

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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Elizabeth A. Brown
Clerk of Supreme Court

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Vol. III

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

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

10 On June 3, 2019, Defendant filed a Motion to Withdraw Guilty Plea. The State filed its
11 Opposition on July 10, 2019. An evidentiary hearing was held on November 20, 2019, wherein
12 Defendant's questioning of witnesses and argument was focused solely on whether the case
13 should have been dismissed, despite the fact that Defendant did not file a Motion to Dismiss
14 and Defendant had previously pleaded guilty over a year earlier. On January 13, 2019, this
15 Court issued a minute order directing both parties to address the fair and just analysis under
16 Stevenson v. State of Nevada, 354 P.3d 1277 (2015), in light of the recent Nevada Supreme
17 Court case, State of Nevada v. Inzunza, 135 Nev. Adv. Op. 69 (Dec. 26, 2019). On January 9,
18 2020, Defendant filed a Supplement in support of his Motion to Withdraw Guilty Plea. On
19 January 19, 2020, Defendant filed an Amended Supplement in support of his Motion to
20 Withdraw Guilty Plea. The State herein responds and incorporates its prior Opposition to
21 Defendant's Motion to Withdraw Guilty Plea.

22 **ARGUMENT**

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

24 A plea of guilty is presumptively valid, particularly where it is entered into on the
25 advice of counsel. Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). The
26 defendant has the burden of proving that the plea was not entered knowingly or voluntarily.
27 Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Wynn v. State, 96 Nev. 673,
28 615 P.2d 946 (1980); Housewright v. Powell, 101 Nev. 147, 710 P.2d 73 (1985). In

determining whether a guilty plea is knowingly and voluntarily entered, the court will review the totality of the circumstances surrounding the defendant's plea. Bryant, 102 Nev. at 271, 721 P.2d at 367. The proper standard set forth in Bryant requires the trial court to personally address a defendant at the time he enters his plea in order to determine whether he understands the nature of the charges to which he is pleading. Id. at 271; State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). The guidelines for voluntariness of guilty pleas “do not require the articulation of talismanic phrases.” Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d 1403, 1404 (1973). It requires only “that the record affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily.” Brady v. United States, 397 U.S. 742, 747-748, 90 S.Ct. 1463, 1470 (1970); United States v. Sherman, 474 F.2d 303 (9th Cir. 1973).

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

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

favoring withdrawal of his plea and therefore affirmed his judgment of conviction. Stevenson v. State, 131 Nev., Adv. Op. 61, slip. op. at 8 (Aug. 13, 2015).

In Stevenson, the Nevada Supreme Court found that none of the reasons presented warranted the withdrawal of Stevenson's guilty plea, including allegations that the members of his defense team lied about the existence of the video in order to induce him to plead guilty. The Court found similarly unconvincing Stevenson's contention that he was coerced into pleading guilty based on the compounded pressures of the district court's evidentiary ruling, standby counsel's pressure to negotiate a plea, and time constraints. As the Court noted, undue coercion occurs when a defendant is induced by promises or threats which deprive the plea of the nature of a voluntary act. Id. at 9, *quoting Doe v. Woodford*, 508 F. 3d 563, 570 (9th Cir. 2007).

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

In this case, just as in Stevenson, considering the totality of the circumstances, Defendant failed to present a sufficient reason to permit withdrawal of his guilty plea. Here,

1 by signing his GPA, Defendant represented that he was fully aware of the plea agreement in
2 this case:

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

5 GPA, p. 1.

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

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

13 GPA, p. 3.

14 Defendant also acknowledged that he was waiving various rights pursuant to the
15 agreement he entered into with the State. (See the section entitled "Waiver of Rights" on page
16 4 of Defendant's GPA). Moreover, in the section entitled "Voluntariness of Plea," Defendant
17 acknowledged that the following statements are true:

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

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

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

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

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

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

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

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

GPA, p. 5.

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

1. I have fully explained to the Defendant the allegations contained in the charge(s) to which guilty pleas are being entered.
2. I have advised the Defendant of the penalties for each charge and the restitution that the Defendant may be ordered to pay.
3. I have inquired of Defendant facts concerning Defendant's immigration status and explained to Defendant that if Defendant is not a United States citizen any criminal conviction will most likely result in serious negative immigration consequences including but not limited to:
 - a. The removal from the United States through deportation;
 - b. An inability to reenter the United States;
 - c. The inability to gain United States citizenship or legal residency;
 - d. An inability to renew and/or retain any legal residency status; and/or
 - e. An indeterminate term of confinement, by with United States Federal Government based on the conviction and immigration status.

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

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

GPA, p. 6.

Based on Defendant's representations on the record, the Court found Defendant's plea was freely and voluntarily entered and accepted Defendant's plea. In reviewing the totality of

circumstances, it is clear that 1) the defendant knowingly waived his privilege against self-incrimination, ***the right to trial by jury***, and the right to confront his accusers; 2) the plea was voluntary, was not coerced, and was not the result of a promise of leniency; 3) the defendant understood the consequences of his plea and the range of punishment; and 4) the defendant understood the nature of the charge, i.e., the elements of the crime.

Defendant entered his plea on September 21, 2018, but waited almost *one year* before filing his Motion To Withdraw Guilty Plea. Defendant claims that he should now be able to withdraw his plea based upon the failure of his prior counsel to litigate the timeliness of the State's prosecution against him. Motion to Withdraw Guilty Plea, p. 4. The contention this was a hastily entered plea, and not a strategic decision by Defendant and his counsel is belied by the record. Defendant attempts to get this Court to review the instant case and motions as if this is in fact a pretrial Motion to Dismiss. Defendant did not file a Motion to Dismiss, and Defendant waived his speedy trial right by pleading guilty. Therefore, Defendant's claims are waived.

State v. Inzunza, 135 Nev. Adv. Op. 69 (Dec. 26, 2019) Analysis

What Defendant attempts to do in his Supplement in Support of Motion to Withdraw Guilty Plea, as well as his Amended Supplement in Support of Motion to Withdraw Guilty Plea, is the same thing Defendant attempted to do during the evidentiary hearing, which is to forgo the fact that Defendant did in fact plead guilty. Defendant acknowledged his guilt and waived his Sixth Amendment speedy trial rights. Therefore, the analysis in State v. Inzunza, 135 Nev. Adv. Op. 69 (Dec. 26, 2019), is irrelevant to the instant case and bears no resemblance to Inzunza because Defendant's Sixth Amendment speedy trial right is not at issue in this case as evidenced by his guilty plea agreement.¹

¹ Defendant brings this Motion to Withdraw Guilty Plea before this Court and at no point did he seek to produce or provide the transcripts of his plea canvas. Thus, because this is his Motion and his burden, his failure to not request the transcripts does not provide a full record for this Court to review. This failure is fatal because “[i]t is [Defendant]’s responsibility ... to make and transmit an adequate appellate record to this court. When evidence upon which the lower court’s judgment rests is not included in the record, it is assumed that the record supports the district court’s decision.” M&R Investment Company, Inc. v. Mandarino, 103 Nev. 711, 718, 748 P.2d 488, 493 (1987). It is Defendant’s “responsibility to provide the materials necessary for this court’s review.” Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975).

1 In Inzunza, the Nevada Supreme Court addressed a defendant's speedy trial rights under
2 the Sixth Amendment. However, In Inzunza, the defendant filed a pretrial Motion to Dismiss,
3 which was ultimately granted by the District Court. In the instant case, Defendant pleaded
4 guilty, and then almost one year later, filed a Motion to Withdraw Guilty plea wherein the
5 basis for withdrawal of plea was a violation of his speedy trial rights. What is glaringly missing
6 from Defendant's Motion to Withdraw Guilty Plea, Supplement to Withdraw Guilty Plea, and
7 Amended Supplement to Withdraw Guilty Plea, is any mention of the fact that Defendant's
8 speedy trial rights are not at issue here because he pleaded guilty, and waived his right to a
9 jury trial. GPA, p. 5.

10 Furthermore, Defendant claims that even though no Motion to Dismiss was filed in this
11 case, such motion should have been filed. Motion to Dismiss, p. 4. Additionally, he explains
12 that his prior defense counsel should have explained the merits of the issue and because he did
13 not, he should be permitted to withdraw his plea. Id. Ultimately, what Defendant is asserting
14 is that Defendant's prior counsel failing to explain the merits of a motion to dismiss based off
15 a violation of a speedy trial right, is essentially the same as an attorney failing to explain
16 immigration consequences as mandated in Padilla v. Kentucky, 130 S.Ct. 1473, 559 U.S. 356
17 (2010). Thus, because Defendant's prior counsel did not advise on that specific issue he was
18 ineffective and Defendant should be permitted to withdraw his plea. Motion to Dismiss, p. 4

19 Defendant's argument lacks merit for multiple reasons. There is zero existing legal
20 authority that Defendant cites to, nor exists, that mandate a defense attorney to inform a
21 defendant about success on the merits regarding a motion to dismiss charges involving a
22 speedy trial right. Moreover, Inzunza was recently decided December 26, 2019, fifteen months
23 after Defendant's entry of plea. To argue that Defendant's prior defense counsel should have
24 advised Defendant to not enter a guilty plea agreement based upon Nevada Supreme Court
25 case law that did not even exist at the time is illogical. One of the goals of the fair and just
26 analysis "[wa]s to allow a hastily entered plea made with unsure heart and confused mind to
27 be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several
28 weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading

1 guilty." Stevenson, 354 P.3d at 1281-1282 (citing United States v. Alexander, 948 F.2d 1002,
2 1004 (6th Cir. 1991)). This was not a hastily entered plea, and Defendant waited more than just
3 several weeks, he waited almost nine months before attempting to withdraw his plea.
4 Defendant's speedy trial rights were waived and Defendant's prior defense counsel was not
5 ineffective for not discussing legal remedies regarding speedy trial rights, as there is no legal
6 basis to support such a contention. Moreover, although the transcript of Defendant's plea
7 canvas was never provided by Defendant, presumably he was canvased by the Court that his
8 reasoning for entering a plea of guilt was because in truth and fact, he was guilty. Additionally,
9 it is pure speculation at this point that this was anything but a strategic decision. Based on the
10 fair and just analysis delineated in Stevenson, allowing Defendant to withdraw his plea at this
11 juncture in the proceedings would be in complete opposition to the goals of the fair and just
12 analysis. Thus, Defendant's request should be denied.

13 CONCLUSION

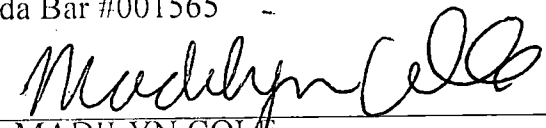
14 The totality of the circumstances in this case clearly demonstrate that Defendant's plea
15 was knowingly and voluntarily made, and that Defendant understood the nature of the offense
16 and the consequences of his plea. Based upon the foregoing, the State respectfully requests
17 that this Court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

18 DATED this 27th day of January, 2020.

19 Respectfully submitted,

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

23 BY


24 MADILYN COLE
25 Deputy District Attorney
26 Nevada Bar #14693

27 ///

28 ///

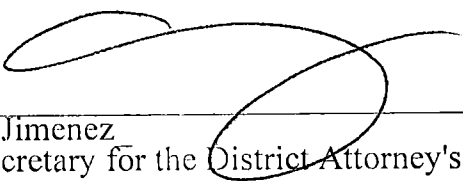
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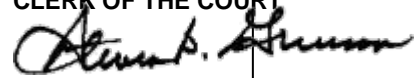
1 CERTIFICATE OF ELECTRONIC FILING

2 I hereby certify that service of STATE'S RESPONSE TO DEFENDANT'S
3 SUPPLEMENT IN SUPPORT OF DEFENDANT'S MOTION TO WITHDRAW GUILTY
4 PLEA, was made this 27th day of January, 2020, by Electronic Filing to:

5 DAMIAN SHEETS, ESQ.
6 dsheets@defendingnevada.com

7 
8 C. Jimenez
9 Secretary for the District Attorney's Office

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1 REP
2 MAYFIELD GRUBER & SHEETS
3 Damian Sheets, Esq.
4 Nevada Bar No. 10755
5 Kelsey Bernstein, Esq.
6 Nevada Bar No. 13825
7 726 S. Casino Center Blvd.
8 Las Vegas, Nevada 89101
9 Telephone: (702) 598-1299
10 Facsimile: (702) 598-1266
11 dsheets@defendingnevada.com
12 Attorney for Defendant
13 Kevin Sunseri

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

11 State of Nevada,	)	Case No.: C-18-334808-1
12 Plaintiff	)	Dept. No: XVII
)	
13 vs.	)	REPLY TO SUPPLEMENT IN SUPPORT OF
	)	DEFENDANT'S MOTION TO WITHDRAW
14 Kevin Sunseri,	)	GUILTY PLEA AND MOTION TO DISMISS
15 Defendant)	
	)	Date of Hearing: March 26, 2020
	)	Time of Hearing: 8:30am

17
18 COMES NOW, Defendant Kevin Sunseri, by and through his attorney of record,
19 DAMIAN SHEETS, ESQ. of the firm Mayfield Gruber & Sheets, hereby submits this
20 Defendant's Reply to Supplement in Support of Defendant's Motion to Withdraw Guilty Plea
21 and Motion to Dismiss.
22

23 ///

24
25 ///

MEMORANDUM OF POINTS AND AUTHORITIES

Given the State's Response is brief with regards to the substantive analysis of *Doggett* and *Inzunza*, Defense will endeavor to keep its Reply equally so, particularly given the thorough filings and hearings that have addressed this issue thus far.

Second, the State argues that “what Defendant is asserting is that the Defendant’s prior counsel failing to explain the merits of a motion to dismiss based off a violation of a speedy trial right, is essentially the same as an attorney failing to explain immigration consequences as mandated in *Padilla v. Kentucky*, 130 S.Ct. 1473, 559 U.S. 356 (2010)” (State’s Response, 8: 13); the State then proceeds to discuss why comparing the instant issue to immigration consequences lacks merit. However, upon review of Defendant’s original Motion, the Supplement, and the Amended Supplement, Defense never once mentioned *Padilla*, nor does the word “immigration” appear in any of these pleadings. Therefore, the State may be confusing the instant case with another, but this argument regarding immigration was never offered by Mr. Sunseri, and so Defense will decline to address it further.

1 Third, the State opposes Mr. Sunseri's request to withdraw his plea because "[t]o
2 argue that Defendant's prior defense counsel should have advised Defendant not to enter a
3 guilty plea based upon Nevada Supreme Court case law that did not even exist at the time is
4 illogical" (State's Response, 8: 23). If the *Inzunza* decision created new law that was not in
5 effect at the time Mr. Sunseri had entered his plea, the State's argument may have merit;
6 however, *Inzunza* was merely the application of *Doggett* and *Barker*, both of which are
7 United States Supreme Court cases that were in effect when Mr. Sunseri entered his plea.
8 The underlying law on which Mr. Sunseri made his request was both existent and
9 controlling during all times relevant to his case.
10
11

12 Lastly, the State claims that "it is pure speculation at this point that this was
13 anything but a strategic decision" (State's Response, 9: 8). Defense cannot imagine, in any
14 circumstances, how accepting a guilty plea to multiple felonies, which contemplate years in
15 prison and without credit to which he would be entitled, is a "strategic decision" in lieu of a
16 complete dismissal.
17

18 To this end, Defense would note that the State failed to address *Doggett* and
19 *Inzunza's* application to this case or why Mr. Sunseri is not entitled to an outright dismissal,
20 which undoubtedly is a "fair and just reason" to withdraw a guilty plea. Given this was the
21 purpose of the supplements requested, this Court should construe the State's failure to
22 oppose the substantive grounds raised therein as a concession that such arguments are
23 meritorious. *King v. Cartlidge*, 121 Nev. 926, 927, 124 P.3d 1161, 1162 (2005) (stating
24 that an unopposed motion may be considered as an admission of merit and consent
25 to grant the motion); *Foster v. Dingwall*, 126 Nev. 56, 66, 227 P.3d 1042, 1049 (2010); *see*
26
27
28

1 also *Walls v. Brewster*, 112 Nev. 175, 178, 912 P.2d 261, 263 (1996) (district court acted
2 properly in construing plaintiff's failure to respond to motion to dismiss as admission that
3 motion was meritorious).

4
5 Therefore, Mr. Sunseri respectfully requests this Court permit him to withdraw his
6 plea and dismiss this case.

7
8 DATED this 26 day of February, 2020.

9 By:
10 MAYFIELD GRUBER & SHEETS

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

16
17 **CERTIFICATE OF SERVICE**

18 I HEREBY CERTIFY that on the 26 day of February, 2020, I served a true and correct
19 copy of the foregoing REPLY, upon each of the parties by electronic service through Wiznet,
20 the Eighth Judicial District Court's e-filing/e-service system, pursuant to N.E.F.C.R.9; and by
21 depositing a copy of the same in a sealed envelope in the United States mail, Postage Pre-
22 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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****February 27, 2020**

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

February 27, 2020 3:00 AM Minute Order

HEARD BY: Villani, Michael**COURTROOM:** Chambers**COURT CLERK:** Shannon Reid

JOURNAL ENTRIES

- Defendant's Motion to Withdraw Plea came before this court on January 27, 2020, whereupon took the matter under further advisement. After considering all pleadings and arguments, the Court renders its decision as follows:

Defendant was originally charged with Conspiracy to Commit Robbery, Robbery with Use of a Deadly Weapon, and Kidnapping with use of a Deadly Weapon. These charges arise out of an alleged incident occurring on December 10, 2015. After subsequent investigation on January 23, 2016 it was learned that a vehicle involved in the crime was registered to the Defendant. Pre-Sentence Investigation Report, p. 12. On or about August 27, 2018 Defendant was arrested for the subject case and pled guilty to the amended charges of Robbery and Ownership or Possession of Firearm by Prohibited Person. As part of the Guilty Plea Agreement the State agreed to have no objection to concurrent time between the two counts and to not seek habitual treatment. The PSI identifies 24 prior separate felony cases which qualified Defendant for habitual criminal treatment under NRS 207.010(1)(b).

Defendant seeks to withdraw his plea of guilty based upon a claim that there is a general likelihood that this case may be subject to dismissal pursuant to Doggett v. United States. Defendant's Motion to Withdraw Guilty Plea, p. 3. Defendant does not claim that he did not understand the terms of the Guilty Plea Agreement nor that his plea canvass was incomplete.

Defendant claims that pursuant to Doggett and Stevenson v State, 354 P.3d 1277 (Nev. 2015), he should be allowed to withdraw his plea. Doggett dealt with a claim of pre-indictment delay, unlike the present case where the defendant accepted a negotiation and pled guilty to substantially reduced charges and avoided the possibility of being sentenced as a habitual felon. Subsequent to

PRINT DATE: 02/27/2020

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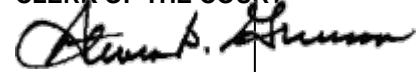
Minutes Date: February 27, 2020

Defendant's filing his Motion to Withdraw Guilty Plea, the Nevada Supreme Court issued its opinion in *State v Inzunza*, 135 Nev. Adv. Op. 69 (2019). In light of that decision, this Court requested supplemental briefing as to what impact, if any, the Inzunza case has on the pending Motion. The Court notes that Inzunza does not deal with a motion to withdraw after entry of plea but an appeal of an order granting a motion to dismiss.

The Stevenson court disavowed the exclusive focus on the validity of a plea analysis but directed the Court to analyze the totality of the circumstances. *Stevenson*, 354 P.3d at 1280-81. Defendant does not allege that information was withheld from him by his attorney, that he was coerced into entering his plea, or that he entered into the plea in a hasty fashion. Considering the totality of the circumstances here, Defendant's Motion is denied. The Court's decision should not be interpreted to preclude the Defendant from pursuing other avenues of relief.

Therefore, Court ORDERED, Motion DENIED. State to submit a proposed order consistent with the foregoing within ten (10) days after counsel is notified of the ruling and to distribute a filed copy to all parties involved pursuant to EDCR 7.21.

CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve /SR 02/27/2020



MOT
NEVADA DEFENSE GROUP
Damian Sheets, Esq.
Nevada Bar No. 10755
Kelsey Bernstein, Esq.
Nevada Bar No. 13825
714 S. Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 988-2600
Facsimile: (702) 988-2600
dsheets@defendingnevada.com
Attorney for Defendant
Kevin Sunseri

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

State of Nevada,	)	Case No.: C-18-334808-1
Plaintiff	)	Dept. No: XVII
)	
vs.	)	MOTION TO DISMISS PURSUANT TO
	)	DOGGETT v. UNITED STATES
Kevin Sunseri,)	
Defendant)	
)	

COMES NOW, Defendant Kevin Sunseri, by and through his attorney of record,
DAMIAN SHEETS, ESQ. of the firm Mayfield Gruber & Sheets, hereby submits this
Defendant's Motion to Dismiss Pursuant to *Doggett v. United States*.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2

3 **I. Statement of the Case**

4 On January 21, 2016, Kevin Sunseri was arraigned in Henderson Justice Court on
5 unrelated felony charges, which were subsequently bound over to the Eighth Judicial
6 District Court on February 9, 2016 (C-16-312626-1). Ten days later, he pled guilty
7 pursuant to a plea agreement with a stipulated sentence of two to five years in the Nevada
8 Department of Corrections. He was sentenced on May 25, 2016 in accordance with the plea
9 agreement. Mr. Sunseri served his sentence in the Nevada Department of Corrections until
10 he was released on parole on August 27, 2018.
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12 However, on that date, he was in fact not released on parole; instead, he was re-
13 booked on an arrest warrant that had apparently remained outstanding in NCIC since July
14 28, 2016 – over two years ago – that initiated the instant case. He was never apprehended
15 or informed of the warrant the entire period that he remained in custody until *the very day*
16 that he was scheduled to be released, despite the warrant being issued two months after
17 Mr. Sunseri was sentenced and in the custody of the State. Thus, instead of initiating the
18 criminal process two years ago and likely reaching a speedy resolution to run a sentence
19 concurrent with his existing 2-5 year stipulated sentence, Mr. Sunseri was instead
20 presented with an entirely new criminal case when he was finally on the verge of being
21 released from custody. The arrest warrant was formally executed on August 27, 2018, the
22 same day of his anticipated release.
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1 On these new charges, Mr. Sunseri unconditionally waived his right to a preliminary
2 hearing pursuant to negotiations and entered a guilty plea in this case on September 21,
3 2018. His sentencing is scheduled for March 26, 2020.

4
5 Prior to sentencing, Defense Counsel filed a Motion to Withdraw Guilty Plea based
6 on the subsequent *Doggett* analysis; this Court denied the Motion to Withdraw Guilty Plea
7 by Minute Order on February 27, 2020. In that Order, this Court noted that recent cases
8 decided by the Nevada Supreme Court which address the *Doggett* analysis, namely *Inzunza*
9 *v. State*, 135 Nev. Adv. Op. 69 (2019), “does not deal with a motion to withdraw after entry
10 of plea but an appeal of an order granting a motion to dismiss.” Although this Court
11 ultimately denied Mr. Sunseri’s request to withdraw his plea under the totality of
12 circumstances, the Court further stated that “[t]he Court’s decision should not be
13 interpreted to preclude the defendant from pursuing other avenues of relief.” Defense
14 Counsel has interpreted this to hold that, although the Court denied the Motion to
15 Withdraw Guilty Plea, the instant Motion to Dismiss is not precluded as an alternative
16 avenue of relief, and similarly remains governed by *Doggett* and *Inzunza*.
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19 From the time of the issuance of the warrant to the formal execution thereof, the
20 warrant lingered while Mr. Sunseri was in custody for 760 days, or 2 years and 30 days.

21 This Motion to Dismiss follows.

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

- While the factors were initially set forth in *Barker*, many of them were revisited in greater depth in *Doggett v. United States*, 112 S.Ct. 2686 (1992). The Court ultimately concluded that once the right to a speedy trial has been violated, dismissal “is the only possible remedy.” *Barker*, 407 U.S. at 552. Recently, the Nevada Supreme Court also published a significant decision on this issue, *Inzunza v. State*, 135 Nev. Adv. Op. 69 (Dec. 26, 2019).

The length of delay is what ultimately triggers a speedy trial analysis. “Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the

1 other factors that go into the balance.” *Barker*, 92 S.Ct. at 2192. This was further discussed
2 in *Doggett*, which held that a one year delay was sufficient as a threshold to “mark the point
3 at which courts deem delay unreasonable enough to trigger the *Barker* inquiry.” The
4 Nevada Supreme Court has also applied this standard. “A post-accusation delay meets this
5 standard as it approaches one year.” *State v. Inzunza*, 135 Nev. Adv. Op. 69, 6.

7 *Doggett* goes into considerable detail regarding how presumptive prejudice plays
8 into the equation. In *Doggett*, the defendant was arrested 8 years after his indictment. The
9 Court found that the delay was presumptively prejudicial (noting the one-year threshold),
10 that the Government was negligent in seeking him out, and that *Doggett* asserted his rights
11 as soon as he became aware of the charges. Since the delay was enough to create the
12 “presumption of prejudice,” the fourth factor was also met without a need to show actual
13 prejudice, and the Court reversed his conviction.
14

15 In the instant case, more than double the required amount of time has elapsed from
16 the issuance of the arrest warrant to the present date, going *well beyond* the one year
17 threshold needed to trigger the initial inquiry and establish “presumptive prejudice.” On its
18 face, per both U.S. and Nevada Supreme Court rulings, the extensive length of time after the
19 issuance of the warrant establishes presumptive prejudice against him.
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21 22 *B. The Delay was Not Caused by the Defendant* 23

24 Delays which are attributable to the State, or agencies under the power of the State,
25 favor dismissal. The Supreme Court in *Barker* and *Doggett* set forth a spectrum to gauge
26 how the root cause of the delay factors into the overall analysis. On one end of the
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1 spectrum is State “diligent prosecution,” and on the other end is State “bad-faith delays.”
2 The Court in *Doggett* recognized that most delays will fall somewhere in the middle as
3 attributable to State “negligence.”
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5 However, even if negligence falls in the middle of the spectrum, *it nonetheless comes*
6 *down in favor of the defendant for purposes of a speedy trial violation.* “A more neutral
7 reason such as negligence or overcrowded courts should be weighed less heavily [than bad
8 faith] but nevertheless should be considered since the ultimate responsibility for such
9 circumstances must rest with the government rather than with the defendant.” *Barker*, 92
10 S.Ct. at 2191.
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12 This was subsequently reaffirmed in *Doggett*. “While not compelling relief in every
13 case where bad-faith delay would make relief virtually automatic, neither is negligence
14 automatically tolerable simply because the accused cannot demonstrate exactly how it
15 prejudiced him.” *Doggett*, 112 S.Ct. at 2693. The Court also noted “[a]lthough negligence is
16 obviously to be weighed more lightly than a deliberate intent to harm the accused’s
17 defense, *it still falls on the wrong side of the divide between acceptable and unacceptable*
18 *reasons for delaying a criminal prosecution once it has begun.*” *Id.* (emphasis added).
19

20 The Inzunza case is also instructive here. In *Inzunza*, the named victim disclosed to
21 her therapist that Inzunza had sexually assaulted her. The victim and her mother went to
22 the police department to file a report, informing officers that Inzunza had moved out of
23 state to New Jersey and providing leads about Inzunza’s whereabouts through Facebook.
24 The detective unsuccessfully attempted to locate Inzunza locally and submitted the case to
25 the District Attorney’s office to file charges. After doing so, the detective entered the
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1 warrant into the NCIC database, but thereafter failed to take any steps to inform or
2 apprehend him on the warrant.

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

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

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

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

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

17 There is absolutely no question that the State knew (or could have with even
18 minimal diligence) Mr. Sunseri’s whereabouts, yet the State did absolutely nothing to
19 advance the prosecution against him, resulting in more than two years of custody that
20 could have been credited towards the instant case. The *Doggett* Court noted that federal
21 agents were negligent in their pursuit because they “could have found him within minutes.”
22 *Id.* The State’s lack of diligence in this case is far more egregious; they did not need to “find”
23 Mr. Sunseri at all – he was already in State custody. They simply needed to type in his
24 name. Because the delay is the product of State gross negligence, this factor favors
25 dismissal.
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1 C. *Mr. Sunseri Did Not Waive his Federal Speedy Trial Right*

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3 The State will likely argue that Mr. Sunseri waived his right to a speedy trial when
4 he entered into his Guilty Plea Agreement, which contains a written waiver of several
5 constitutional rights, including “[t]he constitutional right to a speedy and public trial by an
6 impartial jury.”

7
8 Like Doggett before her, Mr. Sunseri did not know about this case for many years
9 after the warrant was issued; naturally, he cannot be responsible for failing to assert his
10 speedy trial right prior to entering his plea because, as the Court noted in *Barker*, “there are
11 a number of situations, such as where the defendant is unaware of the charge or where the
12 defendant is without counsel, in which it is unfair to require a demand...” *Barker*, 407 U.S.
13 at 529. Furthermore, “a defendant has no duty to bring himself to trial, the State has that
14 duty as well as the duty of insuring that the trial is consistent with due process.” *Id.* at 527.

15
16 The only question, therefore, is whether Mr. Sunseri’s waiver in the Guilty Plea
17 Agreement precludes him entirely from asserting a federal constitutional violation; Defense
18 holds it does not. *Inzunza* provides strong guidance on how Nevada applies this particular
19 factor, and under this analysis, this factor actually weighs in favor of the defense. The
20 reason is simple: this factor focuses exclusively on the Defendant’s invocation of this right
21 “during the period of time between the filing of charges and his arrest.” Activity that occurred
22 subsequent to arrest, such as waiving the statutory right to a speedy trial (which occurred
23 in *Inzunza*) or the entering of a guilty plea, is not applicable to the analysis.

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

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

17 The Nevada Supreme Court affirmed this position, focusing only on invocation of
18 Inzunza's speedy trial rights "during the period of time between the filing of charges and
19 his arrest." Because this analysis focuses solely on that limited time frame, activities that
20 occurred after arrest – whether it be waiving the right to a speedy trial in *Inzunza* or
21 waiving the right to a speedy trial in this case – this factor still comes down in favor of
22 defense.

23 Even if this Court does not necessarily conclude this factor is in favor of Mr. Sunseri,
24 at a minimum it cannot be held against him for failure to assert his rights while the arrest
25 warrant remained outstanding because Mr. Sunseri, while in State custody, did not know of
26 the pending warrant. "[A] defendant must know that the State has filed charges against him
27 to have it weighed against him. Thus, the District Court did not abuse its discretion in
28 finding the assertion of the right was not weighed against Inzunza under *Doggett*." *Inzunza*,
135 Nev. Adv. Op., 8 (internal citations omitted).

1 In summation, this factor focuses on the limited time frame of warrant to arrest, and
2 whether the defendant asserted his speedy trial rights (which would weigh in his favor
3 most heavily), whether he failed to assert his speedy trial rights (which cannot be used
4 against him if he was unaware of the outstanding warrant), and whether he “acquiesced” to
5 the delay by knowing of the warrant and failing to take any additional steps. Mr. Sunseri
6 most likely falls into the second category, as he was unaware of the outstanding warrant
7 and thus failed to assert his speedy trial rights prior to arrest. As a result, this factor should
8 not be weighed negatively regardless of his conduct or waivers after arrest, which fall
9 outside the scope of the *Doggett* analysis.
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12 *D. Presumed Prejudice Exists from the Delay*
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14 The Court in *Barker* articulated three facets of prejudice: (i) to prevent oppressive
15 pretrial incarceration; (ii) to minimize anxiety and concern of the accused; (iii) to limit the
16 possibility that the defense will be impaired. *Barker*, 407 U.S. at 2193.
17

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

7
8 Here, like in *Doggett*, presumptive prejudice exists due to the unreasonably long
9 delay. As noted above, the *Doggett* Court stated that presumptive prejudice will typically
10 attach after a delay of one year. While the excessive delay does not bear on pre-trial
11 detention or anxiety, the delay does establish as a matter of law the presumption that a
12 defendant's case has been impaired.

13
14 *Barker* explicitly recognized that impairment of one's defense is the
15 most difficult form of speedy trial prejudice to prove because time's
16 erosion of exculpatory evidence and testimony 'can rarely be shown'...
17 Thus, we generally have to recognize that excessive delay
presumptively compromises the reliability of a trial in ways that
neither party can prove or, for that matter, identify. *Id.*

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

3 Characterizing the Government's inaction over the course of the delay as
4 "egregious," the Court in *Doggett* ultimately determined that the delay entitled the
5 defendant to a legal presumption of prejudice, and thus he need not specify exactly how he
6 was prejudiced by the delay. *Id.* Accordingly, the *Doggett* Court ordered the case dismissed.
7 Similarly, here the delay has triggered the presumption of prejudice, so Mr. Sunseri need
8 not demonstrate any examples of actual prejudice.
9

10 The *Inzunza* case further clarified how the presumption of prejudice applies to this
11 analysis:
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13 As *Doggett* makes clear, the prejudice factor of *Barker* may weigh in
14 favor of the defendant even though he 'failed to make any affirmative
15 showing that the delay weakened his ability to raise specific defenses,
16 elicit specific testimony, or produce specific items of evidence.'... When
17 the presumption of prejudice is applied, the State is afforded the
18 opportunity to rebut the presumption and detail how the defendant
19 was not prejudiced by the delay. If the State is unable to rebut the
20 presumption, the *Barker* factors will weigh in a defendant's favor,
21 necessitating the 'severe remedy of dismissal'... *Id. at 9.*

22 Even when the accused remains at liberty during the period the warrant remains
23 outstanding, the presumption of prejudice to the case nonetheless attaches. The remaining
24 factors, such as the length of the delay and the reason for the delay, likewise favor dismissal
25 regardless of his or her custodial status. As the presumption of prejudice has attached in
26 this case, the burden now shifts to the State to rebut that presumption.

27 Defense would note that an evidentiary hearing for the State to rebut this
28 presumption has already been held in this case, with the testimony of individuals most

1 knowledgeable of Mr. Sunseri's investigation and warrant from the Las Vegas Metropolitan
2 Police Department. However, despite ample opportunities, the witnesses could identify no
3 affirmative steps whatsoever to inform or apprehend Mr. Sunseri of the warrant, nor could
4 they provide a legitimate explanation as to how or why a warrant remained outstanding for
5 over two years for an individual who was already in State custody. Therefore, Defense
6 maintains the State has failed to rebut the presumption, and dismissal is warranted.
7

8
9 Conclusion

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11 As of this writing, **over 1,567 days** have elapsed from the offense date – 4 years, 3
12 months and 15 days. Because the excessive delay creates a strong presumption of prejudice
13 against Mr. Sunseri, the instant case meets all four factors of the *Barker/Doggett* test for
14 establishing a violation of Mr. Sunseri's Sixth Amendment right to a speedy trial and his
15 associated due process rights. He therefore respectfully requests that this Court, consistent
16 with controlling United States and Nevada Supreme Court precedent, dismiss the case.
17

18
19 DATED this 25 day of March, 2020.

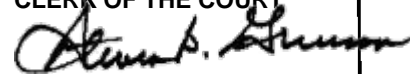
20 By:
21 MAYFIELD GRUBER & SHEETS

22 By: /s/ Damian Sheets
23 Damian Sheets, Esq.
24 Nevada Bar No. 10755
25 726 S. Casino Center Blvd.
26 Las Vegas, Nevada 89101
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Clark County District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155
motions@clarkcountyda.com
pdmotions@clarkcountyda.com

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1 **FCL**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 MADILYN COLE
6 Chief Deputy District Attorney
7 Nevada Bar #14693
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 KEVIN SUNSERI,
13 #8266913

14 Defendant.

CASE NO: C-18-334808-1

DEPT NO: XVII

15 **FINDINGS OF FACT, CONCLUSIONS OF**
16 **LAW AND ORDER**

17 DATE OF HEARING: November 20, 2019
18 TIME OF HEARING: 10:00 a.m.

19 THIS CAUSE having come on for hearing before the Honorable JUDGE MICHAEL
20 VILLANI, District Judge, on the 20th of November, 2019, the Petitioner being present,
21 REPRESENTED BY DAMIEN SHEETS, the Respondent being represented by STEVEN B.
22 WOLFSON, Clark County District Attorney, by and through MADILYN COLE, Deputy
23 District Attorney, and the Court having considered the matter, including briefs, transcripts,
24 arguments of counsel, and documents on file herein, now therefore, the Court makes the
25 following findings of fact and conclusions of law:

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1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

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

10 On June 3, 2019, Defendant filed a Motion to Withdraw Guilty Plea. The State filed its
11 Opposition on July 10, 2019. An evidentiary hearing was held on November 20, 2019, wherein
12 Defendant's questioning of witnesses and argument was focused solely on whether the case
13 should have been dismissed, despite the fact that Defendant did not file a Motion to Dismiss
14 and Defendant had previously pleaded guilty over a year earlier. On January 13, 2019, this
15 Court issued a minute order directing both parties to address the fair and just analysis under
16 Stevenson v. State of Nevada, 354 P.3d 1277 (2015), in light of the recent Nevada Supreme
17 Court case, State of Nevada v. Inzunza, 135 Nev. Adv. Op. 69 (Dec. 26, 2019). On January 9,
18 2020, Defendant filed a Supplement in support of his Motion to Withdraw Guilty Plea. On
19 January 19, 2020, Defendant filed an Amended Supplement in support of his Motion to
20 Withdraw Guilty Plea. On January 27, 2030, the State filed its response to Defendant's
21 Amended Supplement in support of his Motion to Withdraw Guilty Plea. Defendant filed his
22 Reply in Support on February 26, 2020. This Court denied Defendant's Motion to Withdraw
23 Guilty Plea on February 27, 2020.

24 **ARGUMENT**

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

26 A plea of guilty is presumptively valid, particularly where it is entered into on the advice
27 of counsel. Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). The defendant
28 has the burden of proving that the plea was not entered knowingly or voluntarily. Bryant v.

1 State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Wynn v. State, 96 Nev. 673, 615 P.2d
2 946 (1980); Housewright v. Powell, 101 Nev. 147, 710 P.2d 73 (1985). In determining
3 whether a guilty plea is knowingly and voluntarily entered, the court will review the totality
4 of the circumstances surrounding the defendant's plea. Bryant, 102 Nev. at 271, 721 P.2d at
5 367. The proper standard set forth in Bryant requires the trial court to personally address a
6 defendant at the time he enters his plea in order to determine whether he understands the nature
7 of the charges to which he is pleading. Id. at 271; State v. Freese, 116 Nev. 1097, 1105, 13
8 P.3d 442, 448 (2000). The guidelines for voluntariness of guilty pleas "do not require the
9 articulation of talismanic phrases." Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d 1403, 1404
10 (1973). It requires only "that the record affirmatively disclose that a defendant who pleaded
11 guilty entered his plea understandingly and voluntarily." Brady v. United States, 397 U.S.
12 742, 747-748, 90 S.Ct. 1463, 1470 (1970); United States v. Sherman, 474 F.2d 303 (9th Cir.
13 1973).

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

23 The Nevada Supreme Court decided in Stevenson v. State, 131 Nev., Adv. Op. 61, slip.
24 op. at 8 (Aug. 13, 2015), holding that the statement in Crawford v. State, 117 Nev. 718, 30
25 P.3d 1123 (2001), which focuses the "fair and just" analysis solely upon whether the plea was
26 knowing, voluntary, and intelligent is more narrow than contemplated by NRS 176.165. The
27 Nevada Supreme Court therefore disavowed Crawford's exclusive focus on the validity of the
28 plea and affirmed that the district court must consider the totality of the circumstances to

1 determine whether permitting withdrawal of a guilty plea before sentencing would be fair and
2 just. However, the Court also held that appellant had failed to present a fair and just reason
3 favoring withdrawal of his plea and therefore affirmed his judgment of conviction. Stevenson
4 v. State, 131 Nev., Adv. Op. 61, slip. op. at 8 (Aug. 13, 2015).

5 In Stevenson, the Nevada Supreme Court found that none of the reasons presented
6 warranted the withdrawal of Stevenson's guilty plea, including allegations that the members
7 of his defense team lied about the existence of the video in order to induce him to plead guilty.
8 The Court found similarly unconvincing Stevenson's contention that he was coerced into
9 pleading guilty based on the compounded pressures of the district court's evidentiary ruling,
10 standby counsel's pressure to negotiate a plea, and time constraints. As the Court noted, undue
11 coercion occurs when a defendant is induced by promises or threats which deprive the plea of
12 the nature of a voluntary act. Id. at 9, *quoting* Doe v. Woodford, 508 F. 3d 563, 570 (9th Cir.
13 2007).

14 The Nevada Supreme Court also rejected Stevenson's implied contention that
15 withdrawal was warranted because he made an impulsive decision to plead guilty without
16 knowing definitively whether the video could be viewed. Stevenson did not move to withdraw
17 his plea for several months. The Court made clear that one of the goals of the fair and just
18 analysis is to allow a hastily entered plea made with unsure heart and confused mind to be
19 undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks,
20 and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty. Id.
21 at 10, *quoting* United States v. Alexander, 948 F.2d 1002, 1004 (6th Cir. 1991). The Court
22 found that considering the totality of the circumstances, they had no difficulty in concluding
23 that Stevenson failed to present a sufficient reason to permit withdrawal of his plea. Permitting
24 him to withdraw his plea under the circumstances would allow the solemn entry of a guilty
25 plea to become a mere gesture, a temporary and meaningless formality reversible at the
26 defendant's whim, which the Court cannot allow. Id. at 11, *quoting* United States v. Barker,
27 514 F. 2d 208, 222 (D.C. Cir. 1975).

28 //

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

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

7 GPA, p. 1.

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

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

15 GPA, p. 3.

16 Defendant also acknowledged that he was waiving various rights pursuant to the
17 agreement he entered into with the State. (See the section entitled "Waiver of Rights" on page
18 4 of Defendant's GPA). Moreover, in the section entitled "Voluntariness of Plea," Defendant
19 acknowledged that the following statements are true:

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

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

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

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

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

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

I am not now under the influence of any intoxicating liquor, a controlled
substance or other drug which would in any manner impair my ability to

comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

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

GPA, p. 5.

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

1. I have fully explained to the Defendant the allegations contained in the charge(s) to which guilty pleas are being entered.
 2. I have advised the Defendant of the penalties for each charge and the restitution that the Defendant may be ordered to pay.
 3. I have inquired of Defendant facts concerning Defendant's immigration status and explained to Defendant that if Defendant is not a United States citizen any criminal conviction will most likely result in serious negative immigration consequences including but not limited to:
 - a. The removal from the United States through deportation;
 - b. An inability to reenter the United States;
 - c. The inability to gain United States citizenship or legal residency;
 - d. An inability to renew and/or retain any legal residency status; and/or
 - e. An indeterminate term of confinement, by with United States Federal Government based on the conviction and immigration status.
- Moreover, I have explained that regardless of what Defendant may have been told by any attorney, no one can promise Defendant that this conviction will not result in negative immigration consequences and/or impact Defendant's ability to become a United States citizen and/or legal resident.
4. All pleas of guilty offered by the Defendant pursuant to this agreement are consistent with the facts known to me and are made with my advice to the Defendant.
 5. To the best of my knowledge and belief, the Defendant:
 - a. Is competent and understands the charges and the consequences of pleading guilty as provided in this agreement,
 - b. Executed this agreement and will enter all guilty pleas pursuant hereto voluntarily, and

1 c. Was not under the influence of intoxicating liquor, a controlled
2 substance or other drug at the time I consulted with the Defendant
as certified in paragraphs 1 and 2 above.

3 GPA, p. 6.

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

11 Defendant entered his plea on September 21, 2018, but waited almost one year before
12 filing his Motion To Withdraw Guilty Plea. Defendant claims that he should now be able to
13 withdraw his plea based upon the failure of his prior counsel to litigate the timeliness of the
14 State's prosecution against him. Motion to Withdraw Guilty Plea, p. 4. The contention this
15 was a hastily entered plea, and not a strategic decision by Defendant and his counsel is belied
16 by the record. Defendant attempted to get this Court to review the instant case and motions as
17 if this is in fact a pretrial Motion to Dismiss. Defendant did not file a Motion to Dismiss, and
18 Defendant waived his speedy trial right by pleading guilty. Therefore, Defendant's claims are
19 waived.

20 **State v. Inzunza, 135 Nev. Adv. Op. 69 (Dec. 26, 2019) Analysis**

21 What Defendant attempted to do in his Supplement in Support of Motion to Withdraw
22 Guilty Plea, as well as his Amended Supplement in Support of Motion to Withdraw Guilty
23 Plea, is the same thing Defendant attempted to do during the evidentiary hearing, which is to
24 forgo the fact that Defendant did in fact plead guilty. Defendant acknowledged his guilt and
25 waived his Sixth Amendment speedy trial rights. Therefore, the analysis in State v. Inzunza,
26 135 Nev. Adv. Op. 69 (Dec. 26, 2019), is irrelevant to the instant case and bears no
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28

1 resemblance to Inzunza because Defendant's Sixth Amendment speedy trial right is not at
2 issue in this case as evidenced by his guilty plea agreement.¹

3 In Inzunza, the Nevada Supreme Court addressed a defendant's speedy trial rights under
4 the Sixth Amendment. However, In Inzunza, the defendant filed a pretrial Motion to Dismiss,
5 which was ultimately granted by the District Court. In the instant case, Defendant pleaded
6 guilty, and then almost one year later, filed a Motion to Withdraw Guilty plea wherein the
7 basis for withdrawal of plea was a violation of his speedy trial rights. What is glaringly missing
8 from Defendant's Motion to Withdraw Guilty Plea, Supplement to Withdraw Guilty Plea, and
9 Amended Supplement to Withdraw Guilty Plea, is any mention of the fact that Defendant's
10 speedy trial rights are not at issue here because he pleaded guilty, and waived his right to a
11 jury trial. GPA, p. 5.

12 Furthermore, Defendant claimed that even though no Motion to Dismiss was filed in this
13 case, such motion should have been filed. Motion to Dismiss, p. 4. Additionally, he explained
14 that his prior defense counsel should have explained the merits of the issue and because he did
15 not, he should be permitted to withdraw his plea. Id. Ultimately, what Defendant asserted is
16 that Defendant's prior counsel failing to explain the merits of a motion to dismiss based off a
17 violation of a speedy trial right, is essentially the same as an attorney failing to explain
18 immigration consequences as mandated in Padilla v. Kentucky, 130 S.Ct. 1473, 559 U.S. 356
19 (2010). Thus, because Defendant's prior counsel did not advise on that specific issue he was
20 ineffective and Defendant should be permitted to withdraw his plea. Motion to Dismiss, p. 4

21 Defendant's argument lacks merit for multiple reasons. There is zero existing legal
22 authority that Defendant cites to, nor exists, that mandate a defense attorney to inform a
23 defendant about success on the merits regarding a motion to dismiss charges involving a

24 ¹ Defendant brings this Motion to Withdraw Guilty Plea before this Court and at no point did he seek to produce
25 or provide the transcripts of his plea canvas. Thus, because this is his Motion and his burden, his failure to not request the
26 transcripts does not provide a full record for this Court to review. This failure is fatal because "[i]t is [Defendant]'s
27 responsibility ... to make and transmit an adequate appellate record to this court. When evidence upon which the lower
28 court's judgment rests is not included in the record, it is assumed that the record supports the district court's
decision." M&R Investment Company, Inc. v. Mandarino, 103 Nev. 711, 718, 748 P.2d 488, 493 (1987). It is Defendant's
"responsibility to provide the materials necessary for this court's review." Jacobs v. State, 91 Nev. 155, 158, 532 P.2d
1034, 1036 (1975).

1 speedy trial right. Moreover, Inzunza was recently decided December 26, 2019, fifteen months
2 after Defendant's entry of plea. To argue that Defendant's prior defense counsel should have
3 advised Defendant to not enter a guilty plea agreement based upon Nevada Supreme Court
4 case law that did not even exist at the time is illogical. One of the goals of the fair and just
5 analysis "[wa]s to allow a hastily entered plea made with unsure heart and confused mind to
6 be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several
7 weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading
8 guilty." Stevenson, 354 P.3d at 1281-1282 (citing United States v. Alexander, 948 F.2d 1002,
9 1004 (6th Cir. 1991). This was not a hastily entered plea, and Defendant waited more than just
10 several weeks, he waited almost nine months before attempting to withdraw his plea.
11 Defendant's speedy trial rights were waived and Defendant's prior defense counsel was not
12 ineffective for not discussing legal remedies regarding speedy trial rights, as there is no legal
13 basis to support such a contention. Moreover, although the transcript of Defendant's plea
14 canvas was never provided by Defendant, presumably he was canvased by this Court that his
15 reasoning for entering a plea of guilt was because in truth and fact, he was guilty. Additionally,
16 it is pure speculation at this point that this was anything but a strategic decision. Based on the
17 fair and just analysis delineated in Stevenson, allowing Defendant to withdraw his plea at this
18 juncture in the proceedings would be in complete opposition to the goals of the fair and just
19 analysis. The totality of the circumstances in this case clearly demonstrate that Defendant's
20 plea was knowingly and voluntarily made, and that Defendant understood the nature of the
21 offense and the consequences of his plea. Based upon the foregoing, Defendant's Motion to
22 Withdraw Guilty Plea is denied.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Motion to Withdraw Guilty Plea shall be, and it is, hereby denied.

DATED this 29 day of March, 2020.



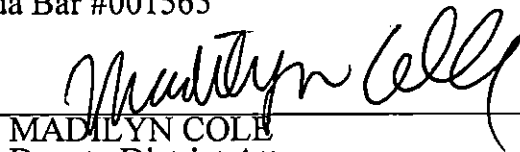
DISTRICT JUDGE

MICHAEL P. VILLANI

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



BY



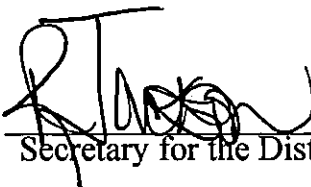
MADILEYN COLE
Deputy District Attorney
Nevada Bar #Deputy Bar

CERTIFICATE OF SERVICE

I certify that on the 1st day of April, 2020, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

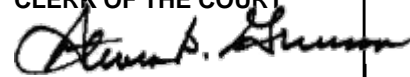
DAMIAN SHEETS, ESQ.
dsheets@defendingnevada.com

BY



Secretary for the District Attorney's Office

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1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 MADILYN COLE
6 Chief Deputy District Attorney
7 Nevada Bar #14693
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 KEVIN SUNSERI,
13 #8266913

14 Defendant.

CASE NO: C-18-334808-1

DEPT NO: XV11

15 **STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DIMISS**

16 DATE OF HEARING: April 7, 2020
17 TIME OF HEARING: 9:00 a.m.

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

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

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1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

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

10 On June 3, 2019, Defendant filed a Motion to Withdraw Guilty Plea. The State filed its
11 Opposition on July 10, 2019. An evidentiary hearing was held on November 20, 2019, wherein
12 Defendant’s questioning of witnesses and argument was focused solely on whether the case
13 should have been dismissed, despite the fact that Defendant did not file a Motion to Dismiss
14 and Defendant had previously pleaded guilty over a year earlier. On January 13, 2019, this
15 Court issued a minute order directing both parties to address the fair and just analysis under
16 Stevenson v. State of Nevada, 354 P.3d 1277 (2015), in light of the recent Nevada Supreme
17 Court case, State of Nevada v. Inzunza, 135 Nev.Adv. Op. 69 (Dec. 26, 2019). On January 9,
18 2020, Defendant filed a Supplement in support of his Motion to Withdraw Guilty Plea. On
19 January 19, 2020, Defendant filed an Amended Supplement in support of his Motion to
20 Withdraw Guilty Plea. On January 27, 2020, the State filed its Response to Defendant’s
21 Supplement in Support of his Motion to Withdraw Guilty Plea. On February 26, 2020,
22 Defendant filed his Reply. On February 27, 2020, the Court filed a Minute Order denying
23 Defendant’s Motion to Withdraw Guilty.

24 On April 1, 2020, Defendant filed the instant Motion to Dismiss. The State herein
25 responds.

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ARGUMENT

I. DEFENDANT'S MOTION TO DISMISS SHOULD BE DENIED

Defendant attempts to use the same previous arguments ruled on by this Court in an attempt to get this Court to reach a different result and reconsider its prior ruling. However, for the same reasons this Court denied Defendant's Motion to Withdraw Guilty Plea, are the same reasons the Court should dismiss this newly titled Motion to Dismiss.

Defendant pleaded guilty on September 21, 2018. Thus, pursuant to NRS 176.165, Defendant had an opportunity to petition the Court to withdraw his plea before sentencing. That Motion was denied on February 27, 2020, by this Court. Thus, Defendant has already exhausted the legal remedy available to him. This Court has already denied Defendant's Motion to Withdraw Guilty Plea considering the analysis of Stevenson v. State of Nevada, 354 P.3d 1277 (2015), Dogget v. United States, 112 S.Ct. 2686 (1992) and in light of the new Nevada case State v. Inzunza, 135 Nev.Adv. Op. 69 (Dec. 26, 2019).

By signing his GPA, Defendant represented that he was fully aware of the plea agreement in this case:

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

GPA, p. 1.

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

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

GPA, p. 3.

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

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

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

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

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

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

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

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

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

21 GPA, p. 5.

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

- 24 1. I have fully explained to the Defendant the allegations contained in the
25 charge(s) to which guilty pleas are being entered.
- 26 2. I have advised the Defendant of the penalties for each charge and the
27 restitution that the Defendant may be ordered to pay.
- 28 3. I have inquired of Defendant facts concerning Defendant's immigration
status and explained to Defendant that if Defendant is not a United States
citizen any criminal conviction will most likely result in serious negative
immigration consequences including but not limited to:
 - a. The removal from the United States through deportation;
 - b. An inability to reenter the United States;
 - c. The inability to gain United States citizenship or legal residency;
 - d. An inability to renew and/or retain any legal residency status; and/or
 - e. An indeterminate term of confinement, by with United States Federal
Government based on the conviction and immigration status.

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

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

GPA, p. 6.

It is clear from the record that 1) Defendant knowingly waived his privilege against self-incrimination, *the right to trial by jury*, and the right to confront his accusers; 2) the plea was voluntary, was not coerced, and was not the result of a promise of leniency; 3) the defendant understood the consequences of his plea and the range of punishment; and 4) the defendant understood the nature of the charge, i.e., the elements of the crime.

None of the law relied on by Defendant are analogous to the present factual scenario—because absent from all those cases is a guilty plea agreement. Defendant's Sixth Amendment speedy trial right is not at issue in this case as evidenced by his guilty plea agreement.¹ However, yet again, Defendant claims his speedy trials were violated, despite the fact that he pleaded guilty and his speedy trial rights were waived. The record acknowledges Defendant's guilty, and it is pure speculation at this point that this was anything but a strategic decision. Moreover, as this Court properly found, Doggett and Inzunza are unlike the present case where

¹ Defendant brings this Motion to Dismiss before this Court and at no point did he seek to produce or provide the transcripts of his plea canvas. Thus, because this is his Motion and his burden, his failure to not request the transcripts does not provide a full record for this Court to review. This failure is fatal because "[i]t is [Defendant's] responsibility ... to make and transmit an adequate appellate record to this court. When evidence upon which the lower court's judgment rests is not included in the record, it is assumed that the record supports the district court's decision." M&R Investment Company, Inc. v. Mandarin, 103 Nev. 711, 718, 748 P.2d 488, 493 (1987). It is Defendant's "responsibility to provide the materials necessary for this court's review." Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975).

1 Defendant accepted a negotiation and pleaded guilty to substantially reduced charges and
2 avoided the possibility of being sentenced as a habitual felony. Minute Order, filed February
3 27, 2020. As such, Defendant's motion is without merit.

4 **CONCLUSION**

5 Based upon the foregoing, the State respectfully requests that this Court deny
6 Defendant's Motion to Withdraw Guilty Plea.

7
8 DATED this 3rd day of April, 2020.

9 Respectfully submitted,

10 STEVEN B. WOLFSON
11 Clark County District Attorney
Nevada Bar #

12
13 BY

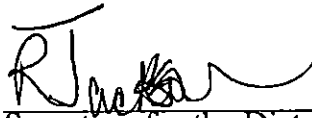


14 MADILYN COLE
15 Chief Deputy District Attorney
Nevada Bar #14693

16 **CERTIFICATE OF ELECTRONIC FILING**

17 I hereby certify that service of State's Opposition To Defendant's Motion To Dismiss,
18 was made this 3rd day of April, 2020, by Electronic Filing to:

19 DAMIAN SHEETS, ESQ.
20 dsheets@defendingnevada.com

21
22 

23 Secretary for the District Attorney's Office

24
25
26
27
28 MC/rmj/L3

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****May 26, 2020**

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

May 26, 2020**3:00 AM****Minute Order****HEARD BY:** Villani, Michael**COURTROOM:** Chambers**COURT CLERK:** Shannon Reid

JOURNAL ENTRIES

- Defendant's Motion to Dismiss Pursuant to Dogget v. United States was set for hearing before this court on April 7, 2020. Pursuant to Administrative Order 20-01 et seq., the Court took the matter under advisement to be decided on the pleadings. After considering all pleadings, the Court renders its decision as follows:

The Court adopts the State's procedural history.

Defendant entered into a guilty plea on September 21, 2018. The Court notes that Defendant has previously moved the Court to permit his withdrawal from that plea, and the Court denied that motion after finding that Defendant failed to allege that information was withheld from him by his attorney, that he was coerced into entering his plea, or that he entered into the plea in a hasty fashion. See Minute Order filed February 27, 2020. The bases for the instant Motion are three cases: Dogget v. United States, 112 S. Ct. 2686 (1992); State v. Inzunza, 135 Nev. Adv. Op. 69 (Dec. 26, 2019); and Barker v. Wingo, 407 U.S. 514 (1972). The Court considered the first two of these cases in its denial of Defendant's Motion to Withdraw Plea. See Minute Order filed February 27, 2020. After considering these cases again, along with Barker, the Court finds Defendant's instant Motion is without merit.

Defendant relies on all three cases to support the contention that his speedy trial rights were violated and the case should thus be dismissed. However, all three of those cases dealt with pre-trial motions to dismiss. Unlike the case at bar, none of the cases that Defendant relies on involved a Defendant who entered a valid guilty plea agreement.

Here, by signing the guilty plea agreement, Defendant represented that he was aware of the plea agreement in this case and that he was not entering the plea under the influence of any promises

PRINT DATE: 05/26/2020

Page 1 of 2

Minutes Date: May 26, 2020

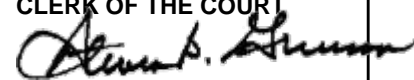
made to him. See Guilty Plea Agreement filed September 21, 2018. Further, as previously determined by the Court, Defendant has not demonstrated that he did not understand the terms of the guilty plea agreement or that his plea canvass was incomplete. See Minute Order filed February 27, 2020. This Court finds that Defendant waived the right to a trial by jury when he entered into the guilty plea agreement. Accordingly, Dogget, Inzunza, and Barker are inapplicable. Defendant has failed to demonstrate any reason to undo the provisions of the valid guilty plea agreement, namely his waiver of right to a jury trial. Thus, the Motion to Dismiss is denied.

Therefore, Court ORDERED, Motion DENIED. State to submit a proposed order consistent with the foregoing within ten (10) days after counsel is notified of the ruling and to distribute a filed copy to all parties involved pursuant to EDCR 7.21. COURT FURTHER ORDERED, status check set for regarding the filing of this proposed order. That date shall be vacated if the Court receives the order sooner.

CUSTODY

06/11/2020 10:15 AM STATUS CHECK: ORDER

CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve /SR 05/26/2020



ORDR

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MADILYN COLE
Deputy District Attorney
Nevada Bar #014693
200 Lewis Avenue
Las Vegas, NV 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-18-344808-1

DEPT NO: XVII

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

DATE OF HEARING: April 7, 2020
TIME OF HEARING: 9:00 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 7th day of April, 2020, the Defendant not being present, Represented by DAMIAN SHEETS, ESQ., the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through MADILYN COLE, Deputy District Attorney, without argument, based on the pleadings and good cause appearing therefor,

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1 IT IS HEREBY ORDERED that the Defendant's Motion to Dismiss Pursuant to
2 Dogget v. United States was set for hearing before this court on April 7, 2020. Pursuant to
3 Administrative Order 20-01 et seq., the Court took the matter under advisement to be decided
4 on the pleadings. After considering all pleadings, the Court renders its decision as follows:
5 The Court adopts the State's procedural history. Defendant entered into a guilty plea on
6 September 21, 2018. The Court notes that Defendant has previously moved the Court to
7 permit his withdrawal from that plea, and the Court denied that motion after finding that
8 Defendant failed to allege that information was withheld from him by his attorney, that he
9 was coerced into entering his plea, or that he entered into the plea in a hasty fashion. See
10 Minute Order filed February 27, 2020. The bases for the instant Motion are three cases:
11 Dogget v. United States, 112 S. Ct. 2686 (1992); State v. Inzunza, 135 Nev. Adv. Op. 69
12 (Dec. 26, 2019); and Barker v. Wingo, 407 U.S. 514 (1972). The Court considered the first
13 two of these cases in its denial of Defendant's Motion to Withdraw Plea. See Minute Order
14 filed February 27, 2020. After considering these cases again, along with Barker, the Court
15 finds Defendant's instant Motion is without merit. Defendant relies on all three cases to
16 support the contention that his speedy trial rights were violated, and the case should thus be
17 dismissed. However, all three of those cases dealt with pre-trial motions to dismiss. Unlike
18 the case at bar, none of the cases that Defendant relies on involved a Defendant who entered
19 a valid guilty plea agreement. Here, by signing the guilty plea agreement, Defendant
20 represented that he was aware of the plea agreement in this case and that he was not entering
21 the plea under the influence of any promises made to him. See Guilty Plea Agreement filed
22 September 21, 2018. Further, as previously determined by the Court, Defendant has not
23 demonstrated that he did not understand the terms of the guilty plea agreement or that his plea
24 canvass was incomplete. See Minute Order filed February 27, 2020. This Court finds that
25 Defendant waived the right to a trial by jury when he entered into the guilty plea agreement.
26 Accordingly, Dogget, Inzunza, and Barker are inapplicable. Defendant has failed to
27 demonstrate any reason to undo the provisions of the valid guilty plea agreement, namely his
28 waiver of right to a jury trial. Thus, the Motion to Dismiss is denied. Therefore, Court

1 ORDERED, Motion DENIED. State to submit a proposed order consistent with the foregoing
2 within ten (10) days after counsel is notified of the ruling and to distribute a filed copy to all
3 parties involved pursuant to EDCR 7.21.

4 COURT FURTHER ORDERED, status check set for regarding the filing of this
5 proposed order. That date shall be vacated if the Court receives the order sooner.

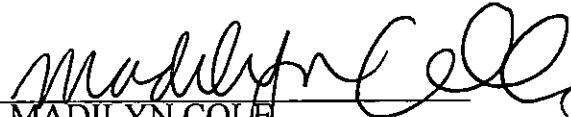
6 DATED this _____ day of May, 2020.

8 _____
DISTRICT JUDGE

BS

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

11
12 BY


MADILYN COLE
13 Deputy District Attorney
14 Nevada Bar #014693

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DISTRICT COURT
CLARK COUNTY, NEVADA

DEPT. XVII

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

Recorded by: CYNTHIA GEORGILAS, COURT RECORDER

1 Las Vegas, Nevada, Thursday, June 25, 2020

2 [Hearing begins at 11:02 a.m.]

3 THE MARSHAL: Page 9.

4 THE COURT: Page 9 is Kevin Sunseri. [Indiscernible] it says
5 here for sentencing. Mr. Sheets, -- is Mr. Sheets on the line?

6 MR. SHEETS: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. SHEETS: Damian Sheets on behalf of Mr. Sunseri.

9 THE COURT: And it says here time set for sentencing.

10 MR. SHEETS: Yes, Your Honor.

11 THE COURT: Are we going forward on sentencing?

12 MR. SHEETS: So, I know the State had sent Your Honor an
13 email -- so it sent the department an email talking about they wanted
14 time to continue for a victim speaker to be present. My client is prepared.
15 We are prepared for sentencing. We have reviewed the Pre-Sentence
16 Investigation Report. We would request the sentencing go forward
17 today, Your Honor.

18 MS. COLE: And, Your Honor, that is correct. I did reach out to
19 Mr. Sheets last night when I realized that the victim had not been notified
20 of the new sentencing date. He told me that his client was ready to go
21 forward. I sent an email to your law clerk last night making those
22 representations. I know this victim has been very cooperative with our
23 office. And this -- I think because of the fact that this Guilty Plea
24 Agreement has just been litigated for almost a year the file wasn't routed
25 to the proper person to notate to let the victim -- so that our victim

1 witness advocate could contact the victim. So, that would be my request
2 first and foremost that the Defendant – or that the victim does want to
3 speak. Our office has had contact with that person. They've submitted
4 restitution requests. And that would be my preference. We could do a
5 quick continuance. I don't believe the Defendant will be prejudiced
6 because he is earning time, and we have spent close to the last year
7 litigating this Guilty Plea Agreement.

8 So, based upon that, if the Court wants to go forward today
9 I'm prepared to go forward, but it would be my preference to wait to
10 allow the victim to be here as they do have a right to speak at
11 sentencing.

12 THE COURT: Because of the nature of the case and the
13 numerous court appearances, I'm just – although I've closed down next
14 Tuesday I'm going to reopen it for this case so this way Mr. Sunseri is
15 not unnecessarily waiting and we can also expedite the victim having
16 their day in court as well.

17 MS. COLE: I appreciate that, Your Honor.

18 THE COURT: So I'm not going to pass it weeks or anything,
19 I'm just going to pass it to Tuesday.

20 THE COURT CLERK: June 30th, 10:15.

21 THE MARSHAL: 10.

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MR. SHEETS: Thank you, Your Honor.

THE COURT: Thank you.

[Hearing concludes at 11:05 a.m.]

* * * * *

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


CYNTHIA GEORGILAS
Court Recorder/Transcriber
District Court Dept. XVII

Felony/Gross Misdemeanor

COURT MINUTES

June 30, 2020

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

June 30, 2020 10:15 AM Sentencing

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

COURT CLERK: Reid, Shannon

RECORDER: Georgilas, Cynthia

REPORTER:

PARTIES PRESENT:

Damian Sheets Attorney for Defendant

Kevin Sunseri Defendant

Madilyn M. Cole Attorney for Plaintiff

State of Nevada Plaintiff

JOURNAL ENTRIES

DEFENDANT SUNSERI ADJUDGED GUILTY OF COUNT 1- ROBBERY (F) AND COUNT 2- OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (F). Arguments by Counsel. Statement from Defendant. Pursuant to NRS 176.063, COURT ORDERED, in addition to the \$25.00 Administrative Assessment fee, \$3.00 DNA Collection fee, \$150.00 DNA Analysis fee is WAIVED as previously ordered, and restitution in the amount of \$2,600.00 payable to Dennis Redoutey, Defendant SENTENCED as to COUNT 1- to a MAXIMUM OF ONE HUNDRED EIGHTY (180) MONTHS AND A MINIMUM OF SIXTY-SIX (66) MONTHS in the Nevada Department of Corrections (NDC), and as to COUNT 2- to a MAXIMUM OF SIXTY (60) MONTHS AND A MINIMUM OF TWENTY-FOUR (24) MONTHS in the Nevada Department of Corrections (NDC), CONCURRENT WITH COUNT 1. Further arguments by Counsel regarding credit for time served. COURT ORDERED, Defendant to receive SIX HUNDRED SEVENTY-FOUR (674) DAYS credit for time served. Court RECOMMENDS the 184 program and/or life skills classes while incarcerated.

BOND, if any, EXONERATED.

NDC

Case Number: C-18-334808-1

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Las Vegas, Nevada, Tuesday, June 30, 2020

[Hearing begins at 10:45 a.m.]

THE COURT: 14 is Kevin Sunseri.

THE DEFENDANT: Yes, Sir.

MR. SHEETS: Good morning, Your Honor, Damian Sheets.

THE DEFENDANT: I need to speak with my attorney please
before sentencing.

THE COURT: Okay. There's a –

THE DEFENDANT: [Indiscernible] just –

THE COURT: There's a phone there. Mr. Sheets, do you have
the number –

THE DEFENDANT: What is the extension –

THE COURT: -- for the holding cell?

MR. SHEETS: I don't remember the last four.

THE MARSHAL: 5632.

THE COURT: 5632.

MR. SHEETS: Thank you, Your Honor.

THE COURT: All right, we'll recall –

MR. SHEETS: I'll call him now.

THE COURT: -- the case. Thank you.

MR. SHEETS: Thank you, Your Honor.

[Matter trailed at 10:46 a.m.]

[Matter recalled at 11:00 a.m.]

THE MARSHAL: Recall 14.

THE COURT: Sunseri. All right, Mr. Sunseri, --

1 THE DEFENDANT: Good morning, Your Honor.

2 THE COURT: -- did you have an opportunity to speak with
3 Mr. Sheets during the break?

4 THE DEFENDANT: I did. Yes sir and thank you for that time.

5 THE COURT: All right. And are we ready to go forward on
6 sentencing, Mr. Sheets?

7 MR. SHEETS: Yes, Your Honor.

8 THE COURT: All right, Defendant's hereby adjudged guilty of
9 Count 1, robbery; Count 2, ownership or possession of firearm by
10 prohibited person.

11 Any argument by the State?

12 MS. COLE: Yes, Your Honor. And I believe we do have a
13 victim speaker who made a reservation. I'm not sure if he's on right now.
14 Is there any way we can check that?

15 [Colloquy between State and Recorder]

16 MS. COLE: He indicated that he might have some issues with
17 that this morning so I'll just go ahead, Your Honor, and see if he logs in
18 later.

19 THE COURT: Okay. Go ahead.

20 MS. COLE: Your Honor, I know you're familiar with this case
21 and I know that you're aware that, as the Defendant stands before you
22 today, he is, in fact, a 29-time convicted felon. This Defendant has one
23 of the worse criminal history's I've ever seen. And at 52 years of age he
24 has been convicted of 29 different felonies and has spent the majority of
25 his lifetime in prison. And, Your Honor, I'm going to be asking this

1 Court to impose the maximum sentence today because that is the only
2 appropriate sentence for this Defendant.

3 In looking back at his criminal history, he does have, out of
4 those felony convictions, three of which are prior robberies and that's not
5 including the instant robbery before Your Honor that took place on
6 December 2015. The victim in this case, Mr. Redoutey, who hopefully
7 you'll get to hear from today, had gone to Mr. D's Bar. This was a place
8 that he commonly frequented and he would cash his paycheck here.

9 On that day that he happened to go there he comes into
10 contact with the Defendant. They start talking about commonalities; the
11 fact that they both have ties to Florida, the fact that they both like cars.
12 He ultimately convinces the victim to come out and look at his Jaguar
13 that he was allegedly selling, which ultimately we find out is actually a
14 stolen vehicle -- and so the victim is out in the parking lot after the
15 Defendant lures him out there. At that point he introduces him to a
16 female who's out there and she's sitting in the passenger seat of the car.
17 The victim goes to the back of the trunk. He's looking at the speakers,
18 'cause the Defendant is kind of bringing him over there to show him. At
19 that point the Defendant goes up to the front side of the vehicle, the front
20 driver's side, turns the music up, and then comes back to the trunk but
21 this time brandishing a firearm and demanding that the victim gives him
22 his money while he's pointing it at his neck. The victim gives him some
23 of his money. But at that point the Defendant demands that he empty his
24 pockets completely inside out to prove that he has, in fact, given him all
25 his money and as he's doing this he's telling him your life is worth more

1 than the money, so threatening him while pointing the firearm at his
2 neck.

3 Next, he forces the victim to get into the vehicle. He still has
4 the firearm while he's demanding that he gets into the car. At that point,
5 the female that's already in the vehicle moves from the passenger seat
6 into the driver's side without getting out of the car and the victim is
7 basically forced into the back seat. While the Defendant is sitting in the
8 front passenger seat, he is requiring the Defendant to hold his arm so
9 that the victim can't escape. So, while the Defendant is sitting in the front
10 passenger seat he is maintaining physical contact with the victim who's
11 in the back seat to ensure that he can't get out of the car, try to open the
12 doors -- so he's doing this while they drive to a different location. They
13 stop somewhere around Opportunity Village. And at that point the
14 Defendant, after he's already robbed him of his -- of all his money,
15 demands his phone and tells him to get out and stand against the wall
16 so that he, you know, I guess, can't see them drive away, speed off in a
17 stolen car.

18 Your Honor, this is egregious and violent conduct, especially
19 from an individual like this who already has such a prolific and lengthy
20 criminal history. He -- this is somebody that preys on people who are
21 vulnerable, who he believes that he can victimize. In this case, the victim
22 was 57 years old. He's a chronic diabetic. And the Defendant ultimately
23 was able to lure him out under this guise that he was trying to show him
24 this car that he was potentially selling, knowing in fact that that's what he
25 was not doing. He knew exactly what he was going to do to him. And

1 these events didn't just happen. This woman didn't just happen to be
2 there. She didn't know that she should scoot over when the victim got in
3 the car. All of this was a premeditated plan to rob this victim and that's
4 exactly what happened.

5 And so, that's why, Your Honor, I'm going to ask for the 72 to
6 180 months on the robbery, the 6 to 15, pursuant to negotiations to run
7 concurrent to the possession of a firearm by a prohibited person which is
8 a 1 to 6 or 28 to 72. And I'll submit it on that, Your Honor.

9 THE COURT: All right. Thank you.

10 Mr. Sunseri, do you have anything to say before I sentence
11 you?

12 THE DEFENDANT: I do.

13 THE COURT: Go ahead, sir.

14 THE DEFENDANT: My attorney's advised me not to talk about
15 the facts of this case, but what I do want to talk about, sir, is that the
16 person that I am today that was five years ago when – on a different
17 [indiscernible] case. You know, somewhere along the lines I hit an
18 emotional, spiritual bottom. I had no one else to blame but myself. You
19 know, I couldn't even blame the alcohol and the drugs for my poor
20 choices at that point, you know, because I figured it out that it was my
21 way of thinking. And, you know, bottom line the alcohol and drugs were
22 merely a side effect of that thinking.

23 From that point on I went on and I got into a program at Ely for
24 one year for dual diagnosis which was for chemical dependency and
25 also for mental health. I went back to school. I got my high school

1 diploma which is right here. Following that, I took a college accredited
2 course from one of the top schools in the country, International Science
3 of Sports Association, and got my personal trainers license. Following
4 that, I wrote a book which was published. I've been studying to be a
5 paralegal for the past year. I've also been working with a good friend of
6 mine. I don't know if you have these letters or not, but – and my pastor,
7 [indiscernible], I stayed in contact with for the last four and a half years
8 and been working on a book with him and that book is a spiritual book
9 for young adults and teenagers. It's – and it looks promising. He's been
10 in the publishing industry and productions for forty years. And I've also
11 got engaged to a spiritual woman. I've managed to build positive
12 relationships and many ones with my family that I never thought I could,
13 including two of my cousins that are in the NFL.

14 You know, I can stand here in front of you and tell you how
15 sorry I am for my past, what kind of a person I am or – I could look at
16 the, you know, the fact that I – of these achievements and the changes
17 that I've made and I think that shows a higher standard of remorse. I
18 think it says a higher standard of change. Even with that said, it hasn't
19 escaped me that all this has been, you know, done and achieved in a
20 controlled environment and I'm basically just a work in progress. But
21 regardless of that, I do intend to keep moving forward on this path, stay
22 positive, focused, and mostly humble.

23 On the downside, I am 53 years old. And by the way, that car
24 is not stolen. Title's in my name and it can be checked out from Florida. I
25 spent over half my life, 27 years of incarceration, most of which has

1 been in solitary confinement. I have a mental disorder, PTSD, and panic-
2 anxiety disorder. You should have those records in front of you as well,
3 Judge. I've had over thirty recorded incidents at High Desert where I
4 required emergency care and outside hospitals for the panic attacks.
5 Last year right here at CCDC I had one. I was rushed to UMC with a
6 blood pressure of 240/190 and almost died. A full [indiscernible] screen
7 was done and the doctor and the psychiatrist both gave me a prognosis
8 of stress and anxiety [indiscernible]. Around the same time, I had a
9 complete meltdown. You yourself referred me to competency court
10 where I was transferred to a mental health facility till I was stabilized.
11 Approximately one month later upon my return you referred me yourself
12 to Mental Health Court but I was denied because it's a probationary
13 court and I have a detainer for a VOP -- for driving on a revoked license
14 from Florida. That same warrant will also keep me in close custody
15 throughout my sentence that you impose today which also means I will
16 remain in solitary confinement. The fact that there's nothing, including
17 medication, to prevent those attacks and that they're spontaneous and
18 [indiscernible] mental, the best I can do to describe one is to tell you that
19 the walls literally feel as those are closing in, sir. I can't breathe. Most of
20 the time I end up curled up in a fetal position in the corner of a room.
21 The only thing that they do is they give me some tranquilizers once I get
22 to medical.

23 I'm sharing this with you not so much for empathy but for
24 reasons for disclosure with the documented documentation both from
25 my psychiatrist and medical doctors to support the testimony. Despite

1 what anybody says, this is – a blood pressure of 240 over 190 is high
2 above the stroke volume. It's also heart attack. So, it is life threatening.
3 It's moved beyond the mental part of it.

4 I think that – and it might be a common perception for, you
5 know, some people looking from the outside in on someone like myself
6 that maybe I've become callous or hardened or immune to doing time
7 but it's just – it happens to be just the opposite. And I, quite honestly,
8 don't know what to do, you know.

9 Like I said, once again, I'm not looking for sympathy from this
10 Court. I would be grateful if you would take into consideration all the
11 testimony I've provided. Most importantly, I am broken and I'm a
12 humbled man. I'm not the same person that I was five years ago. And
13 even if you sentence me today – as you sentence me today, Your
14 Honor, I'm asking that you recommend placement in the 184 program in
15 Indian Springs where I can continue to work on myself in a structured
16 environment. Because the bottom line is that no matter how many
17 academic achievements, how many books I write, I still don't know how
18 to live life on life terms in society and I'm going to need all the help I can
19 get. And I thank you for giving the time to speak today, Mr. Villani [sic].

20 THE COURT: Thank you, sir.

21 Mr. Sheets, -- also Mr. Sheets, did you have a calculation for
22 credit for time served?

23 MR. SHEETS: I do, Your Honor. I was going to address that
24 as part of my argument given the time of the date of the warrant being
25 issued and the fact that he's in State custody. I was going to be asking

1 for 1,437 days today, Your Honor, and I'll explain during my argument
2 here.

3 I would note first off, I understand that this is a very serious
4 case. I would hope that the State is asking for the maximum to run
5 concurrent versus the maximum to run consecutive because the
6 negotiation, to my understanding, required them to ask for concurrent.
7 That being said, Your Honor, I would be asking Your Honor to consider
8 imposing a sentence of 2 to 5 years in the Nevada Department of
9 Corrections on Count 1 with a concurrent 12 to 30 months on Count 2.
10 And the reason for this particular sentence, Your Honor, is a variety of
11 things.

12 First, I think my client did actually a very good job of explaining
13 some of the battles that he's had to go through during his term of
14 incarceration both obviously physical and that he's been incarcerated,
15 but more important mentally. Physical, I guess, because of the other
16 issues where he's been hospitalized, the panic attacks. And I can tell
17 Your Honor I have here in my possession -- and I don't know if my
18 camera does it justice. This is a very thick pile of medical incidents from
19 inside both the Clark County Detention Center and the Nevada
20 Department of Corrections that refer to his PTSD, his anxiety, he has
21 panic attacks and needing care for that, and issues including chest pains
22 and heart pains and then long, long lists, Your Honor, of prescriptions
23 that have resulted from those types of attacks.

24 Now, I would also note, and I believe those are part of the
25 Court record from the competency hearing, at least they were attached

1 to the evaluations I have from the original competence hearing, those
2 mental issues continued when Mr. Sunseri was picked up on this
3 particular case and he was evaluated and he was sent eventually to
4 Lakes as incompetent. Now, what I think is important here is during his
5 evaluation at the Nevada Department of Corrections which was in 2017,
6 -- again, furthermore they indicated the issues that were medically
7 troubling him, including anti-social personality disorder, secondary
8 diagnosis of prior substance abuse disorder, severe panic and anxiety
9 attacks, and then they had indicated that he needed additional
10 evaluation in psychiatry.

11 With regards to things he has done to better himself, I do have
12 copies of the diploma that he did receive from the White Pine County
13 School District, Mountain High School Diploma. So, he did after this –
14 during this last term of incarceration actually go through and get a
15 degree. And then he did get his fitness trainer and I do have the
16 certificate and the membership card from ISSA as well, Your Honor.

17 In support for what he's been doing to better himself, there
18 was a letter that – it was sent in an email so I wasn't particularly sure if I
19 should just forward the email to Your Honor, but I figured I would just
20 kind of go through it with Your Honor now.

21 It was written by [indiscernible], the pastor at Trinity Life
22 Center and this is the individual Mr. Sunseri was specifically talking
23 about. And he discusses that Mr. Sunseri met with him four and a half
24 years ago by attending worship services at the Henderson Detention
25 Center. And at that time, he talked about wanting a new life and wanting

1 to have a life of worship and positivity instead of the life that he had
2 engaged upon. He then talked about being transferred to Clark County
3 Detention Center and doing a prison sentence. But throughout that
4 prison sentence, he was reaching back and forth and communicating
5 with Mr. Sunseri and they were kind of talking back and forth about a
6 positive outlook and coming up with a constructive plan for his life when
7 he got out. This particular pastor felt that if allowed the opportunity to,
8 post-incarceration, be a part of Southern Nevada, that he would like to
9 be a part of Mr. Sunseri's continued progression towards success and
10 that he believes that Mr. Sunseri could be a positive influence in his life
11 and likewise. And that Mr. Sunseri specifically talked about in their
12 working together on working on a book specifically dealing with gangs,
13 drugs, crimes, and getting yourself back on the right path and right with
14 Christ. He concludes by saying very few inmates have made the effort
15 over several years to stay in touch with me or – for prayer and spiritual
16 guidance and is asking Your Honor to consider that for the purposes of
17 today's sentencing.

18 Now, Your Honor is very familiar with the procedural history of
19 this case and some of the issues that were brought forth. This has an
20 offense date of approximately four and one half years ago, from
21 December 10th of 2015. And unlike many cases where a defendant is
22 incarcerated and is only held on this charge, this warrant issued – and I
23 have it up here on my screen --

24 MS. COLE: And, Your Honor, at this point, it appears
25 Mr. Sheets is going to go back into when the arrest warrant was issued

1 which has been litigated for over a year. So, to the extent that he is
2 going to make a credit for time served argument based off the whole
3 warrant issue and the time he was in custody in NDOC, I'm going to
4 absolutely object. This issue has been more than briefed and decided.
5 And so, I just feel like its beyond inappropriate and its beyond
6 disingenuous for Mr. Sheets to again, before this Court, attempt to
7 now -- because he's tried to get the Court to be able to allow him to
8 withdraw his plea and for the third time now is going to attempt to get
9 this Court to rule in his favor --

10 MR. SHEETS: Your Honor, --

11 MS. COLE: -- with a credit argument.

12 MR. SHEETS: -- I'm going to object to the State interrupting
13 my closing argument --

14 THE COURT: Okay. All right.

15 MR. SHEETS: -- at this point. This is a speaking objection at
16 this point.

17 THE COURT: Okay. Mr. Sheets, I give credit for time served
18 during the period of time someone was in custody for the case in front of
19 me. And so, whatever that calculation is I will give Mr. Sunseri.

20 MR. SHEETS: Your Honor, I think I still -- I think the State's
21 proposition that I can't address this as part of Your Honor's decided
22 sentence is incorrect and I think that you can consider the history and
23 the effect that it has -- had on my client when determining if it is a
24 mitigating factor. So, I think I should at that point be allowed to get into it.
25 And then I would like at some point to be able to make a clear record as

1 to why I believe that the higher credit would be justified, understanding
2 Your Honor may not be going that way.

3 THE COURT: All right, make -- go ahead and make your
4 record, but do you have -- I know your -- you have one calculation --

5 MR. SHEETS: I have two of them.

6 THE COURT: -- of 1,437 days --

7 MR. SHEETS: Correct.

8 THE COURT: Okay. Do you have a --

9 MR. SHEETS: So, --

10 THE COURT: -- second calculation for the amount of time that
11 he's been actually in custody on this case?

12 MR. SHEETS: 674.

13 MS. COLE: That's what I have, Your Honor.

14 THE COURT: All right. Go ahead, Mr. Sheets.

15 MR. SHEETS: Okay, so part -- the big part of the reason why I
16 bring it up is that -- and I'll get to the credit argument in a little bit, but I
17 just wanted to indicate to Your Honor that the warrant in this particular
18 case issues on July 28th, 2016. Then Your Honor was -- has heard plenty
19 of testimony and had seen plenty of briefing and heard plenty of
20 argument on the issue but, given that warrant having issued, Mr. Sunseri
21 was in State custody that entire time and I think it's important to note
22 when determining what may be an appropriate sentence in this particular
23 case that Mr. Sunseri was in custody on May -- though, actually it
24 appears on January 13 of 2016, which is six months prior to that, and
25 then was sentenced to prison on May 25 of 2016.

1 Now, the warrant issued in this particular matter in July of
2 2016 and I think its important because the request for the warrant was
3 lodged on April 28 of 2016, this was while he was still in county custody
4 and prior to going to the Nevada Department of Corrections. When these
5 are filed there is generally a case number that is established and that
6 submission for a warrant is in the possession of the District Attorney's
7 Office. So, we have a situation where my client is in the custody of the
8 State and in the custody of the County when the request for the warrant
9 is submitted, and then he goes to prison without having been released
10 and is then – the warrant goes active.

11 Had, during any of that time, he either been returned to the
12 State of Nevada – or returned to Clark County, or had – when that
13 request for a warrant [indiscernible] onto the State's [indiscernible], the
14 State not allowed him to be sent up and filed in an orderly fashion, or
15 had the police department done a civil records check before issuing a
16 warrant for requesting a warrant and just rebooking him, Mr. Sunseri
17 would be – would have been receiving credit from that time period.

18 Now, I'll – that is part of my credit argument later on but its
19 more, at this point during the argument, intended for Your Honor to
20 consider it as a mitigating factor as to what is just and proper. Had he
21 accepted this negotiation and this – at that particular time and Your
22 Honor had imposed a sentence at that time, and everything worked the
23 way it should have, Mr. Sunseri would have had approximately 1,437
24 days credit in that – in this particular case. And that is why, given his
25 record, I'm asking Your Honor to consider a lower sentence on both

1 Counts 1 and Count 2 and to consider running them concurrently
2 because, while it is our position that 1,437 would be a proper amount of
3 credit because he was in the custody of the County at the time of the
4 request and he was in the State's custody and all the other testimony
5 establishes that long chain of events I won't recap -- but even if Your
6 Honor did not wish to pursue that and Your Honor wanted to go with 674
7 days of credit, that would be a way that Your Honor could consider those
8 facts in a way that mitigates Mr. Sunseri's underlying sentence and
9 that's why I believe that the 2 year -- the 2 to 5 year is an appropriate
10 sentence. The Nevada Department of Corrections clearly is not going to
11 parole him on the 2 year. He has 29 felonies. I would be shocked if that
12 were to occur. I would be very, very surprised.

13 So, based on the actions that he's put forth, the things that he
14 has done to try to better himself, now the documented mental health and
15 medical history -- now that we have tracked some of these issues and
16 we can come up with treatment plans, that once doing that he has
17 worked with a pastor to come up with a specific life plan to better
18 himself. And, he has gone through and educated himself and obtained
19 skills necessary to be able to practice in a trade upon his release, and
20 given the long time period by which he has been incarcerated and
21 should have known or something, in my opinion, respectfully should
22 have been done to make him aware so that this could have been taken
23 care of; that is the basis for my request and I would submit.

24 MS. COLE: And, Your Honor, just to clarify. Pursuant to
25 negotiations, we did agree to concurrent time between counts.

1 THE COURT: All right. And what is the name of the victim for
2 the restitution of twenty-six hundred?

3 MS. COLE: It's Dennis Redoutey, R-E-D-O-U-T-E-Y.

4 THE COURT: All right. Thank you.

5 All right, Mr. Sunseri, -- and, you know, I've got to be frank
6 with you sir, I've been an attorney since 1982 and I've never seen
7 anyone with such a long record as you've had. And I see that on three
8 separate cases you were sentenced as a habitual felon and I think two
9 out of Florida -- let me see -- actually, all three out of the state of Florida.
10 And it just seems to me that at some point you would have got the
11 message that, not to use an old cliché, but crime doesn't pay especially
12 with 29 felony convictions. And I understand --

13 THE DEFENDANT: [Indiscernible].

14 THE COURT: -- the history of this particular case. But also, I
15 think you need to own some of this. Because when I did criminal
16 defense work I always asked my clients, is there any other cases
17 pending out there, anything else I should be aware of that could perhaps
18 negotiate, try to package them up? You know, which happens all the
19 time that, you know, the District Attorney in whatever state would agree
20 to any other cases for a particular time frame. So, you know, you have to
21 own some of this sir, because you knew --

22 THE DEFENDANT: Yes, sir.

23 THE COURT: -- that you were involved in this robbery at the
24 bar. And I think its incumbent upon you as well, you know all the parties
25 involved, but incumbent upon you because you knew about this. You

1 should have told your attorney, hey, I've got this other case, package it
2 up. But for whatever reason you decided not to. And so, I am taking into
3 consideration all the factors in this case, and most importantly your
4 record here.

5 And so, I'm going to sentence you to confinement in the
6 Nevada Department of Corrections for a maximum term of 180 months,
7 minimum term of 66 months.

8 You are ordered to pay administrative assessment fee of
9 \$25.00; a DNA – administrative assessment fee [sic] of \$3.00; the
10 \$150.00 DNA fee I am waiving because that would have been in the
11 previous case; restitution in the amount of \$2,600.00 to the named
12 victim. And you have 674 days credit for time served.

13 And I do recommend sir, that you go through life skills classes.
14 If you qualify for the 184 program that would be great for you. So, when
15 you do get out I hope that we don't see you back in the criminal justice
16 system.

17 MS. COLE: Your Honor, --

18 THE DEFENDANT: Can you recommend that program?

19 MS. COLE: We – I think we need a sentence on Count 2.

20 THE COURT: I'm sorry; 24 to 60 for Count 2 will run
21 concurrent to Count 1.

22 THE DEFENDANT: Judge, I don't mean to interrupt, but can
23 you make a – make any recommendations for that 184 program?

24 THE COURT: I just did, sir.


25 THE DEFENDANT: Oh. Thank you.

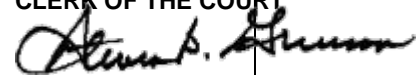
1 THE COURT: The minutes will reflect that sir, --
2 THE COURT CLERK: And you said --
3 THE COURT: -- if you --
4 THE DEFENDANT: Thank you.
5 THE COURT: -- qualify.
6 THE COURT CLERK: And you said 180?
7 THE COURT: Yeah.
8 THE COURT CLERK: Okay.
9 THE COURT: Thank you, sir.
10 THE DEFENDANT: And you said the bottom number was 66?
11 THE COURT: Yes.
12 THE DEFENDANT: Is that correct? [Indiscernible] --
13 THE COURT: Thank you.
14 THE DEFENDANT: -- [indiscernible].
15 THE COURT: Thank you.

16 [Hearing concludes at 11:30 a.m.]

17 * * * * *

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

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



JOCP

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-VS-

KEVIN SUNSERI
#8266913

Defendant.

CASE NO. C-18-334808-1

DEPT. NO. XVII

JUDGMENT OF CONVICTION

(PLEA OF GUILTY)

The Defendant previously appeared before the Court with counsel and entered a plea of guilty to the crimes of COUNT 1 – ROBBERY (Category B Felony) in violation of NRS 200.380; and COUNT 2 – OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony) in violation of NRS 202.360; thereafter, on the 30th day of June, 2020, the Defendant was present in court for sentencing with counsel DAMIAN R. SHEETS, ESQ., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the \$25.00 Administrative Assessment Fee, \$2,600.00 Restitution payable to Dennis Redoutey and \$3.00 DNA Collection Fee, the Defendant is sentenced to the Nevada Department

<input type="checkbox"/> Nolle Prosequi (before trial)	<input type="checkbox"/> Bench (Non-Jury) Trial
<input type="checkbox"/> Dismissed (after diversion)	<input type="checkbox"/> Dismissed (during trial)
<input type="checkbox"/> Dismissed (before trial)	<input type="checkbox"/> Acquittal
<input checked="" type="checkbox"/> Guilty Plea with Sent. (before trial)	<input type="checkbox"/> Guilty Plea with Sent. (during trial)
<input type="checkbox"/> Transferred (before/during trial)	<input type="checkbox"/> Conviction
<input type="checkbox"/> Other Manner of Disposition	

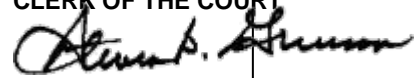
Bates 301

1 of Corrections (NDC) as follows: COUNT 1 - a MAXIMUM of ONE HUNDRED EIGHTY
2 (180) MONTHS with a MINIMUM Parole Eligibility of SIXTY-SIX (66) MONTHS; and
3 COUNT 2 – a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of
4 TWENTY-FOUR (24) MONTHS, CONCURRENT with COUNT 1; with SIX HUNDRED
5 SEVENTY-FOUR (674) DAYS credit for time served. As the \$150.00 DNA Analysis Fee and
6 Genetic Testing have been previously imposed, the Fee and Testing in the current case are
7 WAIVED. COURT recommends Defendant for life skills classes and/or 184 Program while
8 incarcerated.
9

10
11 DATED this 30 day of June, 2020

12
13 

14 MICHAEL VILLANI
15 DISTRICT COURT JUDGE
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NOA
NEVADA DEFENSE GROUP
Damian Sheets, Esq.
Nevada Bar No. 10755
Kelsey Bernstein, Esq.
Nevada Bar No. 13825
714 S. Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 988-2600
Facsimile: (702) 988-9500
dsheets@defendingnevada.com
Attorney for Defendant
Kevin Sunseri

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

State of Nevada,	)	Case No.: C-18-334808-1
Plaintiff	)	Dept. No: XVII
)	
vs.	)	NOTICE OF APPEAL
)	
Kevin Sunseri,)	
Defendant)	
)	

NOTICE IS HEREBY GIVEN that Defendant/Appellant, KEVIN SUNSERI, hereby appeals to the Supreme Court of Nevada from the Judgment of Conviction in the above-referenced case entered on or about July 1, 2020.

DATED this 26 day of July, 2020.

By:
NEVADA DEFENSE GROUP

By: /s/ Damian Sheets
Damian Sheets, Esq.
Nevada Bar No. 10755
714 S. Fourth Street
Las Vegas, Nevada 89101

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

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