IN THE SUPREME COURT OF RESPONDENT OF NEVADA

Kevin Sunseri, Appellant vs. The State of Nevada, Respondent,	)))))))))	Supreme Court Case No.: 81551 Electronically Filed Jan 14 2021 02:01 p.m. Elizabeth A. Brown Clerk of Supreme Court **APPELLANT'S REPLY BRIEF**

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Docket 81551 Document 2021-01262

MEMORANDUM OF POINTS AND AUTHORITIES

Appellant's reply to Respondent State of Nevada's arguments can be sorted into three separate categories: procedurally, whether the *Doggett* violation (or appeal thereof) is waived by virtue of entering into a guilty plea; the merit of the underlying *Doggett* violation; and the recognition of a *Doggett* violation as a potential basis to withdraw a guilty plea.

I. Waiver Does Not Apply Because Appellant Sought to Withdraw His Plea and the District Court Heard the Claim on the Merits, Thereby Preserving the Issue for Appeal

As an initial matter, Appellant would point out that Respondent's argument that he "waived any constitutional claims by nature of his guilty plea" (SAB, 6) is raised here for the first time on appeal. Rather, before the District Court, the argument and focus was exclusively on whether *Doggett* would survive the specific and limited jury trial waiver contained in the written guilty plea agreement.

Nonetheless, Appellant maintains this waiver does not apply because Appellant specifically sought to withdraw his guilty plea, thereby preserving the record and arguments for appeal. The cases cited by Respondent, including *State v. Eighth Judicial District Court*, 121 Nev. 225 (2005) and *Tollett v.*

Henderson, 411 U.S. 258 (1973) specifically analyze issues raised for the first time in post-conviction habeas petitions. Additionally, none of the cases cited by Respondent would hold that issues raised *after* the entry of plea are barred on appeal, and both of Appellant's Motions were filed after the plea canvass.[1]

Further, the District Court's substantive decision on Appellant's Motions bely a waiver claim. On the Motion to Withdraw Plea, the District Court concluded that *Doggett* does not fall within the scope of a request to withdraw a plea, which is not specific to any pre-plea deprivations.

Second, on Appellant's post-plea Motion to Dismiss, the State argued (and the District Court agreed) that Appellant waived his *Doggett* violation by virtue of waiving his right to a speedy trial. This was a substantive point of contention in the Motion, as Appellant argued that he did *not* waive the violation because a prospective jury trial waiver does not cure a prior violation due to the limited time frame in which *Doggett* violations can arise.

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[1] The State argues that Appellant's claims should be denied because he failed to include the transcripts of the plea canvass. However, because Appellant did not argue on appeal (or in the District Court) that any error occurred in the plea canvass itself, the transcripts are not necessary to the disposition of any issues on appeal.

The preservation of these matters after Appellant's plea canvass, combined with the State's substantive opposition and the District Court's substantive decision on the issues raised, distinguish this matter from the authorities provided by Respondent. In each of those cases, constitutional claims that existed before the plea were raised for the first time in post-conviction habeas petitions, and there is no indication that any issues were raised or preserved before those petitions were filed. Here, because Appellant sought to withdraw his plea on the claims raised, this Court may validly consider them on the merits.

Indeed, *all* issues related to the withdrawal of a guilty plea by their nature inherently occur after the plea takes place; if *Stevenson* expanded the scope of bases to withdraw a plea beyond the canvass itself, it must necessarily include potential issues that arose before the plea. Since requests to withdraw a plea (and the reasons therefor) may validly be raised on appeal, the arguments raised Appellant's request to withdraw his plea are equally preserved.

II. Violation of Appellant's Speedy Trial Rights

Respondent's argument regarding the existence of a *Doggett* violation using the four-part test is limited, spanning only pages 11-12 of Respondent's

Answering Brief ("SAB"). Nonetheless, Respondent adopts some peculiar positions that are both nonsensical and legally untenable.

Respondent does not dispute that more than one year had passed from the issuance of the arrest warrant to the execution of this warrant, thereby satisfying the first factor of the analysis.

Respondent further does not dispute that Appellant was in State custody during the entire two year period that the warrant remained outstanding. Yet, Respondent takes the position that the delay is still Mr. Sunseri's fault, even arguing that "Appellant presented no evidence to his Court that police were aware of Appellant's location at any time after the arrest warrant was issued." Appellant was in *law enforcement's custody in the State of Nevada*. Respectfully, if law enforcement is unaware of the people that are in their own custody, that is not a factor that could weigh against Mr. Sunseri.

Further, it is not Mr. Sunseri's responsibility to make his location known when he is not even aware of pending charges. "A defendant has no duty to bring himself to trial." *Barker v. Wingo*, 407 U.S. 514, 527, 92 S. Ct. 2182, 2190 (1972). "A more neutral reason such as negligence or overcrowded courts should be weighed less heavily [than bad faith] but nevertheless should be considered since *the ultimate responsibility for such circumstances must rest*

with the government rather than with the defendant." *Id*. at 2191 (emphasis added).

Respondent asks this Court to reject Appellant's *Doggett* claim because Appellant could not provide "definitive proof… that detectives knew where Appellant was and made no efforts to execute the arrest warrant" (SAB, 11). However, *Doggett* does not require definitive proof that law enforcement knew of the defendant's whereabouts, but rather whether they "could have" located him (the *Doggett* Court noted that federal agents were negligent in their pursuit because they "could have found him within minutes," *Doggett v. United States*, 505 U.S. 647, 653, 112 S. Ct. 2686, 2691 (1992)). Similarly here, law enforcement "could have" found Appellant with truly minimal effort; lastly, the record does reflect that law enforcement could show no efforts to execute the arrest warrant, as this was the precise testimony of Amy Colin during the evidentiary hearing. Respondent offers the speculative possibility that no efforts were made because the detective did not "put the notes in the PI system," but the record-keeping responsibilities of law enforcement are equally not the burden of Appellant to satisfy (SAB, 11).

Regarding the third factor, Respondent simply reiterates that "Appellant never asserted his right to a speedy trial" (SAB, 11). Respondent still fails to

articulate how or why it is Appellant's responsibility to do so when he is not aware of any pending charges or warrants, which is precisely what *Doggett* accounts for and why this factor cannot be held against him.

As to the last factor of prejudice, Respondent blanketly concludes that "Appellant does not even attempt to demonstrate how he was prejudiced." To the contrary, Appellant detailed how he was *actually* prejudiced both in the form of extreme anxiety (leading to suicidal behavior and a formal finding of incompetence) as well as incarceration for an additional *two years*. Further, prejudice is *presumed* due to the two-year delay in execution of the arrest warrant. Therefore, not only has Appellant demonstrated prejudice, but he has actually has shown prejudice above and beyond the presumed prejudice which is all that is needed to substantiate a *Doggett* claim.

In summation, Respondent has failed to refute the existence of a *Doggett* violation which heavily favors dismissal. To contend that "Appellant has demonstrated no negligence on the part of the State" is completely belied by the record and without merit.

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III. A Doggett Violation is Not Categorically Excluded as a Basis to Withdraw a Plea

Respondent's argument here mirrors the position taken by the District Court, which can be succinctly summarized from the Answering Brief:

> The scope of what issues can be raised in a Motion to Withdraw Guilty Plea is extremely narrow. Appellant's claim is outside of the limited scope of whether the plea was knowingly and voluntarily entered through looking at the totality of circumstances. SAB, 20.

This position of both Respondent and the District Court is simply incorrect post-*Stevenson*. "…[A] district court may grant a defendant's motion to withdraw his guilty plea before sentencing for **<u>any reason</u>** where permitting withdrawal would be fair and just." *Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015) (emphasis added). There is nothing in this Court's decision in *Stevenson* that would provide support for Respondent's position that the scope of permissible issues is "extremely narrow." To the contrary, the exclusive focus on whether the plea was "knowingly and voluntarily entered" was expressly overruled.

Respondent cannot reasonably argue that *Stevenson* changed the focus from "whether the plea was knowingly and voluntarily entered" to "whether

the plea was knowingly and voluntarily entered through looking at the totality of circumstances." Simply adding the talismanic phrase of "totality of the circumstances" to *Crawford*'s limited focus does not create a legal runaround to *Stevenson's* ruling that a Court can consider "any reason" that is fair and just, disavowing the exclusive focus on the limited bases set forth in *Crawford*.

Respondent is correct that the standard for reversal on a request to withdraw a plea is a high one, requiring a showing that the District Court's decision is "arbitrary or capricious or exceeds the bounds of law or reason." Respectfully, Appellant believes it has met this burden because the District Court's exclusive focus on *Crawford's* factors related to the plea canvass – to the exclusion of all else – is directly contrary to this Court's ruling in *Stevenson*.

The District Court denied Appellant's Motion to Withdraw Guilty Plea on the mistaken belief that a *Doggett* violation cannot present a "fair and just reason" because it is not within the ambit of *Crawford*'s focus on the plea canvass. As this limited scope was expressly struck down by this Court, the District Court's ruling exceeds the bounds of law.

Further, there is an element of arbitrariness present as well – the District Court granted an evidentiary hearing to determine what, if any, efforts were undertaken to inform Appellant of the outstanding warrant. Law enforcement

could provide no evidence of any efforts taken while Appellant was in state custody.

With no disrespect intended to the District Court, Appellant maintains the District Court would not have granted an evidentiary hearing on the merits of the underlying *Doggett* claim unless the Court believed the *Doggett* issue was relevant to the plea withdrawal. If *Doggett* matters are categorically excluded as a potential basis to withdraw a plea, the evidentiary hearing would not have been necessary and Appellant's Motion would have been summarily denied. The decision to grant an evidentiary hearing is, in itself, an implication that the merits of Appellant's *Doggett* violation was relevant to his Motion to Withdraw Plea.

The evidentiary hearing went in favor of Appellant, as the State could not rebut the presumption that it was negligent in failing to inform him of the warrant (since no efforts had been made). Nonetheless, after the evidentiary hearing, the District Court held that *Doggett* was not within the scope of reasons that can be used to withdraw a plea, which functioned to render the entire evidentiary hearing as moot. The District Court granted an evidentiary hearing to further explore an issue, then afterwards held that issue was categorically excluded as a basis for relief.

CONCLUSION

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

VERIFICATION OF KELSEY BERNSTEIN, ESQ.

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

Dated this 14 day of January, 2021.

NEVADA DEFENSE GROUP
Respectfully Submitted By:

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 with 14 point, double spaced Cambria font.

2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7)(A)(ii) because it is proportionally spaced, has a monospaced typeface of 14 points or more and contains 2,284 words.

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(c), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matte relied on is to be found.

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

Dated this 14 day of January, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 14 day of January, 2021, I served a true and correct copy of the Opening Brief to the last known address set forth below:

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