

IN THE SUPREME COURT OF THE STATE OF MONTANA  
CAUSE NO. DA 21-0454

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STATE OF MONTANA,  
Plaintiff and Appellee,  
and  
NEIL LYNN NUNES,  
Defendant and Appellant.

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**Appellant/Defendant's Opening Brief**

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On Appeal from the District Court of the Ninth Judicial District  
of the State of Montana, In and For Teton County

Before the Honorable Robert G. Olson  
Cause No. DC-19-028; DC-19-031; DC-20-001

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## **TABLE OF CONTENTS**

<b>Table of Contents .....</b>	<b>2</b>
<b>TABLE OF AUTHORITIES .....</b>	<b>3</b>
Cases .....	3
Statutes .....	3
<b>STATEMENT OF THE ISSUE .....</b>	<b>4</b>
<b>STATEMENT OF THE CASE .....</b>	<b>4</b>
<b>SUMMARY OF ARGUMENT .....</b>	<b>6</b>
<b>STATEMENT OF FACTS .....</b>	<b>7</b>
<b>STANDARDS OF REVIEW .....</b>	<b>11</b>
<b>ARGUMENT .....</b>	<b>12</b>
I. The district court’s factual determination that Nunes was responsible for 158 days of delay is clearly erroneous because the underlying cause was the unavailability of discovery materials. ....	12
II. The district court erred by determining Nunes’ speedy trial right had not been violated when on balance the evidence supported a finding that Nunes’ speedy trial right had been violated. ....	15
A. The Length of Delay Presumptively Violates Nunes’ Speedy Trial rights. ....	16
B. The Reasons for Delay Show that Nunes’ Speedy Trial Right was Violated. ....	17
C. The Defendant’s Response to the Delay Weighs Heavily in Nunes’ Favor. ....	20
D. Nunes was Prejudiced by the Speedy Trial Delay .....	21
1. Oppressive Pretrial Incarceration .....	22
2. Minimizing the Defendant's Anxiety and Concern. ....	24
3. Impairment of the Defendant’s Defense .....	25
E. On Balance the Speedy Trial Factors Favor Nunes .....	25
<b>CONCLUSION .....</b>	<b>26</b>
<b>CERTIFICATE OF COMPLIANCE .....</b>	<b>27</b>
<b>APPENDIX .....</b>	<b>28</b>

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Barker v. Wingo</i> , 407 U.S. 514 .....	20
<i>State v. Ariegwe</i> , 2007 MT 204 .....	14, 15, 16, 17, 20, 21, 22, 24, 25
<i>State v. Billman</i> , 2008 MT 326 .....	17, 22
<i>State v. Burnett</i> , 2022 MT 10.....	14, 17
<i>State v. Couture</i> , 2010 MT 201.....	11, 12
<i>State v. Heath</i> , 2018 MT 318 .....	12
<i>State v. Kirn</i> , 2023 MT 98 .....	14, 17
<i>State v. Larson</i> , 191 Mont. 257.....	17
<i>State v. Heath</i> , 2018 MT 318 .....	12
<i>State v. Wetzel</i> , 2005 MT 154 .....	12
<i>United States v. Marion</i> , 404 U.S. 307 .....	17
<i>United States v. MacDonald</i> , 456 U.S. 1 .....	24

### **Statutes**

Mont. Code Ann. § 46-15-322.....	13
Mont. Code Ann. § 46-15-327.....	13

## **STATEMENT OF THE ISSUE**

The district court erred by denying Defendant's Motions to Dismiss for Lack of Speedy Trial, when the Defendant was incarcerated for 438 days prior to trial and a majority of the time was attributable to the State.

## **STATEMENT OF THE CASE**

This appeal was consolidated with two other appeals, DA 21-0455 and DA 21-0456 because the three district court cases<sup>1</sup> giving rise to the appeals all suffered from the same speedy trial defect. Each of the lower court cases differ in the number of days speedy trial was violated but the analysis of the overall issue applies to each of them equally. After Appellant Neil Nunes ("Nunes") had been incarcerated for 438 days, the three district court cases were tried over three consecutive days in two jury trials held back-to-back.<sup>2</sup>

On December 3, 2019, an Information was filed in Teton County District Court Cause No. DC-19-028 charging Nunes with the offence of Failure to Give Notice of Change of Residence, as he was required to do as a registered person on the Montana Sexual and Violent Offender Registry. An arrest warrant was issued the same day.

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<sup>1</sup> DA 21-0454 is on appeal from DC-19-028; DA 21-0455 is on appeal from DC-19-031; DA 21-0456 is on appeal from DC-20-001

<sup>2</sup> DC--19-028 was tried on April 12, 2021; DC-19-031 and DC-20-001 were tried together April 13-14, 2021.

On December 11, 2019, Nunes was arraigned in Teton County Justice Court for a misdemeanor charge of Partner or Family Member Assault (PFMA), posted bond and was released. The PFMA case is not part of this appeal but is related to the charges on appeal. Immediately after being released, Nunes made contact with the alleged victim of the PFMA case in a way that was perceived as threatening or intimidating.

On December 16, 2019, an Information was filed in Teton County District Court, Cause DC-19-031 charging the Defendant with the offense of Intimidation or in the alternative, Tampering with Witnesses or Informants. These charges arose from Nunes' contact with the alleged victim of the PFMA. As a result, an arrest warrant was issued, and bond set at \$50,000.

Nunes was served the new warrant on December 16, 2019, taken into custody, and remained in custody until the jury trials were conducted April 12-14, 2021, 438 days later.

On February 25, 2020, an Information was filed in Teton District Court in cause number DC-20-001 charging Nunes with two counts of Tampering with Witnesses or Informants. It was alleged that while Nunes was in custody he directed a person to try to influence the witnesses and victim in his previous cases, including the PFMA case.

On December 31, 2020, Nunes filed Pro Se the of two Writs of Habeas Corpus (OP 20-0618) with this Court alleging a violation speedy trial, this Court denied that Writ to allow the district court to address the issue.

On February 19, 2021, Nunes filed Pro Se his second Writ of Habeas Corpus (OP 21-0078) with this Court, which was also denied to allow the district court to address the speedy trial issue.

In all three lower court cases, Nunes filed a Motion to Dismiss for Lack of Speedy Trial, and the district court denied those motions. Nunes alleges the district court erred by denying those motions, that his right to a speedy trial was violated, and his convictions should be vacated.

### **SUMMARY OF ARGUMENT**

Nunes right to a speedy trial was violated when each of his trials were delayed between 413 and 496 days and the majority of that time, Nunes remained in custody. The district court attributed much of the delay to the State as institutional delay and assigned very little weight to that delay when analyzing the speedy trial issue. While it is settled law that institutional delay does weigh less heavily against the State, it still does weigh against the State and the district court should have considered the overall length of the delay as being excessive. Additionally, when the length of delay is combined with the other speedy trial factors, the district court should have determined that Nunes' right to a speedy trial had been violated.

## **STATEMENT OF FACTS**

On December 3, 2019, an Information was filed in Teton County District Court Cause No. DC-19-028 charging Nunes with the offence of Failure to Give Notice of Change of Residence, as he was required to do as a registered person on the Montana Sexual and Violent Offender Registry.<sup>3</sup> An arrest warrant was issued the same day.<sup>4</sup>

On December 11, 2019, Nunes was arraigned in Teton County Justice Court for a misdemeanor charge of Partner or Family Member Assault (PFMA), posted bond and was released.<sup>5</sup> The PFMA case is not part of this appeal but is related to the charges on appeal. Immediately after being released, Nunes made contact with the alleged victim of the PFMA case in a way that was perceived as threatening or intimidating.<sup>6</sup>

On December 16, 2019, an Information was filed in Teton County District Court, Cause DC-19-031 charging the Defendant with the offense of Intimidation or in the alternative, Tampering with Witnesses or Informants.<sup>7</sup> These charges arose from Nunes' contact with the alleged victim of the PFMA.<sup>8</sup> As a result, an arrest warrant was issued, and bond was set at \$50,000.<sup>9</sup>

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<sup>3</sup> DC-19-028 Information at Doc. 3.

<sup>4</sup> DC-19-028 Warrant at Doc. 3.5.

<sup>5</sup> DC-19-031 Information at Doc. 1, ¶ 3.

<sup>6</sup> *Id.*

<sup>7</sup> DC-19-031 Information at Doc. 3.

<sup>8</sup> DC-19-031 Motion and Affidavit for Leave to File Information at Doc. 1.

<sup>9</sup> DC-19-031 Arrest Warrant at Doc. 3.5.

Nunes was served the new warrant on December 16, 2019, and taken into custody.<sup>10</sup>

On February 25, 2020, an Information was filed in Teton District Court in cause number DC-20-001 charging Nunes with two counts of Tampering with Witnesses or Informants.<sup>11</sup> It was alleged that while Nunes was in custody he directed a person to try to influence the witnesses and victim in his previous cases, including the PFMA case.<sup>12</sup>

DC-19-028 was initially set for jury trial to occur July 16, 2020<sup>13</sup>; DC-19-031 was initially set for jury trial to occur June 22, 2020<sup>14</sup>; DC-20-001 was initially set for jury trial to occur October 27, 2020.<sup>15</sup>

On June 4, 2020, Nunes, in DC-19-031, filed a Motion to Continue Jury Trial until July 16, 2020, to all three cases to be tried together.<sup>16</sup> The district court granted the motion and reset trial to July 16, 2020, in line with DC-19-028.<sup>17</sup>

On June 9, 2020, the State filed a Motion for Joinder to join all three cases for the purpose of jury trial, which the district court granted.<sup>18</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> DC-20-001 Information at Doc. 3.

<sup>12</sup> DC-20-001 Motion and Affidavit for Leave to File Information at Doc. 1.

<sup>13</sup> DC-19-028 Omnibus Memorandum at Doc. 14.

<sup>14</sup> DC-19-031 Omnibus Memorandum at Doc. 11.

<sup>15</sup> DC-20-001 Omnibus Memorandum at Doc. 15.

<sup>16</sup> DC-19-031 Motion to Continue Jury Trial at Doc. 23.

<sup>17</sup> DC-19-031 Order at Doc. 24.

<sup>18</sup> DC-19-028 Motion for Joinder at Doc. 21; DC-19-031 Motion to Dismiss at Doc. 25; DC-20-001 Motion to Dismiss at Doc. 17.



On June 25, 2020, Nunes filed a Motion to Continue Jury Trial in all three cases, noting “[T]his motion is made on the grounds that there has not been an opportunity for discovery to be exchanged in the DC-20-1 case” and requested trial be reset for November 23, 2020.<sup>19</sup> The district court reset the jury trial to occur December 21, 2020 for all three cases.<sup>20</sup>

On October 30, 2020, the district court, sua sponte vacated the December 21, 2020 trial date and reset trial for all three cases to occur February 8, 2020.<sup>21</sup>

On December 31, 2020, Nunes filed Pro Se his first of two Writs of Habeas Corpus (OP 20-0618) with this Court alleging a violation speedy trial, this Court denied that Writ to allow the district court to address the issue.

On January 19, 2021, the district court sua sponte vacated the February 8, 2021 trial date and reset trial for all three cases to occur April 13, 2021.<sup>22</sup>

On January 27, 2021, the district court issued an order resetting the trial date for DC-19-031 and DC-20-001 to April 13, 2021.<sup>23</sup> DC-19-028 was set for jury trial on April 12, 2021.<sup>24</sup>

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<sup>19</sup> DC-19-028 Motion to Continue Jury Trial at Doc. 25; DC-19-031 Motion to Continue Jury Trial at Doc. 28; DC-20-001 Motion to Continue Jury Trial at Doc. 20.

<sup>20</sup> DC-19-028 Order Resetting Jury Trial Date at Doc. 26; DC-19-031 Order Resetting Jury Trial at Doc. 29; DC-20-001 Order Resetting Jury Trial at Doc. 20.

<sup>21</sup> DC-19-028 Order at Doc. 27; DC-19-031 Order at Doc. 30; DC-20-001 Order at Doc. 22.

<sup>22</sup> DC-19-028 Order Vacating Trial Date at Doc. 39; DC-19-031 Order Vacating Trial Date at Doc. 39; DC-20-001 Order Vacating Trial Date at Doc. 31.

<sup>23</sup> DC-19-031 Order Resetting Trial Date at Doc. 44; DC-20-001 Order Resetting Trial Date at Doc. 37.

<sup>24</sup> DC-19-028 Order at Doc. 44.

On February 19, 2021, Nunes filed Pro Se his second Writ of Habeas Corpus (OP 21-0078) with this Court, which was also denied to allow the district court to address the speedy trial issue.

On March 3, 2021, in all three cases, Nunes filed a Motion to Dismiss for Lack of Speedy Trial, and the district court later denied those motions.<sup>25,26</sup> The district court determined that for speedy trial purposes 488 days had passed in DC-19-028<sup>27</sup>; 483 days in DC-19-031<sup>28</sup>; and 412 days in DC-20-001.<sup>29</sup>

When denying the motions to dismiss, the district court attributed 158 days to the Defendant in DC-19-028, 182 days in DC-19-031, and 158 days in DC-20-001.<sup>30</sup> And attributed 330 days to the State in DC-19-028; 301 days in DC-19-031, and 254 days in DC-20-001.<sup>31</sup> All time attributable to the State was determined to be institutional in nature and given virtually no weight by the district court.<sup>32</sup> Of the time allocated to Nunes, the district court attributed 158 days based upon Nunes June

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<sup>25</sup> DC-19-028 Motion to Dismiss at Doc. 48; DC-19-031 Motion to Dismiss at Doc. 48; DC-20-001 Motion to Dismiss at Doc. 42.

<sup>26</sup> DC-19-028 Order Denying Motion to Dismiss at Doc. 66; DC-19-031 Order Denying Motion to Dismiss at Doc. 64; DC-20-001 Order Denying Motion to Dismiss at Doc. 56.

<sup>27</sup> DC-19-028 Order Denying Motion to Dismiss at Doc. 66, § III(i).

<sup>28</sup> DC-19-031 Order Denying Motion to Dismiss at Doc. 64, § III(i).

<sup>29</sup> DC-20-001 Order Denying Motion to Dismiss at Doc. 56, § III(i).

<sup>30</sup> DC-19-028 Order Denying Motion to Dismiss at Doc. 66, § III(ii); DC-19-031 Order Denying Motion to Dismiss at Doc. 64, § III(ii); DC-20-001 Order Denying Motion to Dismiss at Doc. 56, § III(ii).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

25, 2020 Motion to Continue Jury Trial, while Nunes was awaiting discovery in DC-20-001.<sup>33</sup>

On April 12, 2023, Nunes was tried by jury and found guilty in DC-19-028.<sup>34</sup> On April 13-14, Nunes was tried by jury and found guilty in DC-19-031 and DC-20-001.<sup>35</sup>

Nunes alleges the district court erred by denying his Motions to Dismiss for Lack of Speedy Trial, that his right to a speedy trial was violated, and his convictions should be vacated.

### **STANDARDS OF REVIEW**

This Court applies two standards when reviewing a district court's ruling on a speedy trial motion. First, this Court reviews factual findings to determine whether those findings are clearly erroneous. *State v. Couture*, 2010 MT 201, ¶ 47, 357 Mont. 398, 240 P.3d 987. Next, this Court examines de novo whether the district court correctly interpreted and applied constitutional law to the facts at issue. *Id.*, at ¶ 47.

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<sup>33</sup> DC-19-028 Order Denying Motion to Dismiss at Doc. 66, Statement of Facts, ¶ 5.; DC-19-031 Order Denying Motion to Dismiss at Doc. 64, Statement of Facts, ¶ 5; DC-20-001 Order Denying Motion to Dismiss at Doc. 56, Statement of Facts, ¶ 5.

<sup>34</sup> DC-19-028 Verdict at Doc. 71.

<sup>35</sup> DC-19-031 Verdict at Doc. 72; DC-20-001 Verdict at Doc. 64.

## ARGUMENT

### **I. THE DISTRICT COURT’S FACTUAL DETERMINATION THAT NUNES WAS RESPONSIBLE FOR 158 DAYS OF DELAY IS CLEARLY ERRONEOUS BECAUSE THE UNDERLYING CAUSE WAS THE UNAVAILABILITY OF DISCOVERY MATERIALS.**

The district court’s determination regarding which party bears the responsibility for pretrial delay is a factual finding, reviewed to determine if those finds are clearly erroneous. *Couture*, at ¶ 47. To determine whether a finding of fact is clearly erroneous, this Court ascertains whether the finding is supported by substantial evidence, whether the district court misapprehended the effect of the evidence, and whether the Court is nevertheless left with a definite and firm conviction that the district court made a mistake. *State v. Wetzel*, 2005 MT 154, ¶ 10, 327 Mont. 413, 114 P.3d 269.

Generally, if a defendant causes a delay, it will be attributable to the defendant, and where a defendant requests and acquiesces in a continuance, the delay caused by the continuance will be attributed to the defendant. *State v. Heath*, 2018 MT 318, ¶ 18, 394 Mont. 41, 432 P.3d 141.

In each of its orders denying Nunes’ motions, the district court simply stated that “the Defendant moved the Court to reset the Trial Date. The Court reset the Trial Date for December 21, 2020. This delay of 158 days is chargeable to the

Defendant."<sup>36</sup> However, the district court did not consider the underlying reason making Nunes motion to continue necessary; specifically, the motion was made on the basis that discovery material had not yet been made available to the defense.

Montana Code Annotated § 46-15-322 requires the timely disclosure of all evidence to the defense, Montana Code Annotated § 46-15-327 makes that duty a continuing duty so that any evidence later discovered must be disclosed to the defense. Further, in the Omnibus Memorandum in all cases and in particular DC-20-001, the State affirmatively stated that they “shall immediately and on a continuing basis...” disclose all evidence to the defense. See Doc.3 15.

The omnibus memorandum in DC-20-001 was filed June 2, 2020, and the State moved to join all the cases together on June 9, 2020. Yet, the State had not provided discovery to the defense on June 25, 2020, at the time of Nunes’ motion. Further, Nunes motion requested that trial be reset until November 23, 2020, and the district court reset the hearing until December 21, 2020. Despite these factors, the district court attributed the full 158 days to Nunes when determining the allocation of speedy trial delay.

The district court did not provide an analysis of its decision to attribute all the delay to Nunes, other than to indicate it was Nunes that filed the motion to continue.

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<sup>36</sup> DC-19-028 Order Denying Motion to Dismiss at Doc. 66, Statement of Facts, ¶ 5.; DC-19-031 Order Denying Motion to Dismiss at Doc. 64, Statement of Facts, ¶ 5; DC-20-001 Order Denying Motion to Dismiss at Doc. 56, Statement of Facts, ¶ 5.

The district court's attribution of the entirety of 158-day delay is not supported by substantial evidence, rather the evidence indicates that the State bears at least a portion of the responsibility, if not the entirety. The State moved to join the cases together but failed to provide the defense with discovery in a manner that would allow the trial to proceed forward by the appointed date, leaving Nunes with no choice but to continue to the next available trial date, apparently November 23, 2020. Then the district court scheduled the trial another 28 days beyond Nunes' request. Given these facts, the attribution of 158 days to Nunes is not supported by substantial evidence, or the district court misapprehended the evidence before it.

Moreover, even if the delay were to be attributed to Nunes, the district court failed to consider the weight that should have been given to that delay. There are gradations of culpability in the delay attributed to the State and to the defendant. *State v. Ariegwe*, 2007 MT 204, ¶ 71, 338 Mont. 442, 167 P.3d 815; *State v. Burnett*, 2022 MT 10, ¶ 21, 407 Mont. 189, 502 P.3d 703; *State v. Kirn*, 2023 MT 98, ¶ 20, 412 Mont. 309, 530 P.3d 1. In the case of delay caused by the defendant, delay to avoid being brought to trial or for tactical reasons weighs more heavily against the defendant than does delay caused by such things as a missing witness. *Ariegwe*, ¶ 71. Lack of discovery is a similar issue, outside the control of the defendant, yet critical to mount a defense. This mitigates against placing the full weight of the delay against Nunes, and the district court should have given little weight the 158-day

delay, much like the consideration the district court shows the State for institutional delays.

This Court should determine the district court's finding attributing all 158 days of delay was clearly erroneous and not supported by substantial evidence. Additionally, this Court should determine the district court's placing the full weight of the delay against Nunes without considering the reason for that delay was clearly erroneous and a misapprehension of the evidence before the district court.

**II. THE DISTRICT COURT ERRED BY DETERMINING NUNES' SPEEDY TRIAL RIGHT HAD NOT BEEN VIOLATED WHEN ON BALANCE THE EVIDENCE SUPPORTED A FINDING THAT NUNES' SPEEDY TRIAL RIGHT HAD BEEN VIOLATED**

This Court examines de novo whether the district court correctly interpreted and applied constitutional law to the facts at issue. *Couture*, ¶ 47.

In *Ariegwe*, this Court established a four-factor balancing test to determine if a defendant's speedy trial right had been violated. at ¶ 120. Those factors include 1. The Length of Delay, 2. The Reasons for the Delay, 3. The Defendant's Response to the Delay, and 4. Prejudice to the Defendant. *Id.*, at ¶¶ 34-35. This is a balancing test of all four factors based upon the facts of the particular case and the weights assigned to each factor; none of the factors are dispositive by itself, instead they are considered together with any other circumstance that may be relevant. *Ariegwe*, at ¶ 153.

**A. The Length of Delay Presumptively Violates Nunes’ Speedy Trial rights.**

The threshold question is whether the interval between accusation and trial is at least 200 days thereby triggering further speedy trial analysis. *Ariegwe.*, at ¶ 121.

Here, the district court determined that 488 days had passed in DC-19-028; 483 days in DC-19-031; and 412 days in DC-20-001. All of which clearly exceed the 200-day threshold. Although it does not impact the analysis here, and as will be discussed later, the district court incorrectly calculated the days because the district court used the date of arrest, rather than the date of accusation as the start of the speedy trial clock. The correct number of days is calculated as 496 days in DC-19-028; 484 days in DC-19-031; and 413 days in DC-20-001. However calculated, the number of days involved in the present case clearly exceed the 200 day threshold.

The second inquiry under Factor One is the extent to which the delay stretches beyond the 200-day trigger date. *Id.*, ¶ 123. In *Ariegwe*, similar to this case, the time that had passed was more than double the amount of delay that is considered sufficiently prejudicial to trigger the speedy trial test. at ¶ 123. Which is why, like the *Ariegwe* Court, this Court should require the State to provide a “particularly compelling” justification for the delay under the second factor, and a highly persuasive showing that Nunes was not prejudiced by the delay. at ¶ 123. Meanwhile, the proof required of Nunes should be correspondingly lower. *Id.*



**B. The Reasons for Delay Show that Nunes' Speedy Trial Right was Violated.**

To determine whether a defendant's speedy trial right was violated, it is necessary to identify each period of delay and to attribute each period of delay to the State or defendant. *Ariegwe*, at ¶ 124. Actions or events that did not result in a delay will not be considered. *Kirn*, at ¶ 22, citing *Burnett*, at ¶ 21. Courts must assign weight to each delay based on the specific cause and motive for the delay after identifying and assigning each period of delay. *Burnett*, at ¶ 21. The State bears the burden to explain pretrial delays. *State v. Billman*, 2008 MT 326, ¶ 27, 346 Mont. 118, 194 P.3d 58.

The speedy trial clock begins to run upon the filing date of a formal complaint, indictment, or information, or the date of arrest on the original charge, whichever occurs first. *Ariegwe*, ¶ 42, (citing *State v. Larson*, 191 Mont. 257, 261, 623 P.2d 954, 957-58 (1981)); see also *United States v. Marion*, 404 U.S. 307, 320, 92 S. Ct. 455 (1971).

In the present case, Nunes disagrees with the district court's calculation and assignment of delays. The district court calculated its speedy trial dates from Nunes' date of arrest, not the date upon which the information was filed. Further, as previously discussed, the assignment of the 158-day delay following Nunes' motion is in error.

**1. Filing of Information in DC-19-028 to First Trial Date  
December 3, 2019 to June 22, 2020  
202 Days**

The district court miscalculated this time, due to using the date of arrest as the start of speedy trial. The district court attributed all this time to institutional delay for pretrial action. Nunes agrees, this time should be categorized as institutional delay. Note that at 202 days, even the original trial date would give rise to a presumption of a speedy trial issue.

**2. Filing of Information in DC-19-031 to First Trial Date  
December 16, 2019 to June 22, 2020  
189 Days**

Nunes appeared on the same day the information was filed, beginning the speedy trial clock in this case. Again, this is institutional delays due to pretrial preparation.

**3. Filing of Information in DC-20-001 to First Trial Date  
February 25, 2020 to June 22, 2020  
118 Days**

Nunes appeared on the same day the information was filed, beginning the speedy trial clock in this case. Again, this is institutional delays due to pretrial preparation.

**4. First Trial Date to Second Trial Date  
June 22, 2020 to July 16, 2020  
24 Days**

Nunes moved the district court for a continuance in DC-19-028 until the July trial calendar to allow all his cases to be tried together. This delay should weigh against Nunes; however, it is clear that it was not made to avoid trial but rather to hasten trial in all his cases, it should weigh little against Nunes.

**5. Second Trial Date to Third Trial Date**  
**July 16, 2020 to December 21, 2020**  
**158 Days**

This delay was previously discussed at length, and as previously stated should have been counted against the State, at least partially if not entirely. Further, the district court should have given little weight to this delay, if it were to be counted against Nunes.

**6. Third Trial Date to Fourth Trial Date**  
**December 21, 2020 to February 8, 2021**  
**49 Days**

On October 29, 2020 the Court issued an Order sua sponte resetting the trial due to another case taking priority jury trial on the same date. This delay is chargeable against the State as institutional delay.

**7. Fourth Trial Date to Fifth Trial Date**  
**February 8, 2021 to April 13, 2021**  
**64 days**

Again, the district court issued an order sua sponte resetting the trial date due to its schedule. This delay is chargeable to the State as institutional delay.

After corrections and accounting for the two different trial dates, the total delay was 496 days in DC-19-028; 484 days in DC-19-031; and 413 days in DC-20-001.

Of the total delay, only 24 days can clearly be attributed to Nunes, and

Of the between 413 and 496 days of trial delay, only 24 days can truly be attributed to Nunes' actions and only in DC-19-028, the remainder should be attributed to the State. Further, the 24-day delay should be given little weight once the reason behind the delay is considered. Nunes moved the district court to continue jury trial, in order to consolidate all his cases and submit them to a jury trial at the earliest available date.

The remainder is chargeable to the State and the majority of that delay was caused by institutional delays. Although institutional delays are given little weight, institutional delays still carry some weight against the State. The question becomes, when are there enough feathers to tip the scale?

**C. The Defendant's Response to the Delay Weighs Heavily in Nunes' Favor.**

Whether the defendant actually wanted to be brought to trial promptly is an "important" consideration in ascertaining whether his or her right to a speedy trial has been violated. *Ariegwe*, at ¶ 76, citing *Barker v. Wingo*, 407 U.S. 514, 534, 92 S. Ct. 2182, 2194 (1972). While it is not always readily apparent if the defendant actually wanted to be brought to trial in a speedy manner, the frequency

and force of the defendant's objections to pretrial delay and the reasons for acquiescence to any delays are strong indicators. *Ariegwe*, at ¶ 76.

In the present case, the district court correctly acknowledged this factor weighed in favor of Nunes. Nunes asserted his right to a speedy trial throughout the entirety of proceedings, with counsel initially advising the district court that a speedy trial motion was forthcoming. Then Nunes filed two Pro Se writs with this Court alleging violations of speedy trial, and finally by filing a Motion to Dismiss for Lack of Speedy Trial in the district court.

As the district court determined, and as the record strongly indicates, Nunes asserted his right to a speedy trial at every juncture.

Moreover, when Nunes consented to the first continuance, it was only to allow all his matters to be tried at one time, within a few months and arguably in the most expeditious manner possible. Nunes only later consented to a continuance when discovery was unavailable to put on a defense, this cannot be taken as an intention to waive or forego Nunes' speedy trial right.

This factor weighs heavily in Nunes' favor.

#### **D. Nunes was Prejudiced by the Speedy Trial Delay**

Under the fourth speedy trial factor, a court must examine whether the pretrial delay has prejudiced the defendant in light of the interests that the speedy trial right protects: (1) preventing oppressive pretrial incarceration; (2) minimizing the

defendant's anxiety and concern; and (3) limiting the possibility that pretrial delay will impair the defendant's defense. *Ariegwe*, ¶ 111. A presumption arises that pretrial delay has prejudiced the defendant when the speedy trial analysis is triggered, and this presumption increases as the delay increases. *Ariegwe*, ¶ 56. The defendant must present evidence establishing prejudice and the State must present evidence showing a lack of prejudice. *Ariegwe*, ¶ 56. As a result of the extended delay in this case, the State must make a persuasive showing that the pretrial delay did not prejudice Nunes, and the quantum of proof required from Nunes is correspondingly lower. See *Billman*, at ¶ 36.

### **1. Oppressive Pretrial Incarceration**

This Court determines whether pretrial incarceration is oppressive by considering the duration of incarceration, the complexity of the charged offenses, whether the defendant engaged in any misconduct related to the incarceration, and the conditions of the incarceration. *Ariegwe*, P 113.

Although not addressed by the district court in its analysis, the duration of incarceration in the present case was more than double the speedy trial trigger and should rightly weigh heavily in Nunes' favor. Nunes was incarcerated a total of 483 days before trial, 283 days beyond the 200-day speedy trial trigger. The district court erred by not considering or analyzing the impact of this lengthy incarceration. Further, there are few facts related to the impact of the incarceration in the record.

However, the presentence investigation reported that “[T]he Defendant reported that he does not have an income at this time due to his incarceration.”<sup>37</sup>

All three cases involved relatively uncomplicated charges, DC-19-028 charged a Failure to Notice Change of Residence; DC-19-031 charged one count of Intimidation; and DC-20-001 charged two counts of Tampering with Witnesses and Informants. These charges required the proof of relatively straightforward and simple facts, and all of the evidence needed was readily available to the State.

Nothing in the record indicates any misconduct during Nunes’ incarceration, so this is should not be a consideration on appeal.

Under its analysis of Oppressive Pretrial Incarceration, the district court only addressed the conditions of incarceration in its determination that Nunes that Nunes did not suffer from oppressive pretrial incarceration. The district court determined, and nothing in the record contests, that Chouteau County Detention provides adequate inmate services. However, the district court only addressed this issue in its orders denying the motions to dismiss for lack of speedy trial, and failed to consider the other issues under this factor.

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<sup>37</sup> DC-19-028 Presentence Investigation at Doc. 89; DC-19-031 Presentence Investigation at Doc. 85; DC-20-001 Presentence Investigation at Doc. 76.

## **2. Minimizing the Defendant's Anxiety and Concern.**

The defendant's interest in minimizing anxiety and concern caused by the presence of unresolved criminal charges—"is subjective, not to mention difficult to demonstrate." *Ariegwe*, at ¶ 95. Nonetheless, it is an interest protected by the right to a speedy trial. *Id.*, citing *Marion*, 404 U.S. at 320, 92 S. Ct. at 463.

When evaluating the interest in minimizing anxiety and concern, the focus is on the ways in which the presence of unresolved criminal charges has disrupted the defendant's life. *Ariegwe*, at ¶ 97. A certain amount of anxiety and concern is inherent in being accused of a crime. *Id.* (internal citations omitted). Courts may infer from evidence that the defendant has suffered anxiety and concern, which in turn suggests that he or she has been prejudiced. *Id.*

The speedy trial guarantee is designed "to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges," *Id.*, quoting *United States v. MacDonald*, 456 U.S. 1, 8, 102 S. Ct. 1497, 1502 (1982). The extent to which the disruption of life and the associated anxiety and concern will support a finding of prejudice will depend on their duration and intensity. The crucial question is whether the delay in bringing the defendant to trial has unduly prolonged the disruption of his or her life or aggravated the anxiety and concern that are inherent in being accused of a crime. *Ariegwe*, at ¶ 97 (internal citations omitted).



The district court conducted little fact finding regarding this issue and there is no evidence in the record, other than the statement regarding loss of income in the Presentence Investigation that demonstrates how Nunes was caused anxiety and concern related to the extended delay. Some anxiety and concern should be presumed based upon the long period of incarceration combined with the loss of income potential while incarcerated. While the district court determined this interest weighed in favor of the State, it should be given very little weight.

### **3. Impairment of the Defendant's Defense**

Nunes did not argue at the district court that his defense was impaired by the speedy trial delay, accordingly the district court determined this factor weighed in favor of the State.

#### **E. On Balance the Speedy Trial Factors Favor Nunes**

After reviewing each of the four factors, courts determine whether the defendant has been deprived of the right to a speedy trial by balancing each of the factors. *Ariegwe*, at ¶ 112.

Factor One, the length of the delay weighs in favor of Nunes, the speedy trial delay was over twice the 200-day threshold.

Factor Two, reasons for delay, also weighs in favor of Nunes, nearly all the delay was attributable to the State. Even though nearly all the delay was institutional in nature, it should still be given some weight.

Factor Three, the defendant's response to the delay, weighs in favor of Nunes, Nunes made it clear that he intended to pursue his right to a speedy trial. He did this through counsel at the district court and twice sought relief from this Court Pro Se.

Factor Four, prejudice to the defendant, weighs slightly in favor of Nunes. Nunes was subjected to extended incarceration, which caused a loss of income, and undoubtedly caused some anxiety and concern; however, Nunes presented no evidence or argued that his defense was impaired by the speedy trial delay.

Given that the first three factors weigh in favor of Nunes, and the fourth factor weighs slightly in his favor, on balance this Court should determine that Nunes' right to a speedy trial was violated.

### **CONCLUSION**

For the foregoing reasons, this Court should reverse and remand, having determined that Nunes was denied his right to a speedy trial.

DATED this 30th day of October 2023.

PEACE LAW GROUP, LLC

/s/Rufus I. Peace  
Rufus I. Peace  
*Attorney for Appellant/Defendant*

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes, quoted, and indented material; and that the word count calculated by Microsoft Word Professional Edition is 5,404 words, excluding the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

DATED this 30th day of October 2023.

PEACE LAW GROUP, LLC

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Rufus I. Peace  
*Attorney for Appellant/Defendant*

## **APPENDIX**

Order Denying Motion to Dismiss, DC-19-028, Doc. 66.....	Appendix A
Order Denying Motion to Dismiss, DC-19-031, Doc. 64.....	Appendix B
Order Denying Motion to Dismiss, DC-20-001, Doc. 56.....	Appendix C
Presentence Investigation Report, DC-19-028, Doc. 89.....	Appendix D

## **CERTIFICATE OF SERVICE**

I, Rufus I. Peace, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-31-2023:

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