

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

Kevin Sunseri,  
Appellant

**VS.**

The State of Nevada,  
Respondent,

) Supreme Court Case No.: 81551

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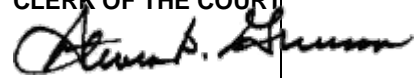
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2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

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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 WEDNESDAY, NOVEMBER 20, 2019

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

17  
18 APPEARANCES:

19  
20 For the State:

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

21  
22  
23 For the Defendant:

DAMIAN SHEETS, ESQ.

24  
25 Recorded by: CYNTHIA GEORGILAS, COURT RECORDER

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1 Las Vegas, Nevada, Wednesday, November 20, 2019

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

3 THE COURT: Sunseri.

4 MR. VILLANI: Good morning, Your Honor, Jake Villani and  
5 Madilyn Cole on behalf of the State.

6 MR. SHEETS: Good morning, Your Honor.

7 [Colloquy between Court and Law Clerk]

8 MR. SHEETS: Good morning, Your Honor, Damian Sheets on  
9 behalf of Mr. Sunseri who is present in custody.

10 THE COURT: Now, on previous occasion, I think Judge  
11 Barker was here, is that correct? And then – refresh my – I wasn't here  
12 obviously. What occurred when Judge Barker was here? And I have  
13 some vague recollection on a previous date that – I thought, Mr. Sheets,  
14 that someone was going to contact Mr. Kang, that someone was going  
15 to look into perhaps having a detective to get information as to why there  
16 was a delay. Is that – am I thinking of the correct case or –

17 MR. VILLANI: You're on the correct case.

18 THE COURT: Okay.

19 MR. VILLANI: The short answer to what happened to when  
20 Judge Barker was here is nothing.

21 THE COURT: Okay.

22 MR. VILLANI: Mr. Sheets was in another sentencing and so –

23 MR. SHEETS: That was –

24 MR. VILLANI: -- nothing occurred that day.

25 MR. SHEETS: I had a DUI death sentencing that went

1     incredibly long.

2                 THE COURT: That's fine. Okay.

3                 MR. SHEETS: I wasn't sure about the -- Mr. Kang. In fact, I  
4     think Judge Barker had asked kind of a question, at least as it was  
5     relayed to me what the scope of the overall hearing was since we were  
6     obviously arguing both the Doggett issue and a motion to dismiss.

7                 I had spoken to Mr. Kang today. Obviously, I don't think I need  
8     him as a witness. I had subpoenaed a Simone from the Metropolitan  
9     Police Department. However, --

10                THE COURT: Oh, excuse me. Sir, you can have a seat.

11                MR. SHEETS: -- and Simone --

12                THE COURT: That's fine.

13                MR. SHEETS: -- was served.

14                THE COURT: Okay.

15                MR. SHEETS: She didn't appear today. I think that  
16     Mr. Villani indicated that she was probably at the last hearing, but I know  
17     I didn't speak to her. But I spoke with Mr. Villani about at least what she  
18     had relayed to our office she was going to testify to was that when she  
19     had accessed the Metropolitan Police Department system that tracks  
20     what steps were made to pick somebody up on a warrant, that she found  
21     no entries and no information that anybody at Metro made an effort to  
22     pick up or to procure the Defendant on this particular warrant.

23                THE COURT: I'm sorry, --

24                MR. SHEETS: And I think --

25                THE COURT: -- say that again. I may have missed some of --



1 so she said she did not find –

2 MR. SHEETS: That there were no records that she could  
3 identify that –

4 THE COURT: Okay.

5 MR. SHEETS: -- showed that Metro had made any efforts to  
6 pick up on the warrant or to apprehend him or to notify the appropriate  
7 agencies or –

8 MR. VILLANI: And this is a COR for ID records for Metro who  
9 is searching in a computer; right?

10 THE COURT: Okay.

11 MR. SHEETS: Right. Yeah. It was the PMK is what I think she  
12 had mentioned. So, I think the State's willing to stipulate to that aspect of  
13 the testimony versus me having to ask for an order to show cause today.

14 MR. VILLANI: That's – and we will stipulate to that. If I can just  
15 get a clarification, though, -- and I've reviewed the JAVS. I'm fairly  
16 familiar with the procedural history of the case. We're here on a motion  
17 to withdraw guilty plea, correct?

18 THE COURT: Correct.

19 MR. VILLANI: Okay, 'cause it was just stated that we're here  
20 on a Doggett motion and motion to dismiss, so we're using Doggett as a  
21 reason under the totality of a circumstances analysis that the guilty plea  
22 could possibly be withdrawn; is that where we're at procedurally?

23 THE COURT: We may be there under Stevenson. You know,  
24 we still look at totality of the circumstances, whether or not it's –

25 MR. VILLANI: 'Cause I mean the State –

1 THE COURT: -- just cause.

2 MR. VILLANI: The State's issue with that is, look, this isn't  
3 Padilla, right? Like, there's no -- and I argued the Doggett -- it's actually  
4 the State of Nevada versus Rigoberto Inzunza. The Doggett issue is  
5 now with the Supreme Court. I argued that in front of the Supreme  
6 Court. I don't know what the Supreme Court's going to say about that.

7 And so, if the allegation is that Mr. Rasmussen or  
8 Mr. Kang, or whoever advised Defendant did not advise him of the  
9 possibility of a Doggett issue, there's no case law. There's no nothing to  
10 advise him [indiscernible] so I don't know how a defense attorney could  
11 be expected to know the future when the Deputy who argued the case  
12 does not know the future of what the Supreme Court will hold as far as  
13 Doggett analysis is concerned with Nevada cases. And so, that's where  
14 my confusion comes in is I don't know how we decide an issue that's --

15 THE COURT: Right.

16 MR. VILLANI: -- undecided.

17 MR. SHEETS: And I got a -- I have an absolute response to  
18 that. The State --

19 THE COURT: All right.

20 MR. SHEETS: -- the whole State's premise on their appeal on  
21 that is a factual argument. The law is crystal clear. Doggett reverses the  
22 United States sets out exactly what the path is. The warrant out there --  
23 there's no efforts. It's not through the fault of the Defendant. The year  
24 passes, prejudice is presumed, and dismissal is where its at.

25 In the case the State has taken up, it was a sexual assault on

1 a minor or a sex crime against a minor whereby that analysis was done.  
2 The Court made a legal finding that the triggers of Doggett were met and  
3 dismissed the matter. And the State's appeal is, well, under these facts,  
4 we don't think that prejudice has been established. And the Defense's  
5 response is it's presumed. So, it's a factual position, not a legal position,  
6 that the State –

7 THE COURT: But –

8 MR. SHEETS: -- is taking in that –

9 THE COURT: Okay. But we're –

10 MR. SHEETS: -- appeal.

11 THE COURT: -- not here on a motion to dismiss.

12 MR. VILLANI: Right.

13 MS. COLE: Yes.

14 MR. SHEETS: Right, --

15 THE COURT: Okay, so --

16 MS. COLE: Correct.

17 MR. SHEETS: -- but I think the underlying viability –

18 THE COURT: That's for another day.

19 MR. SHEETS: -- of the motion – right [indiscernible]. So, that's  
20 kind of where my position is, the underlying viability of the motion. Either  
21 it not being pursued or not being advised and being viable are things  
22 that he would have needed to understand prior to entering into the guilty  
23 plea. And so, I think inherent in it is somewhat establishing to Your  
24 Honor that that was a very viable motion.

25 MR. VILLANI: And so now here's where –

1 MR. SHEETS: Um, --

2 MR. VILLANI: Sorry. Go ahead.

3 MR. SHEETS: I'm --

4 THE COURT: Well, why don't you just, you know, finish up or  
5 complete your argument you may have on the motion to withdraw.

6 MR. SHEETS: Okay.

7 THE COURT: So, that's what I'm dealing with today.

8 MR. SHEETS: So, my position on the motion to withdraw  
9 -- and if required, Mr. Sunseri will testify that he had -- that when he  
10 found out about the case, that he hired Mr. Kang and that was, I think, in  
11 2018 is when he found out -- and that he consulted with Mr. Kang, that  
12 Mr. Kang did not address with him the substance of a Doggett motion,  
13 the test for the Doggett motion, or the possibility of success given the  
14 large amount time that had passed by. Nor was he advised by Mr. Kang  
15 that there had been any investigation done with Metro to determine  
16 whether there were efforts to pick him up on that warrant. He would  
17 establish that he was in the Nevada Department of Corrections from the  
18 time the warrant went active until he was then brought here to deal with  
19 it. And he was not only not advised that he had the hold, but in emails  
20 that were being sent regarding holds -- that the only hold that the  
21 Nevada Department of Corrections was notified of was a hold out of Polk  
22 County, Florida on a matter and that he was then granted release at that  
23 point. And then five days before his actual release did they then pull  
24 back and say, oh, no, wait. You have this other case. And then they  
25 revoked that release and brought him here.

1                   And then he would establish that he didn't have the  
2 discussions with his counsel about whether or not – and our position  
3 would be prejudice is presumed but the State would argue that they can  
4 rebut that and there are tests set forth for that -- I argue they can't -- but  
5 he would establish that around that time, because he had finally come to  
6 the conclusion that he was getting out of custody, that he was going to  
7 get to go home, that he'd done all of this, he served all of this time, that  
8 he was – he actually ended up getting committed.

9                   At that point he lost his mental stabilities and his ability to  
10 recall things became impaired, especially from years ago, and his ability  
11 to remember details of an offense that he did not know that he was  
12 charged with in 2015 or that he loses all the details of the offense over  
13 time and -- between that and his commitment. And then we had  
14 grievances that talk about him being medicated for depression and other  
15 mental issues that kind of just show that he was seeking treatment. He  
16 was seeing a psychiatrist.

17                   THE COURT: What's that time frame?

18                   MR. SHEETS: This time frame – it would be nice if they put  
19 years on the paperwork. I mean that would be a lot better, but it appears  
20 to me it's about the time he was brought in from Department of  
21 Corrections -- and I'm going to take that position because it's Las Vegas  
22 Metro, but they don't like to put a lot of dates on. They put – like, I have  
23 9/27. That's not helpful for me because Metro doesn't put a date on  
24 there; 8/11, 8/12, -- I don't have those. And then I have a -- obviously a  
25 counseling, a psychotherapy evaluation that shows that he was having

1 issues emotionally and mentally back in 2015 in the first place and he  
2 was being treated at Hamlin Counseling Services and that's date 3/5 of  
3 2015. So, between all of that, his ability to remember and recall specific  
4 details became a, you know, – I mean the details faded because he  
5 didn't think it was something that he needed to try to remember to  
6 defend himself.

7           And then as final evidence that, you know, the State has made  
8 a big deal, I was going to say that he has 29 felony convictions, which I  
9 don't think is relevant to whether Doggett would apply if we were in a  
10 Doggett hearing -- but in 29 guilty pleas he's never moved to withdraw a  
11 guilty plea ever, even after having done prison time on those guilty  
12 pleas, which I would argue is substantive evidence that this is a situation  
13 which is truly -- does not feel that he was properly advised and that he  
14 had a potential to argue for a dismissal here under Doggett versus  
15 United States. And so, from the standpoint of a manifest injustice, I think  
16 it would, as much as I have the utmost level of respect for Mr. Kang, I  
17 think that this is just an issue that Mr. Kang didn't have as much  
18 familiarity with. It hasn't been a commonly used issue here in Nevada. I  
19 know that Mr. Kang had approached me about Doggett later on and  
20 asked me what the case was about because when – as one of our  
21 exhibits I think we had attached the order for the Dequincy Mitchell case  
22 where we had gone on a Doggett issue where Metro had made no  
23 efforts to pick up and there had been prison time in the interim and  
24 Judge Jones had granted dismissal there. That kind of got out, and so  
25 lawyers started to approach me and ask me about that particular case.

1           So, I think that the – either the failure to advise or the failure to  
2 pursue, or both, would constitute a manifest injustice when based on  
3 everything. I look at prejudice is presumed and there would at least be a  
4 substantial likelihood of dismissal. So, I think we could argue there  
5 would be a probable difference in the outcome, so that's where that  
6 comes from, Your Honor.

7           THE COURT: Now, is it, just so I'm clear, it's your position that  
8 Mr. Kang was aware of the other case at the time he entered into the  
9 negotiations in this case?

10          MR. SHEETS: And that I can't answer. I don't know. I wouldn't  
11 be able to recall. I know it was around the time, but I know that I took  
12 over this case shortly after I was asked about Doggett by Mr. Kang and I  
13 don't know if that was pre-plea or post-plea. I just – somebody asks me,  
14 hey, how did this case go about this case, tell me about it; I'm just going  
15 to answer. I don't feel the need to take a note on it and write down when  
16 I had the conversation 'cause people just ask and that's how we all try to  
17 get better as lawyers is just talk to each other about what's out there. So,  
18 I mean I can't in good faith tell you that I can answer that question.

19          THE COURT: Well, one of the arguments is that he didn't  
20 voluntarily enter the plea in this case because not knowing –

21          MR. SHEETS: Right.

22          THE COURT: -- the status of the other case, if he didn't tell his  
23 attorney that there was another case out there, then shouldn't your client  
24 know allegedly he committed another crime and hey, why don't you  
25 package these up? Because you know we often have – the State will not

1 file any other charges from this date to that date. They will not file any  
2 other similar charges. I mean I see those pleas all the time. I'm sure  
3 you've entered into those pleas on behalf of your clients.

4 MR. SHEETS: What I would just put forth, that's -- under  
5 Doggett that's not part of the test.

6 THE COURT: Well, are we dealing with Doggett on the motion  
7 to withdraw?

8 MR. SHEETS: Well, I think it's important. I think its important. I  
9 think the viability of the Doggett issue -- I think the non-discussion of the  
10 Doggett issue is really the key component, the critical component here,  
11 as to whether or not the manifest injustice occurred.

12 A defendant is -- the whole premise of Doggett is that a  
13 defendant is unaware that he's been charged with a crime. And he has a  
14 right to be notified that that's happening and he has -- and when the  
15 government doesn't take those steps and they wait for a long period of  
16 time in excess of a year, then we have to presume prejudice and there  
17 has -- there need be no showing of prejudice because by the  
18 government's -- and the case law is clear on that point -- when its out  
19 there is that that prejudice is presumed because a defendant can't be  
20 presumed to know when or if or what he is going to be charged with.  
21 And that's why Doggett I don't think addresses that a defendant has to  
22 have knowledge.

23 And actually, that was an issue that the State brought forth in  
24 argument on the Dequincy Mitchell matter that got dismissed before  
25 Judge Jones. They argued, well, he should have known he bumped her



1 on the head with a rock and we have the whole thing on video, so he  
2 should have known when he left for California and moved to California  
3 that he could be charged here. And the test, as was laid out, says that's  
4 not what it is. There was no – there's no finding, no evidence that he  
5 tried to run from the charge and that's where Doggett would stop is if the  
6 defendant made affirmative acts to avoid or to run from the matter.  
7 That's not the case here. That wasn't the case there. And I would note  
8 that Dequincy Mitchell the State never actually filed an appeal on that  
9 particular matter.

10 THE COURT: All right. Thank you.

11 And Mr. Sunseri, just so you know, I don't know if Mr. Villani  
12 has appeared on other occasions when I've been here because I know  
13 Judge Barker was here on one occasion, we just have the same last  
14 name. We're not related, sir. I don't know if you had any concerns about  
15 that.

16 THE DEFENDANT: I just made a comment on the way out  
17 that I was totally screwed, but I was kidding when I spoke to—

18 THE COURT: I – no, I didn't hear that. I'm just telling you.  
19 I'm just advising you.

20 THE DEFENDANT: No, sir. I understand.

21 THE COURT: Okay.

22 Mr. Villani.

23 MR. VILLANI: And, Your Honor, I kind of want to bring this  
24 back to the motion to withdraw Guilty Plea Agreement here 'cause we  
25 seem to have gotten off on this Doggett analysis.

1 I just note, -- look, as far as whether this plea was freely and  
2 voluntarily entered, whether the totality of the circumstances indicate  
3 that he didn't freely and voluntarily enter this plea, what have you, it's the  
4 Defense burden at this point. We don't have prior counsel here. They  
5 didn't even seek the transcripts from the entry of the plea. That all, thus,  
6 comes in our favor as far as whether or not this client --

7 MR. SHEETS: I have the transcripts.

8 MR. VILLANI: Are they filed?

9 MR. SHEETS: It looks [indiscernible]. I don't -- the clerk didn't  
10 file them. I don't know why [indiscernible].

11 MS. COLE: Of the canvass.

12 MR. VILLANI: The plea canvass.

13 MS. COLE: There's no transcript for the plea canvass.

14 MR. VILLANI: I'm not talking about the waive at preliminary  
15 hearing.

16 MR. SHEETS: Okay.

17 MR. VILLANI: I'm talking about the --

18 MS. COLE: Yeah.

19 MR. VILLANI: -- plea canvass where he actually --

20 MS. COLE: The plea canvass.

21 MR. SHEETS: I know we had a signed order for it.

22 MR. VILLANI: Okay, but do you have them?

23 MR. SHEETS: I don't, but I mean I have a signed order for it.

24 MR. VILLANI: Okay. I mean we've checked.

25 MS. COLE: There's no transcript.

1 MR. VILLANI: There's no transcripts in Odyssey, what have  
2 you. My point being is, look, that's the relevant inquiry here. And we can  
3 go down this Doggett road as far as whether or not a defense attorney  
4 should have to advise his client of any novel argument that may or may  
5 not be up in front of the Supreme Court now or to come, but we have to  
6 go beyond that with this particular Defendant because we go beyond –  
7 the Doggett issue is essentially – the case is the guy was on – he was  
8 eight years moved on with his life, he had attended college, he had a  
9 family, all these things. Rigoberto Inzunza, which is the case that Judge  
10 Ellsworth decided, the guy had moved to New Jersey. He was running a  
11 landscaping company. He had a Facebook page. She took issue with  
12 the fact the detective didn't fly back to New Jersey and arrest him.

13 This case, he's in NDOC so this ultimately comes down to is it  
14 the State or Metro's burden to transport an inmate down to face charges.  
15 And I'll note for the Court's edification, we're still within the statute of  
16 limitations for this crime. There's a four year statute of limitations. This  
17 crime was – occurred in 2015, December of 2015. And that was part of  
18 the argument on the Rigoberto Inzunza case too, is at what point does  
19 the statute of limitations trump a federal speedy trial right? And then  
20 moving beyond that, can you have a speedy trial right for a trial that you  
21 specifically waived pursuant to a Guilty Plea Agreement? Can you have  
22 a jury for a trial that you waived, which would be the same analysis  
23 because in this Guilty Plea Agreement he acknowledges he's waiving  
24 his right to trial by jury. He is in truth and fact guilty of the crime and he  
25 was advised of all that.

1           So ultimately, this Court's decision comes down to this isn't  
2 Padilla. We don't have a Supreme Court decision where we've had to  
3 add it into our GPA's: Were you advised of your immigration  
4 consequences? Yes, I was advised of my immigration consequences.  
5 Does the State now have to start adding if it was over a year between  
6 the time of the filing of the criminal complaint and the time you were  
7 brought in: Did you advise your client that they could possibly have a  
8 federal speedy trial right violation possibly under the facts of their case?

9           And so, I think we're going too far there.

10           The ultimate inquiry here is, look, is it fair and just for him to  
11 withdraw his plea? Your Honor can note the 29 -- 27 felonies, however  
12 many he's got, are relevant to the point of he got a heck of a deal here. I  
13 mean he's not spending the rest of his life in prison. So, this Court does  
14 the analysis of, hey, is it fair and just to allow you to back out of this deal  
15 now where the State may or may not have issues going forward with this  
16 case? Or, should we hold you to that agreement that you made -- I  
17 believe, what was it, a year between the time he entered --

18           MS. COLE: Um, 9 --

19           MR. VILLANI: -- so he entered into it on 9/21/18, where not  
20 more than a year later where he's attempting to withdraw this plea, and  
21 from the first hearing, I believe was 7/25/19 we were almost a year to  
22 that date. So, this isn't some rushed plea that he was rushed into as the  
23 Stevenson case notes. This is just a Guilty Plea Agreement. He -- there's  
24 now this argument up in front of the Supreme Court that they're trying to  
25 capitalize on, but I think we're putting the cart before the horse, if

1 anything, here.

2 So, I'll submit it with that.

3 MR. SHEETS: If I could just briefly reply?

4 THE COURT: Sure.

5 MR. SHEETS: Our position's the transcript of the plea is not  
6 needed because the transcript of the colloquy, if as it is according to the  
7 script, always would matter not if a defendant is giving a decision based  
8 off of advice that he is not given. And in this case, he has not been given  
9 advice on this Doggett issue. I would note that my client is still willing to  
10 testify to establish that burden. And I was just notified actually the Metro  
11 witness has shown up.

12 THE COURT: I'm sorry, say that again?

13 MR. SHEETS: I was just notified the Metro witness has  
14 appeared. She's -- she is here in the anteroom. So, I mean I -- if we want  
15 to call witnesses, we can call witnesses. If the -- you know the State's  
16 already stipulated to the substance of the Metro witness's testimony.  
17 The fact of the matter is the strength of the Doggett issue is at the heart  
18 as to whether or not he knowingly and voluntarily entered into this plea.  
19 He will establish -- if Your Honor really wants me to have him called I  
20 will. He will establish that it was not talked about. This was not talked  
21 about.

22 It's the same test as it -- you know if you have -- and I can tell  
23 you my office was basically held ineffective on a case of -- it was a  
24 trafficking case where the defendant had -- you know that drugs were  
25 found on her at the jail after having been arrested for another offense.

1 And Mr. Lipman handled that plea out of our office. And Mr. Gonzalez,  
2 Javier Gonzalez, held a hearing on the matter and said there is a strong  
3 likelihood under this case that we could be granted suppression of those  
4 drugs and suppression of the evidence at the stop. And in that particular  
5 case, I think it was Judge Cadish, I think -- I -- don't quote me on that.  
6 The Court concluded that there was a likelihood, or at least a strong  
7 argument, on that suppression issue and the defendant's understanding  
8 that that argument existed, could have played a major role in the  
9 voluntariness of the plea and the fact that that wasn't brought up with  
10 that defendant was enough to reverse that plea. And Mr. Lipman at our  
11 office was held to be ineffective in that particular circumstance.

12 And that's the same thing here, you know. I mean we can hold  
13 the Doggett hearing. I'm prepared to hold the Doggett hearing but I was  
14 prepared to kind of do both in one because I just feel like they're so  
15 intrinsically tied together. The fact that he wasn't advised of this issue  
16 where the law is just so clear. There is no burden on the defendant in  
17 Doggett. The burden is on the State to show efforts to procure the  
18 defendant and there is no burden on behalf of the defendant to prove  
19 prejudice. It is presumed.

20 We're not jumping on a Nevada Supreme Court case like the  
21 State would imply. Our Dequincy Mitchell/Doggett issue predated the  
22 ruling on the Inzunza case that the State has now taken before the  
23 Nevada Supreme Court. And I can speculate as to why they chose that  
24 one. I think it's because it's a sexual case against a minor. You have  
25 more, air quotes, sympathetic facts for a dismissal on that versus a

1 domestic battery. But, the fact of the matter is, the rulings that exist at  
2 the district court level are consistent with those at the Supreme Court  
3 level and we can establish through testimony today, if need be, that he  
4 wasn't advised of the issue. And then we can establish the strength of  
5 the motion because we have the officer here and stipulated testimony  
6 that Metro engaged in no efforts to procure him or to apprehend him on  
7 this.

8           And there is no legal basis for the State to argue. The Doggett  
9 test doesn't say fairness to the State. It's fairness to the defendant.  
10 Federal law trumps and preempts state law. The State's not even  
11 making that argument at the Supreme Court level. They are truly just  
12 making a factual argument at the Supreme Court level on the analysis of  
13 the law. It is United States Supreme Court law. It's there. It's  
14 substantive. It's – I think it's a winner. I think Your Honor doesn't have to  
15 conclude that today, but if you conclude that there are facts that show  
16 that there is a, I would almost say a substantial likelihood of success on  
17 the merits, the fact that there is a likelihood of success on the merits is  
18 absolutely something that he has a right, I think it's a due process right,  
19 and the right to competent counsel to have knowledge of and  
20 understand before deciding enter into the plea.

21           If you go by the State's reasoning and the State's logic, if he  
22 had a hundred percent guaranteed dismissal but he pleads without  
23 having been told that that guarantee exists, by the State's logic we  
24 would have to disregard the fact that that dismissal exists because he  
25 had voluntarily pled and he waived his right. A waiver is only proper if it's

1 knowingly, voluntarily based on competent and effective advice of  
2 counsel after having adequately advised of his rights, his defenses, and  
3 the strategies. It's in the guilty plea: I have discussed defenses and  
4 defense strategies. This would have been a very real defense and a very  
5 real defense strategy that belies his criminal record that has nothing to  
6 do with that, that has nothing to do with the underlying facts of the case  
7 and I think the substantial likelihood of success on the merits warrants  
8 that.

9           If Your Honor would like me to call him to establish that that  
10 conversation didn't occur since the State is sitting here arguing that I  
11 have yet to do so, I am more than inclined to call him and to establish  
12 that if we need to.

13           THE COURT: Is there a stipulation as to what the Metro  
14 representative would state or we can have some –

15           MR. VILLANI: Yeah, --

16           THE COURT: -- testimony?

17           MR. VILLANI: No, we went over that at the beginning, Your  
18 Honor. It's just that she searched the Metro computer system and there  
19 was no notes in the computer system that she searched indicating that  
20 they had attempted to procure – or to serve the warrant on Defendant  
21 while he was in prison. That's what she would testify to.

22           MR. SHEETS: She would also testify that there – that –

23           THE COURT: Let's –

24           MR. SHEETS: -- they did not.

25           THE COURT: Let's have her testify.



1 MR. SHEETS: Okay.

2 THE COURT: All right.

3 MR. SHEETS: So, we'll call, I think its Simone or Simonee  
4 [phonetic] Davis.

5 [Colloquy in courtroom]

6 **SIMONE DAVIS**

7 [having been called as a witness and first being duly sworn, testified as  
8 follows:]

9 THE COURT CLERK: For the record, would you please state  
10 your full name, spelling your first and last name.

11 THE WITNESS: Simone Michelle Davis. My first name is  
12 spelled S-I-M-O-N-E, last name, D-A-V-I-S.

13 THE COURT: Go ahead, Counsel.

14 **DIRECT EXAMINATION**

15 BY MR. SHEETS:

16 Q Good morning, Ms. Davis.

17 A Good morning.

18 Q Can you tell us how you're employed?

19 A I am employed with the Las Vegas Metropolitan Police  
20 Department as a records manager in the Records and Fingerprint  
21 Bureau.

22 Q And what do – what is records and fingerprints, what kind of  
23 records do you keep?

24 A All kinds of records.

25 Q Do you keep records with regards to active arrest warrants?

1           A     Yes, we do.

2           Q     And do those records keep track of what is done to either –  
3 whether those – whether that arrest warrant is entered into a computer  
4 system for law enforcement to see?

5           A     All arrest warrants don't go into computer systems, though.

6           Q     Okay. So, some of them they're not entered into the computer  
7 system?

8           A     Absolutely.

9           Q     Would your department be the department that enters an  
10 arrest warrant into a computer system if need be?

11          A     That would probably be from the jail.

12          Q     Okay. But your computer would be able to access that  
13 information?

14          A     If it's entered into SCOPE we could access the information.

15          Q     Okay. All right. And your records department, does it also  
16 keep track of the efforts made by officers or detectives to apprehend  
17 somebody on a warrant?

18          A     Not in our database, no.

19          Q     Okay. So, you don't have a system where if a police officer  
20 makes a phone call to, say, a father or somebody on a warrant and he  
21 wants to make a note, you don't have a system?

22          A     You can make notes with regard to any case if its in a P1  
23 system which is a reporting system that we use, but that's up to the  
24 detectives.

25          Q     Okay.

1           A     Yes, sir.

2           Q     But, nonetheless, that's kept in Metro's records; is that right?

3           A     Some. Some, yes.

4           Q     Okay. And have you had the opportunity to speak with

5 somebody from my office regarding a Kevin Sunseri?

6           A     I have not spoken to anyone from your office.

7           Q     Okay. So, you did not speak with a Brendan Garrison?

8           A     I did not speak to anyone from your office.

9           Q     Okay. How about your assistant, to your knowledge?

10          A     She's right there.

11          Q     Oh. Did your assistant have an opportunity to – I may have

12 subpoenaed the wrong witness.

13          A     I can't –

14          Q     Maybe we should call her. So, you don't recall any

15 conversations? To your knowledge, have you done any research

16 regarding Kevin Sunseri?

17          A     No, I have not.

18          Q     Okay. Did your assistant indicate to you what this case was

19 about?

20          A     About pulling documentation --

21          Q     Okay. Did she –

22          A     -- that was requested.

23          Q     Did she indicate the name of the party in that?

24          A     I know the gentleman's name based on, you know, the

25 subpoena, but I do not myself pull any documentation.

1 Q Okay. To your knowledge, did your assistant do so?

2 A Yes.

3 Q Okay.

4 MR. SHEETS: I think it's probably best just have no further  
5 questions and to call the assistant.

6 THE COURT: Any cross by the State?

7 MR. VILLANI: No, Your Honor.

8 THE COURT: All right. And can Ms. Davis be excused for the  
9 day?

10 MR. VILLANI: Yes.

11 THE COURT: All right, thank --

12 THE WITNESS: Thank you.

13 THE COURT: -- you ma'am, for your testimony.

14 All right, try the next witness, okay.

15 MR. SHEETS: I guess we would call Any Colin, Your Honor.

16 [Colloquy in courtroom]

17 **AMY COLIN**

18 [having been called as a witness and first being duly sworn, testified as  
19 follows:]

20 THE COURT CLERK: For the record, please state your full  
21 name, spelling your first and last name.

22 THE WITNESS: Amy Lyn Colin, A-M-Y, C-O-L-I-N.

23 THE COURT: Go ahead, Counsel.

24 /////

25 /////

**DIRECT EXAMINATION**

BY MR. SHEETS:

Q And is – I'm sorry, was it Collin or Colin?

A Colin.

Q Colin. Okay, thank you Ms. Colin.

A No worries.

Q Can you tell us how you're employed?

A I work for Las Vegas Metropolitan Police Department. I am a  
LEST, a Law Enforcement Support Technician in the Records and  
Fingerprint Bureau.

Q Okay. And you heard the testimony that Ms. Davis gave this  
morning, is that right?

A I did.

Q Okay. And did you happen to have a conversation with  
somebody from our office?

A I did.

Q And you're familiar with the name Kevin Sunseri?

A I am.

Q Did you look into your system for records on Mr. Sunseri?

A Per event number, absolutely.

Q Okay. And that would be – do you happen to have the event  
number handy?

A Not off the top of my head, no.

Q Okay. Would this be –

MR. SHEETS: Court's indulgence. I just want to make sure I

1 get the right event number here.

2 [Brief pause in proceedings]

3 BY MR. SHEETS:

4 Q Would it be the event number 1512110017 ring a bell?

5 A Off the top of my head, sir, -- you have to understand I deal  
6 with multiple event numbers and multiple suspects every day pulling  
7 documents so I can't answer that honestly unless I have something to  
8 look at that has everything on it. I apologize.

9 Q And I'm sorry. I'm just going to ask so that I can try and help  
10 refresh your recollection, you mean -- when you say everything what do  
11 you mean?

12 A I understand -- I do remember getting, I believe, it was an  
13 order requesting documents on the warrant for a Kevin Sunseri.  
14 However, after research, we do not store documents by warrant number.  
15 We only store them in my office by event number --

16 Q Okay.

17 A -- and that is the affidavit that Simone Davis signed and I  
18 provided to you guys, stated that we only store documents by event  
19 number.

20 Q Okay. So, you did look up by event number at that time,  
21 though?

22 A Yes, because I believe there was 3 or 4 points on that order.

23 Q Yes. I think I got it right here. Okay, so if I showed you a copy  
24 of the order, would it refresh your recollection?

25 A A little bit.

1 Q Okay.

2 MR. SHEETS: May I approach?

3 THE COURT: Yes.

4 BY MR. SHEETS:

5 Q I'm going to – without – can you just [indiscernible]?

6 A That would be an event number that I would search because  
7 those are documents that you're requesting.

8 Q Okay. And what -- does looking at that event number refresh  
9 your recollection as to the order?

10 A Just that I searched for that event number and any documents  
11 relative to that.

12 Q Okay. So, that event number – having looked at that  
13 document, would it be fair to say that the event number was  
14 1512110017?

15 A Sure.

16 Q Okay. And what did your research reveal? What records did  
17 you – were you able to recover?

18 A Without giving – having the packet in my hands, sir, I can't  
19 attest to that. You have to understand I do criminal subpoenas all day.  
20 That's all I do in my office. I get so may per day with requests from  
21 Public Defenders, outside attorneys, and including the DA, I cannot  
22 without having that packet in my hand as to what I sent out.

23 MR. SHEETS: May I approach, Your Honor?

24 THE COURT: Yes.

25 BY MR. SHEETS:

1 Q So, you were ordered to produce any and all documents  
2 related to the arrest and investigation of Kevin Sunseri in connection  
3 with the above referenced case and/or relating to the Las Vegas  
4 Metropolitan Police Department, event number  
5 151211-0017, is that correct?

6 A That's correct.

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

9 A I do.

10 Q Okay. Did you come to draft the letter on September 12<sup>th</sup>,  
11 2019 indicating that there were no reports found within the Las Vegas  
12 Metropolitan Police Department Records and Fingerprint Bureau  
13 pertaining to the attempted execution of the arrest warrant?

14 A That is correct, yes.

15 Q Okay.

16 MR. SHEETS: And if I may approach?

17 THE COURT: Okay.

18 MR. VILLANI: That's fine. [Defense Counsel showing State a  
19 document].

20 THE WITNESS: Because again, we do not store documents  
21 by warrant numbers, only by event numbers.

22 BY MR. SHEETS:

23 Q Right. And you were ordered to research by that event  
24 number, isn't that correct?

25 A Well, the rest of the order talks about a warrant number as



1 well, sir.

2 Q Okay. So, -- but one of the several points you mentioned --

3 A Absolutely.

4 Q -- requires the event never researched --

5 A [Indiscernible] --

6 THE COURT: Wait. Hang on. You're talking over each other.

7 [Indiscernible] restate your question.

8 BY MR. SHEETS:

9 Q Okay, so one of the points that you were ordered to research  
10 was the specific event number, correct?

11 A Correct.

12 Q And that letter's the sole response that our office received  
13 from you in regards to that subpoena and this order, correct?

14 A Well, there should have been papers attached with it, all of the  
15 documents relevant to event number 151211-0017. I believe your office  
16 also paid \$41.00 for them.

17 Q Okay. All right. So, --

18 MR. SHEETS: If I may approach?

19 THE COURT: Mr. Sheets, have those documents been turned  
20 over to the State, the \$41.00 dollars' worth of documents?

21 MR. SHEETS: Her documents would already be in the State's  
22 possession.

23 [Colloquy between State and Defense Counsel]

24 MR. SHEETS: Yes, Your Honor. State's seen it and they'll  
25 acknowledge nothing that they don't have in their file.

1 THE COURT: Is that correct, Mr. Villani?

2 MR. VILLANI: That's correct, Your Honor.

3 THE COURT: All right. Thank you.

4 MR. SHEETS: May I approach?

5 THE COURT: Sure.

6 BY MR. SHEETS:

7 Q If you can take a look at that packet and tell me if that's your –  
8 the same packet you provided?

9 A Well, the P1's missing the front page, so.

10 Q Would it be fair to say the front page was the letter?

11 A No, sir.

12 Q Okay.

13 A You have page 2 of 2. There's a page 1 of 2, so let me just  
14 see if its at the back here. Yes. Okay.

15 Q So, --

16 A So, these would have been the documents that I would have  
17 stamped, redacted per NRS, and put with this affidavit, had Simone sign,  
18 and put up for you guys to pick up.

19 Q And if there were notes in the computer system regarding an  
20 officer's attempt to pick up on an arrest warrant or an officer's attempt to  
21 follow up on an arrest warrant, that would be kept in your system, isn't  
22 that correct?

23 A Sir, that part I don't know. I work in Records. I don't work with  
24 detectives.

25 Q Okay, so if a detective –

1           A     So, --

2           Q     -- enters into the computer system notes that they've made an  
3 effort to pick up on an arrest warrant, that would kept in Records, isn't  
4 that correct?

5           A     If they've put them into P1.

6           Q     Okay. All right. And there's nothing in that packet that talks  
7 about any interaction between officers and anyone trying to apprehend  
8 my client on an arrest warrant, is that correct?

9           A     Correct. Again --

10          Q     Okay.

11          A     -- because that would be warrant event number -- or warrant  
12 number based, not event number.

13          Q     Okay. So, -- but you just said you don't track by warrant  
14 number, correct?

15          A     Everything I have access to sir, is by event number.

16          Q     Okay. Right. And -- all right.

17               MR. SHEETS: If I may approach, Your Honor?

18               THE COURT: Sure.

19       BY MR. SHEETS:

20          Q     So just so that I can be clear, you had indicated in the letter  
21 that you drafted that Ms. Davis signed there were not reports within the  
22 Las Vegas Metropolitan Police Department's Records and Fingerprints  
23 Bureau pertaining to the attempted execution of arrest warrant  
24 W52475664, is that correct?

25          A     Can you please -- yes, sir. But can you please read the

1 sentence after that?

2 Q Okay: Please contact the Las Vegas Metropolitan Police  
3 Department Communications Bureau at – phone number – for possible  
4 computer notes. Is that correct?

5 A Correct. And down at the bottom where it says there are no  
6 records or reports, I don't know which one it states, but it talks about the  
7 warrant number again towards the bottom.

8 Q The next line: In addition, we do not store documents by  
9 warrant numbers, only by event numbers?

10 A Correct. Yes, sir.

11 Q Okay.

12 A That's the statement I'm referring to.

13 Q Yeah. So, you are aware that the order ordered the  
14 Metropolitan Police Department to comply with the production of the  
15 records including those that pertain to the warrant, correct?

16 A Correct. Again, --

17 Q Okay.

18 A -- sir, we do not store documents on warrant number. They  
19 are stored by event number. I have --

20 Q But --

21 A -- no way to comply or to produce any records because I do  
22 not have access to anything that is warrant based.

23 Q Okay. And you don't actually indicate in here that you don't  
24 have access to it, is that correct?

25 A No, because it --

1 Q Okay.

2 A -- states that we do not store documents by warrant number. It  
3 clearly states -- obviously you got documents by event number. We do  
4 not store documents by warrant number. Documents in our systems are  
5 only done by event number, sir.

6 Q Okay. But, again, you are aware that the order says to provide  
7 -- we're you actually given a copy of the subpoena during the course of  
8 this matter?

9 A This --

10 Q You were provided with a subpoena to produce the  
11 documents and an order, correct?

12 A I was produced with a subpoena back in September, which I  
13 sent an invalid letter to.

14 Q Okay. And you sent that invalid letter because it was your  
15 position that we needed an order of the Court to enforce a subpoena  
16 which is an order of the Court.

17 A No, sir. Let me explain. Per my legal department at Metro,  
18 when I get those subpoenas in, I have to check what date they're due. If  
19 you subpoena me for documentation and it is a trial date, that is a valid  
20 subpoena. I will provide documents. However, if you subpoena me for  
21 court date that is anything other than a trial, whether it's a bench or a  
22 jury trial, you will get an invalid letter, sir.

23 Q And -- so its your basis that a subpoena issued by the Court is  
24 invalid unless there's a trial date, is that what I'm hearing?

25 A That is correct. And that is --

1 Q Okay.

2 A -- per our legal department.

3 Q Okay. If I may -- well, it would be fair to say the subpoena that  
4 was provided said to the attention of the person most knowledgeable, is  
5 that correct?

6 A That's correct.

7 Q And the order was to comply with the subpoena, is that  
8 correct?

9 A That's correct.

10 Q Which requires any and all documents related to the  
11 attempt/execution of arrest warrant by that number, correct?

12 A Correct. However, --

13 Q Okay. And your letter, ma'am, says that you're not going to  
14 produce it but we could go to somebody else to produce it even though --

15 A No.

16 Q -- you have an order that says you are to produce --

17 A I am --

18 Q -- it, is that --

19 A My letter --

20 Q -- right?

21 A My letter states that we do not store documents by warrant  
22 number, only by event number. All of our databases at the Las Vegas  
23 Metropolitan Police Department are stored by event number, not warrant  
24 number.

25 Q So, in this case, this entire packet comprises all of the --

1           A     Documents –

2           Q     -- information you have.

3           A     -- based on event number.

4           Q     Okay. Correct. And you had zero reports found within the Las  
5 Vegas Metropolitan Police Department's Records and Fingerprints  
6 Bureau pertaining to the attempted execution of the arrest warrant,  
7 correct?

8           A     Because we do not store documents by warrant number, sir.

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

12          A     That is correct.

13          Q     Thank you.

14               MR. SHEETS: I have no further questions.

15               THE COURT: Any cross examination?

16               MR. VILLANI: No, thank you, Your Honor.

17               THE COURT: All right, thank you. Thank you for your time  
18 today.

19               THE WITNESS: Thank you. And I apologize for the way I am  
20 dressed. I was not expecting to have to –

21               THE COURT: Don't worry about it.

22               THE WITNESS: -- testify.

23                               [Colloquy in courtroom]

24               MR. SHEETS: Okay, Your Honor, at this point if you'd like to  
25 hear from my client, I'll call my client.

1 [Colloquy in courtroom]

2 **KEVIN SUNSERI**

3 [having been called as a witness and first being duly sworn, testified as  
4 follows:]

5 **DIRECT EXAMINATION**

6 BY MR. SHEETS:

7 Q Good morning, Mr. Sunseri. Are you the Defendant in the  
8 instant case here?

9 A I am.

10 Q And are you aware of the purpose of today's hearing?

11 A I am.

12 Q Do you understand that today we're talking about potentially  
13 withdrawing a guilty plea, is that right?

14 A I do.

15 Q Okay. Let me ask you, prior to being apprehended on this  
16 case, where were you residing?

17 A I was in the Nevada State Department of Corrections.

18 Q Okay. And about what time did you begin that stint?

19 A Apparently it was one month prior to this warrant coming out  
20 of the same county which was six – I believe it – approximately June  
21 2015 – '16.

22 Q June of 2016?

23 A Correct.

24 Q Okay. And at that time that you started your incarceration in  
25 the Nevada Department of Corrections were you even aware that there



1 was an investigation in relation to this case?

2 A Absolutely not. That email that I gave you is – was in jail.

3 Q We'll talk about that. And so, at the time you were originally  
4 incarcerated you said you did not have any knowledge of an  
5 investigation in this case. Were you aware that there was a pending  
6 warrant or anything like that in this matter?

7 A No, sir.

8 Q Now, did you learn about an investigation or a warrant prior to  
9 – well, actually strike that. Did you at some point go to a parole board or  
10 somebody to talk about a release?

11 A I spoke to my case worker about release and they informed  
12 me the only thing that was – a hold or detainer that was on me was the  
13 case numbers that I provided you with from Florida which was for driving  
14 under a revoked license.

15 Q So you were informed that there was only a case in Florida for  
16 you that was keeping you from being released?

17 A That's correct.

18 Q Was that a parole release or was that – did you time out?

19 A That was to expire my sentence.

20 Q Okay. And so, you had met with a case worker to talk about  
21 the upcoming release date and what may or may not keep you from  
22 actually walking out the door, is that right?

23 A That's correct.

24 Q Okay. And you'd been made aware of a case in Florida, is that  
25 right?

1           A     Yes, sir.

2           Q     And as soon as you found out about the case in Florida, did  
3 you take any actions to alleviate that issue?

4           A     I hired Robert Norgard from Norgard, Norgard & Chastang out  
5 of Bartow, Florida to represent me on those cases which the email  
6 addressed.

7           Q     Okay. So, you hired counsel as soon as you found out about  
8 it, is that right?

9           A     I did.

10          Q     Okay. And did you have any indication as to how your case  
11 worker came to know about this Florida matter?

12          A     I guess he looked on the database he was provided to him  
13 from – through the Department of Corrections and it shows all  
14 outstanding warrants.

15          Q     Did he indicate whether he had heard anything about any  
16 state or county case in the State of Nevada?

17          A     No, sir.

18          Q     Okay. So, to your knowledge, the only thing that was creating  
19 issues was this Florida matter?

20          A     That's correct.

21          Q     Now, when you – was there a time that you were pending  
22 release did you come to find that Florida was going to pick you up or  
23 were you going to be released to the streets?

24          A     No, sir. We had -- they had come to an agreement to pay  
25 \$10,000.00 in restitution in Florida and that would be – that warrant

1 would be vacated and – which was vacated actually on the day of my  
2 release which was August 27<sup>th</sup>, the date that I was supposed to be  
3 released, that email.

4 Q So you were warned that you were going to be released and  
5 you had understood that to mean release to the streets?

6 A Yes, sir.

7 Q Did there come a time when that changed?

8 A Five days prior to my release, the case worker, the same case  
9 worker came to see me and told me that I had these – this case, this  
10 instant case, against me in Nevada and was being held on it and would  
11 be transferred here immediately following – on the day of my release.

12 Q Now, you had been – you came to learn that at the time period  
13 that the warrant issued, is that right?

14 A What's that?

15 Q You came to learn when the warrant was issued?

16 A No. I've never -- was informed when the warrant was issued. I  
17 was informed five days prior to my release.

18 Q I'm sorry. That was a really bad question. You eventually  
19 learned the date that the warrant was issued, is that correct?

20 A I did.

21 Q And did that pre-date or post-date your initial incarceration in  
22 the Nevada Department of Corrections?

23 A It post-dated my initiation into the Department of Corrections  
24 by one month which –

25 Q So, at the time the warrant went active you were a resident of

1 the State of Nevada Department of Corrections, is that right?

2 A Yes, sir, and sentenced from the same county.

3 Q Now, what happened when you found out about this warrant  
4 on this case? Were you told that you were going to be released or were  
5 you told that you were going to be re-incarcerated?

6 A I was told that I was going to be brought here and booked  
7 under that – under those charges.

8 Q Okay. And what happened to you then? Was everything fine  
9 and what did you do?

10 A I got here on that date. My fiancé tried to post bond but the  
11 hold – another hold had arrived from Florida. At that point in time I could  
12 not bond out. You know, to elaborate, I had made a lot of decisions and  
13 beneficial to my well-being while I was incarcerated in Ely. And I went  
14 back and got my high school diploma. I got a degree in college. I also  
15 became a certified trainer in fitness. I wrote a book. I got it published on  
16 Amazon. I try to become part of the solution instead of part of the  
17 problem. I reached out to St. Jude's Hospital to do work for them -- to do  
18 charity –

19 MR. VILLANI: Objection;

20 THE WITNESS: -- work.

21 MR. VILLANI: -- non-responsive.

22 THE COURT: Sustained and its irrelevant.

23 THE WITNESS: Okay. I'm –

24 THE COURT: Just go ahead, Mr. Sheets. Next question.

25 MR. SHEETS: Okay.

1 BY MR. SHEETS:

2 Q So when you – what happened when – what did you do when  
3 you found out that this case was going to be going forward? Were you –

4 A I fell apart. I – I mean my mind – I began losing my mind.

5 MR. VILLANI: Objection; relevance.

6 THE COURT: Are you talking about legal proceedings? So,  
7 what did you do legally when you found out about the warrant or this  
8 new case?

9 THE WITNESS: We hired Dowon Kang.

10 THE COURT: Okay.

11 BY MR. SHEETS:

12 Q Okay. Now, you had mentioned at some point during the  
13 course of those proceedings that you'd lost your mind. Were you  
14 ordered committed in this case?

15 A Yes. Your Honor, -- Mr. Villani had ordered that I be seen for  
16 competency. I was sent to Lakes Crossing. It's one of the reasons this  
17 lengthy delay.

18 Q And was that under a order of commitment dated January 9 of  
19 2019?

20 A I believe that was the approximate date.

21 Q Okay. And was that based on a finding of both doctors that  
22 you were not competent to proceed forward?

23 A That's correct.

24 Q Okay. And were you – prior to your commitment, were you  
25 able to have substantive or legal conversations with Mr. Kang or was

1 your mental state impairing that ability?

2 A My mental state was impairing a lot of my abilities including  
3 the fact that I was sent to suicide prevention in the same jail.

4 MR. VILLANI: Objection; relevance. I don't even think this  
5 issue's brought up in the motion. Are we somehow switching to the fact  
6 that he was incompetent to enter this plea?

7 THE COURT: Mr. Sheets, the issue was that -- about the  
8 outstanding warrant, --

9 MR. SHEETS: Right.

10 THE COURT: -- whether or not Metro/the DA's office should  
11 have pursued it.

12 MR. SHEETS: Right, but it also -- and again, I don't know how  
13 far you want me to go 'cause it also addresses the same issues that I  
14 bring up as far as Doggett goes, and so I'm trying to put together, again  
15 for Your Honor, the mental state and the things that happened with his  
16 mind that would have impaired his ability to aid in his defense and it  
17 would have made it more difficult to aid in his defense of his prior  
18 charge. It was --

19 THE COURT: Well, are you saying that on the date of his  
20 entry of plea he was incompetent?

21 MR. SHEETS: That was not my intention. It's -- it more -- that  
22 portion of it goes more to the underlying potential substance of the  
23 Doggett issue, the fact that the mental issues occurred. It shows the  
24 effect on him, it shows the anxiety, the lack of knowledge of the warrant.  
25 And then it further goes to discuss the issues since have -- it shows an

1 actual prejudice even though we're not required to show a prejudice in  
2 terms of his ability to recall and assess facts dealing with the defense of  
3 the matter from an actual prejudice standpoint. If we – if you want me to  
4 stick solely to the warrant issue, I can do that for now.

5 THE COURT: Mr. Villani.

6 MR. VILLANI: And, Your Honor, I thought we were clear this is  
7 not a Doggett hearing. I understand Your Honor is giving some leeway.  
8 We had some witnesses here as to what he's going to testify to, but all  
9 of this testimony – I mean Your Honor's not making a decision today  
10 under Doggett is my understanding. So, my objection is to the relevance  
11 of – if he's not claiming he was incompetent, which I don't think he  
12 should be able to because none of the briefing even addresses  
13 competence, but if he's not claiming he's incompetent to enter this pleas  
14 then my objection is to the relevance of that line of inquiry.

15 MR. SHEETS: I guess my response would be I think that one  
16 of the tests talks about the strength of an underlying, unadvised motion,  
17 which would be Doggett. Not being advised of an issue that has a strong  
18 likelihood of success on the merits goes towards effective assistance of  
19 counsel, --

20 THE COURT: Well, --

21 MR. SHEETS: -- one that falls so far below the standard of  
22 care.

23 THE COURT: I understand that he was not – I mean your  
24 position is he was not advised of that, okay.

25 MR. SHEETS: Right. And --

1 THE COURT: So, that's fine. But you're getting the  
2 competency issues -- you're getting into other issues here. And so --

3 MR. SHEETS: And I can --

4 THE COURT: -- I'm going to sustain the objection. Next  
5 question.

6 MR. SHEETS: And just so the record is straight, I'm not using  
7 that for the purposes of alleging competency at the time he enters his  
8 plea but for discussing the prejudice requirement to show that the  
9 proceedings would have probably been different which is one of those  
10 prongs under the ineffective assistance of counsel test.

11 BY MR. SHEETS:

12 Q So, you came back. When you -- at some point you returned  
13 from Lakes Crossing?

14 A I did.

15 Q About how long were you there?

16 A Little over a month.

17 Q Okay. So, when you returned, were you deemed competent at  
18 that time?

19 A I was.

20 Q And at that point, did you have conversations with Mr. Kang?

21 A I did.

22 Q Okay. And were those conversations about this case?

23 A They were.

24 Q During the course of any of those conversations, did you have  
25 an opportunity to discuss any potential motions to dismiss in this case?



1           A     No. The only thing Mr. Kang did was submit a – ask Mr. –  
2 Judge Villani to submit a court – a application to Mental Health Court  
3 which was accepted but denied because of the warrant that was existing  
4 which is no longer existing now.

5           Q     Okay. Did Mr. Kang also file a motion to try and get a bail set?

6           A     Yes, because the bond had been revoked because I went to  
7 Lakes Crossing but it just had to – it needed to be reinstated technically.

8           Q     Understood. So, there was no – was there any talk of any kind  
9 of motion to dismiss as being an option in this matter?

10          A     Absolutely not.

11          Q     Did Mr. Kang talk to you at all about an arrest warrant or the  
12 length of time between the arrest warrant and when you got picked up?

13          A     Absolutely not.

14          Q     To your knowledge, did he discuss with you – to your  
15 knowledge, was there any discussion regarding asking Metro for records  
16 on that issue?

17          A     No, sir.

18          Q     Were you – do you recall with Mr. Kang discussing something  
19 by the name of Doggett?

20          A     No, sir.

21          Q     Okay. And have you come to learn about what Doggett – and  
22 what the case of Doggett versus United States is?

23          A     I have.

24          Q     And when you entered into your plea, was that a plea that you  
25 wanted to enter into or was it recommended by your Counsel?

1 MR. VILLANI: Objection.

2 THE COURT: Well, I took the plea and you're saying it's not –  
3 it wasn't involuntarily entered and you're saying he wasn't incompetent  
4 at the time. I understand the legal issue but – I mean is he now alleging  
5 that he was pressured or coerced or under duress to enter the plea?

6 MR. SHEETS: No, it just may have been a badly phrased  
7 question --

8 THE COURT: Okay. Next question.

9 MR. SHEETS: -- is what it might have been.

10 BY MR. SHEETS:

11 Q When you had spoken with Mr. Kang, did he recommend you  
12 accept the negotiation?

13 A He did.

14 Q Did he talk about a basis for that recommendation? Did he  
15 give you a reason why he was making that recommendation?

16 A It was at my preliminary hearing and he basically told me that  
17 this was probably the best deal that I could get.

18 Q Okay. And did he visit you at the jail [indiscernible]?

19 A Several times.

20 Q Okay. And you had talked about the underlying facts of the  
21 case, is that right?

22 A I did.

23 Q Okay. Was your ability to remember those facts as clear  
24 during those meetings as they would have been back in 2015?

25 A No, sir.

1 Q Why not?

2 A I guess over time my memory's diminished. I mean at the  
3 same time I was you know under a lot of stress. I mean and –

4 Q Okay. Now, during all of those meetings, is it your testimony  
5 that there was never a conversation regarding any potential motion to  
6 dismiss?

7 A There was no other alternatives presented, sir.

8 Q Had you been advised of a potential motion to dismiss –  
9 actually, strike that. Have you had the opportunity to review what is  
10 required for a dismissal pursuant to the case of Doggett versus United  
11 States?

12 A I was never presented with anything concerning Doggett.

13 Q Okay. Since you have entered your plea, have you learned  
14 what is required for a Doggett motion to be successful?

15 A I've read everything I could possibly read on it.

16 Q Okay. And had you had that knowledge at the time you  
17 entered – had you had that knowledge, like, at your preliminary hearing,  
18 would you have entered a plea?

19 A No, sir.

20 Q Okay.

21 MR. SHEETS: I have no further questions.

22 THE COURT: Any cross examination by the State?

23 MR. VILLANI: Just briefly, Your Honor.

24 /////

25 /////

1 **CROSS EXAMINATION**

2 BY MR. VILLANI:

3 Q Do you remember Rebecca Teel [phonetic]?

4 A I do.

5 Q Who was that?

6 A She's my fiancé.

7 Q Okay. Do you remember getting in an altercation with her on  
8 November 30<sup>th</sup>, 2015?

9 MR. SHEETS: Objection; relevance.

10 MR. VILLANI: Well, I mean we went into his memory of the  
11 event, is it under the prejudice prong.

12 THE COURT: And for what purpose –

13 THE WITNESS: No, I don't.

14 THE COURT: -- are you asking the question?

15 MR. VILLANI: Well, I'm asking to rebut his claim that he  
16 doesn't remember anything and – see, now I'm confused 'cause I don't  
17 know how far into this Doggett issue we're getting but --

18 THE COURT: All right, go and ask –

19 MR. VILLANI: -- if its not relevant to the Court's inquiry, then  
20 I'll withdraw that question, just go straight into the plea.

21 THE COURT: All right, thank you.

22 BY MR. VILLANI:

23 Q Okay, sir, you remember signing a Guilty Plea Agreement in  
24 this case?

25 A I do.

1 Q And you entered into that plea in front of this Court back on  
2 September 21<sup>st</sup>, 2018.

3 A It was not this Court. It was a different Court, but yes.

4 Q Okay, down in master calendar [sic] then?

5 A Yes, sir.

6 Q Okay. And so, you entered that plea. She read to you various  
7 stipulations. You went through this plea with your attorney, correct?

8 A I did.

9 Q You read it?

10 A I did.

11 Q You understood it?

12 A I did.

13 Q Okay. You agreed with it?

14 A I did.

15 Q You signed at the end saying, yes, I'm entering into this plea?

16 A I did.

17 Q Do you recall being asked by that Court if you were entering  
18 into this plea because in truth and fact you were guilty of these crimes?

19 A I remember it something to that effect.

20 Q Okay. And do you recall answering yes to that question?

21 A I don't recall.

22 MR. SHEETS: I'm going to object as to relevance. That  
23 doesn't address the basis of a knowing plea or – and has no relevance  
24 to whether or not Counsel was ineffective.

25 THE COURT: Overruled. Go ahead.

1 MR. VILLANI: Thank you.

2 BY MR. VILLANI:

3 Q When you signed this plea, do you recall there being a  
4 subsection under waiver of rights that you're waiving the constitutional  
5 right to a speedy and public trial by an impartial jury?

6 A I don't recall.

7 Q Okay, if I showed you this, would it help to refresh your  
8 recollection?

9 A Yes.

10 MR. VILLANI: May I approach the witness, Your Honor?

11 THE COURT: Yes.

12 MR. VILLANI: Page 4, number two. There -- I -- just hold them  
13 here.

14 BY MR. VILLANI:

15 A If I signed it, I --

16 Q You're not disputing it?

17 A I don't -- I don't remember that clause in that -- in there.

18 Q And that's fair, sir. It's been a little bit. However, --

19 A It's been a while.

20 Q -- you do acknowledge that a Guilty Plea Agreement in this  
21 case, correct?

22 A I did.

23 Q And if I was to represent to you this is the Guilty Plea  
24 Agreement you signed, you would have no reason to argue with that?

25 A No.

1 Q Okay. So, subsection two here, and I showed it to you there  
2 and I'll bring it to you if you like, but it just reads, for the record, the  
3 constitution I am waiving – "I understand I am waiving and forever giving  
4 up the following rights and privileges – and I'm jumping down to  
5 subsection two here. "The constitutional right to a speedy and public trial  
6 by an impartial jury, free of it excessive pretrial publicity prejudicial to the  
7 defense, at which at trial I would be entitled to assistance of an attorney,  
8 either appointed or retained. At trial the State would bear the burden of  
9 proving beyond a reasonable doubt each element of the offense  
10 charged." You signed the document acknowledging that you were  
11 waiving those – that right, correct?

12 A Yes, but I was not aware of constitutional right to that – of  
13 mine that was being – that was blatantly violated at the same time. I had  
14 no knowledge of it.

15 Q And that's not my question. But you waived your right to a  
16 speedy trial, correct?

17 A I don't remember sign – if I signed it – its been a while. I don't  
18 – I mean it was going quick. They –

19 Q Absolutely.

20 A -- everything was pretty –

21 Q If you signed the document to the effect that said you're  
22 waiving your right to a speedy trial, correct, if you signed a document  
23 saying you're waiving your right to a speedy trial you really have no  
24 Doggett issue, correct?

25 A I signed that –

1 MR. SHEETS: I'm going to object. That's a legal conclusion.

2 THE COURT: Sustained.

3 BY MR. VILLANI:

4 Q Okay. You waived your right to a speedy trial by signing this  
5 document, correct sir?

6 MR. SHEETS: I'm going to object. That's a legal conclusion.

7 MR. VILLANI: No, it's not.

8 THE COURT: No, --

9 MR. SHEETS: [Indiscernible] --

10 THE COURT: -- the document states that.

11 MR. SHEETS: But --

12 THE COURT: I mean that -- is that the document you signed,  
13 sir, that you reviewed it?

14 THE WITNESS: I see my signature. It's a document I signed,  
15 sir.

16 MR. SHEETS: As a brief rebuttal, he can say that he signed a  
17 document saying that, but to say that he actively waived it is a legal  
18 conclusion, especially if the allegation is the document was signed  
19 without due process.

20 MR. VILLANI: What?

21 MR. SHEETS: That's why I'm arguing it's a legal conclusion.  
22 As long as we're accepting it as he's admitting he signed a document  
23 that says that versus he waived it because it's out position --

24 MR. VILLANI: There's -- that's a distinction without a  
25 difference --



1 THE COURT: Okay.

2 MR. VILLANI: -- in State's opinion. But I'll submit it to the  
3 Court.

4 THE COURT: I've made note of his testimony.

5 MR. VILLANI: Okay. Thank you.

6 BY MR. VILLANI:

7 Q And so, sir, you're acknowledging you did sign a Guilty Plea  
8 Agreement, the Guilty Plea Agreement on file is the one you signed, you  
9 read it, you understood it, everything in that Guilty Plea Agreement was  
10 true and accurate, correct?

11 A I remember signing the agreement. Like I said, it was gone  
12 over very quickly. It was very -- everything was going really -- very fast  
13 with that agreement.

14 Q Yeah, but you understood you were pleading guilty to two  
15 felony counts, correct?

16 A I did.

17 Q Okay. And you understood you were pleading guilty pursuant  
18 to the language in that document you signed 'cause as you said you  
19 read it, you understood it, you agreed with it, correct?

20 A Under the advisement of my attorney, I did. At the time,  
21 Dowon Kang, under the advisement of my attorney I signed the  
22 agreement.

23 Q Okay. Sir, but then once again, you were canvassed by the  
24 Court downstairs and they asked you a number of questions, one of  
25 which you're pleading guilty because in truth and fact you are guilty,

1 correct?

2 A Correct. But once again, it was under the advisement of my  
3 attorney who was acting in my best interest. I paid a lot of money to him  
4 so I thought that he had my best interest at heart and knew the best  
5 avenue of defense to pursue.

6 Q Okay. And you also signed a voluntariness of plea section in  
7 that Guilty Plea Agreement saying that my attorney has answered all my  
8 questions regarding this Guilty Plea Agreement and its consequences to  
9 my satisfaction and I am satisfied with the services provided by my  
10 attorney, correct?

11 A At the time, that's what I signed.

12 Q Okay. And then after you learn about the possible Doggett  
13 issue, is that fair, after you signed this document agreeing to all this  
14 stuff, you learn about the Doggett case, the Doggett issue, whatever the  
15 issue is you're claiming now?

16 A Correct.

17 Q After you sign this document?

18 A That's correct.

19 Q Okay.

20 MR. VILLANI: That's all I have, Your Honor.

21 THE COURT: Any redirect?

22 MR. SHEETS: Yes.

23 **REDIRECT EXAMINATION**

24 BY MR. SHEETS:

25 Q In page 5 of that same Guilty Plea Agreement you signed a

1 section that says: I have discussed with my attorney any possible  
2 defenses, defense strategies, and circumstances which might be in my  
3 favor, correct?

4 A Yes.

5 Q And you never had a talk about Doggett, correct?

6 A No, sir.

7 Q And based on your review of the Doggett versus United States  
8 case law and the analysis there, is that a defense that, without saying it  
9 is in your favor, is that a defense that could be in your favor?

10 A I believe it is.

11 Q Okay. And was that ever discussed?

12 A No, sir.

13 Q Okay. And are you aware of your constitutional rights, sir?

14 A Yes, sir.

15 Q And you're aware that you have a constitutional right to have  
16 an effective -- effective assistance of counsel, is that correct?

17 A That is correct.

18 Q And to be properly advised of those defenses, --

19 MR. VILLANI: Objection; Counsel's --

20 MR. SHEETS: -- defense strategies --

21 MR. VILLANI: -- just arguing through questioning.

22 THE COURT: Right. It sounds like your closing.

23 MR. SHEETS: Yes.

24 THE COURT: Okay. Sustained.

25 /////

1 BY MR. SHEETS:

2 Q So when you signed this document, at the time you thought  
3 you were getting correct advice, right?

4 A I did.

5 Q That you later learned that there was this major issue?

6 A I did.

7 Q Okay. And had you known about that before signing this  
8 document, would you have signed this document?

9 A Absolutely not.

10 Q Okay. Now, there's a certification section on that same Guilty  
11 Plea Agreement that was signed by an attorney. Did you ever read that  
12 section with your attorney?

13 A No, I didn't.

14 Q Okay. Nonetheless, it's in the document you signed. Would it  
15 be fair to say this is all pleas of guilty offered by the Defendant pursuant  
16 to this agreement are consistent with the facts known to me and are  
17 made with my advice to the Defendant, does that sound like what Mr.  
18 Kang signed in this document?

19 A It does.

20 MR. VILLANI: Objection. I think there's multiple levels of –

21 MR. SHEETS: Okay.

22 MR. VILLANI: -- hearsay here and he hasn't quite  
23 acknowledged –

24 MR. SHEETS: All right.

25 MR. VILLANI: -- that document.

1 MR. SHEETS: Will the State stipulate that that's in the Guilty  
2 Plea Agreement?

3 MR. VILLANI: Yes.

4 MR. SHEETS: Okay.

5 THE COURT: Well, the Guilty Plea Agreement speaks for  
6 itself.

7 MR. SHEETS: Right.

8 BY MR. SHEETS:

9 Q So, in that Guilty Plea Agreement, Mr. Kang affirms all pleas  
10 of guilty offered by the Defendant pursuant to this agreement are  
11 consistent with the facts known to me and are made with my advice to  
12 the Defendant.

13 MR. VILLANI: Objection; relevance to his answer to that  
14 question.

15 MR. SHEETS: I haven't even posed a question.

16 THE COURT: Okay, what's your question?

17 BY MR. SHEETS:

18 Q My question is those facts that were – did Mr. Kang ever  
19 convey to you that he had facts known to him regarding a case of the  
20 United States versus Doggett?

21 A No.

22 Q Okay. Is—and now the State has made it [indiscernible] fact  
23 that you said that in truth and in fact you were guilty, did you make that  
24 statement for the purposes of entering into the negotiation –

25 MR. VILLANI: Objection.

1 MR. SHEETS: -- or did you make it for some other reason?

2 MR. VILLANI: I'm not -- objection; relevance.

3 MR. SHEETS: Well, it goes to the underlying basis for him  
4 signing an agreement and making an admission of guilt.

5 THE COURT: Wait. Because you -- if he's saying I am guilty of  
6 those two counts, are you saying he's was lying to the Court?

7 MR. SHEETS: No, but if the purpose underlying that  
8 admission of guilt is a negotiation, its prefaced on ineffective assistance  
9 of counsel, then I may argue that that statement would be  
10 constitutionally protected if the plea is reversed. And the State's trying to  
11 set that up so they can use that against him in the event that is reversed.

12 THE COURT: Well, that's for another day, okay? So, next  
13 question.

14 MR. SHEETS: Okay. I have no further questions.

15 THE COURT: Any recross?

16 MR. VILLANI: No, Your Honor.

17 THE COURT: Any additional witnesses for the Defense?

18 MR. SHEETS: No, Your Honor.

19 THE COURT: All right. Argument, Mr. --

20 MR. SHEETS: Oh, it's my argument.

21 THE COURT: Yes.

22 MR. SHEETS: Oh, okay. Yes, Your Honor, I'm sorry.

23 THE COURT: It's your motion.

24 MR. SHEETS: I think that we've established that what needs  
25 to be established in order to prove that Counsel did not advise my client

1 of a legal issue that existed that has a likelihood of success on the  
2 merits or the potential for a – a very real potential for success on the  
3 merits.

4 The facts that are in the Court's record are very clear. Metro  
5 did not have any documents that establish any attempts to contact on  
6 the arrest warrant. My client has put forth that the only thing holding him  
7 was a case in Florida that was lifted and then he finds out. My client has  
8 indicated that he had no idea of an arrest warrant up until that five days  
9 before his release, that he was a resident of the Nevada Department of  
10 Corrections and the State could have easily notified the Defendant in  
11 this particular circumstance of this warrant considering it is the State of  
12 Nevada in the caption and he was in the custody, care, and control of  
13 the State of Nevada. Instead, they chose not to apprehend him on the  
14 warrant. They chose not to send anything over to the Nevada  
15 Department of Corrections. Metro has no record that they did anything to  
16 try and capture him on this warrant and that is all very real and very  
17 important. After the fact, he's committed. And he indicates he's had  
18 difficulty recalling because of memory loss over the years.

19 Now, I would point out that for success on the Doggett issue,  
20 which is the underlying basis, prejudice is absolutely presumed. The  
21 State must rebut that. Doggett makes it very clear. Our brief makes it  
22 very clear. The State would like to come up with a case that says  
23 otherwise, but they have yet to do so and they didn't do it in their own  
24 Supreme Court brief. That's why they had to go with facts only. It's  
25 presumed. It's in black and white, governing law, presumed in this

1 circumstance.

2 But even if not presumed, which we argue it is, it is still  
3 established. You don't have to grant that motion today because it's not  
4 even ripe today. But there has certainly been, I would pose, more than  
5 what would even be the *prima facie* showing that this is a legitimate,  
6 honest to goodness, we believe, strong legal defense that he was not  
7 advised of and that is where this ultimately lies. If he is not advised of  
8 this remedy that could potentially set him free and probably will – even  
9 should set him free, has he been properly advised? The State likes to  
10 rely on these pre-fab documents that are meant to try to include  
11 everything that could possibly be addressed, but what it cannot do is  
12 waive your constitutional right to have an effective attorney.

13 Paragraph 6 of that Guilty Plea Agreement allows you post-  
14 conviction remedies under Chapter 34 of the Nevada Revised Statute  
15 and those post-conviction remedies encompass ineffective assistance of  
16 counsel. So, they are not waivable contrary to what the State's position  
17 is. That's why they must list those. In fact, in federal court, the guilty  
18 pleas go in so far as specifically indicating that the remedy that you  
19 cannot waive is ineffective assistance of counsel. The State had the  
20 opportunity to bring Mr. Kang in and testify otherwise to try to rebut what  
21 our testimony was going to establish and they did not. They did not call  
22 Mr. Kang. They did not call anybody from Metro to testify as to making  
23 attempts. They did not call anybody from the Nevada Department of  
24 Corrections to say that they received a copy of the warrant. They didn't  
25 do any of that. So, all of that would go, especially the conversation with



1 Mr. Kang, that would go directly towards the ineffective argument but  
2 they chose not to do so and he's not here today.

3 We've heard the testimony of my client. I would pose that it is  
4 credible, that it makes sense, that there is evidence that we presented  
5 independent of my client that back up the proposition regarding the  
6 Doggett issue and it's a question whether there's a manifest injustice.

7 Now, the State likes to make a big deal about the phenomenal  
8 deal he got, the amazing deal he got, the knock dead drag out gift that  
9 they claim exists here. And yet, they talk about prejudice to the State, of  
10 looking at a guy who clearly would – if going to trial might face habitual  
11 eligibility versus a guy who got a sweetheart of a deal where he, quote,  
12 doesn't spend the rest of his life in prison. I would pose that shows the  
13 absence of prejudice in the State and the concern that the State has with  
14 the substance of our arguments because they're concerned that if this  
15 plea gets reversed – and I don't even think we have to meet manifest  
16 injustice. I think it's just good cause, but nonetheless, I think we meet  
17 manifest injustice if the – I think the State's concern that if they lose this  
18 motion to withdraw the plea, they have a real problem with the Doggett  
19 issue because the rulings that have come out of the district court in this  
20 jurisdiction have been dismissal in circumstances similar to this because  
21 it is consistent with United States Supreme Court and Ninth Circuit law.  
22 It is very clear.

23 And so, I do believe that we were able to show that, at the  
24 very least, you need to be advised of this. I think its good cause.  
25 Ineffective assistance of counsel is manifestly unjust, but I think good

1 cause, which is where we're at, can even be the failure to advise of this  
2 is a potential defense. That is good cause because you have a  
3 Defendant here saying, if I had even known about this I wouldn't have  
4 entered the negotiation. I would have pursued that remedy that was  
5 available to me. I would have pursued it. I would have continued  
6 forward. And we would have held a hearing on that issue and I think  
7 that's a fair thing for a Defendant who is unaware of something that  
8 could potentially remove the entire offense. I think it's fair to take that  
9 position. Because the fact of the matter is, even – the prejudice has  
10 been to my client because even if Your Honor were to decide you were  
11 not going to withdraw the plea and you were going to be sentencing my  
12 client, this is a situation, where under this plea, had my client been  
13 brought here to answer for the charges in 2016, would have 2 to 3 years  
14 of credit already and that is a real prejudice, absent the factual defense  
15 on the case.

16 And that – and I would pose that when you put all of that  
17 together, I think that we have established a good cause to withdraw his  
18 plea, to address the Doggett issue and more specifics if needed to  
19 conduct any follow up hearings necessary on the Doggett issue. And I  
20 believe that that's what's fundamentally fair to my client. I believe that  
21 he's entitled to that. And I believe that the guilty plea is defective on its  
22 face when it indicates all defenses are given -- that the advice is given  
23 from counsel based on his research and we have testimony here that  
24 that was never given. That was never discussed and was never  
25 provided. And I think too, I think that non-pursuit of a potentially

1 exonerating motion is good cause. And I would submit that we've met  
2 our burden and the State has provided nothing to counter that.

3 THE COURT: All right. Thank you.

4 State.

5 MR. VILLANI: Your Honor, the State's position is that the  
6 Guilty Plea Agreement's clear. He's up here claiming that he would have  
7 claimed a federal speedy trial right had he known he had a speedy trial  
8 right when he specifically waived it pursuant to the terms of the Guilty  
9 Plea Agreement. It would be unfair to the State to allow him to withdraw  
10 his plea at this point 'cause we are – down the road we are – any  
11 witnesses we did have for this case we're relying upon this case being at  
12 a close.

13 Given that, Your Honor, I'll just submit on the arguments  
14 previously made and on our briefing. I would ask Your Honor to keep it  
15 in mind, we are not at a Doggett hearing despite the minutes of  
16 argument we just heard as if we were. This is not a Doggett hearing.  
17 This is a hearing on a motion to withdraw guilty plea. If this is even  
18 granted, the Defendant does not walk out as Counsel just said. I mean  
19 we reinstate the charges and we go to trial on it. So, I just want to make  
20 that clear, but I'll submit it on our briefing, Your Honor.

21 THE COURT: Anything further, Mr. Sheets?

22 MR. SHEETS: Yes. A Guilty Plea Agreement or a waiver of  
23 rights premised on an unconstitutional underpinning as put forth under  
24 NRS Chapter 34 is not valid. That's why NRS Chapter 34 exists, and  
25 that would be my rebuttal.

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THE COURT: All right. Thank you.

Due to the nature of the case, I'm going to prepare a written decision for this matter. My goal is to have a written decision filed by November 27<sup>th</sup>.

MR. SHEETS: Thank you, Your Honor.


MR. VILLANI: Thank you, Your Honor.

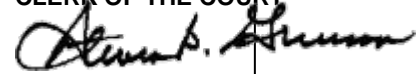
THE COURT: Thank you.

[Hearing concludes at 11:32 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



SUP  
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Kevin Sunseri

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

State of Nevada,	)	Case No.: C-18-334808-1
Plaintiff	)	Dept. No: XVII
	)	
vs.	)	<b>SUPPLEMENT IN SUPPORT OF MOTION</b>
	)	<b>TO WITHDRAW GUILTY PLEA</b>
Kevin Sunseri,	)	
Defendant	)	<b>Date of Hearing: January 16, 2020</b>
	)	<b>Time of Hearing: 8:30am</b>

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 Supplement in Support of Motion to Withdraw Guilty Plea, based on the  
Nevada Supreme Court's recent ruling in State of Nevada v. Inzunza, Case No. 75662 (see  
**Exhibit 1**, attached hereto)

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However, on that date, he was actually re-booked on an arrest warrant that had apparently remained outstanding in NCIC since July 28, 2016 – over two years ago – that initiated the instant case. The arrest warrant was formally executed on August 27, 2018, the same day of his anticipated release.

Mr. Sunseri's case was set for an evidentiary hearing on November 20, 2019. On that day, defense subpoenaed witnesses from the Las Vegas Metropolitan Police Department who affirmed, albeit in a somewhat hostile fashion, that no effort was undertaken to inform or apprehend Mr. Sunseri on the warrant. Although the officer testified that she could not admit or deny anything that may have occurred outside her department, she did not see any notations or information tied to Mr. Sunseri's individual file or arrest warrant that

1 would indicate efforts to apprehend him. After testimony and argument, this Court  
2 thereafter took the matter under advisement.

3         On December 26, 2019, the Nevada Supreme Court released a published decision in  
4 State of Nevada v. Rigoberto Inzunza, Case No. 75662. In that case, the State appealed the  
5 dismissal of multiple felony counts against Mr. Inzunza, including sex assault on a minor  
6 under fourteen, after a request to dismiss under *Doggett v. United States* had been granted  
7 by the Eighth Judicial District Court. The Nevada Supreme Court not only affirmed the  
8 dismissal, but addressed and struck down many of the State's arguments that were raised  
9 against Mr. Sunseri as well. The *Inzunza* decision is highly probative to the instant case; it  
10 illustrates why Mr. Sunseri should be permitted to withdraw his plea and simultaneously  
11 why he is entitled to have the instant case dismissed.  
12

13  
14         Notably, the following points are relevant from the Nevada Supreme Court's  
15 opinion:  
16

- 17         • Delays at they approach one year are "presumptively prejudicial," and the burden  
18 then shifts to the State to rebut the presumption by establishing how the defendant  
19 was not prejudiced by the delay;
- 20         • The warrant for Inzunza was uploaded into NCIC, and the Detective had been given  
21 leads through Facebook about where Inzunza was located in New Jersey but failed  
22 to pursue those leads;
- 23         • The District Court properly ruled that such inaction by law enforcement was "gross  
24 negligence" attributable to the State and weighing in favor of the defendant  
25 ("Though Detective Hoyt had knowledge of Inzunza's whereabouts, he did not  
26 attempt to contact Inzunza or have him arrested during the entire 26-month period.  
27 Moreover, there was no evidence showing that Inzunza was aware of the charges  
28 before the date of his arrest");
- The prejudice factor "may weigh in favor of the defendant even though he failed to  
make any affirmative showing that the delay weakened his ability to raise specific  
defenses, elicit specific testimony, or produce specific items of evidence;"

- When a delay is greater than two years but less than five years and the delay is more than mere negligence but less than bad-faith intentional misconduct, the extent of prejudice can be determined using the following factors: length of post-charge delay, whether the length of post-charge delay was compounded by a length and inordinate pre-charge delay, the complexity of the alleged crime, the investigation conduct by law enforcement, and whether the negligence was particularly egregious;
- When law enforcement's failure to inform or apprehend the defendant is the result of department policy, it constitutes State negligence and weighs in favor of the defendant;
- The State had the means to locate Inzunza, but failed to take any steps to do so except putting the arrest warrant in the NCIC database, likening such inaction to "feeble efforts to locate" the defendant, which is weighed against the government;
- Government actions which are tangential, frivolous, *dilatory*, or taken in bad faith weigh heavily in favor of a finding that speedy trial violation occurred, defining "dilatory" as "designed to tending to cause delay" (emphasis in original);
- Citing with approval *United States v. Erenas-Luna*, 560 F.3d 772, 776 (8th Cir. 2009) ("agreeing with the lower court's conclusion that the government was 'clearly seriously negligent' when it omitted placing a defendant's warrant in the NCIC database and 'failed to take appropriate action to attempt to apprehend' the defendant in a timely manner");
- A statute of limitations analysis is not applicable to a speedy trial analysis, because "statutes of limitations deal with the period between the commission of the crime and the filing of charges, not the time period between obtaining a warrant to arrest until actual arrest, which is at issue here."

As the *Inzunza* case makes clear, Mr. Sunseri is entitled to have his plea withdrawn and his case dismissed. Although law enforcement had the means to locate him, the only steps taken were to enter the warrant into NCIC, and therefore it meets the same "gross negligence" or "clearly seriously negligent" standard articulated in *Inzunza*. When affirming *Inzunza*, the Nevada Supreme Court repeatedly asserted that law enforcement could have located him, but failed to do so, instead only entering the warrant into NCIC. Here, law



1 enforcement not only could have located Mr. Sunseri, but *already had him in their custody*,  
2 and yet still failed to inform or apprehend him of the warrant.

3       The delay here was approximately 25 months, and therefore also falls along the  
4 same line of analysis as the 28 month delay in *Inzunza*; yet, this case presents facts even  
5 more egregious than *Inzunza* because Mr. Sunseri was in the Nevada Department of  
6 Corrections for the *entire* period the arrest warrant remained outstanding.

7  
8       For these reasons, Mr. Sunseri should be permitted to withdraw his plea. The  
9 analysis of his case under *Doggett* would heavily favor outright dismissal, and this remedy  
10 was not properly explained nor raised to Mr. Sunseri prior to entering the plea. This lack of  
11 information created a very real prejudice to Mr. Sunseri by resulting in a plea negotiation  
12 for multiple felony charges and possible prison time on a matter that should actually be  
13 dismissed or, at a bare minimum, initiated two years ago (and thereby giving Mr. Sunseri at  
14 least two years of credit). Finally, as noted in the original Motion, the burden for the  
15 defendant on a Motion to Withdraw plea is significantly lower if raised prior to sentencing,  
16 as is the case here; Mr. Sunseri need only present any fair and just reason under the  
17 circumstances, and Defense submits that the high likelihood of *outright dismissal*, made  
18 even more likely by the extremely favorable *Inzunza* decision, is such a reason.

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1 Therefore, Mr. Sunseri respectfully requests this Court permit him to withdraw his  
2 plea and dismiss his case.

3  
4 DATED this 9 day of January, 2020.

5 By:  
6 MAYFIELD GRUBER & SHEETS

7 By: /s/ Damian Sheets  
8 Damian Sheets, Esq.  
9 Nevada Bar No. 10755  
10 726 S. Casino Center Blvd.  
11 Las Vegas, Nevada 89101

12 **CERTIFICATE OF SERVICE**

13 I HEREBY CERTIFY that on the 9 day of January, 2020 I served a true and correct  
14 copy of the foregoing MOTION, upon each of the parties by electronic service through  
15 Wiznet, the Eighth Judicial District Court's e-filing/e-service system, pursuant to  
16 N.E.F.C.R.9; and by depositing a copy of the same in a sealed envelope in the United States  
17 mail, Postage Pre-Paid, addressed as follows:

18 Clark County District Attorney's Office  
19 200 Lewis Ave., 3rd Floor  
20 Las Vegas, NV 89155  
21 motions@clarkcountyda.com  
22 pdmotions@clarkcountyda.com

23  
24 /s/ Kelsey Bernstein  
25 An Employee of Mayfield Gruber & Sheets  
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# EXHIBIT 1

135 Nev., Advance Opinion 69

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,  
Appellant,  
vs.  
RIGOBERTO INZUNZA,  
Respondent.

No. 75662

**FILED**

DEC 26 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

Appeal from a district court order granting respondent's pretrial motion to dismiss an indictment. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

*Affirmed.*

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, Jonathan VanBoskerck, Chief Deputy District Attorney, and Jacob J. Villani, Deputy District Attorney, Clark County, for Appellant.

Darin Imlay, Public Defender, and Deborah L. Westbrook and P. David Westbrook, Chief Deputy Public Defenders, Clark County, for Respondent.

---

BEFORE HARDESTY, STIGLICH and SILVER, JJ.

*OPINION*

By the Court, HARDESTY, J.:

The question presented in this case is whether the district court abused its discretion in granting respondent Rigoberto Inzunza's pretrial motion to dismiss the indictment for violation of his Sixth Amendment right to a speedy trial. The district court applied the factors enunciated in *Barker*

*v. Wingo*, 407 U.S. 514, 530-33 (1972), and *Doggett v. United States*, 505 U.S. 647, 651-54 (1992), and concluded that the State violated Inzunza's right to a speedy trial because the State's gross negligence caused a 26-month delay between the filing of charges and Inzunza's arrest, and the State offered nothing to rebut the presumption that the delay prejudiced Inzunza. We conclude that, given the length of the delay and the finding that it was caused by the State's gross negligence, the district court did not err in concluding that Inzunza was entitled to a presumption of prejudice under the *Barker-Doggett* factors. The State did not rebut this presumption in its opposition to Inzunza's motion to dismiss or at the evidentiary hearing before the district court, nor has the State explained on appeal how Inzunza was not prejudiced by the delay. Therefore, we affirm the district court's dismissal of the indictment.

#### *FACTS AND PROCEDURAL HISTORY*

Rigoberto Inzunza lived with E.J.'s mother when E.J. was nine years old. During this time, Inzunza allegedly sexually assaulted E.J. while her mother was at work and her siblings were sleeping. The abuse was alleged to have continued for at least a year until Inzunza eventually moved out and relocated to New Jersey. Six years later, 15-year-old E.J. disclosed to her therapist that Inzunza had sexually assaulted her. The therapist informed E.J.'s mother, and E.J. and her mother both went to the North Las Vegas Police Department (NLVPD) to file a police report. The NLVPD interviewed E.J. and began an investigation into Inzunza. E.J.'s mother informed Detective Mark Hoyt that Inzunza lived in New Jersey. She also gave Detective Hoyt printouts from Inzunza's Facebook profile that depicted his car, New Jersey license plate, and his employer's work truck with the business's name and number. Following an attempt to locate

Inzunza locally, Detective Hoyt submitted the case to the District Attorney's (DA's) office to file charges against Inzunza.

On December 3, 2014, one month after E.J. reported the sexual assault, the State filed a criminal complaint charging Inzunza with 10 counts of sexual assault of a minor under 14 years of age and 5 counts of lewdness with a child under 14 years of age. The NLVPD's records department staff entered the warrant into the National Crime Information Center (NCIC) database, but consistent with NLVPD policy, no one informed Detective Hoyt, and Detective Hoyt made no further effort to follow up on the case. A little over two years later, on January 29, 2017, Monmouth County Sheriff's Department arrested Inzunza in New Jersey based on the outstanding warrant. He was transported to Nevada, and the State subsequently obtained an indictment, adding another count of sexual assault of a child under 14 years of age.

Inzunza moved to dismiss the case, arguing that the State had violated his Sixth Amendment right to a speedy trial and his due process rights under the Fifth and Fourteenth Amendments. Inzunza complained of the delay between the day he was charged and his arrest, which was approximately two years and two months.

The State conceded that the NLVPD knew that Inzunza was in New Jersey, but it explained that it would have been futile for the NLVPD to contact New Jersey authorities before the State obtained a warrant for Inzunza's arrest. It further explained that the State's policy does not alert the detective when the warrant issues, so the error was in the NLVPD "failing to check up and then seeing that a warrant was approved and then following up on the information from New Jersey." Detective Hoyt explained at the evidentiary hearing that he had relied on the DA's office to



file charges, and return the case to NLVPD to get a warrant and enter the warrant into the NCIC database. He then “hope[d]” that utilizing the NCIC database would work to apprehend Inzunza, but he never followed up on the New Jersey identification or Facebook information or attempted to contact authorities in New Jersey. He indicated that it was not the NLVPD’s policy to follow up on a case once submitted to the DA’s office, to call other jurisdictions without a warrant, or to follow up on Facebook leads. Rather, after he submits a case to the DA’s office, the case is “out-of-sight out-of-mind” for the department. Finally, Detective Hoyt explained that it was not customary for the already taxed police department to expend additional resources in tracking down the perpetrator in a case that was not “high profile,” but rather a “common sexual assault” case.

The district court concluded that the State had been grossly negligent in pursuing Inzunza. Applying the principles and factors under the *Barker-Doggett* test, the district court determined that the case should be dismissed because: (1) the delay between the filing of charges and the time of Inzunza’s arrest was presumptively prejudicial, (2) the State’s gross negligence caused the entire delay, (3) Inzunza was not required to assert his right to a speedy trial earlier when he did not know about the charges or arrest warrant, and (4) the State had not rebutted the presumption that the delay had prejudiced Inzunza.

The State appeals the dismissal, arguing that the district court abused its discretion because the *Barker-Doggett* factors do not weigh in Inzunza’s favor.

### *DISCUSSION*

We review a district court’s decision to grant or deny a motion to dismiss an indictment based on a speedy trial violation for an abuse of discretion. *See Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008)

(reviewing for abuse of discretion a denial of motion to dismiss an indictment based on grand juror bias); *cf. State v. Craig*, 87 Nev. 199, 200, 484 P.2d 719, 719 (1971) (reviewing for abuse of discretion a grant of motion to dismiss an indictment based on a statutory speedy trial violation). In evaluating whether a defendant's Sixth Amendment right to a speedy trial has been violated, this court gives deference to the district court's factual findings and reviews them for clear error, but reviews the court's legal conclusions de novo. *See United States v. Gregory*, 322 F.3d 1157, 1160-61 (9th Cir. 2003); *see also United States v. Carpenter*, 781 F.3d 599, 607-08 (1st Cir. 2015) (noting that most federal circuit courts review district court rulings on Sixth Amendment speedy trial claims de novo).

*The Barker-Doggett speedy trial test*

The Sixth Amendment to the United States Constitution guarantees that, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial.” U.S. Const. amend. VI. We evaluate a claim alleging a violation of the Sixth Amendment speedy trial right by applying the four-part balancing test the United States Supreme Court set out in *Barker*, 407 U.S. at 530, and clarified in *Doggett*, 505 U.S. at 651. Under this test, courts must weigh four factors: “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” *Barker*, 407 U.S. at 530. What is prevalent throughout speedy trial challenges is that “there [are] no hard and fast rule[s] to apply . . . , and each case must be decided on its own facts.” *United States v. Clark*, 83 F.3d 1350, 1354 (11th Cir. 1996). Additionally, “[n]o one factor is determinative; rather, they are related factors which must be considered together with such other circumstances as may be relevant.” *United States v. Ferreira*, 665 F.3d 701, 705 (6th Cir. 2011) (internal quotation marks



omitted). We therefore lay out the intricate *Barker-Doggett* test and the factors necessary for us to consider in this case.

*Length of delay*

The first factor, length of delay, is a “double [i]nquiry.” *Doggett*, 505 U.S. at 651. First, to trigger the *Barker-Doggett* speedy-trial analysis, the length of the delay must be presumptively prejudicial. *Id.* at 651-52; *United States v. Erenas-Luna*, 560 F.3d 772, 776 (8th Cir. 2009). A post-accusation delay meets this standard “as it approaches one year.” *Doggett*, 505 U.S. at 652 n.1; see also *United States v. Corona-Verbera*, 509 F.3d 1105, 1114 (9th Cir. 2007) (recognizing that “[m]ost courts have found a delay that approaches one year is presumptively prejudicial”). Second, if the speedy-trial analysis is triggered, the district court must consider, “as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim.” *Doggett*, 505 U.S. at 652; *United States v. Ingram*, 446 F.3d 1332, 1336 (11th Cir. 2006). The length of time extending beyond the threshold one-year mark tends to correlate with the degree of prejudice the defendant suffers and will be considered under factor four—the prejudice to the defendant. *Doggett*, 505 U.S. at 652.

We hold that the district court did not abuse its discretion in determining that Inzunza’s length of delay from charge to arrest was sufficient to trigger the *Barker-Doggett* analysis. A 26-month delay from charge to arrest is well over a year and, therefore, is long enough for the district court to classify as presumptively prejudicial so as to trigger the speedy-trial analysis. In arguing that this delay “is not so lengthy as to greatly prejudice Inzunza,” the State ignores a string of cases allowing a *Barker-Doggett* analysis for significantly shorter delays than in *Doggett*.

See, e.g., *United States v. Moreno*, 789 F.3d 72, 81 (2d Cir. 2015) (analyzing a 27-month delay, of which 10 months were attributable to the government); *United States v. Dent*, 149 F.3d 180, 185 (3d Cir. 1998) (analyzing a 26-month delay, of which 14 months were attributable to the government); *United States v. Beamon*, 992 F.2d 1009, 1014 (9th Cir. 1993) (analyzing a 17- and 20-month delay attributable to the government).

#### *Reason for delay*

The second factor, the reason for the delay, focuses on whether the government is responsible for the delay and is the “focal inquiry” in a speedy trial challenge. *United States v. Alexander*, 817 F.3d 1178, 1182 (9th Cir. 2016) (internal quotation marks omitted). A district court’s finding on the reason for delay and its justification is reviewed “with considerable deference.” *Doggett*, 505 U.S. at 652. The *Barker* Court outlined three types of governmental delay, with each assigned a corresponding weight:

A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

407 U.S. at 531 (footnote omitted). Furthermore, and applicable to these facts, “[o]ur toleration of negligence varies inversely with the length of the delay that the negligence causes.” *United States v. Oliva*, 909 F.3d 1292, 1302 (11th Cir. 2018) (internal quotation marks omitted).

We conclude the district court did not abuse its discretion under factor two when it found the 26-month delay was caused entirely by the State’s “gross negligence.” Though Detective Hoyt had knowledge of

Inzunza's whereabouts, he did not attempt to contact Inzunza or have him arrested during the entire 26-month period. Moreover, there was no evidence showing that Inzunza was aware of the charges before the date of his arrest. Therefore, the district court correctly found that the State was solely responsible for the delay. *See Doggett*, 505 U.S. at 652 (affording a district court's finding "considerable deference" when it determines the reason for delay and its justification).

*Assertion of the right*

The third factor is "whether in due course the defendant asserted his right to a speedy trial." *Erenas-Luna*, 560 F.3d at 778 (internal quotation marks omitted); *see Barker*, 407 U.S. at 531-32 (explaining that "[t]he defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right"). The State argues that this factor weighs against Inzunza because he did not assert his right to a speedy trial during the period of time between the filing of charges and his arrest. However, this argument misses the fact that a defendant must know that the State had filed charges against him to have it weighed against him. *See Doggett*, 505 U.S. at 653-54 (stating that a defendant who is ignorant as to the formal charges against him "is not to be taxed for invoking his speedy trial right only after his arrest"). Thus, the district court did not abuse its discretion in finding that the assertion of the right was not weighed against Inzunza under *Doggett*.

*Prejudice to the defendant*

The last factor we must consider is prejudice to the defendant. In assessing prejudice, courts look at the following harms that the speedy-trial right was designed to protect against: "oppressive pretrial

incarceration,” “anxiety and concern of the accused,” and “the possibility that the defense will be impaired.” *Barker*, 407 U.S. at 532. “Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.” *Id.* The only relevant interest here is the last, as Inzunza was not incarcerated before his arrest, nor did he suffer anxiety given that he was unaware of the charges against him.

“[I]mpairment of one’s defense is the most difficult form of speedy trial prejudice to prove because time’s erosion of exculpatory evidence and testimony ‘can rarely be shown.’” *Doggett*, 505 U.S. at 655 (quoting *Barker*, 407 U.S. at 532). Thus, “courts should not be overly demanding with respect to proof of such prejudice.” 5 Wayne R. LaFave et al., *Criminal Procedure* § 18.2(e) (4th ed. 2015). As *Doggett* makes clear, the prejudice factor of *Barker* may weigh in favor of the defendant even though he “failed to make any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence.” 505 U.S. at 655. For example, in *Doggett*, the Supreme Court found that the delay between the defendant’s indictment and arrest, of which six years was solely attributable to the government’s negligence, was sufficiently egregious to presume prejudice. *Id.* at 657-58. When the presumption of prejudice is applied, the State is afforded the opportunity to rebut the presumption and detail how the defendant was not prejudiced by the delay. *See id.* at 658. If the State is unable to rebut the presumption, the *Barker* factors will weigh in a defendant’s favor, necessitating the “severe remedy of dismissal,” which is “the only possible remedy” when a defendant’s speedy-trial right has been denied. *Barker*, 407 U.S. at 522.



Relieving the defendant of showing actual prejudice is typically triggered in cases in which the delay is five years or more. *See, e.g., United States v. Serna-Villarreal*, 352 F.3d 225, 232 (5th Cir. 2003) (“[T]his Court and others generally have found presumed prejudice only in cases in which the post-indictment delay lasted at least five years.”); *see also United States v. Velazquez*, 749 F.3d 161, 175 (3d Cir. 2014) (“Negligence over a sufficiently long period can establish a general presumption that the defendant’s ability to present a defense is impaired, meaning that a defendant can prevail on his claim despite not having shown specific prejudice.”). However, a “bright-line rule” is not appropriate under the *Barker-Doggett* test, and, therefore, the presumption of prejudice is not forfeited simply because Inzunza’s delay is less than five years.<sup>1</sup> *Ferreira*, 665 F.3d at 708-09. Rather, “[t]he amount of prejudice a defendant must show is inversely proportional to the length and reason for the delay.” *Alexander*, 817 F.3d at 1183 (citing *Doggett*, 505 U.S. at 655-56).

In this case, we face the difficult task of analyzing contextually a delay that is greater than one year but less than five, coupled with a reason for the delay that is something more than mere negligence, but less than bad-faith intentional misconduct on the government’s part. *Oliva*, 909

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<sup>1</sup>We previously held in *State v. Fain*, 105 Nev. 567, 569-70, 779 P.2d 965, 966-67 (1989), that dismissal of the indictment was improper because the defendant was unable to show particularized prejudice from the nearly 4½-year delay. However, *Fain* predates *Doggett*, which rejected a defendant’s requirement to affirmatively establish prejudice in every case to prevail on a speedy trial claim. *See Doggett*, 505 U.S. at 655-56 (detailing that “consideration of prejudice is not limited to the specifically demonstrable” and that “affirmative proof of particularized prejudice is not essential to every speedy trial claim”). Therefore, we recognize that *Doggett* overruled *Fain* to the extent *Fain* precluded the court from presuming prejudice to the defendant under certain circumstances.

F.3d at 1302 (“[T]he length of the delay impacts our determination of whether the Government’s negligence weighs heavily against it.”). While it is clear that intentional delay on the State’s part would present “an overwhelming case for dismissal,” *Doggett*, 505 U.S. at 656, it is less obvious whether something less than intentional delay—here, gross negligence—should result in dismissal when the delay is just over two years. Our canvass of federal caselaw involving similar lengths of delay caused by government negligence reveals that courts have applied the following factors in determining whether prejudice should be presumed: the length of the post-charge delay, whether the length of the post-charge delay was compounded by a lengthy and inordinate pre-charge delay, the complexity of the alleged crime, the investigation conduct by law enforcement, and whether the negligence was particularly egregious.<sup>2</sup> We find these factors

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<sup>2</sup>See, e.g., *Oliva*, 909 F.3d at 1305-06 (analyzing a 23-month delay and determining “[t]he Government’s negligence” did not favor the defendant); *Brown v. Romanowski*, 845 F.3d 703, 717 (6th Cir. 2017) (evaluating a 25-month delay and finding the government’s actions were “negligent at most” and did not favor the defendant); *Moreno*, 789 F.3d at 81 (attributing a 10-month delay to the government for failing “to exercise reasonable diligence,” but the delay did not favor the defendant); *Ferreira*, 665 F.3d at 705, 708-09 (reasoning a 35-month delay and the government’s “gross negligence” favored the defendant); *Erenas-Luna*, 560 F.3d at 778-80 (analyzing a 36-month delay and the government’s “serious negligence” weighed in favor of the defendant); *United States v. Hall*, 551 F.3d 257, 272-73 (4th Cir. 2009) (reasoning a 24-month delay and “‘neutral’ factor[s]” such as a “complex conspiracy charge” did not favor the defendant); *Ingram*, 446 F.3d at 1338-39 (examining a 24-month delay and “egregious” government negligence favored the defendant); *Dent*, 149 F.3d at 185 (reasoning the government’s action was “to blame” for only 14 months of a 26-month delay and thus did not favor the defendant); *Beamon*, 992 F.2d at 1013-14 (determining a 17- and 20-month delay for two defendants coupled with “the government’s negligence” did not favor the defendants).

useful and apply them here. *See Ferreira*, 665 F.3d at 705 (“No one factor is determinative; rather, they are related factors which must be considered together with such other circumstances as may be relevant.” (internal quotation marks omitted)).

In arguing that the district court erred in presuming prejudice, the State asserts that the delay was justified by the fact that Inzunza had moved to New Jersey, meaning that Detective Hoyt could not locate him using local investigative procedures. The State acknowledged before us that the detective was negligent in pursuing Inzunza, but insisted that fact is not a determinative factor because Detective Hoyt’s investigation was consistent with the NLVPD’s policy. We disagree and hold that the extent of the State’s negligence and its inaction weighs in favor of Inzunza.

The record shows that the State had the means to locate Inzunza and failed to take any steps to do so. *See Doggett*, 505 U.S. at 652-53 (detailing that “[f]or six years the [g]overnment’s investigators made no serious effort to [find him] . . . , and, had they done so, they could have found him within minutes”). The victim’s mother provided Detective Hoyt with Facebook printouts with specific information about Inzunza’s whereabouts in New Jersey. Detective Hoyt had Inzunza’s location, and the printouts depicted his license plate and his employer’s work truck, business name, and number. Further, the NLVPD crime report shows Inzunza’s address in New Jersey and his employer’s address. *See Ingram*, 446 F.3d at 1335 (recounting that law enforcement knew the defendant’s phone numbers, where he lived, and where he worked). The only step taken by law enforcement to apprehend Inzunza was putting the arrest warrant in the NCIC database. *Doggett*, 505 U.S. at 652-53; *see also Ingram*, 446 F.3d at 1338 (reasoning the government’s “feeble efforts to locate” the defendant



and the lack of evidence showing the defendant evaded law enforcement weighed against the government). Thus, we hold the investigation by law enforcement weighs in favor of Inzunza. The actions—or in this case the inaction—of law enforcement, despite the overwhelming information provided by E.J.’s mother to locate Inzunza, is fatal to the State’s argument. *See Doggett*, 505 U.S. at 657 (“Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state’s fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority.”).

As to the State’s contention that Detective Hoyt was merely following NLVPD policy, this fact does not negate the district court’s finding that the delay was caused by the State’s gross negligence. The detective’s failure to pursue leads to locate Inzunza in New Jersey and the NLVPD’s policy of not notifying the detective in charge of the case that a warrant has issued is dilatory. *See United States v. Schlei*, 122 F.3d 944, 987 (11th Cir. 1997) (“Government actions which are tangential, frivolous, *dilatory*, or taken in bad faith weigh heavily in favor of a finding that a speedy trial violation occurred.” (emphasis added) (citing *United States v. Loud Hawk*, 474 U.S. 302, 315-17 (1986))); *Dilatory*, *Black’s Law Dictionary* (11th ed. 2019) (defining “dilatory” as “[d]esigned or tending to cause delay”); *see also Ingram*, 446 F.3d 1339 (finding the government’s “delay intolerable” where the officer in charge “knew that he was the only law enforcement agent responsible for arresting [the defendant]; and he had more than enough information to do so”). Had Detective Hoyt been informed that the warrant issued, steps could have been taken to arrest Inzunza that may have shifted the reason for delay from gross negligence to a valid reason to justify the delay. *See Barker*, 407 U.S. at 531. The only effort made by the State was



placing Inzunza's warrant in the NCIC database and hoping this singular action by the State was sufficient to apprehend Inzunza. *Cf. Erenas-Luna*, 560 F.3d at 775, 777 (agreeing with the lower court's conclusion that the government was "clearly seriously negligent" when it omitted placing a defendant's warrant in the NCIC database and "fail[ed] to take appropriate action[] to attempt to apprehend" the defendant in a timely manner (internal quotation marks omitted)).

Furthermore, there is no evidence in the record to show that Inzunza knew about the charges or that he was fleeing from the NLVPD when he left the state. *See United States v. Mendoza*, 530 F.3d 758, 763 (9th Cir. 2008) (recognizing that a defendant who is aware of the charges against him or her and flees or otherwise causes the delay forecloses any Sixth Amendment speedy trial claim). Therefore, we agree with and defer to the district court's determination that the State's gross negligence was the sole reason for the delay of 26 months—entitling Inzunza to a presumption of prejudice. *See Doggett*, 505 U.S. at 652 (giving "considerable deference" to district court's determination).

With the burden shifted to the State to rebut the presumption of prejudice, we conclude the State failed to meet its burden. *See Doggett*, 505 U.S. at 658. As the district court noted, the State "offered no rebuttal evidence at the evidentiary hearing . . . [and] did not address prejudice in its Opposition to Defendant's Motion to Dismiss." In its opening brief, the State argues that during the evidentiary hearing the district court told the State "to stop" when it began to offer its argument why Inzunza was not prejudiced by the delay. Despite the State's attempt to rebut the district court's findings, we find no motions or pleadings in the record detailing the State's argument to supplement the evidentiary hearing. Further, the State

makes no persuasive rebuttal before this court or otherwise describes what evidence it intended to introduce to the district court. Because the State raises an issue on appeal that was not properly raised (or preserved) before the district court, we need not consider it. *Browning v. State*, 120 Nev. 347, 354, 91 P.3d 39, 45 (2004) (“[A]n appellant must present relevant authority and cogent argument; issues not so presented need not be addressed by this court.” (internal quotation marks omitted)); see also NRAP 28(a)(10)(A) (“[T]he argument . . . must contain . . . appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which appellant relies.”).

The State further argues before us that the delay did not actually prejudice Inzunza because he was arrested during the statute of limitations period. This argument is misguided. Statutes of limitations deal with the period between the commission of the crime and the filing of charges, not the time period between obtaining a warrant to arrest until actual arrest, which is at issue here. Additionally, the statute of limitations period is meant to give the victim more time to come forward, not afford law enforcement more time to arrest the perpetrator. Therefore, we affirm the district court’s finding that the State has not persuasively rebutted the presumption of prejudice entitled to Inzunza under the *Barker-Doggett* factors.

### CONCLUSION

The Sixth Amendment speedy-trial right is evaluated under the *Barker-Doggett* test, and we must afford the severe remedy of dismissal to Inzunza because it is “the only possible remedy” when a defendant’s speedy-trial right has been denied. *Barker*, 407 U.S. at 522. The crimes alleged against Inzunza are serious. But the unusual facts concerning pre-arrest delay compel our affirmance of the district court’s findings and conclusions

that Inzunza properly invoked his speedy-trial right, he was entitled to a presumption of prejudice, and the State failed to rebut the presumption. Accordingly, we affirm the district court's dismissal of the indictment.

K Hardesty, J.  
Hardesty

We concur:

Stiglich, J.  
Stiglich

Silver, J.  
Silver

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Felony/Gross Misdemeanor**

**COURT MINUTES**

**January 13, 2020**

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

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<b>January 13, 2020</b>	<b>11:35 AM</b>	<b>Minute Order Re: Deft's Motion to Withdraw Guilty Plea - Supplemental Briefing Requested</b>
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**HEARD BY:** Villani, Michael

**COURTROOM:** RJC Courtroom 11A

**COURT CLERK:** April Watkins

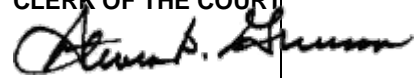
**JOURNAL ENTRIES**

- Defendant s Motion to Withdraw Guilty Plea came before this court on November 20, 2019, whereupon the Court took the matter under further advisement. After considering all pleadings and arguments, the Court renders its decision as follows:

In light of a recent decision by the Supreme Court of Nevada, State v. Rigoberto Inzunza, No. 75662, the Court finds good cause to order supplemental briefing on Defendant s Motion. Specifically, the parties are to brief the Court on whether the totality of the circumstances amount to a fair and just reason sufficient to permit withdrawal of Defendant s guilty plea. See Stevenson v. State, 131 Nev. 598 (2015) (holding that this determination is not limited to whether plea was knowingly, voluntarily, and intelligently entered, abrogating Crawford v. State, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-26 (2001)).

Therefore, Court ORDERED, supplemental briefs due on January 27, 2020.

CLERK'S NOTE: The above minute order has been distributed to: Jacob Villani, Chief Deputy District Attorney, (jacob.villani@clarkcountyda.com), Madilyn Cole, Deputy District Attorney, (madilyn.cole@clarkcountyda.com) and Damien Sheets, Esq., (dsheets@defendingnevada.com). aw



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 THURSDAY, JANUARY 16, 2020

15 **RECORDER'S TRANSCRIPT OF HEARING:**  
16 **STATUS CHECK: STATUS OF THE CASE**

17  
18 APPEARANCES:

19  
20 For the State: MADILYN M. COLE, ESQ.  
21 Deputy District Attorney

22 For the Defendant: DAMIAN SHEETS, ESQ.

23  
24 Recorded by: CYNTHIA GEORGILAS, COURT RECORDER  
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Las Vegas, Nevada, Thursday, January 16, 2020

[Hearing begins at 9:01 a.m.]

THE MARSHAL: 6.

THE COURT: Kevin Sunseri.

MR. SHEETS: Good morning, Your Honor, Damian Sheets on behalf of Mr. Sunseri who's present in custody. I did receive a minute order –

THE COURT: Right.

MR. SHEETS: -- from you a couple of days ago. I think they probably crossed in the night, the ships, but we did actually already – we had already filed the supplemental as soon as the Supreme Court decision came out.

THE COURT: Well, I think you'll need – because I think you'll need to file your motion to dismiss because I think – because the original motion was based upon – no, actually the supplement was to address the issues of that new case and I gave each party so many days to file a supplement; correct?

MR. SHEETS: Right. I –

THE COURT: Until the 27<sup>th</sup>?

MR. SHEETS: We had filed a supp I think a couple of days before. I don't know if that was sufficient or if Your Honor reviewed that –

THE COURT: If you feel that's --

MR. SHEETS: -- before the minute order. Okay

THE COURT: -- sufficient for your supplement then we'll leave it there, and State –

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MR. SHEETS: Okay.

THE COURT: -- has their deadline and we'll just wait --

MS. COLE: Perfect.

THE COURT: -- to receive all the briefs and then I'll issue a  
written decision based upon the supplemental briefing.

MS. COLE: Okay.

THE COURT: All right.

MS. COLE: So, there's no in court hearing?

THE COURT: No.

MS. COLE: Okay.


THE COURT: Thank you.

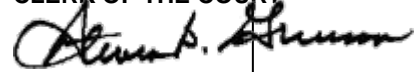
MR. SHEETS: Thank you, Your Honor.

[Hearing concludes at 9:02 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



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Attorney for Defendant  
Kevin Sunseri

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

State of Nevada,  
Plaintiff

vs.

Kevin Sunseri,  
Defendant

) Case No.: C-18-334808-1  
) Dept. No: XVII  
)

) **AMENDED SUPPLEMENT IN SUPPORT OF**  
) **MOTION TO WITHDRAW GUILTY PLEA,**  
) **AND MOTION TO DISMISS**  
)

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 Amended Supplement in Support of Motion to Withdraw Guilty Plea, and  
Motion to Dismiss, based on the Nevada Supreme Court's recent ruling in *State of State v.*  
*Inzunza*, 135 Nev. Adv. Op. 69 (Dec. 26, 2019).

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 *1. Procedural History*

3 In 2016, Kevin Sunseri pled in the Eighth Judicial District Court to a stipulated  
4 sentence of two to five years in the Nevada Department of Corrections on unrelated felony  
5 charges. He was sentenced on May 25, 2016 in accordance with the plea agreement. Mr.  
6 Sunseri served his sentence in the Nevada Department of Corrections until he was released  
7 on parole on August 27, 2018.  
8

9 However, on that date, he was actually re-booked on an arrest warrant that had  
10 apparently remained outstanding in NCIC since July 28, 2016 – over two years ago – that  
11 initiated the instant case. The arrest warrant was formally executed on August 27, 2018,  
12 the same day of his anticipated release.  
13

14 On these new charges, Mr. Sunseri unconditionally waived his right to a preliminary  
15 hearing pursuant to negotiations entered in this case on September 21, 2018. Prior to  
16 sentencing, Mr. Sunseri sought to withdraw his plea on the primary basis that his counsel  
17 did not investigate or inform him of his potential right to have the case dismissed under  
18 *Doggett v. United States*.  
19

20 Mr. Sunseri's case was set for an evidentiary hearing on November 20, 2019. On that  
21 day, defense subpoenaed witnesses from the Las Vegas Metropolitan Police Department  
22 who affirmed, albeit in a somewhat hostile fashion, that no effort was undertaken to inform  
23 or apprehend Mr. Sunseri on the warrant. Although the officer testified that she could not  
24 admit or deny anything that may have occurred outside her department, she did not see  
25 any notations or information tied to Mr. Sunseri's individual file or arrest warrant that  
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1 would indicate efforts to apprehend him. After testimony and argument, this Court  
2 thereafter took the matter under advisement.

3  
4 *2. Renewed Analysis Under Inzunza*

5  
6 On December 26, 2019, the Nevada Supreme Court released a published decision in  
7 State of Nevada v. Rigoberto Inzunza, Case No. 75662. In that case, the State appealed the  
8 dismissal of multiple felony counts against Mr. Inzunza, including sex assault on a minor  
9 under fourteen, after a request to dismiss under *Doggett v. United States* had been granted  
10 by the Eighth Judicial District Court. The Nevada Supreme Court not only affirmed the  
11 dismissal, but addressed and struck down many of the State's arguments that were raised  
12 against Mr. Sunseri as well. The *Inzunza* decision is highly probative to the instant case; it  
13 illustrates why Mr. Sunseri should be permitted to withdraw his plea and simultaneously  
14 why he is entitled to have the instant case dismissed.

15  
16  
17 Notably, the following points are relevant from the Nevada Supreme Court's  
18 opinion:

- 19
- 20 • Delays at they approach one year are "presumptively prejudicial," and the burden  
21 then shifts to the State to rebut the presumption by establishing how the defendant  
22 was not prejudiced by the delay;
  - 23 • The warrant for Inzunza was uploaded into NCIC, and the Detective had been given  
24 leads through Facebook about where Inzunza was located in New Jersey but failed  
25 to pursue those leads;
  - 26 • The District Court properly ruled that such inaction by law enforcement was "gross  
27 negligence" attributable to the State and weighing in favor of the defendant  
28 ("Though Detective Hoyt had knowledge of Inzunza's whereabouts, he did not  
attempt to contact Inzunza or have him arrested during the entire 26-month period.  
Moreover, there was no evidence showing that Inzunza was aware of the charges  
before the date of his arrest");

- The prejudice factor “may weigh in favor of the defendant even though he failed to make any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence;”
- When a delay is greater than two years but less than five years and the delay is more than mere negligence but less than bad-faith intentional misconduct, the extent of prejudice can be determined using the following factors: length of post-charge delay, whether the length of post-charge delay was compounded by a length and inordinate pre-charge delay, the complexity of the alleged crime, the investigation conduct by law enforcement, and whether the negligence was particularly egregious;
- When law enforcement’s failure to inform or apprehend the defendant is the result of department policy, it constitutes State negligence and weighs in favor of the defendant;
- The State had the means to locate Inzunza, but failed to take any steps to do so except putting the arrest warrant in the NCIC database, likening such inaction to “feeble efforts to locate” the defendant, which is weighed against the government;
- Government actions which are tangential, frivolous, *dilatory*, or taken in bad faith weigh heavily in favor of a finding that speedy trial violation occurred, defining “dilatory” as “designed to tending to cause delay” (emphasis in original);
- Citing with approval *United States v. Erenas-Luna*, 560 F.3d 772, 776 (8th Cir. 2009) (“agreeing with the lower court’s conclusion that the government was ‘clearly seriously negligent’ when it omitted placing a defendant’s warrant in the NCIC database and ‘failed to take appropriate action to attempt to apprehend’ the defendant in a timely manner”);
- A statute of limitations analysis is not applicable to a speedy trial analysis, because “statutes of limitations deal with the period between the commission of the crime and the filing of charges, not the time period between obtaining a warrant to arrest until actual arrest, which is at issue here.”

As the *Inzunza* case makes clear, Mr. Sunseri is entitled to have his plea withdrawn and his case dismissed. Although law enforcement had the means to locate him, the only steps taken were to enter the warrant into NCIC, and therefore it meets the same “gross negligence” or “clearly seriously negligent” standard articulated in *Inzunza*. When affirming *Inzunza*, the Nevada Supreme Court repeatedly asserted that law enforcement could have

1 located him, but failed to do so, instead only entering the warrant into NCIC. Here, law  
2 enforcement not only could have located Mr. Sunseri, but *already had him in their custody*,  
3 and yet still failed to inform or apprehend him of the warrant.  
4

5 The delay here was approximately 25 months, and therefore also falls along the  
6 same line of analysis as the 28 month delay in *Inzunza*; yet, this case presents facts even  
7 more egregious than *Inzunza* because Mr. Sunseri was in the Nevada Department of  
8 Corrections for the *entire* period the arrest warrant remained outstanding. There is no  
9 other word that would apply than “gross negligence” when an inmate is within Nevada’s  
10 custody, yet the law enforcement undertakes no effort whatsoever to inform or apprehend  
11 Mr. Sunseri of his warrant until the day of his pending release.  
12

### 13 14 3. *Totality of the Circumstances*

15 A defendant may withdraw his plea if he presents a fair and just reason under the  
16 totality of circumstances. Based on the *Doggett* analysis as set forth above and during the  
17 evidentiary hearing, Mr. Sunseri should be permitted to withdraw his plea. He has provided  
18 such a fair and just reason in his request for dismissal pursuant to *Doggett* and *Inzunza*.  
19 The analysis of his case under *Doggett* would heavily favor outright dismissal, and this  
20 remedy was not properly explained nor raised to Mr. Sunseri prior to entering the plea.  
21 This lack of information created a very real prejudice to Mr. Sunseri by resulting in a plea  
22 negotiation for multiple felony charges and possible prison time on a matter that should  
23 actually be dismissed or, at a bare minimum, initiated two years ago (and thereby giving  
24 Mr. Sunseri at least two years of additional credit).  
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1 Finally, as noted in the original Motion, the burden for the defendant on a Motion to  
2 Withdraw plea is significantly lower if raised prior to sentencing, as is the case here; under  
3 the totality of the circumstances standard, the Nevada Supreme Court expressly disavowed  
4 *Crawford's* exclusive focus on whether a plea was freely, knowingly and voluntarily entered  
5 into. The Court specifically expanded the scope of the analysis to withdraw a guilty plea to  
6 *any* fair and just reason considering the totality of *all* applicable circumstances. As such,  
7 there can be little doubt that his instant request for, and likelihood of, dismissal based on a  
8 fundamental constitutional violation is a legitimate circumstance that may be considered  
9 by this Court as much as any other constitutional claim.  
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12 “A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165,  
13 and ‘a district court may grant a defendant's motion to withdraw his guilty plea before  
14 sentencing **for any reason** where permitting withdrawal would be fair and just.’ When  
15 making this determination, ‘the district court must consider the totality of the  
16 circumstances.’” *Brooks v. State*, 443 P.3d 552 (Nev. 2019) (citing *Stevenson v. State*, 131  
17 Nev. 598, 604, 354 P.3d 1277, 1281 (2015)) (emphasis added).  
18

19 In the instant case, it was the State of Nevada who failed to act on an outstanding  
20 warrant for a substantial period of time while Mr. Sunseri was incarcerated. He was in the  
21 custody of the Nevada Department of Corrections during the entire time the warrant  
22 remained outstanding; Mr. Sunseri could do nothing to avoid this situation, and the only  
23 party that could have taken action was too negligent to even type in his name. How could  
24 there be any more fair result than holding the State accountable for what can only be  
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1 classified as a grossly negligent delay, rather than forcing Mr. Sunseri to remain in custody  
2 on new charges that could have been resolved several years ago.

3       Mr. Sunseri was serving his debt to society, a prisoner slowly awaiting his  
4 approaching freedom; years went by, anticipation building, and just as he was on the  
5 precipice of his return to civilian life, *on the day of his scheduled release*, he was rebooked  
6 on these charges. Instead of returning to freedom, he was returned to CCDC. Mr. Sunseri  
7 quickly became suicidal, necessitating the need for psychiatric treatment – all because law  
8 enforcement could not be bothered to type in the name of someone who was already in  
9 their control. The delay was not the fault of Mr. Sunseri. He, quite literally, could have done  
10 *nothing* to make himself easier to find in the State of Nevada.

13       Although dismissal is a difficult pill to swallow, it is the only remedy. Mr. Sunseri,  
14 had he been timely prosecuted for the instant case, would likely be closely approaching or  
15 already released on this case, as the two years credit he should have earned in addition to  
16 year he's been in custody since the warrant was satisfied equates to nearly three years in  
17 custody. He should not be punished by more years in prison simply because of the State's  
18 mistake. This cannot even be a case of comparative negligence, as Mr. Sunseri contributed  
19 nothing to the delay which falls solely on shoulders of the State.

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23 ///

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1 Mr. Sunseri's entitlement to dismissal is a circumstance which may be considered  
2 under the "totality of the circumstances" by the Court for purposes of his request to  
3 withdraw his plea. In view of the *Doggett* analysis that overwhelmingly favors dismissal, he  
4 has presented a fair and just reason to withdraw his plea under the totality of the  
5 circumstances. Therefore, Mr. Sunseri respectfully requests this Court permit him to  
6 withdraw his plea and dismiss his case.  
7

8  
9 DATED this 19 day of January, 2020.

10 By:  
11 MAYFIELD GRUBER & SHEETS

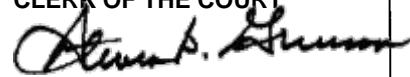
12 By: /s/ Damian Sheets  
13 Damian Sheets, Esq.  
14 Nevada Bar No. 10755  
15 726 S. Casino Center Blvd.  
16 Las Vegas, Nevada 89101

17 **CERTIFICATE OF SERVICE**

18 I HEREBY CERTIFY that on the 19 day of January, 2020 I served a true and correct  
19 copy of the foregoing MOTION, upon each of the parties by electronic service through  
20 Wiznet, the Eighth Judicial District Court's e-filing/e-service system, pursuant to  
21 N.E.F.C.R.9; and by depositing a copy of the same in a sealed envelope in the United States  
22 mail, Postage Pre-Paid, addressed as follows:

23 Clark County District Attorney's Office  
24 200 Lewis Ave., 3rd Floor  
25 Las Vegas, NV 89155  
26 motions@clarkcountyda.com  
27 pdmotions@clarkcountyda.com

28 /s/ Kelsey Bernstein  
An Employee of Mayfield Gruber & Sheets



RSPN  
STEVEN B. WOLFSON  
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Nevada Bar #001565  
MADILYN COLE  
Deputy District Attorney  
Nevada Bar #14693  
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: XVII

**STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENT IN SUPPORT OF  
DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA**

DATE OF HEARING: January 27, 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 Response to Defendant's Supplement and Amended Supplement in Support of Defendant's Motion to Withdraw Guilty Plea.

This Response 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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