

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 85782

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Elizabeth A. Brown
Clerk of Supreme Court

JUSTIN D. PORTER

Appellant,

v.

THE STATE OF NEVADA

Respondent.

Appeal from a Judgment of Conviction
Eighth Judicial District Court, Clark County
The Honorable Jacqueline Bluth, District Court Judge
District Court Case No. 01C174954

APPELLANT'S REPLY BRIEF

Thomas A. Ericsson, Esq.
Nevada Bar No. 4982
Ornoz & Ericsson, LLC
9900 Covington Cross Dr., Suite 290
Las Vegas, Nevada 89144
Telephone: (702) 878-2889
Facsimile: (702) 522-1542
tom@ornozlawyers.com
Attorney for Appellant Justin Porter

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I. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

NONE

Attorney of Record for Justin D. Porter

/s/ Thomas A. Ericsson

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<i>Barker v. Wingo</i> , 407 U.S. 514, 92 S. Ct. 2182 (1972)	1
<i>Middleton v. State</i> , 114 Nev. 1089, 968 P.2d 296 (1998)	3, 5, 7

NRS 176.017	9
U.S. Const. amend. VI	1, 9

IV. ARGUMENT

A. Mr. Porter's Constitutional Right to a Speedy Trial was Violated.

The Sixth Amendment to the Constitution guarantees that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. Const. amend. VI. Mr. Porter was arraigned on May 2, 2001. He went to trial on the severed charges on May 8, 2009, and to trial for a second time on the remaining charges on August 29, 2022. Regardless of how the State attempts to frame the history of this case, the reality is that Mr. Porter suffered an unjustifiable twenty-two (22) year long delay in violation of his Sixth Amendment right to a speedy trial.

In its Response, the State contends that Mr. Porter's constitutional right to a speedy trial was not violated because the circumstances of his case do not meet the four criteria provided in *Barker v. Wingo*, 407 U.S. 514, 519, 92 S. Ct. 2182, 2186 (1972): (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of his speedy trial right, and (4) prejudice to the defendant. This argument is belied by the record.

1. Mr. Porter was not responsible for a 22-year delay in going to trial.

After conceding the first factor, that the twenty-two (22) year long delay is “presumptively prejudicial,” the State claims that “[*Mr.*] *Porter himself is responsible for any delay in bringing this case to trial.*” Respondent's Answering Brief (RAB) at 25; emphasis added. The State further argued:

1 It was Porter who incessantly requested continuances, it was Porter who
2 filed countless Pretrial Motions and Petitions through his attorneys and
3 pro per, it was Porter who was incarcerated in NDOC on a related
4 charged while this prosecution was pending, and it was Porter, who
5 created the impasses with his multiple attorneys necessitating new
6 attorneys to be appointed and to get up to speed on the case to prepare
7 for trial.

8 RAB at 25, 26.

9 Perhaps in an effort to substantiate its sweeping declaration that the Appellant
10 himself is responsible for “any” delay that occurred during the twenty-two (22)
11 years, the State misrepresents the history of this case. Despite its claim that Mr.
12 Porter “incessantly requested continuances,” this was simply not the case. In fact,
13 on multiple occasions he not only demanded a speedy trial but objected, on the
14 record, to continuances made. RA I 004; RA I 016; RA I 034; RA I 084; RA I 064;
15 RA I 126.

16 Furthermore, regarding the “countless Pretrial Motions and Petitions” Mr.
17 Porter purportedly filed, in fact only six (6) defense motions were filed in the first
18 seven (7) years of this case. The majority of his pro per motions were filed in 2019,
19 eighteen (18) years after he was charged. The State’s claim also insinuates that these
20 motions and petitions were filed for the purpose of delaying trial, as opposed to
21 zealous advocacy of legitimate issues. Mr. Porter should not be punished for being
22 a strong advocate for himself and demanding that his appointed counsel be as well.
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1 The State’s Response seeks to justify the delay by citing *Middleton v. State*,
2 114 Nev. 1089, 1109, 968 P.2d 296, 310 (1998), a case wherein the court found the
3 defendant’s right to a speedy trial was not violated by a thirty (30) month delay
4 because “the reason for the delay was partially due to the defendant's extensive
5 pretrial litigation.” RAB at 32. That case is incomparable and irrelevant to the
6 instant case. Thirty (30) months – two and half years – is a fraction of the amount
7 of time that Mr. Porter waited for trial. If litigation of his pretrial motions is in part
8 attributable to any delay in Mr. Porter going to trial, it would not have been until
9 many, many years into his case and would only be responsible for a small fraction
10 of the twenty-two (22) year delay.
11

12 Mr. Porter does not have to choose between the right to a speedy trial and
13 competent representation; he has constitutional rights to both. He also has the right
14 to refuse a plea and exercise his right to a jury trial. In claiming that he “created the
15 impasse with multiple attorneys” the State implies that concerns regarding his
16 counsel were not legitimate, and Mr. Porter had to ignore those concerns or forfeit
17 his right to a speedy trial. It also suggests that this attorney turnover happened
18 repeatedly and intentionally. In reality, however, attorneys from the Clark County
19 Public Defender’s Office represented Mr. Porter from the time his charges were
20 filed in 2001 until 2012 – for almost eleven (11) years. At that time, Mr. Porter
21 voiced serious concerns he had about his attorneys and their competence. In
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1 requesting new counsel, he alleged that his attorney had “lied to me numerous
2 times...” RA I 022. Mr. Porter also explained that he did not believe his counsel
3 were doing a proper job or had done any investigation on his behalf. He also
4 believed they could have “done a lot better” in his first trial on the murder charge.
5 RA I 022-023. Accordingly, the court advised that he meet with another attorney at
6 the public defender’s office. RA I 024. Mr. Maningo of the Public Defender’s
7 Office served as Mr. Porter’s counsel from 2012 to 2018 – for about six (6) years.
8 Due to a conflict of interest between Mr. Porter and his counsel, Mr. Maningo was
9 then dismissed from the case. RA I 061.

11 Thus, while the State paints a picture of Mr. Porter irrationally and
12 continually dumping and acquiring new attorneys to delay his trial for almost a
13 quarter of a century, this was not the case. After working with his attorneys for
14 many years, he found the relationship was no longer productive and he exercised
15 his right to counsel he trusted. He does not and should not have to choose between
16 availing himself of this right and that to a speedy trial.

18 It is also important to clarify the portion of the State’s Response that
19 confusingly suggests Mr. Porter’s case was initially delayed five years due to an
20 accomplice being tried. RAB at 30. It appears that the State conflated the *Barker*
21 case facts with Mr. Porter’s in that instance; the accomplice explanation is irrelevant
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1 to this case and was not the reason Mr. Porter's trial was initially delayed as Mr.
2 Porter did not have an alleged accomplice.

3 The State claims that, aside from his own actions, "Porter's case was delayed
4 for various reasons that were either neutral or justifiable." RAB at 33. It cited
5 conflicts in trial schedules, the COVID-19 pandemic, and mutually agreed-to
6 continuances as the underlying reasons. *Id.* Perhaps some of the delay can be
7 explained away in this way, perhaps some of it was reasonable. But certainly not
8 all of it was. Maybe some of the scheduling conflicts were unavoidable. Maybe Mr.
9 Porter's zealous self-representation did result in continuances, but not twenty-two
10 (22) years' worth. Maybe two continuances were legitimately due to the COVID-
11 19 pandemic, but that did not occur until nineteen (19) years after Mr. Porter was
12 charged. All the above may be true; but even taken together, it does not add up.
13 There is simply no justification for a twenty-two (22) year delay.
14

15 The State argued, "Porter attempts to persuade this Court into believing it
16 took the State twenty-two years for Porter to be tried in this case. However, Porter
17 is largely the cause of the delay due to his extensive pretrial litigation." RAB at 35.
18 Porter doesn't *attempt to persuade* the Court into *believing* it took the state twenty-
19 two years for him to be tried; it actually did take that long. It is simply an
20 unavoidable fact that the State cannot explain away.
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1 **2. The State concedes that Mr. Porter did assert his speedy trial rights.**

2 The State’s flimsy contention that Mr. Porter’s “assertions of his right to a
3 speedy trial were contradicted by his tactical decisions” causing a twenty-two (22)
4 year delay is simply not true. The state argued:

5 While Porter asserted his speedy trial rights, his refusal to cooperate
6 with counsel and filing extensive pro per Motions and Petitions
7 prevented the district court from being able to honor his request. In
8 addition, a Pre-Trial Habeas Corpus Petition must be accompanied by
a waiver of the 60-day rule.

9 RAB at 36.

10 In conceding that Mr. Porter did assert his speedy trial rights, the State
11 characterizes his concern regarding counsels’ competence and his own zealous self-
12 advocacy as “tactical decisions” that *prevented* the court from protecting his
13 constitutional rights. While litigating legitimate issues does take time, it does not
14 automatically cause unreasonable delay. Yes, Mr. Porter waived his right to be tried
15 within sixty (60) days but waiving the sixty (60) day rule does not impliedly consent
16 to waiting more than 8,112 days – the amount of delay Mr. Porter experienced.

17 The State’s Response also discusses the September 19, 2007, hearing,
18 excerpted by Appellant in his Opening Brief, to justify the delay Mr. Porter
19 experienced for the first seven years. The State seems to miss the point, though, that
20 the purpose of including this hearing transcript was to capture the Honorable Judge
21 Gates’ outrage at the length of the delay only seven years into this case. *Fifteen*
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1 years before Mr. Porter's second trial, Judge Gates rebuked counsel for the
2 unreasonable delay and instructed them to prioritize this case. It is not hard to
3 imagine what his enraged reaction would have been twenty-two (22) years into this
4 case when Mr. Porter finally went to trial on his remaining charges.

5
6 **3. Mr. Porter was undeniably prejudiced by this 22-year delay.**

7 The State's contention that "[Mr.] Porter was in no way harmed by the delay"
8 defies logic. RAB at 36. The State further argues, "[Mr.] Porter was not prejudiced
9 by the delays caused by his own behavior." *Id.* at 37, 968 P.2d 296. Although
10 perhaps not interpreted as intended, this statement is certainly true. He was not
11 prejudiced by the delays caused by his *own* behavior; he was prejudiced by delays
12 caused by others.

13
14 Citing *Barker* the State provides, "Prejudice is assessed in light of the
15 interests that the speedy-trial right was designed to protect: 'to prevent oppressive
16 pretrial incarceration,' 'to minimize anxiety and concern of the accused,' and 'to
17 limit the possibility that the defense will be impaired.'" *Middleton*, 114 Nev. at 37,
18 968 P.2d 296

19
20 The State appears to interpret the first interest as preventing oppressive
21 pretrial incarceration *prior to a finding of not guilty*. This, however, is not what the
22 *Barker* court found; the speedy-trial right is designed to prevent this from happening,
23 period, regardless of the eventual verdict.

1 To review: Mr. Porter spent twenty-two years in pretrial incarceration prior
2 to the trial on his remaining charges. The State contends that because he was
3 credited with about twenty-two (22) years of time served for his second conviction
4 that he was not prejudiced. The indisputable, unavoidable fact, though, is that he
5 waited more than two decades to be tried on most of his charges and was
6 incarcerated for the duration of that time. Receiving credit for time served after the
7 fact does not negate that oppression.

9 Appropriately, the State did not even argue that Mr. Porter was not prejudiced
10 in respect to the second interest, “to minimize anxiety and concern of the accused.”
11 Undoubtedly, he had to live with that anxiety and concern for every single one of
12 the 8,112 days he served prior to his second trial.

14 Regarding the third interest, “to limit the possibility that the defense will be
15 impaired,” Mr. Porter was prejudiced because multiple witnesses were deceased
16 and others were no longer able to be located. RA II 320; RA III 529-536. The State
17 argues that he in fact benefited from this delay because “his charges were severed,
18 and he was offered various negotiations on the remaining felony charges.” RAB at
19 37. Legitimate extensions of time due to matters being litigated are not at issue here
20 and any such severance “benefits” occurred a decade before his second trial.

22 Ultimately, regardless of the State’s attempts to justify, minimize or reframe
23 the circumstances that resulted in a twenty-two (22) year delay in Mr. Porter going
24

1 to trial, it simply cannot be explained away. The circumstances of his case meet all
2 four of the *Barker* factors – Mr. Porter was prejudiced by an unreasonably long
3 delay in going to trial, despite asserting his speedy trial right.

4 A denial of the Sixth Amendment right to a speedy trial requires that the
5 charges against an accused be dismissed. Accordingly, under the Constitution of
6 the United States of America, this court has no choice but to dismiss them. The
7 nature and number of crimes with which he was charged is irrelevant; the fact that
8 this state violated his constitutional rights is inescapable.

9
10 **B. The State’s Response does not change Mr. Porter’s position on the**
11 **remaining issues.**

12 Mr. Porter maintains that the district court judge illegally sentenced him to an
13 aggregate sentence that is the functional equivalent of life without the possibility of
14 parole in violation of the eighth amendment’s prohibition against cruel and unusual
15 punishment and in violation of Nevada law.

16
17 Mr. Porter also maintains that the district court judge illegally imposed a
18 sentence on him without considering the differences between juvenile and adult
19 offenders as required by NRS 176.017.

20 Mr. Porter further maintains that the district court abused its discretion by
21 imposing a sentence that constitutes cruel and unusual punishment in violation of
22 the Eighth Amendment of the United States Constitution and Article One Section
23 Six of the Nevada constitution.
24

1 Finally, Mr. Porter maintains that the cumulative effect of these errors
2 necessitates the reversal of his convictions.

3 **C. CONCLUSION**

4 Appellant Porter respectfully requests that this Court vacate his conviction
5 due to the clear violation of his right to a speedy trial. In the alternative, Mr. Porter
6 requests that he receive a new sentencing hearing due to his current illegal sentence.
7

8 Dated: February 2, 2024

9 Respectfully submitted,

10
11 By: /s/ Thomas A. Ericsson
12 THOMAS ERICSSON, ESQ.
13 *Attorney for Appellant Porter*
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1 **D. CERTIFICATE OF COMPLIANCE**

2 I hereby certify that I have read this appellate brief, and to the best of my
3 knowledge, information, and belief, it is not frivolous or interposed for any
4 improper purpose. I certify that this brief complies with all applicable Nevada
5 Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every
6 assertion in the brief regarding matters in the record to be supported by a reference
7 to the page of the transcript or appendix where the matter relied on is to be found.
8 I further certify that this brief complies with the formatting requirements of NRAP
9 32(a)(4)-(6) and the type style requirements of NRAP 32(a)(6) because this brief
10 has been prepared in a proportionately spaced typeface using Microsoft Word, a
11 word-processing program, in 14 point Times New Roman.
12

13
14 I further certify that this brief complies with the type volume limitations of
15 NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or
16 more and contains 2,813 words. I understand that I may be subject to sanctions in
17 the event that the accompanying brief is not in conformity with the requirements of
18 the Nevada Rules of Appellate Procedure.
19

20 Dated: February 2, 2024

21 By: /s/ Thomas A. Ericsson
22 THOMAS ERICSSON, ESQ.
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AARON FORD
Nevada Attorney General

STEVEN B. WOLFSON
Clark County District Attorney

By: /s/ Mariela Ramirez
Employee of Oronoz & Ericsson