYNTHIA GEORGILAS
Court Recorder/Transcriber
District Court Dept. XVII



OPPM
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MADILYN COLE
Deputy District Attorney
Nevada Bar #014693
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

KEVIN SUNSERI,
#8266913

Defendant.

CASE NO: C-18-334808-1

DEPT NO: VII

**STATE'S OPPOSITION TO DEFENDANT'S MOTION TO WITHDRAW GUILTY
PLEA**

DATE OF HEARING: July 18, 2019
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through MADILYN COLE, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to Withdraw Guilty Plea.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On July 25, 2016, the State filed a Criminal Complaint against Kevin Sunseri
4 (hereinafter "Defendant") charging him with Count 1 – Conspiracy to Commit Robbery, Count
5 2 – Robbery with Use of a Deadly Weapon, and Count 3 – First Degree Kidnapping with Use
6 of a Deadly Weapon. On September 12, 2018, Defendant unconditionally waived his right to
7 a preliminary hearing. On September 21, 2018, Defendant pled guilty to 1 Count of Robbery
8 and 1 Count of Ownership or Possession of Firearm by Prohibited Persons. Pursuant to
9 negotiations, the State retained the right to argue.

10 On June 3, 2019, Defendant filed a Motion to Withdraw Guilty Plea. The State's
11 Opposition follows.

12 **ARGUMENT**

13 **I. DEFENDANT'S PLEA WAS FREELY AND VOLUNTARILY ENTERED**

14 A plea of guilty is presumptively valid, particularly where it is entered into on the
15 advice of counsel. Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). The
16 defendant has the burden of proving that the plea was not entered knowingly or voluntarily.
17 Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Wynn v. State, 96 Nev. 673,
18 615 P.2d 946 (1980); Housewright v. Powell, 101 Nev. 147, 710 P.2d 73 (1985). In
19 determining whether a guilty plea is knowingly and voluntarily entered, the court will review
20 the totality of the circumstances surrounding the defendant's plea. Bryant, 102 Nev. at 271,
21 721 P.2d at 367. The proper standard set forth in Bryant requires the trial court to personally
22 address a defendant at the time he enters his plea in order to determine whether he understands
23 the nature of the charges to which he is pleading. Id. at 271; State v. Freese, 116 Nev. 1097,
24 1105, 13 P.3d 442, 448 (2000). The guidelines for voluntariness of guilty pleas "do not require
25 the articulation of talismanic phrases." Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d 1403,
26 1404 (1973). It requires only "that the record affirmatively disclose that a defendant who
27 pleaded guilty entered his plea understandingly and voluntarily." Brady v. United States, 397
28

1 U.S. 742, 747-748, 90 S.Ct. 1463, 1470 (1970); United States v. Sherman, 474 F.2d 303 (9th
2 Cir. 1973).

3 Specifically, the record must affirmatively show the following: 1) the defendant
4 knowingly waived his privilege against self-incrimination, the right to trial by jury, and the
5 right to confront his accusers; 2) the plea was voluntary, was not coerced, and was not the
6 result of a promise of leniency; 3) the defendant understood the consequences of his plea and
7 the range of punishment; and 4) the defendant understood the nature of the charge, i.e., the
8 elements of the crime. Higby v. Sheriff, 86 Nev. 774, 781, 476 P.2d 950, 963 (1970).
9 Consequently, in applying the “totality of circumstances” test, the most significant factors for
10 review include the plea canvass and the written guilty plea agreement. See Hudson v. Warden,
11 117 Nev. 387, 399, 22 P.3d 1154, 1162 (2001).

12 The Nevada Supreme Court recently decided Stevenson v. State, 131 Nev., Adv. Op.
13 61, slip. op. at 8 (Aug. 13, 2015), holding that the statement in Crawford v. State, 117 Nev.
14 718, 30 P.3d 1123 (2001), which focuses the “fair and just” analysis solely upon whether the
15 plea was knowing, voluntary, and intelligent is more narrow than contemplated by NRS
16 176.165. The Nevada Supreme Court therefore disavowed Crawford’s exclusive focus on the
17 validity of the plea and affirmed that the district court must consider the totality of the
18 circumstances to determine whether permitting withdrawal of a guilty plea before sentencing
19 would be fair and just. However, the Court also held that appellant had failed to present a fair
20 and just reason favoring withdrawal of his plea and therefore affirmed his judgment of
21 conviction. Stevenson v. State, 131 Nev., Adv. Op. 61, slip. op. at 8 (Aug. 13, 2015).

22 In Stevenson, the Nevada Supreme Court found that none of the reasons presented
23 warranted the withdrawal of Stevenson’s guilty plea, including allegations that the members
24 of his defense team lied about the existence of the video in order to induce him to plead guilty.
25 The Court found similarly unconvincing Stevenson’s contention that he was coerced into
26 pleading guilty based on the compounded pressures of the district court’s evidentiary ruling,
27 standby counsel’s pressure to negotiate a plea, and time constraints. As the Court noted, undue
28 coercion occurs when a defendant is induced by promises or threats which deprive the plea of

1 the nature of a voluntary act. Id. at 9, *quoting Doe v. Woodford*, 508 F. 3d 563, 570 (9th Cir.
2 2007).

3 The Nevada Supreme Court also rejected Stevenson's implied contention that
4 withdrawal was warranted because he made an impulsive decision to plead guilty without
5 knowing definitively whether the video could be viewed. Stevenson did not move to withdraw
6 his plea for several months. The Court made clear that one of the goals of the fair and just
7 analysis is to allow a hastily entered plea made with unsure heart and confused mind to be
8 undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks,
9 and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty. Id.
10 at 10, *quoting United States v. Alexander*, 948 F.2d 1002, 1004 (6th Cir. 1991). The Court
11 found that considering the totality of the circumstances, they had no difficulty in concluding
12 that Stevenson failed to present a sufficient reason to permit withdrawal of his plea. Permitting
13 him to withdraw his plea under the circumstances would allow the solemn entry of a guilty
14 plea to become a mere gesture, a temporary and meaningless formality reversible at the
15 defendant's whim, which the Court cannot allow. Id. at 11, *quoting United States v. Barker*,
16 514 F. 2d 208, 222 (D.C. Cir. 1975).

17 In this case, just as in Stevenson, considering the totality of the circumstances,
18 Defendant failed to present a sufficient reason to permit withdrawal of his guilty plea. Here,
19 by signing his GPA, Defendant represented that he was fully aware of the plea agreement in
20 this case:

21 My decision to plead guilty is based upon the plea agreement in this case which
22 is as follows: The State retains the right to argue

23 GPA, p. 1.

24 Defendant also acknowledged that he did not enter his plea pursuant to any promises
25 made to him:

26 I have not been promised or guaranteed any particular sentence by anyone. I
27 know that my sentence is to be determined by the Court within the limits
28 prescribed by statute. I understand that if my attorney or the State of Nevada or
both recommend any specific punishment to the Court, the Court is not obligated
to accept the recommendation.

1 GPA, p. 3.

2 Defendant also acknowledged that he was waiving various rights pursuant to the
3 agreement he entered into with the State. (See the section entitled "Waiver of Rights" on page
4 4 of Defendant's GPA). Moreover, in the section entitled "Voluntariness of Plea," Defendant
5 acknowledged that the following statements are true:

6 I have discussed the elements of all of the original charge(s) against me with my
7 attorney and I understand the nature of the charge(s) against me.

8 I understand that the State would have to prove each element of the charge(s)
against me at trial.

9 I have discussed with my attorney any possible defenses, defense strategies and
10 circumstances which might be in my favor.

11 All of the foregoing elements, consequences, rights, and waiver of rights have
been thoroughly explained to me by my attorney.

12 I believe that pleading guilty and accepting this plea bargain is in my best
13 interest, and that a trial would be contrary to my best interest.

14 I am signing this agreement voluntarily, after consultation with my attorney, and
15 I am not acting under duress or coercion or by virtue of any promises of leniency,
except for those set forth in this agreement.

16 I am not now under the influence of any intoxicating liquor, a controlled
17 substance or other drug which would in any manner impair my ability to
comprehend or understand this agreement or the proceedings surrounding my
entry of this plea.

18 My attorney has answered all my questions regarding this guilty plea agreement
19 and its consequences to my satisfaction and I am satisfied with the services
provided by my attorney.

20 GPA, p. 5.

21 Finally, Defendant's attorney executed a "Certificate of Counsel" as an officer of the
22 Court affirming the following:

- 23 1. I have fully explained to the Defendant the allegations contained in the
24 charge(s) to which guilty pleas are being entered.
- 25 2. I have advised the Defendant of the penalties for each charge and the
restitution that the Defendant may be ordered to pay.
- 26 3. I have inquired of Defendant facts concerning Defendant's immigration
27 status and explained to Defendant that if Defendant is not a United States
28 citizen any criminal conviction will most likely result in serious negative
immigration consequences including but not limited to:

//

- a. The removal from the United States through deportation;
- b. An inability to reenter the United States;
- c. The inability to gain United States citizenship or legal residency;
- d. An inability to renew and/or retain any legal residency status; and/or
- e. An indeterminate term of confinement, by with United States Federal Government based on the conviction and immigration status.

Moreover, I have explained that regardless of what Defendant may have been told by any attorney, no one can promise Defendant that this conviction will not result in negative immigration consequences and/or impact Defendant's ability to become a United States citizen and/or legal resident.

4. All pleas of guilty offered by the Defendant pursuant to this agreement are consistent with the facts known to me and are made with my advice to the Defendant.
5. To the best of my knowledge and belief, the Defendant:
 - a. Is competent and understands the charges and the consequences of pleading guilty as provided in this agreement,
 - b. Executed this agreement and will enter all guilty pleas pursuant hereto voluntarily, and
 - c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time I consulted with the Defendant as certified in paragraphs 1 and 2 above.

GPA, p. 6.

Based on Defendant's representations on the record, the Court found Defendant's plea was freely and voluntarily entered and accepted Defendant's plea. In reviewing the totality of circumstances, it is clear that 1) the defendant knowingly waived his privilege against self-incrimination, the right to trial by jury, and the right to confront his accusers; 2) the plea was voluntary, was not coerced, and was not the result of a promise of leniency; 3) the defendant understood the consequences of his plea and the range of punishment; and 4) the defendant understood the nature of the charge, i.e., the elements of the crime.

Defendant entered his plea on September 21, 2018, but waited almost *one year* before filing the instant Motion. Defendant then claims that he should now be able to withdraw his plea based upon the failure of his prior counsel to litigate the timeliness of the State's

1 prosecution against him. Motion, p. 4. The contention this was a hastily entered plea, and not
2 a strategic decision by Defendant and his counsel is belied by the record.

3 Defendant made the decision to plead guilty, and by doing so waived any right to file
4 any pretrial motion or claims. The scope of what issues can be raised in a Motion to Withdraw
5 Guilty Plea is extremely narrow. The claim that Defendant is raising is outside that limited
6 scope of whether the plea was knowingly and voluntarily entered through looking at the
7 totality of the circumstances. Higby v. Sheriff, 86 Nev. 774, 781, 476 P.2d 950, 963 (1970).
8 Moreover, to the extent that Defendant is alleging that his counsel was ineffective in not
9 advising him of certain legal remedies, that claim is also improperly brought before this Court.
10 An ineffective assistance of counsel claim can only be brought in a post-conviction Petition
11 for Writ of Habeas Corpus. Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994).
12 Thus, this Court should deny Defendant's motion.

13 **CONCLUSION**


14 The totality of the circumstances in this case clearly demonstrate that Defendant's plea
15 was knowingly and voluntarily made, and that Defendant understood the nature of the offense
16 and the consequences of his plea. Based upon the foregoing, the State respectfully requests
17 that this Court deny Defendant's Motion to Withdraw Guilty Plea.

18 DATED this 10th day of July, 2019.

19 Respectfully submitted,

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

23 BY


24 MADILYN COLE
25 Deputy District Attorney
26 Nevada Bar #014693
27
28

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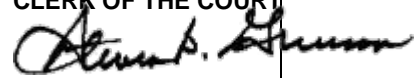
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Robert

Secretary for the District Attorney's Office

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1 RTRAN

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

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6
7 THE STATE OF NEVADA,
8 Plaintiff,

CASE: C-18-334808-1

DEPT. XVII

9 vs.

10 KEVIN SUNSERI,
11 Defendant.

12
13 BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE
14 THURSDAY, JULY 18, 2019

15 **RECORDER'S TRANSCRIPT OF HEARING:**
16 **MOTION TO WITHDRAW PLEA**

17
18 APPEARANCES:

19
20 For the State: MADILYN M. COLE, ESQ.
21 EKATERINA DERJAVINA, ESQ.
Deputy District Attorneys

22 For the Defendant: NO APPEARANCE

23
24
25 Recorded by: CYNTHIA GEORGILAS, COURT RECORDER

Bates 085

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Las Vegas, Nevada, Thursday, July 18, 2019

[Hearing begins at 9:29 a.m.]

THE COURT: Page 10, which is Kevin Sunseri.

Mr. Sunseri is here.

Sir, Mr. Sheets – I don’t know if he mis-calendared the case. He’s not here. He hasn’t checked in, and so I’m going to pass this to my next available date so we can – so you can argue your motion; all right? Here’s your date.

THE COURT CLERK: August 1st, 8:30 a.m.

[Hearing concludes at 9:29 a.m.]

[Case recalled at 9:30 a.m.]

[Colloquy between State and Recorder]

MS. COLE: I apologize. Is there any way we could do August 6th instead of the 1st?

THE COURT CLERK: August 6, 8:30 a.m.

THE COURT: That’s fine.

MS. COLE: Thank you, Your Honor.

THE COURT: Thank you.

[Hearing concludes at 9:30 a.m.]

[Case recalled at 9:30 a.m.]

THE DEFENDANT: Your Honor, there’s no way to do it sooner?

THE COURT: I’m sorry?

THE DEFENDANT: Is there any way you can move it up sooner?

1 THE CORRECTIONS OFFICER: Stand up.
2 THE COURT: Oh, actually, --
3 THE DEFENDANT: I'm sorry.
4 THE LAW CLERK: We can now.
5 THE COURT: We -- actually, sir, I'm glad you inquired. We
6 have a possible plea in just a few minutes. If the plea goes forward, then
7 yes I can set it earlier. If it does not, then --
8 THE DEFENDANT: Okay. Thank you, sir.
9 THE COURT: Okay? So, we'll see.
10 THE DEFENDANT: Thank you.
11 [Hearing concludes at 9:31 a.m.]
12 [Case recalled at 10:13 a.m.]
13 THE COURT: I had passed this, sir.
14 THE DEFENDANT: Yes, sir.
15 THE COURT: As you saw, we took a plea on a murder case
16 which -- that's why--
17 THE DEFENDANT: Yes, sir.
18 THE COURT: -- I blocked the calendar off --
19 THE DEFENDANT: Thank you.
20 THE COURT: -- and now we have some time; okay? I'm going
21 to set this for next Thursday.
22 THE COURT CLERK: July 25th, 8:30.
23 THE COURT: And we'll contact Mr. Sheets office.
24 MS. DERJAVINA: I'm sorry, --
25 THE DEFENDANT: I just asked --

1 MS. DERJAVINA: -- Your Honor, --
2 THE DEFENDANT: -- your bailiff to contact --
3 THE COURT: I'm sorry?
4 THE DEFENDANT: I just asked your bailiff to contact him.
5 MS. DERJAVINA: And, Your Honor, I have a date of August
6 6th, is that not [indiscernible]?
7 THE COURT: No, we passed it because I was going to be in
8 this murder trial and I was going to -- and I had to block off my calendar
9 for the last two weeks.
10 MS. DERJAVINA: Okay. The only reason is the DA that was
11 here is the one who is going to be arguing it, so -- its fine. We'll figure it
12 out.
13 THE COURT: Okay. If there's an issue --
14 MS. DERJAVINA: Issue -- yeah.
15 THE COURT: -- have him put it on calendar for Tuesday.
16 MS. DERJAVINA: Okay. Thank you.
17 THE COURT: All right. Thank you.
18 THE DEFENDANT: Thank you, sir.
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THE COURT: You're welcome, sir.

[Hearing concludes at 10:14 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.


CYNTHIA GEORGILAS
Court Recorder/Transcriber
District Court Dept. XVII

Felony/Gross Misdemeanor

COURT MINUTES

July 25, 2019

C-18-334808-1 State of Nevada
 vs
 Kevin Sunseri

July 25, 2019 08:30 AM Motion to Withdraw Plea

HEARD BY: Villani, Michael COURTROOM: RJC Courtroom 11A

COURT CLERK: Black, Olivia

RECORDER: Georgilas, Cynthia

REPORTER:

PARTIES PRESENT:

Damian Sheets Attorney for Defendant

Kevin Sunseri Defendant

Madilyn M. Cole Attorney for Plaintiff

State of Nevada Plaintiff

JOURNAL ENTRIES

Arguments by counsel regarding the merits of the motion. COURT ORDERED, Evidentiary Hearing SET; Motion to Withdraw Plea CONTINUED. Court stated 10 days before the hearing date if Counsel was using documents or had witnesses they would be calling they needed to be turned over to each side. Court instructed Mr. Sheets to subpoena the witnesses he needed.

CUSTODY

08/23/19 9:00 AM EVIDENTIARY HEARING...MOTION TO WITHDRAW

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CASE: C-18-334808-1
DEPT. XVII

**RECORDER'S TRANSCRIPT OF HEARING:
MOTION TO WITHDRAW PLEA**

Recorded by: CYNTHIA GEORGILAS, COURT RECORDER

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Las Vegas, Nevada, Thursday, July 25, 2019

[Hearing begins at 10:05 a.m.]

THE COURT: Kevin Sunseri.

THE DEFENDANT: Good morning, Your Honor.

THE COURT: Now, Mr. Sheets.

MR. SHEETS: Yes, Your Honor.

THE CORRECTIONS OFFICER: Stand up.

THE COURT: This is your motion to withdraw guilty plea.

MR. SHEETS: Yes, Your Honor. The State's prepared to argue. I am prepared to argue, Your Honor.

THE COURT: All right. You ready?

[Colloquy between Defense Counsel and State]

MS. COLE: Yes, Your Honor.

THE COURT: Go ahead, Mr. Sheets.

MR. SHEETS: Yes, Your Honor.

Most – I won't belabor you too much. Most of what we've included is in the motion to withdraw plea. The reason, after reviewing the opposition, I didn't see the need to kind of belabor a lot of the same points in reply, the opposition seemed to me to be fairly short and stock and said basically here's the language in the guilty plea, here's the canvass, and therefore it's enough. The problem is I don't think it addresses the underlying substance.

One, the standard is cause and I think we've established good cause 'cause we think – I do believe that there's a very viable defense that wasn't really addressed, wasn't pushed forward, and if asked

1 [indiscernible] at a hearing, Your Honor, I would be able to present
2 testimony from my client that he wasn't advised of the warrant in a timely
3 fashion – and he wasn't advised of the warrant really at all until his
4 release. But additionally, that prior counsel was also advised of the
5 potential Doggett issue, both via text message and orally, I'd be able to
6 [indiscernible] and if that wasn't thoroughly –

7 THE COURT: By your client or by some other witness?

8 MR. SHEETS: It was discussed from my client's family
9 member, whose present here, via text to Mr. Kang as was presented to
10 her from Public Defender Erika Ballou. I would also be able to present
11 testimony from someone at my office who indicated that they were
12 asked to consult on the issue.

13 So, that being said, Your Honor, part of the – you know, the
14 basis for a motion to withdraw plea – and I don't really want to say it
15 because I actually think he's a very fine lawyer, would be if counsel were
16 ineffective, and that would be even post-sentencing. And in this
17 particular case, if we have an issue that's this prevalent and that there's
18 a very – there's a likelihood of success in this particular type of motion,
19 then that would be a situation where there could be ineffectiveness
20 rendered.

21 Quite frankly, Your Honor, as a prime example, there was a
22 case that our office handled and Mr. Lippman had handled that of my
23 office where he had properly advised the client of immigration
24 consequences, however, had not stated a specific case that was on
25 point with the underlying case that could have – it wasn't certain but

1 could have suppressed evidence. And because that particular case was
2 not addressed, the plea was actually ordered withdrawn by Judge
3 Cadish in that particular circumstance and that was a post-sentencing
4 plea.

5 In this particular matter, its very similar. This is a situation
6 where the likelihood of success on the merits for Doggett is very
7 substantial as you do the analysis and as we did throughout our brief.
8 Presumptive prejudice – prejudice is presumed in this particular type of
9 circumstance and we don't have to actually show actual harm to the
10 analysis as is set forth in Doggett.

11 In this particular case, we have a client who was in warrant.
12 As the State was doing for so long, the State has been issuing warrants
13 and putting them in a computer system, sometimes nationally, sometime
14 locally, and sometimes they haven't put them in at all and they let them
15 sit there and they've just taken the position that we'll be able to catch up
16 to him whenever he gets pulled over for a traffic stop or whatnot. And
17 our office has actually filed four of these particular motions, this being
18 number four, over the last year. The first one was granted by Judge
19 Jones, the male Jones, in an instance where a warrant was filed. The
20 defendant was incarcerated in California. Defendant was released from
21 California, came back to Nevada, got pulled over and was arrested. That
22 was about a three and a half year time lapse in that particular
23 circumstance. And Judge Jones called a hearing. We had the witness
24 testify. The witnesses were brought by the State. There were detectives
25 to testify as to what steps were made. In that particular case, they went

1 and reviewed Metropolitan Police Department data bases and then
2 determined that a detective made a single call to the defendant's father
3 three days after the warrant was issued to ask about his whereabouts.
4 The father said he did not know. After that, they put it in the system and
5 it remained in the system. However, the system that they put it in was a
6 local state system and so California was unable to even see it in that
7 particular matter.

8 In another one, we had a situation where there was a five year
9 domestic violence warrant for a misdemeanor domestic violence out of
10 Judge Chellini's courtroom and we filed a motion in that circumstance.
11 The client had been local the entire time. It was in the system. They
12 threw it in the system. However, they waited for a traffic stop. In that
13 particular instance, the State dismissed on the date of the hearing for the
14 Doggett issue.

15 The third issue is now pending a hearing currently in front of, I
16 believe, it's Judge Siscento and we're waiting the results of that one.

17 And then the fourth one is this one. Additionally, there is a
18 case, a Doggett case going before -- it was going I think on Tuesday
19 before the Nevada Supreme Court on the issue -- I think it was the case
20 of Inzunza. And that was a case where the court also dismissed a sexual
21 assault against a minor case where a case sat in warrant for a period of,
22 I think it was three or four years prior to a defendant being picked up as
23 well. And the State has appealed that and I think that went for oral
24 argument.

25 So, I think there's at least some precedence here, in addition

1 to the United States Supreme Court, that Nevada courts are adopting
2 that Doggett is governing law. And it's never the decision that we want to
3 make on a – in a situation where somebody's charged with a crime, but I
4 think the law has set forth in a fairly clear and concise fashion by
5 Doggett and I think it very clearly establishes what's necessary, what
6 establishes it, what prejudice is presumed, and the lack of the need to
7 show actual harm.

8 In this particular instance, we had a defendant who was in
9 State custody the entire time and this motion was issued and there was
10 no efforts made to apprehend him on it. I would also be able to present
11 testimony – or present evidence that my client sent an email to his
12 attorney in Florida talking about warrants that had popped up, while he
13 was in custody, from Florida that he was taking care of and he had never
14 been advised of the – its devoid of any discussion of any other warrants
15 and indicates in the very same email that he's due to be released and he
16 wants this Florida warrant taken care of so that he can be released. The
17 language of that particular email makes it crystal clear that he has no
18 knowledge of a Nevada warrant at all, yet he's been given knowledge of
19 a Florida warrant. It's an email that's dated while he's in custody that
20 indicates the very same.

21 So, I would be able to establish, if we had a hearing, that he's
22 being advised of out of state warrants but he's not being advised of in
23 state warrants. And then on the day he – so in this particular instance,
24 the State of Nevada decides to just release him, and they release him
25 and he immediately gets picked up on a warrant and he gets told about

1 this warrant so he doesn't actually get out of custody and here we stand
2 today.

3 So, I think when we look at that I think we can establish
4 absolutely without a doubt the negligence requirement and that the delay
5 was through no fault of his own in this particular circumstance. And then
6 we have active efforts by him to take care of warrants he's actually been
7 advised of which are out of state warrants. So, I think there would be a
8 likelihood of success on the merits. And based on that, we'd ask to
9 withdraw the plea because of the fact that his counsel did not file said
10 motion, did not thoroughly discuss the factors of that with him, and so
11 that we could have any opportunity to file that motion.

12 THE COURT: Thank you; State.

13 MS. COLE: Your Honor, I just like to start with a little bit of
14 procedural history from this case. This Defendant was initially charged
15 with conspiracy to commit robbery, robbery with use of a deadly
16 weapon, first degree kidnapping with use of a deadly weapon, and had
17 29 prior felonies before he entered into this Guilty Plea Agreement,
18 which ultimately resolved his case into being 2 counts total: one being
19 robbery, one being ownership possession of a firearm by a prohibited
20 person, no opposition to concurrent time, and no habitual. For somebody
21 with his record this was an extremely favorable negotiation. And there's
22 no doubt that he made a strategic decision in entering into this plea,
23 especially regarding the fact that the State would not be seeking
24 habitual.

25 Guilty pleas entered with counsel are presumptively valid. And

1 although the validity of the plea is not the sole focus of the analysis, it's
2 the best evidence that we have in the record of the Defendant's
3 understanding of what's going on. And, Your Honor, we don't have the
4 actual transcript of the plea canvass, but I've been in this Court and this
5 Court goes to great lengths to make sure the Defendant is
6 understanding what's going on. And even goes as far as to say you
7 know if you want to change your mind, you know, you can come back
8 tomorrow, that's not how it works. And so, the fact that the Defendant
9 entered his plea September 21st, 2018, and its not until June 3rd, 2019
10 that this motion is brought to the Court's attention, nine months later, you
11 know, there's an unreasonable delay in that.

12 It's also pure speculation at this point that this motion, this
13 Doggett motion that the Defense brings up, would have been granted.
14 And now almost a year later from entering his plea, the Defendant thinks
15 his attorney could have made a better decision. By pleading guilty, he
16 waived his right to litigate any pre-trial motions. He can't now say that his
17 attorney should have filed a motion to suppress. He can't now say that
18 his attorney should have filed, you know, essentially a motion to dismiss.
19 And that's ultimately what's going on right here is this Defendant is
20 having buyer's remorse and he's trying to get a second bite at the apple
21 at the State's expense.

22 And Your Honor, this delay also prejudices the State. He can't
23 plead guilty – we're relying on that plea. And now almost a year later
24 he's saying, oh, actually, my defense attorney should have done this, he
25 should have done that, he should have done this. What the Defendant is

1 asking this Court to do is to make the formality of entering a plea
2 reversible on a defendant's whim. And in Stevenson, the Supreme Court
3 was clear when they, you know, disavowed Crawford and talked about
4 how it was now going to be more – a fair and just analysis, that they did
5 not want situations like this to occur, that it wasn't going to be just now
6 that the defendants could get a second bite at the apple because,
7 obviously, the formality of entering a plea is not just easily reversible on
8 the defendant's whim. And the delay tactics, as previously mentioned,
9 have also prejudiced the State at this point.

10 And so, based upon that, Your Honor, the State is going to
11 ask this Court to not grant the Defendant's motion.

12 THE COURT: Thank you; Mr. Sheets.

13 MR. SHEETS: Yes, I've got to reply on a couple of the points
14 there.

15 First, I would like to note that its interesting that the State
16 stands here and says moving to withdraw a plea almost a year after he's
17 been booked on a warrant is prejudicing the State, we're relying on that
18 plea.

19 So, the State is sitting here before Your Honor telling you that
20 a delay of one year causes prejudice to the State but they're telling you
21 to ignore the fact that there was a two and a half year delay to the
22 Defendant. That's a concern that I have here and is almost tantamount
23 to an admission that a delay of a year's period is prejudicial. They're
24 asking you almost to presume prejudice to the State, when in fact there's
25 case law directly on point that says you presume prejudice to the

1 Defendant in a time period that's more than twice what the State is now
2 claiming is prejudice to them. That's point number one.

3 Issue number two that I see is the claim that a plea is
4 presumptively valid. That is true that pleas can be presumptively valid.
5 However, when they're not – when the defendants are not thoroughly
6 informed of a defense that may very well be dispositive of their entire
7 case, you cannot sit here and say that a plea is knowingly and
8 voluntarily. You have to be advised of what's out there. And if you're not
9 thoroughly advised of what it is, what the potential is for success, that its
10 possibly dispositive of your entire case -- and the State's made a very
11 important point that he's facing -- he would be facing considerable
12 amount of time in prison, that he's facing very large charges, that he's
13 been given a deal where he's facing a ton of time. It would be important
14 to discuss with the Defendant thoroughly the possibility of success in a
15 matter where there – where this much time is at stake and he's going to
16 make a decision to give up that much time of his life. And – you know,
17 we have a situation here where if that's not thoroughly discussed with
18 him, he's making a decision without even knowing he might have a
19 possible defense.

20 I can't tell Your Honor how many times I bring the defense up
21 to defendants and it all started with a conversation with the defendant,
22 well, geez, that was four years ago, that was two years ago, that was
23 three years ago. I don't know where these people are, and this is the
24 conversations I have with my clients. And then we have to try and put
25 the pieces back together and try and find where everybody is, find

1 videos, find evidence that may or may not exist because years have
2 passed by. That's why the prejudice is presumed. And these are
3 discussions in a case where there's an alleged robbery and there's an
4 alleged kidnapping, where there's potential life. I mean, oh my
5 goodness. The ability to collect evidence is tantamount to saving a
6 man's life from a life sentence.

7 So, as far as pre-trial motion argument the State makes -- and
8 they're waiving a right to a pre-trial motion. This is not a
9 pretrial motion. This is a motion to withdraw a guilty plea which has kind
10 of moved around in Nevada Supreme Court law as to where its placed. I
11 liked the old version before, before they kind of changed procedurally
12 where it sits. But this is a motion to withdraw a plea based on what
13 basically amounts to what we believe would be a constitutional defect,
14 something you cannot waive in a plea.

15 Finally, the timing of the motion, Your Honor, the timing of the
16 filing of the motion and everything, I think, would be consistent with
17 what's going on. A consultation in our office -- I can tell Your Honor, the
18 first consultation occurs on March 15th. We're engaged shortly
19 thereafter. We have to complete an investigation of the case, of the
20 facts, of the surrounding circumstances, then give advice on it, then
21 prepare -- then based on giving that advice, respond to the client's
22 position, oh my gosh, I didn't know that this remedy was as big of a
23 remedy and is possible as you're telling us, I didn't know that the law
24 encompassed and presumed these things. And then we prepare the
25 motion and then we file a motion, which would, I think, be evidence of

1 the fact that the Defendant was concerned. They hired additional
2 counsel. Counsel brought forth the fact that this is a potential remedy in
3 this circumstance.

4 And then we come before Your Honor and, what I believe is a
5 fairly timely fashion after having what we need to do to compile the full
6 investigation, put out what we think is kind of a full set of the facts in the
7 particular case which included an interview of Mr. Kang himself. And we
8 do that because we don't just want to file things without at least
9 investigating the basis therefore. So, that's why the timing issue is what
10 the timing issue is. And I'm concerned the State says that we have to
11 presume that this is a buyer's remorse situation. Well, I'm telling you if
12 I'm going to go buy a car and I'm told that its got a lot of horsepower and
13 its going to really move and then I find out its got a 4-cylinder engine that
14 does you know 120, I'm going to be a little – 120 horses, I'm going to be
15 a little bit concerned. So, you can look at the package, but you may not
16 know what's on the inside.

17 And Doggett is such a very unique issue. It's not like it's very
18 well-known among defendants, otherwise I think honestly, Your Honor, I
19 would be getting flooded with these types of motions. But in these types
20 of circumstances it's important. And the State – the only reason the
21 State talks about the Defendant's priors and what the Defendant is
22 charged with in this case I think is to create a prejudice. But that's why in
23 Inzunza the district court – it's not relevant to the assessment. Doggett
24 doesn't say, man, we should be concerned about what the charges are.
25 That's not the analysis. It's completely irrelevant to what would be the

1 Doggett analysis and it has to do strictly with that prejudice, with the
2 delay, with the prejudice, with where it sits on that sliding scale between
3 bad faith and prejudice. The State's very clearly concerned about the
4 issue, and in that case, a sexual assault of a minor was dismissed under
5 very similar circumstances as this.

6 And these are very important issues, and the State, I think,
7 clearly sees the concern with the way they've been doing things. That's
8 why they've appealed it. They're trying to reverse a position of the
9 United States Supreme Court and arguing essentially abuse of
10 discretion in that particular matter, and I think that should be telling. And
11 I think that we would have all we need to have a very viable and
12 potentially motion to withdraw – sorry, motion to dismiss and I don't think
13 that was thoroughly discussed with the client and without that thorough
14 discussion you just don't have a knowing plea. And the standard of proof
15 is far lower pre-sentencing than its post-sentencing, Your Honor. And I
16 would submit.

17 THE COURT: Don't – doesn't the Court need to do an
18 analysis under Barker v. Wingo?

19 MR. SHEETS: I'm all right with Your Honor doing – well, I
20 think that Doggett sets out exactly what the analysis is to be. But – and,
21 yes, I think Barker v. Wingo would be correct. I think – but it clearly
22 establishes I think the reason for the delay. I mean if we're going to go –
23 if you want me to go through those factors, the prejudice I think is –

24 THE COURT: What I'm going to do Mr. Sheets, I think –

25 MS. COLE: Your Honor, --

1 THE COURT: Well, I'm not ruling today. An evidentiary
2 hearing would be appropriate on this matter. It's not necessarily
3 dispositive of all the legal issues but I want to have a complete record.
4 So, we're going to set an evidentiary hearing. I'll give you 30 days.

5 [Colloquy between Court and Court Clerk]

6 THE COURT CLERK: August 30th, at 9:00 a.m.

7 MR. SHEETS: Madame Clerk, can we do maybe a week
8 after? I'm going to be out of the –

9 THE COURT CLERK: 9/6.

10 MR. SHEETS: -- jurisdiction that, like, whole –

11 [Colloquy between Court and Court Clerk]

12 THE COURT CLERK: Court's indulgence.

13 THE COURT: I'm trying to set it during my criminal stack
14 versus my murder stack, and so it would have to be bumped into
15 October then.

16 MR. SHEETS: Okay. Is there – I'm just – I'm out of town and
17 its an unchangeable August 28th to September 2.

18 THE COURT: How about the 23rd?

19 MR. SHEETS: That's – that'd be fine.

20 THE COURT CLERK: August 23rd, 9:00 a.m.

21 THE COURT: And at least 10 days before that hearing date, if
22 either party is going to be using any documents for the hearing, they are
23 to turn that over to the other side. So, Mr. Sheets, if there's – if you have
24 emails – you said the family may have contacted Mr. Kang. State, -- I
25 mean if there's any documentation by either side because I'm not going

1 to have this by ambush by either side, so. I will not consider it unless it's
2 been supplied to the other party 10 days beforehand.

3 MR. SHEETS: And, I don't know if the State -- generally when
4 these hearings have been ordered the State has issued the subpoenas
5 to the law enforcement personnel who were -- who did or did not
6 participate in the attempt to apprehend --

7 MS. COLE: And, --

8 MR. SHEETS: -- on a warrant. I don't know.

9 MS. COLE: -- Your Honor, that's what we need to clarify. The
10 State's position is we completely disagreed with the fact Mr. Sheets is
11 trying to raise -- essentially trying to argue a motion, a Doggett motion
12 on the merits disguised as a motion to withdraw guilty plea. The State is
13 going to ask that -- you know, that's the State's position is that it's
14 outside the scope. And Mr. Sheets, when he's talking to this Court about
15 knowing and voluntarily, he's using it in the everyday we use the words
16 knowing and voluntarily.

17 THE COURT: I'm not ruling today. It seems like you're still
18 arguing the motion.

19 MS. COLE: No, Your Honor, I'm just -- I'm trying to figure out
20 if we can limit the evidentiary hearing or if the Court can tell us what the
21 scope is going to be because I just -- I don't want this to turn into
22 something that you know he's calling -- that the State is completely in
23 opposition with it, believes the Court doesn't need to hear from.

24 THE COURT: Mr. Sheets, subpoena whatever witnesses you
25 need.

1 MR. SHEETS: Okay. The only -- yeah, the only concern, I just
2 -- I express -- is the reason normally the State subpoenas law
3 enforcement is because I would be unaware of who does or does not
4 enter the information directly into Metro's system without a long, drawn
5 out discovery process. That's why like when I had the hearing with
6 Ms. Luzaich she actually brought in the detective that entered it into the
7 system and then any detective that had done follow up.

8 THE COURT: You can do a PMK, person most
9 knowledgeable subpoena.

10 MR. SHEETS: Okay.

11 THE COURT: And then, also both sides are to provide the 10
12 day time frame any -- identify to the other side which -- what witnesses
13 you will be calling as well as any documents.


14 MR. SHEETS: Thank you, Your Honor.

15 THE COURT: Thank you.

16 [Hearing concludes at 10:27 a.m.]

17 * * * * *

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20
21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio/video recording in the above-entitled case to the best of my ability.

23 
24 CYNTHIA GEORGILAS
25 Court Recorder/Transcriber
District Court Dept. XVII

Felony/Gross Misdemeanor

COURT MINUTES

August 23, 2019

C-18-334808-1 State of Nevada
 vs
 Kevin Sunseri

August 23, 2019 10:00 AM All Pending Motions

HEARD BY: Villani, Michael COURTROOM: RJC Courtroom 11A

COURT CLERK: Kidd, Lauren

RECORDER: Georgilas, Cynthia

REPORTER:

PARTIES PRESENT:

Kevin Sunseri	Defendant
Madilyn M. Cole	Attorney for Plaintiff
State of Nevada	Plaintiff

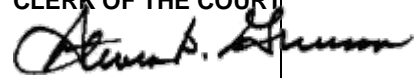
JOURNAL ENTRIES

EVIDENTIARY HEARING...MOTION TO WITHDRAW PLEA

Kelsy Bernstein, Esq. present for Defendant.

Ms. Bernstein advised the hearing regarding the Evidentiary Hearing and Motion to Withdraw Plea would not go forward because her firm was unable to obtain records from the State. Ms. Bernstein indicated her firm served a subpoena on the State through the Las Vegas Metropolitan Police Department (Metro) and it was rejected. Argument by Ms. Bernstein that the State did not have a legitimate basis to avoid the subpoena and the Court should set an Order to Show Cause regarding State's failure to comply with Court orders. Ms. Cole indicated she reached out to Mr. Sheets numerous times and had not heard from him. Ms. Cole indicated she became aware of Defenses issues obtaining records yesterday. Colloquy regarding Defendant's sentence and plea. Ms. Bernstein argued Defense needed to review transcripts from the Justice Court hearing that took place in July of 2016 as well as documentation of what efforts, if any, were taken to inform Defendant of his outstanding arrest warrant while he was incarcerated. Ms. Bernstein argued Defendants cases should have been joined and Defendant should be allowed to withdraw his plea. Argument by Ms. Cole in opposition to Defendant withdrawing plea. Colloquy regarding Defenses efforts to obtain records through Metro. Ms. Bernstein provided a subpoena rejection letter from Metro for the Court to review. Court GRANTED Ms. Bernstein's request for Court Orders for Defense to obtain a Justice Court transcript and records from Metro. Ms. Bernstein to prepare the orders for the Court's signature. COURT ORDERED, Status Check SET.

9/3/19 8:30 AM STATUS CHECK



1 RTRAN

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6
7 THE STATE OF NEVADA,
8 Plaintiff,

9 vs.

10 KEVIN SUNSERI,
11 Defendant.

CASE: C-18-334808-1

DEPT. XVII

12
13 BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE
14 FRIDAY, AUGUST 23, 2019

15 **RECORDER'S TRANSCRIPT OF HEARING:**
16 **EVIDENTIARY HEARING**
17 **MOTION TO WITHDRAW PLEA**

18 APPEARANCES:

19
20 For the State:

MARC DIGIACOMO, ESQ.
Chief Deputy District Attorney
MADILYN M. COLE, ESQ.
Deputy District Attorney

23 For the Defendant:

KELSY BERNSTEIN, ESQ.

24
25 Recorded by: CYNTHIA GEORGILAS, COURT RECORDER

1 Las Vegas, Nevada, Friday, August 23, 2019

2 [Hearing begins at 10:05 a.m.]

3 THE COURT: All right, Sunseri, which is page 2.

4 MS. BERNSTEIN: Good morning, Your Honor, Kelsy
5 Bernstein, bar number 13825, with Mr. Sheet's office. He is present in
6 custody.

7 Your Honor, this was the time set for the hearing. The matter
8 has been called off because what we indicated to Your Honor last time,
9 or Mr. Sheets did, is that when we tried to serve a subpoena on Metro
10 they basically give us a rejection letter and say send it through the DA's
11 office. That's exactly what we got. So, at this point, Your Honor, -- and
12 even -- the problem that I have is that the basis for not complying with
13 the warrant is based on a non-binding district court order from 2016 from
14 another department who was not the Chief Judge. I don't think that's a
15 legitimate basis to avoid the subpoena. The proper procedure if they
16 believe its an invalid subpoena or invalid process would be to file a
17 motion to quash the subpoena, not to just send a letter saying, no, we're
18 not going to do anything.

19 So, Your Honor, I don't believe at this point there's any reason
20 not for Your Honor to issue an order to show cause as to why they failed
21 to comply. And we'll have Your Honor sign an order that requires them
22 to produce the records, 'cause obviously Metro is going to be the key
23 player here with regards to the warrant process and the procedures for
24 execution as to what efforts were taken to inform or apprehend
25 Mr. Sunseri on the warrant while he was in Nevada's custody.

1 THE COURT: State.

2 MS. COLE: Your Honor, I reached out to Mr. Sheets on
3 Wednesday. Your Honor told Defense Counsel that 10 days before he
4 needed to turn over documents and let me know any witnesses that he
5 had subpoenaed. He never did that. Wednesday he told me he had
6 issued subpoenas but wasn't sure if it was going forward. So, I haven't
7 really heard anything from him until yesterday when he told me that
8 there were some problems, but I don't know what those problems entail
9 substantively. I'm not aware of who he's trying to subpoena or what
10 records he's trying to get. I haven't spoken to him at all regarding any of
11 that.

12 THE COURT: And these – refresh my recollection on – this
13 was whether he was – that the State knew that he was in custody on
14 another case –

15 MS. BERNSTEIN: Correct. He was serving a sentence in the
16 Nevada Department of Corrections while the arrest warrant remained
17 outstanding for a number of years. And so, the argument is that even if
18 its not going to be dismissed, he's at the very least entitled to credit for
19 that time that he was in custody. And based on the original plea
20 agreement, I believe that would virtually satisfy the sentence.

21 The issue, though, with regards to getting it dismissed
22 obviously versus credit for time served and having another conviction on
23 his record is we need to be able to show what efforts were taken to
24 inform or apprehend him of the warrant while it sat there. And I
25 understand this isn't her case and I'm not trying to kind of pin this on her.

1 There's really no substantive issues except for the standard – well, if I
2 could speak freely. In our office we call it the 'suck it' letter because it's
3 basically Metro saying we're not going to do anything, see the DA's
4 office.

5 And the other people that we served – we served the justice
6 court, which is same thing, just person most knowledgeable as to the
7 entrance of the warrant into NCIC and any efforts that were undertaken
8 possibly by the marshals or anything like that. We're literally just
9 covering all of our bases to find anybody that would have done anything
10 with regards to this warrant. And so, we served CCDC -- that was purely
11 for medical records -- and then Metro for the arrest warrant procedures
12 and then the justice court for the arrest warrant procedures.

13 The other thing that I would point out to Your Honor, and it –
14 this is in the court record. I know she's probably not going to have
15 knowledge of this. But when this case was in justice court there was an
16 indication that was actually notated in the minutes where his Public
17 Defender said this case should have been joined with the other case so
18 many years ago. And we tried to get transcripts for that hearing to see if
19 there was any argument or what happened if there was even possibly a
20 stipulation that just kind of just got glossed over, and then the justice
21 court said no, we can't give you those transcripts unless the district court
22 orders them. So, --

23 THE COURT: [Indiscernible] prepare an order on the
24 transcripts. I mean that's a simple one for right now.

25 MS. BERNSTEIN: Okay. I thought you – if I can just have you

1 sign an order for that. That would kind of clear that up and resolve that
2 pretty quickly. But then we're still left with Metro basically saying we're
3 going to ignore your subpoena.

4 THE COURT: Well, you know, I refer to it as a go pound sand
5 letter. I mean you're absolutely correct. Whether the subpoena was
6 properly issued or not, okay, the proper way to do that is a motion to
7 quash the subpoena. I mean whether you have authority or not, you
8 don't – I mean you have to file a motion to quash. I mean it happens all
9 the time in the civil cases. I don't know why they don't do it the criminal
10 cases.

11 And, State, you haven't had – I mean I know its not your case
12 here.

13 MS. COLE: Your Honor, I haven't spoken to Mr. Sheets. I've
14 reached out to him. I don't know what the issue is. Me and Mr. Sheets
15 did argue this motion before Your Honor several weeks ago. And it still
16 remains the State's position that this claim is waived, that guilty pleas
17 entered with Counsel are presumptively valid and that the Defendant is
18 essentially asking the Court to make the formality of entering a plea
19 reversible on a defendant's whim.

20 THE COURT: Now, did I grant a specific evidentiary hearing,
21 or we just had a status – refresh my memory because this is from July,
22 back in July.

23 MS. BERNSTEIN: Correct. And this is secondhand 'cause I
24 wasn't at that hearing so it would be through Mr. Sheets, but my
25 understanding is that Your Honor was inclined to set an evidentiary

1 hearing and Your Honor is the one that actually invited us to issue the
2 subpoena so that we could have the proper documentation to present
3 necessary to determine what, if any, efforts were taken to apprehend or
4 inform him of a warrant. So, I [indiscernible] that I wasn't specifically
5 here, but it sounded to me through all circumstantial inferences that you
6 were going to permit an evidentiary hearing and that is why you asked
7 us to issue the subpoenas is for that specific purpose, and that, I
8 believe, is what today was set for but it was called off because we
9 haven't gotten anything.

10 THE COURT: Any – so, the justice court transcript and then
11 these documents here; anything else that you are seeking to obtain?

12 MS. BERNSTEIN: The medical records from the detention
13 center 'cause its my understanding that immediately after being informed
14 of these new charges he was placed on suicide watch for severe anxiety
15 and that obviously goes to the Doggett issue as well. So, it was the Clark
16 County Detention Center medical records.

17 THE COURT: Have they refused to give those to you?

18 MS. BERNSTEIN: We just haven't heard back from them. We
19 – I'm not sure if I printed the Affidavits of Service, but it was served in
20 person on CCDC's representative area, same with Metro. We send it out
21 with a process server and they gave us back an Affidavit of Service.

22 THE COURT: And did your client sign a HIPAA release
23 for --

24 MS. BERNSTEIN: I believe he did –

25 THE COURT: I don't know if they need –

1 MS. BERNSTEIN: -- previously.

2 THE COURT: -- that.

3 MS. BERNSTEIN: You -- I think we had you sign the medical
4 release, right?

5 THE DEFENDANT: I don't know if I did or not.

6 MS. BERNSTEIN: I thought we did.

7 THE DEFENDANT: Your Honor, in [indiscernible] --

8 THE COURT: Well, sir, let's let -- your attorney needs to argue

9 --

10 THE DEFENDANT: I'm sorry.

11 THE COURT: -- the case.

12 MS. BERNSTEIN: Court's indulgence, just briefly.

13 THE COURT: Sure.

14 [Colloquy between Defense Counsel and Defendant]

15 MS. BERNSTEIN: Your Honor, he just wanted me to also add
16 that he was declared incompetent for a short period of time due to that
17 mental anxiety and he went for treatment and then was subsequently
18 returned. So, he just wanted me to add that --

19 THE COURT: Was that in --

20 MS. BERNSTEIN: -- to the record.

21 THE COURT: -- this case or the other case?

22 MS. BERNSTEIN: I think it -- yeah, I think it was in this case.

23 And we do believe we have the order of commitment or it would be in
24 the record, possibly another case number because it was still in justice
25 court at that time, but that would be out there. So, there was that to deal

1 with the mental anxiety component, the records from Metro to see if they
2 actually did anything with the warrant or even entered it into the
3 database. And then basically the same request on the justice court, did
4 anybody enter it into the database, did any of the marshals try to go out
5 and catch him or serve him or do anything with it, so anybody that would
6 have touched this warrant. And we have the warrant number. We have
7 the specific dates it was issued. We have exactly what we're looking for
8 in the subpoena. So, they're not overbroad. They're not just give us
9 everything. I think I – oh, I can actually give Your Honor a copy of the
10 subpoena because they copied it and attached it to the letter.

11 THE COURT: Can I see it, please?

12 MS. BERNSTEIN: Sure. If I may approach?

13 THE COURT: Yes.

14 [Brief pause in proceedings]

15 THE COURT: The order signed by Judge Adair back in
16 November 2016, have you ever received any of those documents?
17 Because it says here it's ordered that Metro will provide an affidavit
18 verifying the records produced in its response for the various event
19 numbers.

20 MS. BERNSTEIN: Nope. We haven't received anything except
21 the letter, which is attached to the front of the order.

22 THE COURT: It says: Please provide a copy of the order in
23 support of the subpoena for pre-trial production pursuant to NRS 174, as
24 explained in the attached district court order.

25 MS. BERNSTEIN: That's –

1 THE COURT: So, its saying attach an order –

2 MS. BERNSTEIN: That's not what the statute requires. If you
3 read –

4 THE COURT: No, but I don't understand –

5 MS. BERNSTEIN: -- it and then –

6 THE COURT: -- what they're – they're saying please attach an
7 order regarding the order that's attached.

8 All right, Counsel, on the justice court transcript prepare an
9 order for my signature, --

10 MS. BERNSTEIN: Will do, Your Honor.

11 THE COURT: -- okay? And then as the same order – well,
12 they're different entities so you'll need to prepare one for Metro records
13 for these event numbers; okay? I mean Judge Adair ordered this. It
14 says we'll provide an affidavit verifying the records produced in response
15 to your request for the numerous event numbers and that's November
16 2016 and that was in her case. And this is – are they just – I'm sorry, are
17 they referencing just a form order or are they referencing a specific order
18 for this case?

19 MS. BERNSTEIN: I'm not sure if that's –

20 THE COURT: Okay because that's –

21 MS. BERNSTEIN: -- a form order but –

22 THE COURT: -- I just noticed that because the name is
23 blocked out.

24 MS. BERNSTEIN: I think –

25 MR. DiGIACOMO: They're giving an example, Judge, that the

1 --

2 THE COURT: Okay.

3 MR. DiGIACOMO: We've worked this policy out. We've done it
4 with the judges at the judges meeting that they have to send an order
5 signed by the Court and they attach that as a form order so the Defense
6 knows what they have to get from the Court for Metro to respond --

7 THE COURT: Okay.

8 MR. DiGIACOMO: -- to an unlawful subpoena.

9 THE COURT: Yeah, that's coming back to me now. Yes, so
10 they're saying just prepare an order similar to this but identify the event
11 numbers and I'll sign off on it.

12 MS. BERNSTEIN: Okay, will do.

13 THE COURT: Okay, so you'll have -- you'll need two orders.

14 MS. BERNSTEIN: Yup.

15 THE COURT: One for the -- you know directed to justice court
16 for the transcript and then one to Metro records --

17 MS. BERNSTEIN: Okay.

18 THE COURT: -- with the subpoena it looks like.

19 All right, and let's come back in -- I don't know how long it's
20 going to take.

21 MS. BERNSTEIN: Hopefully, if we can get this done a little bit
22 sooner rather than later. He is staying in custody on these charges that
23 are kind of really up in the air right now. He's got some other matters he
24 needs to take care of. So, I would ask if Your Honor's inclined, a two
25 week return date.

1 THE COURT: If you can get the order to me, I'll be here this
2 afternoon and I'll sign it.

3 MS. BERNSTEIN: I can do that.

4 THE COURT: All right.

5 MS. BERNSTEIN: Did you want me to come grab that?

6 THE COURT: Yes, please.

7 MS. BERNSTEIN: Okay.

8 THE COURT: And I just, you know I want to give a heads up
9 to both sides, [indiscernible]. You know I do have my notes from last
10 hearing. You know there's an issue here of you know other cases were
11 involved in this package deal and so the deal may have been
12 advantageous because he's packaged up other cases, so –

13 MS. BERNSTEIN: And that's why we kind of presented it in
14 the alternative, –

15 THE COURT: Right.

16 MS. BERNSTEIN: -- or at the very least the credit that he
17 would have been entitled to.

18 THE COURT: I just wanted to throw out that both sides should
19 be aware of that I mean because that's one of the factors. You know,
20 like –

21 MS. BERNSTEIN: Right.

22 THE COURT: -- you know is this buyer's remorse and is he
23 going to undo the other deal? You know, so.

24 MS. COLE: And, Your Honor, it also contemplated the State
25 not seeking habitual.

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THE COURT: Right, so that's –

MS. COLE: And he has 29 prior felonies.

THE COURT: I don't see that's something that this Court would look at, but you know we'll – let's cover all your bases, okay? And we're just going to come back as a status check --

MS. BERNSTEIN: Okay.

THE COURT: -- on the – in two weeks' time.

THE COURT CLERK: September 3rd at 10:30 – excuse me, September 3rd at 8:30.


THE COURT: Okay, are we ready on – thank you, Counsel.

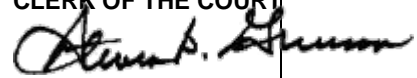
MS. BERNSTEIN: Thank you, Your Honor.

[Hearing concludes at 10:19 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.


CYNTHIA GEORGILAS
Court Recorder/Transcriber
District Court Dept. XVII



1 RTRAN

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6
7 THE STATE OF NEVADA,
8 Plaintiff,

9 vs.

10 KEVIN SUNSERI,
11 Defendant.

CASE: C-18-334808-1

DEPT. XVII

12
13 BEFORE THE HONORABLE DAVID BARKER, SR. DISTRICT COURT
14 JUDGE

15 FRIDAY, OCTOBER 18, 2019

16 **RECORDER'S TRANSCRIPT OF HEARING:**
17 **EVIDENTIARY HEARING: MOTION TO WITHDRAW PLEA**

18 APPEARANCES:

19
20 For the State:

JACOB J. VILLANI, ESQ.
Chief Deputy District Attorney
MADILYN M. COLE, ESQ.
Deputy District Attorney

23 For the Defendant:

NO APPEARANCE

24
25 Recorded by: CYNTHIA GEORGILAS, COURT RECORDER

1 Las Vegas, Nevada, Friday, October 18, 2019

2 [Hearing begins at 10:33 a.m.]

3 THE COURT: All right, we're on the record in C334808, State
4 of Nevada versus Kevin Sunseri.

5 The record should reflect the presence of the Defendant in
6 custody without Counsel, Mr. Sheets; presence of the State
7 Mr. Villani, Ms. Cole. Time set evidentiary hearing motion to withdraw
8 plea. The minutes should further reflect the Court's been informed that
9 Mr. Sheets is in another department on extended sentencing on a felony
10 DUI and will be there for a significant more – amount – more time.

11 I was [indiscernible] to – I understand that Mr. Sheets has
12 already had one issue or a pre-trial writ argument continued this
13 morning, and so I was just going to push this to the same date as that
14 was.

15 Mr. Villani, you said you have – and understand, I'm not
16 hearing any argument. I'm just – this is all procedure because I don't
17 have Sheets standing here. You had –

18 MR. VILLANI: I do have – I guess our issue is we don't know
19 what the parameters of the hearing we're supposed to be holding are. I
20 mean as far as we're concerned, we haven't subpoenaed any witnesses.
21 This is all Mr. Sheets burden.

22 THE COURT: Who's the witness in the hall that –

23 MR. VILLANI: That's – I believe she's Metro.

24 MS. COLE: It's a Metro – it's a representative from Metro that
25 they subpoena.

1 THE COURT: That they subpoenaed?

2 MR. VILLANI: Yes.

3 MS. COLE: Yes.

4 MR. VILLANI: Yeah.

5 THE COURT: Oh, so a 30(b)(6) or PMK under civil rules?

6 MR. VILLANI: Right. So, I'm not exactly – and I think Metro's
7 actually challenging that subpoena, but that's neither here nor there –

8 MS. COLE: Right.

9 MR. VILLANI: -- as far we're concerned. We're here on a
10 motion to withdraw a guilty plea but this seems to have morphed
11 somehow into like a Barker v. Wingo analysis with speedy trial rights and
12 all that. I don't know what the parameters of this hearing are or why it
13 was set. And it was set by Judge Villani, I get that, but I mean –

14 THE COURT: Well, and I think Judge --

15 MR. VILLANI: -- we should have a purpose here.

16 THE COURT: Then Judge Villani – I wish I could advise you
17 more. I have reviewed the motions. I've reviewed the JAVS capture of
18 the previous hearing with Ms. Cole and Mr. Sheets. I've reviewed –
19 frankly, I'm well prepared on the motion but I'm not – you know its going
20 to be hours for Mr. Sheets to be here, so the reality is I'm going to
21 continue this to the 15th and let Judge Villani make decisions he can. I
22 wish I could give you more insight on his intention. I encourage all to
23 look at the JAVS capture again in anticipation of your hearing on
24 November 15th, --

25 MR. VILLANI: Okay. Could I have –

1 THE COURT: -- all right?

2 MR. VILLANI: -- Madame Recorder burn us a copy of that,
3 please, the JAVS captured from the last hearing that the Judge
4 [indiscernible]?

5 THE COURT: Because its more extensive. That was on –

6 THE COURT CLERK: July 25th.

7 THE COURT: When was it?

8 THE COURT CLERK: July 25th.

9 THE COURT: July 25th.

10 THE DEFENDANT: Judge Barker, --

11 THE COURT: Yes.

12 THE DEFENDANT: -- could I just ask one thing?

13 THE COURT: Sure.

14 THE DEFENDANT: I've been in custody for 14 months since –

15 THE COURT: I'm not adjusting custody status.

16 THE DEFENDANT: No, no. I'm not asking that. Is there any
17 way to move this hearing up at all any closer?

18 THE COURT: Well, that – November 15th is just a couple of
19 weeks away. It's the best I can do. I know Sheets is going to be here on
20 that day. He can't have a conflict on that day because he's here on the
21 other one.

22 THE DEFENDANT: Okay.

23 THE COURT: That's why I went there.

24 MR. VILLANI: We thought that was today.

25 THE DEFENDANT: Thank you.

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MS. COLE: We thought that was today too.

MR. VILLANI: Right.

MS. COLE: And that's at 10:00, Your Honor?

THE COURT: Yes.

MR. VILLANI: Okay.

THE COURT CLERK: November 15th, 10:00 a.m.

MR. VILLANI: Thank you.

MS. COLE: Thank you.

THE DEFENDANT: And Judge Barker, will Mr. Villani be here
– Judge Villani be here as well?

THE COURT: Yes. So, I'm encouraging all to review all the
JAVS in the case, both this case and his earlier case, and let Judge
Villani rule as he must, all right?

MR. VILLANI: Sounds good. Thank you, Judge.


MS. COLE: Thank you.

THE COURT: Thank you all.

[Hearing concludes at 10:36 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the
audio/video recording in the above-entitled case to the best of my ability.


CYNTHIA GEORGILAS
Court Recorder/Transcriber
District Court Dept. XVII

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

November 20, 2019

C-18-334808-1 State of Nevada
 vs
 Kevin Sunseri

November 20, 2019 10:00 AM Evidentiary Hearing: Motion to Withdraw Plea

HEARD BY: Villani, Michael **COURTROOM:** RJC Courtroom 11A

COURT CLERK: Olivia Black
 Carolyn Jackson/cj

RECORDER: Cynthia Georgilas

REPORTER:

PARTIES

PRESENT:	Cole, Madilyn M.	Attorney for Plaintiff
	Sheets, Damian	Attorney for Defendant
	State of Nevada	Plaintiff
	Sunseri, Kevin	Defendant
	Villani, Jacob J.	Attorney for Plaintiff

JOURNAL ENTRIES

- Court noted that Senior Judge Barker presided at the last hearing. Arguments by counsel regarding the relevance of Doggett v. United States. Testimony presented (see worksheet). Further arguments by counsel regarding the delayed execution of the arrest warrant for Defendant and whether Defendant freely entered the Guilty Plea Agreement (GPA). COURT ORDERED, Evidentiary Hearing: Motion to Withdraw Plea UNDER ADVISEMENT. The Court would issue a minute order.

CUSTODY