NO. A 24-235

IN THE COURT OF APPEALS FOR THE STATE OF NEBRASKA

STATE OF NEBRASKA,
Appellee,
v.
JOHN L. PARKS SR.,
Appellant.

APPEAL FROM THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

HONORABLE DUANE C. DOUGHERTY, District Court Judge

APPELLANT'S BRIEF

John L. Parks Sr., Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

This is an appeal by John L. Parks Sr. who was found guilty by a jury in the District Court of Douglas County, Nebraska, of two counts of first degree murder, two counts of use of a firearm to commit a felony, two counts of possession of a firearm by a prohibited person, and one count of possession with intent to deliver cocaine, found at case number CR21-1565. This appeal is authorized by the Nebraska Constitution, Article I, Section 23, *Neb. Rev. Stat.* § 25-1912. The Notice of Appeal in the District Court was filed on March 28, 2024.

STATEMENT OF THE CASE

A.) Nature of the Case

This was a criminal prosecution of John L. Parks, Sr. for two counts of first degree murder, two counts of use of a firearm to commit a felony, two counts of possession of a firearm by a prohibited person, and one count of possession with intent to deliver cocaine.

B.) Issues Tried in the Courts Below

Parks made a Motion for Discharge on the ground that his statutory and constitutional right to a speedy trial was violated. The trial court denied that motion. Parks filed an interlocutory appeal asserting that the District court erred in overruling his motion for absolute discharge on speedy trial grounds. The Nebraska Court of Appeals affirmed that decision on interlocutory appeal. At a jury trial, John L. Parks, Sr. was found guilty of the above charges, but disputed a Motion for absolute discharge regarding continuances made by appointed counsel, without his consent, that negatively affected the speedy trial clock.

C.) How the Issues were Decided

The District Court overruled his motion for absolute discharge on speedy trial grounds. Parks was found guilty of the above charges and was sentenced to imprisonment for period of life at the Nebraska Department of Corrections.

D.) Scope of Review

Plain error. Clearly Erroneous. Abuse of discretion. Ineffective assistance of counsel.

STANDARDS OF REVIEW

I. Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Worth v. Kolbeck*, 273 Neb. 163, 175, 728 N.W.2d 282, 293–94 (2007).

II. Under a clearly erroneous standard of review, an appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party, resolving evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *State v. Rashad*, 316 Neb. 101, 107–08, 3 N.W.3d 325, 330–31 (2024)

III. Discovery in a criminal case is generally controlled by either a statute or court rule. Therefore, unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion. *State v. Henderson*, 289 Neb. 271, 272, 854 N.W.2d 616, 621 (2014)

IV. Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement. *State v. Hood*, 301 Neb. 207, 917 N.W.2d 880 (2018). The appellate court determines as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a

defendant was or was not prejudiced by a defense counsel's alleged deficient performance. *Id*.

ASSIGNMENTS OF ERROR

I. The district court committed plain error in failing to rule on Parks' motions to depose witnesses resulting in violations of his statutory and constitutional rights to a speedy trial.

II. The district court erred in denying Parks' second motion for absolute discharge.

III. The district court erred in denying Parks' motions for discovery.

IV. The district court erred in denying Parks' motion for mistrial.

V. The district court erred by continuing numerous pretrial hearings without Parks' knowledge and consent, and directly contrary to his directives to appointed counsel, based solely on oral motions to continue and then finding that the continuances tolled his speedy trial rights; the appellate court erred by affirming those errors.

VI. Parks' appointed counsel was ineffective in refusing to assert Parks' statutory and constitutional rights to a speedy trial.

VII. Parks appointed and trial counsel were ineffective for entering into a contractual agreement with the State without Parks knowledge or consent prohibiting him from having direct access to his discovery.

VIII. Parks' trial and appointed counsel was ineffective by failing to withdraw the motions to depose.

IX. Parks' trial counsel was ineffective by failing to petition for further review of the interlocutory appeal.

I. Parks' appointed and trial counsel were ineffective for failing to review the discovery

PROPOSITIONS OF LAW

I. The right to a speedy trial is a fundamental right, and "[c]ourts should indulge every reasonable presumption against waiver, and they should not presume acquiescence in the loss of fundamental rights." *Barker v. Wingo*, 407 U.S. 514, 525, 92 S. Ct. 2182, 2189, 33 L. Ed. 2d 101 (1972).

II. Unreasonable delay should not toll the speedy trial clock. *State v. Wilcox*, 224 Neb. 138, 140, 395 N.W.2d 772, 773 (1986).

III. It is the duty of a court to see that justice is administered speedily, without delay, and legally, and is in conformity with constitutional mandates, including that a criminal defendant receives a trial which is fair and does not contravene a criminal defendant's Sixth Amendment right to effective counsel. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997).

IV. The rule in Nebraska is that the days excludable for an interlocutory appeal begins on the date the notice of appeal is filed, and they end "when the district court first reacquires jurisdiction over the case by taking action on the mandate of the appellate court." *State v. Baker*, 264 Neb. 867, 872, 652 N.W.2d 612, 617 (2002).

V. The right to a speedy trial is one of the rights guaranteed by the Nebraska Bill of Rights and the Sixth and Fourteenth Amendments of the United States Constitution. *State v. Bruns*, 181 Neb. 67, 146 N.W.2d 786 (1966).

VI. The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004).

VII. A defendant, this Court affirmed, has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal. *Fla. v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 560, 160 L. Ed. 2d 565 (2004).

VIII. The inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Doggett v. United States*, 505 U.S. 647, 654 (1992).

STATEMENT OF THE FACTS

This is an appeal by John L. Parks Sr. who was found guilty of two counts of murder in the first degree, two counts of use of a deadly weapon to commit a felony, one count of intent to distribute cocaine, and two counts of possession of a weapon by a prohibited person found at case number CR21-1565 in the District Court of Douglas County, Nebraska. The charges relate to a double homicide that occurred at hotel parking lot. (T53). John L. Parks Sr. was charged by the Information on May 7, 2021. (T3-5). The Information was later amended to add a habitual criminal allegation. *Id*.

The appearance of John Park Sr.'s original counsel, Mary M. Dvorak, was filed May 10, 2021. (T6). On May 10, 2021, a Waiver of Appearance/Plea of Not Guilty and a Motion for Discovery were filed with the Court by Park's first counsel. (T6; T7-8). On May 11, 2021, the Court filed an Order stating that the public defender had been appointed; the Defendant's plea of Not Guilty was accepted and mutual and reciprocal discovery was granted. (T9-10). On June 2, 2021, the District Court ordered a pretrial conference for June 25, 2021, where the defendant was ordered to appear. (T11-12). The District Court also ordered that mutual and reciprocal discovery be completed prior to the pre-trial conference. *Id*.

Next, there followed a series three (3) of pretrial conferences (on June 25, August 13, and September 27, 2021) the substance of which received a detailed treatment in State v. Parks, No. A-22-691, at pg. 2. None of those three pretrial conferences contained a verbatim record, but an order was filed subsequent to each. *Id*. Subsequent to the June 25th and August 13th, 2021 pretrial conferences, the District Court entered orders indicating that: Parks appeared personally and with counsel; defense counsel, on Parks' behalf, had requested a continuance; defense counsel confirmed that they advised Parks that the continuance would toll the speedy trial clock; Parks understood and consented to the same. (T13-15; T16-17). For each order, the District Court further found that Parks' motion

to continue tolled his statutory speedy trial rights pursuant to *Neb. Rev. Stat.* § 29-1207(4)(b) (Reissue 2016). *Id*. Additionally, the "Judge's Notes" section of the Douglas County District Court docket found at CR21-1565, contains notes supporting the substantive content of each respective order, to wit: that a pretrial hearing was held, the defendant was present, and he was advised his speedy trial rights would be tolled.

The third pretrial conference was originally scheduled for September 27th, 2021, but was rescheduled to September 23, 2021 on the District Court's own motion. (T14; T23). Again, no verbatim record was made of the September 23rd pretrial conference. *See* State v. Parks, No. A-22-691, at pg. 2. On September 24th, 2021, the District Court filed an order continuing the September 23rd pretrial conference to November 5th, 2021. That order indicated that: "the Defendant's attorney, on behalf of the Defendant, moves the Court to continue the pretrial conference. Defendant's counsel confirms that he/she has advised Defendant that the continuance will toll the speedy trial time and the Defendant understands and consents to same. *Id*. Unlike the previous two orders for continuances, there is no indication that Parks was present. Additionally, as noted in the interlocutory opinion, the record contains documents indicating that Parks was not transported from jail because he was in quarantine. *See* State v. Parks, No. A-22-691, at pg. 2. Finally, unlike for the previous two pretrial conferences, the "Judge's Notes" section of the Douglas County District Court docket found at CR21-1565, does not indicate that Parks was present, although it does state that "Defendant's counsel confirms that he/she has advised Defendant of his/her speedy trial rights and that a continuance will toll the speedy trial time."

In a separate order filed that same day, September 24th, 2021, the court scheduled a jury trial to begin on May 16, 2022. (Supp. T.??). On September 27, 2021, Parks filed a handwritten pro-se motion for discovery on the grounds that he was not being allowed to review his discovery at jail. (T25-26).

Once again, there is no verbatim record for the pretrial conference scheduled for November 5, 2021. The appellate court noted: "It appears from the record that the pretrial hearing scheduled for November 5, 2021, did not occur." *See* State v. Parks, No. A-22-691, at pg. 2. That assumption is supported by the lack of any notes in the "Judge's Notes" section of the Douglas County District Court docket found at CR21-1565 indicating that a hearing was held. Nonetheless, in an order dated November 10th, 2021 District Court stated that the matter was "before the Court on Defendant's oral motion to continue the pretrial conference which is scheduled before the Honorable Duane C. Dougherty on the 5th day of November, 2021." (T27). That Order further recited that" "Defendant's counsel confirms that he/she has advised Defendant that the continuance will toll the speedy trial time and the Defendant understands and consents to same. *Id*. In that manner, the pretrial hearing was continued to November 29, 2021. (T27).

On November 29, 2021, the first hearing on the record in State v. Parks Sr. was held. (BOE Vol. 1, 4:1-20:16). That same day, Parks' counsel filed two motions to take depositions. (T30-33). At the hearing, Parks stated on the record that this was the first time he had appeared in court. (BOE Vol. 1, 7:12-13). That assertion was not challenged by the District Court nor the State. The Court of Appeals addressed the issue of whether Parks Sr. was present at the first two pretrial conferences in its opinion on Parks' interlocutory appeal:

> We pause here to note that the record from which we can examine this issue is thin. No verbatim record of the pretrial hearings prior to November 29, 2021, were made. The State concedes in its brief that the record calls into question that part of the court's orders that stated Parks was present for at least two of the hearings. Parks' testimony at the November 29 hearing also contests the findings of the court that his counsel advised him of their intent to seek a continuance and asserted that he never consented to those motions.

See State v. Parks, No. A-22-691, at pg. 5

At the November 29th hearing, Parks orally motioned the District Court to assign him a different attorney, and argued that: he was not being represented properly; he had communicated his desire for a fast a speedy trial to his counsel; and he did not understand how his counsel could file continuances without Parks knowledge and contrary to his wishes. (BOE Vol. 1, 6:3-7:21). Parks asked the District Court whether he had a right to a fast and speedy trial, to which the District Court responded that he did but that his counsel would advise him of the scope of that right. (8:5-14). Parks responded that he had not been advised of nor waived his right to a fast and speedy trial. *Id*.

An extensive back-and-forth ensued between the District Court and Parks where the court cautioned Parks about moving forward unrepresented, and suggested that he take "a little bit more time to improve some relations between yourself -- your working relationship with you and counsel and see if you can gather a little more satisfaction." (BOE Vol. 1, 8:15-9:6). Parks again questioned the District Court as to whether he had a right to assert his constitutional right to a speedy trial and also whether his counsel was bound to support his assertion of that right. (BOE Vol. 1, 9:7-10:11). Additionally, Parks questioned whether his counsel was working with the State to delay the case in order to attain a tactical advantage. (BOE Vol. 1, 10:12-22).

Ultimately, Parks was given a choice by the District Court: persist in his motion for his current counsel to withdraw, in which case the court would not appoint a different attorney and Parks would represent himself, or attempt to work things out with his counsel. (BOE Vol. 1, 12:4-13). Ultimately, after again asserting his desire for a speedy trial to the District Court, Parks chose to keep his appointed counsel rather than proceed pro se. (BOE Vol. 1, 12:14-13:12). However, Parks persisted, and made it "obvious to all", that he did not want any further motions or depositions,

and that he wanted to assert his right to a speedy trial. (BOE Vol. 1, 13:11-19). The District Court then denied Parks motion to withdraw counsel. (BOE Vol. 1, 14:2-3). Then, Parks persisted in forcefully reiterating that he did not want any depositions done, but that his counsel persisted in opposing his wishes. (BOE Vol. 1, 14:5-15:13). The District Court refused to address those motions for deposition, telling Parks to work it out with his counsel. *Id*.

Next, the District Court took up Parks' handwritten motion for discovery (BOE Vol. 1, 15:14-17:14). The gist of Parks' motion, according to his counsel, was that he wanted to have his own copy of the discovery that he could review on his own time. ((BOE Vol. 1, 16:21-17-5). The State represented that it had provided complete discovery to Parks counsel, and objected to providing any actual discovery directly to Parks in jail, arguing that Parks himself was not entitled to copies of the police reports, and that the nature of the case made it appropriate to withhold providing copies of discovery directly to Parks. (BOE Vol. 1, 15:20-16:18). The district court denied Parks Motion for Discovery. (BOE Vol. 1, 17:6-14).

At this point, Parks interjected, asking permission to speak on his Motion for Discovery. (BOE Vol. 1, 17:17-18:2). Parks stated that he had not been afforded sufficient time to review his discovery by his counsel, and he questioned how he could defend himself without his own copy. (BOE Vol. 1, 18:3-20:16). Additionally, Parks attempted to argue that there was an insufficient basis to deny him his own copy of discovery; that other defendants in Sarpy County Jail had access to their discovery; and that reasonable accommodations could be made to allow him to access his discovery while incarcerated. *Id*. The District Court refused to entertain those arguments and terminated the proceeding. *Id*. In an order filed on November 30, 2021, the Court denied the motion for discovery filed by the defendant as well as Parks oral motion to dismiss his counsel and appoint a replacement. (T34)

New counsel for Parks entered his appearance on January 22, 2022. (T36). A pretrial hearing was held on February 4, 2022 with Parks present. (BOE Vol 1, 21:1-7). Parks new counsel (hereinafter "trial counsel"), who would represent him through his interlocutory appeal and trial, requested a continuance of the pretrial, and further informed the District Court that a continuance of the trial date might be requested in the future due to the voluminous discovery. (BOE Vol 1. 21:19-22:14). Parks' trial counsel stated on the record that he had discussed the issue with his client who understood that any continuances would toll the speedy trial clock. *Id*. The Court continued the pretrial hearing until February 18, 2022. (BOE Vol 1, 23:4-6).

On February 18, 2022, a pretrial hearing was held in which Parks was present. (BOE Vol 1, 24:16-18). The pretrial hearing was continued to March 2, 2022 on Parks' motion. (BOE Vol 1, 26:17-21). Parks stated on the record that he understood everything that was discussed at this hearing. (BOE Vol 1, 26:11-13). An order to continue was filed by the Court on February 18, 2022, continuing the pretrial to March 2, 2022. (T38).

While there is no record of any hearing regarding or any motion filed by Parks requesting a continuance of the March 2nd, 2022 pretrial hearing, the District Court filed an order on February 28, 2022, continuing the pretrial hearing until March 9, 2022. (T41). That order represented that defendant made an oral motion to continue the pretrial conference, and that Parks was advised by counsel and consented to the tolling of the speedy trial clock. *Id*. However, the order does not indicated that any attorney appeared, nor that Parks himself appeared. *Id*. Similarly, the "Judges Notes" section of the Douglas County District Court docket found at CR21-1565, indicates that the "matter came on for pretrial conference" but does not indicate that anyone appeared.

During the March 9, 2022 pretrial hearing, trial counsel requested that the trial set for May 16, 2022 be continued until September 21, 2022.

(BOE Vol 1, 28:20-29:6). An order filed by the Court on March 9, 2022, confirms this new trial date as well as the fact that the defendant was advised that this action would continue to toll the speedy trial clock. (T46).

Next, several motions filed with the court were scheduled for hearing on July 28, 2022. That hearing was continued to August 25, 2022. (T51). At the hearing on August 25, the motions filed by the defendant were described at the hearing as follows: a motion to sever charges; a motion in limine in regard to a K9 search; as well as a motion in regards to arguments as to discovery materials. . (BOE Vol 1, 32:11-18; 32:20-23). The motion in regards to discovery materials related to the earlier denial of the Parks' request to receive a copy of discovery materials for his review. (BOE Vol 1, 41:10-42:25). His trial counsel requested that the Court reconsider the request citing to Parks' due process and equal protection considerations. *Id*. Defense counsel reiterated the frustrating nature of the delays of Mr. Park's disposition and expressed concern by the defendant. *Id*.

An order on these motions was filed by the Court on August 29, 2022. (T66-67). The Court sustained the motion in limine, as the state conceded this motion. *Id*. The Court denied the motion for the defendant to review discovery while in custody. *Id*. The Court then ruled separately on the defense's motion to sever charges. *Id*.

From there, Parks brought a motion to discharge filed on September 19, 2022. (T69). In that motion, the defendant moved the court for absolute discharge under *Neb. Rev. Stat.*§ 29-1208, for the reason that the Defendant had not been brought to trial within six months, as is required by *Neb. Rev. Stat.*§ 29-1207 and has been denied his right to a speedy trial under Article VI of the United States Constitution and Neb. Const. Art. I, § 11.

The Court calculated that forty-nine (49) days had run off of Parks' speedy trial clock. (T82). Additionally, the Court calculated that the total

number of excludable days was four-hundred and fifty three 453. (T84). The court denied Parks motion for absolute discharge (T85).

Following denial of relief on interlocutory appeal, Parks went to trial where he was convicted on all counts. Between the time that the interlocutory appeal was spread on the record and when he was brought to trial, Parks made no motions or took any other action that would toll his statutory speedy trial clock.

SUMMARY OF THE ARGUMENT

A presumptively innocent man who is detained pretrial has little to no agency. Only though the court and its officers can his rights be vindicated. Ostensibly, Parks had statutory and constitutional rights to a speedy trial. He had a right to a fair trial, and to have effective counsel. Parks did everything in his power to assert those rights, but was stymied by both the court and his appointed counsel. Several continuances were requested and granted not only without his consent, but directly contrary to the instructions he gave his appointed attorney. Parks was not transported to court for those initial appearances, yet the court blithely made an erroneous record that Parks was present, had consulted with his attorney, and had given his informed consent to the continuances. That was all false. By the time Parks was finally brought to court, over six (6) months had already passed. At that point, he told the court as directly and clearly as he could that he did not want any further continuances, did not want depositions, and wished to assert his right to a speedy trial. But the court refused to rule on the motions to depose despite Parks insistence that he take action on them. Parks appointed counsel refused to act on them at that hearing. When Parks procured trial counsel, they neglected either to withdraw those motions to depose, or to ask the court to rule on them. Meanwhile, the parties moved forward with scheduling the depositions, and actually took one, notwithstanding the fact that the motions to depose remained undecided. Thus, when Parks again asserted his right to a speedy trial, and motioned

for absolute discharge the trial court, and later the appellate court, calculated that a mere forty-nine (49) days had passed on the speedy trial clock. At the time he motioned for absolute discharge, Parks had been incarcerated for almost a year and a half.

Parks did not prevail in his first motion for discharge, nor his interlocutory appeal. Nothing in this appeal is meant to constitute a waiver any of the arguments and assignments of error he made in his interlocutory appeal. However, the assignments of error in this appeal do not require that the appellate court re-calculate its statutory speedy trial calculation because Parks is entitled to an absolute discharge based on the records of what occurred after his interlocutory appeal. Importantly, Parks vehemently asserts that the same facts and circumstances at issue in the interlocutory appeal support his position that his constitutional right to a speedy trial was violated. That position in regards to his constitution rights is only strengthened by what occurred post-interlocutory appeal. At that point, Parks' right to a speedy trial remained, and his statutory speedy trial clock should have begun to run again. This time around, neither Parks nor his trial counsel took any action that would toll his speedy trial clock. Yet, Parks was not brought to trial in the time proscribed by statute. Parks again asserted that he was due an absolute discharge on the eve of trial, but the trial court again denied his motion. This time, the trial court didn't even make the effort to do the required calculation to determine the date by which Parks must be brought to trial.

Parks asks this Court to hold that his speedy trial clock resumed after his interlocutory appeal concluded and was spread on the record. The State will argue that Parks speedy clock never stopped being tolled from November 29, 2021, when his appointed counsel filed motions to depose against his wishes, until he was brought to trial on December 11, 2023. That argument makes a mockery of both Parks statutory and constitutional rights to a speedy trial. It would enshrine into law the principle that a trial court can simply refuse or neglect to rule on a motion properly before it to the indefinite detriment of a defendant's right to a speedy trial. If this court

determines that the statutory speedy trial clock failed to resume after the interlocutory appeal, then Parks will lose that argument based on a technicality: not because any of his actions delayed his trial. The vindication of the constitutional right to a speedy trial should not rise or fall based on a statutory technicality. A constitutional right should not, as Thomas Jefferson warned against, be "a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics[.]" *The Works of Thomas Jefferson*. Collected and edited by Paul Leicester Ford. Federal Edition. Vol. 12:135—38. New York and London: G. P. Putnam's Sons, 1904--5.

Parks other arguments dovetail and augment the above. Parks was denied his right to a fair trial when the court refused to allow him personal access to any discovery while he was in pretrial detention. His own trial counsel represented to the court that it was not feasible to schedule enough time with Sarpy County Jail to facilitate Parks review of the discovery. Finally, Parks received ineffective assistance from his appointed counsel that directly resulted in the trampling of his right a speedy trial. Appointed and trial counsel were also ineffective for entering into a contract with the State to deny Parks personal access to his discovery. That ineffective assistance continued with his trial counsel, who did not withdraw the motions to depose despite repeated opportunities and reminders.

Ultimately, the constitutional promise of a fair and speedy trial was not realized, and Parks suffered the extreme prejudice of multiple criminal convictions and life sentences as a result. Accordingly, he asks this Court to reverse the district court's decision on his motion for absolute discharge.

ARGUMENTS

I. The district court committed plain error in failing to rule on Parks' motions to depose witnesses resulting in violations of his statutory and constitutional rights to a speedy trial

Summary of Argument

Parks original counsel filed two motions to depose. (T30-31). Those motions were never ruled on by the district court nor withdrawn by Parks appointed or trial counsel despite several opportunities for action to be taken on the record. The district court had a duty to act on the motions to depose that were properly before it. The district court's failure to rule on those motions was plain error because it prejudiced Parks right to a speedy trial. Parks understands that, as a statutory matter, the reasonableness of the delay is not a factor pursuant to *Neb. Rev. Stat.* § 29–1207(4)(a), which may preclude him from relief in accordance with *State v. Turner,* 252 Neb. 620, 564 N.W.2d 231 (1997). Nevertheless, Park asserts that the principle elucidated in *State v. Wilcox* should control. 224 Neb. 138, 140, 395 N.W.2d 772, 773 (1986).

If Parks does not prevail on statutory grounds, it will be due to a mere technicality of the computation required by § 29–1207(4)(a). His arguments regarding his constitutional right to a speedy trial should be afforded a deeper analysis.

Argument

The right to a speedy trial is a fundamental right, and "[c]ourts should indulge every reasonable presumption against waiver, and they should not presume acquiescence in the loss of fundamental rights." *Barker*

v. Wingo, 407 U.S. 514, 525, 92 S. Ct. 2182, 2189, 33 L. Ed. 2d 101 (1972) (internal citations and quotations omitted). Here, Parks did not waive his right to a speedy trial. Rather, the trial court failed to ensure that Parks was afforded that constitutional right by refusing to rule on his motions to depose.

Motions to depose are a request for discovery. A trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion. *State v. Vela*, 279 Neb. 94, 107, 777 N.W.2d 266, 280 (2010). A motion to depose is a proceeding that tolls the speedy trial pursuant to *Neb. Rev. Stat.* § 29-1207(4).

"A defendant must accept delay as a consequence of making pretrial motions, where delay is not inordinate or unreasonable." *State v. Wilcox*, 224 Neb. 138, 141, 395 N.W.2d 772, 774 (1986). However, once a motion to depose is granted by the court, the speedy trial clock is no longer tolled. *State v. Murphy*, 255 Neb. 797, 804, 587 N.W.2d 384, 389 (1998). *Murphy* acknowledges that motions to depose are somewhat unique compared to other motions in that, once granted, the parties typically need not motion the court for further proceedings. *Id*. Additionally, "to the extent the parties rely on their own devices to secure the necessary depositions, the taking of the depositions is not a 'proceeding' within the meaning of § 29-1207(4)(a)." *Id*. Finally, unopposed motions to depose are routinely granted in district courts without a hearing. Here, there is no indication that the State objected, as evidenced by the fact that they went forward with scheduling and taking the depositions.

The issue here is not whether the court's decision on the motions to depose was an abuse of discretion, because the court never took any action on those motions. Ultimately, it was the trial court's poor procedural practices that likely robbed Parks of his statutory speedy trial right, despite his strong assertion of that right. *See State v. Rashad*, 316 Neb. 101, 113, 3 N.W.3d 325, 334 (2024). Parks recognizes that the Nebraska Supreme

Court has previously held that the plain terms of § 29–1207(4)(a) exclude all time between the time of the filing of the defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the delay. *State v. Turner,* 252 Neb. 620, 564 N.W.2d 231 (1997). However, this was an egregious error that ultimately resulted in a violation of Parks statutory and constitutional right to a speedy trial.

Thus, the standard of review should be plain error. Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Worth v. Kolbeck*, 273 Neb. 163, 175, 728 N.W.2d 282, 293–94 (2007).

On interlocutory appeal, the district court got a pass from this Court for not taking action at the November 29, 2021 hearing on the motions to depose filed by Parks appointed counsel without his consent. That opinion did not even address Parks arguments that unreasonable delay should not toll the speedy trial clock. *See State v. Wilcox*, 224 Neb. 138, 140, 395 N.W.2d 772, 773 (1986). But the interlocutory opinion was not without qualification:

> Clearly, Parks and his appointed counsel had disagreements regarding trial strategy. At the time Parks informed the court of his issues relating to the depositions, he had made a motion to dismiss his counsel. After a lengthy discussion with Parks about the disagreements, the court instructed Parks that he needed to talk with counsel. Counsel did not ask the court to rule on the motions to take depositions and the court did not assert itself further into the disagreement by issuing a ruling. *Because the court was aware of conflict between Parks and his counsel specifically related to the motions to depose, we*

> *find no error* in the court's decision not to further address the motions on November 29.

State v. Parks, No. A-22-691, at p. 7 (emphasis added).

After the November 29 hearing, there is nothing on the record indicating that Parks and his trial counsel had any conflict regarding the motions to depose. Additionally, the district court was aware that the parties had "relied on their on devices" in the scheduling and taking of depositions. *See State v. Murphy*, 255 Neb. 797, 804, 587 N.W.2d 384, 389 (1998). In light of those circumstances, the district court should not get a second pass for its continued failure to take action on the motions to depose after the interlocutory appeal concluded. To absolve this continued failure would be a miscarriage of justice that would do damage to the integrity, reputation, and fairness of the judicial process.

In this case, similar to the circumstances *Wilcox*, Parks' motions were pending before the court for years. In Parks' case, those motions were never ruled on despite the fact that the parties "relied on their own devices" and did, in fact, move forward with scheduling and taking depositions. *See Id*. The delay in ruling on the motions to depose was unreasonable and it should not toll Parks' speedy trial rights. *See State v. Wilcox*, 224 Neb. 138, 140, 395 N.W.2d 772, 773 (1986). Without waiving any of his arguments made on interlocutory appeal, Parks asserts that, at a minimum, his speedy trial clock should have resumed when the district court spread the mandate of the interlocutory appeal on the record.

There was no justification for the court's failure to act. It is the duty of a court to see that justice is administered speedily, without delay, and legally, and is in conformity with constitutional mandates, including that a criminal defendant receives a trial which is fair and does not contravene a criminal defendant's Sixth Amendment right to effective counsel. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997). Here, the trial court had a judicial responsibility to rule on the motions properly before it. The Nebraska

Revised Code of Judicial Conduct § 5-302.5(A)**,** mandates that Judges "*shall* perform judicial and administrative duties, competently and diligently." The comments to that section further elucidate the judge's responsibilities.

> [3] Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and *expeditious in determining matters under submission*, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.
>
> [4] In disposing of matters promptly and efficiently, *a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay*. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Id. (emphasis added).

Subsequent to the November 29, 2021 hearing, and prior to the interlocutory appeal, the court had no fewer than five (5) opportunities to rule on Parks' motions to depose on the record, yet took no action at hearings on: February 4, 2022; February 18, 2022; March 9, 2022; August 25, 2022. On September 20, 2022, the trial court heard arguments from the parties on Parks motion for absolute discharge. Parks himself testified as to his appointed counsel's refusal to abide by his express wishes regarding continuances, and that he had taken the issue directly to Tom Riley, the Douglas County Public Defender. (BOE Vol. 1, 84:9-87:19).

In coming to the decision to deny Parks' first motion for absolute discharge, the trial court reasoned on the record. (BOE Vol. 1, 112:4-118:10).

The trial court stated that Parks " didn't say he didn't want to take depositions." (BOE Vol. 1, 114:22-1:15-2). That conclusion is ludicrous. Immediately after the portion of the transcript quoted above, Parks again directly and forcefully told the court he did not want any depositions or any other motions filed and wanted to go to trial. (BOE Vol. 1, 12:22-15:14).

At that hearing, Parks was essentially in the position of a pro-se litigant advocating for himself because his appointed counsel refused to follow his directives. True, Parks did not invoke the exact legal incantation: I hereby orally motion the court to withdraw the motions to depose. Respectfully, Parks disagrees with this Court's reasoning on interlocutory appeal that Parks was required to make such a formal motion to withdraw the motions to depose in order to invoke judicial action. State v. Parks, No. A-22-691, at pg. 6. Parks' intent was crystal clear: he wanted the motions withdrawn so that his speedy trial clock would run. The trial court knew exactly what Parks was requesting, in his own words, Parks "made it obvious to all". (BOE Vol. 1, 12:22-15:14).

Putting aside the November 29 hearing, the district court had an obligation to take up those motions to depose at some point, particularly considering Parks' obvious concern on that front. At the November 29 hearing, the district court implicitly assured Parks that it would uphold his speedy trial rights: "When the Court is ready, the Court will set the matter for trial when the Court can. That's my obligation, and I will do that. With or without counsel, I'll set you for trial. When counsel tells me they're ready--" (BOE Vol. 1, 13:6-10). But the district court never made good on that promise by timely ruling on the motions to depose despite knowing full well the consequences to Parks rights. On September 20, 2022, the district court stated: "I think the way I understand the law, the Defendant's

motion to take depositions have never been brought to a conclusion -- filed November 29, 2021 -- are still tolling the clock up until the time of trial, if there's no order or withdrawal of those depositions. So I don't think any of that time has run in that respect." (BOE Vol. 1, 116:2-8).

The district court's failure to act was patently unfair to Parks. The Neb. Rev. Code of Judicial Conduct § 5-302.2. states that a "judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." It should be self-evident that a court should not unreasonably delay matters before it, and should make timely rulings that ensure fairness and respect for a defendant's rights. In the Federal system, that principle is enshrined in the rules. Federal Rule of Criminal Procedure 12(d) states that a court "*must* decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record." That same principle should be upheld in this case.

The trial court's refusal to rule on Parks motions to depose constitutes plain error that deprived him of a fundamental right. The statutory speedy trial clock should not have been tolled indefinitely based on the unreasonable delay caused by the district court's failure to timely rule (or rule at all) on his motions to depose. Alternatively, Parks constitutional rights were violated. Parks asks this Court to hold that the motions to depose filed his case do not toll his speedy trial clock indefinitely, and that, at a minimum, his speedy trial clock should have resumed when the district court spread the mandate of the interlocutory appeal on the record.

II. The district court erred in denying Parks' second motion for absolute discharge

Summary of the argument

Parks had a statutory right to a speedy trial that was violated when he was not brought to trial in accordance with § 29–1207. Following the interlocutory appeal, Parks took no action to delay his trial, and his speedy trial clock should have resumed. Parks is entitled to an absolute discharge because he was not brought to trial by December 1, 2023.

Additionally, Parks constitutional right to a speedy trial was violated by the unreasonable delay in bringing him to trial, despite his vigorous assertion of that right.

a. Parks' statutory speedy trial deadline was December 1, 2023

"Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question that will be affirmed on appeal unless clearly erroneous." *State v. Rashad*, 316 Neb. 101, 107–08, 3 N.W.3d 325, 330–31 (2024). "Under a clearly erroneous standard of review, an appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party, resolving evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence." *Id*.

"The rule in Nebraska is clear that to calculate the time for speedy trial purposes, we must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add in any time excluded under § 29–1207(4) to determine the last day the defendant can be tried. "*State v. Baker*, 264 Neb. 867, 874, 652 N.W.2d 612, 618 (2002).

The interlocutory appeal paused Parks' speedy trial clock; it did not restart it. *See State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999). The rule in Nebraska is that the days excludable for an interlocutory appeal begins on the date the notice of appeal is filed, and they end "when the district court first reacquires jurisdiction over the case by taking action on

the mandate of the appellate court." *State v. Baker*, 264 Neb. 867, 872, 652 N.W.2d 612, 617 (2002) (internal citations omitted).

On the eve of trial, December 11, 2023, Parks again motioned the court for absolute discharge. (BOE Vol. 5, 3:11-4:3). The court did not engage in any analysis nor did it calculate Parks speedy trial date as required. *See State v. Nelson*, 313 Neb. 464, 477, 984 N.W.2d 620, 631 (2023). Nor did the state prove by preponderance of evidence the existence of a period of time which is authorized by speedy trial statute to be excluded in computing time for commencement of defendant's trial. *Neb. Rev. Stat.* §§ 29-1207(4), 29-1208; *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). Instead, the trial court simply referenced the interlocutory appeal and ignored judicial precedent, elucidated in *Baker*, that the speedy trial clock resumes following the conclusion of the interlocutory appeal. That failure to calculate Parks new speedy trial date was plain error.

In this case, the district court determined, and the appellate court affirmed on interlocutory appeal, that there were four hundred and fifty three (453) excludable days between the filing of the information on May 7, 2021 and the day Parks was first brought to trial, on September 20, 2022. All the days from that date until July 19, 2023, when the District Court filed its Judgement on the Mandate, should be excluded: three hundred and one (301) days. Between July 19, 2023 and the day Parks was brought to trial, December 11, 2023, the Defendant filed no motions, and there should be no days excluded from his speedy trial clock. As previously argued, the motions to depose filed years before should not toll Parks speedy trial clock after the interlocutory appeal was concluded.

Thus, the total number of excludable days is seven hundred and fifty four (754), putting the expiration of Parks' speedy trial clock on December 1, 2023. Put another way, on September 20, 2022, when he filed his Motion for Absolute Discharge, forty-nine (49) days had run off of his speedy trial clock according to the District Court (T83). That clock was paused

throughout the pendency of the interlocutory appeal. It resumed on July 19, 2023. At that point, the State had approximately one-hundred and thirty-five (135) days to try Parks, or until December 1, 2023. Regardless of how it is calculated, more than 6 months of non-excludable time passed before the State brought Parks to trial. Trial counsel made an oral Motion to Discharge on the first day of trial, December 11, 2023 which was denied. (BOE Vol. 5, 3:11-4:3).Therefore, the District Court erred in denying Parks' Motion for Discharge, because more than six (6) months of non-excludable time had passed without the State bringing Parks.

b. Parks constitutional right to a speedy trial was violated

The right to a speedy trial is one of the rights guaranteed by the Nebraska Bill of Rights and the Sixth and Fourteenth Amendments of the United States Constitution. U.S. Const. Amend. VI; Neb. Const. Art. I, § 11; *State v. Bruns*, 181 Neb. 67, 146 N.W.2d 786 (1966). The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004). The primary burden to ensure that cases are brought to trial lies with the courts and the prosecutors. *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972);

> Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, the factors are related and must be considered together with such other circumstances as may be relevant....

State v. Trammell, 240 Neb. 724, 728, 484 N.W.2d 263, 267 (1992) (internal citations and quotations omitted). "None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. Rather, the factors are related and must be considered together with other circumstances as may be relevant." *State v. Brooks*, 285 Neb. 640, 646, 828 N.W.2d 496, 501 (2013)

Here, if Parks' does not prevail on his statutory speedy trial claim, that failure will be based on a technicality regarding the motions to depose remaining undecided. Yet, there is no legitimate argument that judicial inaction should toll the constitutional speedy trial clock time in these circumstances when the parties moved forward as if the depositions had been ordered, and no delay whatsoever was caused that could be attributable to the defendant.

Length of delay

The first step in this analysis is the length of the delay, **w**hich acts as the "triggering mechanism." *Barker v. Wingo*, 407 U.S. at 530, 92 S.Ct. 2182. "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *State v. Betancourt-Garcia*, 295 Neb. 170, 188, 887 N.W.2d 296, 311 (2016). Generally, courts have found a delay "presumptively prejudicial" when it approaches one year. See 21A Am. Jur. 2d Criminal Law § 934.

"While the constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other, we have recognized that § 29-1207 provides a useful standard for assessing whether the length of a trial delay is unreasonable under the U.S. and Nebraska Constitutions. *State v. Lovvorn*, 303 Neb. 844, 852, 932 N.W.2d 64, 70 (2019). Again, if the statutory speedy clock was tolled indefinitely simply because § 29–1207(4)(a) provides no provision to consider the reasonableness of judicial delay, that factor does nothing to undercut the merits of Parks' constitutional arguments.

The delay here was considerable and unjustifiable. More than six (6) months had passed between the filing of the indictment on May 7, 2021, and the first time Parks appeared in court on November 29, 2021. Five-hundred (500) days, well over a year, passed between the indictment and when Parks filed a motion for absolute discharge on the eve of his originally scheduled trial on September 19, 2022. While the trial and appellate courts determined that only forty-nine (49) days ticked off Parks' statutory speedy trial clock, this constitutional analysis should not simply replicate the statutory analysis and perpetuate the unfairness of holding Parks responsible for the unjustifiable delays caused by the court and his counsel, as previously argued.

The time elapsed between the filing of the indictment and the first continuance filed with Parks knowledge and consent on February 4, 2022, was two hundred and seventy three (273) days. After the interlocutory appeal was spread on the record, on July 19, 2023, one-hundred and forty-five (145) days passed. Thus, the delays not attributable to Parks spanned four hundred and eighteen (418) days, or well over a year. Such a delay is presumptively prejudicial. This factor favors Parks.

The reason for the delay

The delay between the indictment and Parks first physical appearance in court on November 29, 2021 must be attributed to the court and Parks appointed counsel. Again, the State previously conceded, and the interlocutory opinion noted, that the record regarding Parks presence is was questionable. *See* State v. Parks, No. A-22-691, at pg. 5. Importantly, Parks assertion on November 21 that it was his first physical appearance in court went uncontested by the court and the State. (BOE Vol. 1, 7:12-13) Parks was incarcerated during that entire period of time between indictment and November 29, and there was nothing he could have done to ensure that he was transported to court for his pretrial hearings, nor could he force his appointed counsel to consult with him and follow his directives.

Again, in these extraordinary circumstances where appointed counsel is causing a tollable trial delay directly contrary to the express wishes of their client, such delay should not be attributable to the defendant. Parks appointed counsel was not bound to consult Parks on every tactical decision; " But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant, this Court affirmed, has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal. *Fla. v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 560, 160 L. Ed. 2d 565 (2004) (internal quotations and citations omitted). The right to a speedy trial is amongst those fundamental rights that are a defendants to assert or waive personally.

> The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.
> The counsel provision supplements this design. It speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists.

Faretta v. California, 422 U.S. 806, 819–20, 95 S. Ct. 2525, 2533–34, 45 L. Ed. 2d 562 (1975).

Here, Parks was denied a meaningful opportunity to assert his personally held constitutional right a speedy trial by the conduct of his appointed counsel who caused a delay that Parks objected vehemently to.

On interlocutory appeal, this court found that one-hundred and thirty-three (133) days were excluded from his statutory speedy trial clock based on those continuances. Applying that statutory calculation in the constitutional context would ignore the specific facts in this case, and the result would be unfair and unjust to Parks because that delay is not attributable to Parks.

After Parks obtained trial counsel, he consented to three (3) continuances. Those continuances did not constitute a waiver of his constitutional speedy trial right. The reason for the continuances was so that Parks' trial counsel could prepare for trial, and also due to scheduling conflicts. Thus, Parks should be held responsible for a delay of two-hundred and twenty-nine days (229) prior to his first motion for absolute discharge.

Following the denial of his first motion for absolute discharge, Parks appealed. That interlocutory appeal resulted in a delay of three-hundred and three (303) days. That delay is attributable to Parks.

Following the spreading of the mandate of the interlocutory appeal on the records, neither Parks nor his counsel took any action that caused a delay.

Therefore, Parks should be held responsible for approximately five-hundred and thirty two (532) days of delay. The total number of days between indictment and trial was nine-hundred and forty eight (948) days. Four hundred and sixteen (416) days, well over a year, are delays attributable to the State or the trial court. While the statutory six months is just a useful guide, it is notable that the delay attributable to the State and trial court is well over twice the statutory standard. This factor should favor Parks.

The defendant's assertion of the right

Parks previous arguments went into significant detail on his assertion of his constitutional right to a speedy trial, and he reasserts those arguments here. Parks objections were frequent and forceful. *See State v. Lovvorn*, 303 Neb. 844, 853, 932 N.W.2d 64, 70 (2019).

Parks attempted to assert his conditional right to a speedy trial through his appointed counsel, who subsequently vitiated that right through repeated motions to continue and other pretrial motions without his knowledge or consent. Parks testified directly on this issue at the time of his first motion for absolute discharge. (BOE Vol. 1, 85:8-86:18).

At his very first opportunity to be heard in court, Parks forcefully asserted the right directly to the trial court. Again, Parks was not given any form of redress. He asserted it again in his first motion for absolute discharge and during his interlocutory appeal of the trial court's denial of such. He asserted it on the eve of trial in a second motion to discharge. Parks even asserted it during his sentencing allocution.

It is difficult to imagine what more Parks could have done to assert that right, especially in light of his pretrial detention. Parks was as forceful as he could respectfully be, yet the trial court, by both its actions and inactions, failed to protect that fundamental right. Parks own appointed counsel refused to protect that right. The circumstances that forced Parks to advocate for himself are an egregious affront to the integrity of the justice system.

Prejudice to the defendant.

In analyzing the prejudice factor of the four-factor test, yet another balancing test is called for, based on the following factors: (1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of the defendant, and (3) limiting the possibility that the defense will be impaired by dimming memories and loss of exculpatory evidence. *State v.Betancourt-Garcia*, 295 Neb. 170, 187–88, 887 N.W.2d 296, 311 (2016), *abrogated on other grounds, State v. Guzman*, 305 Neb. 376, 940 N.W.2d

552 (2020) (quoting 407 U.S. at 532, 92 S.Ct. 2182). Of these three aspects, the third is considered most important "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id*.

Factor one supports a finding of prejudice, because Parks was incarcerated for over six months before he ever physically appeared in court. The already inherently oppressive nature of pretrial incarceration was compounded by the unreasonable delay in bringing Parks to court. Ultimately, Parks spent more than a year in pretrial incarceration due to delay that was not reasonably attributed to him.

Factor two also supports a finding of prejudice. Parks understood his right to a speedy trial. He had concerns that the potential witnesses, such as Evelyn Lee, would be subject to threats, coercion or pressure from the police and/or relatives of the victims to point an accusatory finger at him. His anxiety and concern were manifest in his handwritten pro se motion for discovery filed on September 7, 2021. That anxiety persisted and grew with each successive denial of his motions for discovery. Likewise, the entire exchange between Parks and the court on November 29 was essentially an expression of Parks anxiety and concern over the denial of his right to a speedy trial. The abject failure of appointed counsel to abide by its obligations under Nebraska Rules of Professional Conduct, §§ 3-501.2 and 3-501.4 to abide by Parks directives was particularly concerning. Parks believed that his right to a speedy trial was being actively denied to him by his appointed counsel, directly accusing her on the record of working with the prosecution. (BOE Vol. 1, 10:12-16).

The third factor also favors Parks. Parks received information from friends and family that they were being threatened by individuals associated with the victims. One of whom, Lena Parks, was so scared by the threats that she left her home for a period. Parks rightfully believed that there was one witness to the events that day, Evelyn Lee, whose truthfulness or dishonesty would either vindicate or incarcerate him. Parks learned from Theresa McGee that Evelyn Lee was also being threatened and pressured to

implicate himself and to falsely state that she witnessed Parks shoot the victims. Parks was concerned that delay would be to his disadvantage, because it allowed time for Evelyn Lee to be threatened and coerced into slanting her story against him. Eventually, Evelyn Lee did testify that Parks had a gun in his hand immediately after the shooting, and that Parks told her that Harbour had been involved in his son's murder. Parks contends that she fabricated those statements in response to threats and coercion that could have been avoided had he been brought to trial speedily.

Additionally, Parks learned from the mother of his murdered son, Stacy Peak, that she had information that Parks was innocent, and that she knew who the actual shooter was. Unfortunately, Stacy Peak passed away on August 21, 2021, before Parks was brought to trial. The death or disappearance of a witness is a specific source of prejudice mentioned in *Barker v Wingo*, 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182. The prejudice factor should favor Parks.

III. The district Court erred in denying Parks' motion for discovery

Discovery in a criminal case is generally controlled by statute; therefore, unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion. *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014). A defendant in a criminal proceeding has no general due process right to discovery. *Id.*

Discovery in criminal cases in Nebraska is governed by *Neb. Rev. Stat.* § 29-1912 (Reissue 1995). Nothing in § 29-1912 states that a defendant is not allowed personal access to discovery while incarcerated. In fact, the statute specifically identifies that it is the defendant, not his counsel, who may request to inspect copy of photograph that discovery. *Id*. Following such a request, the statute grants courts discretion to issue an order pursuant to that section. While granting the discovery request is

discretionary, the statute requires that the court consider a series of factors. § 29-1912(2)(a-3). Furthermore, if the court denies such a request "it shall render its findings in writing together with the facts upon which the findings are based." § 29-1912(3). Finally, the statue gives the State the ability to submit a written statement in support of their position that granting the order will result in " the possibility of bodily harm to witnesses or that witnesses will be coerced". § 29-1912(4).

Crucially, none of those statutorily mandated actions were taken by the court. Each respective order simply states that the motion is denied without any analysis. (T32; T65). The State made a blanket objection that, "historically", providing discovery to incarcerated individuals leads to witnesses being contacted. (BOE Vol. 1, 43:11-19) The State further argued that it was a "consistent policy of our office" to obligate defense attorneys to refrain from providing discovery to their clients. (BOE. Vol. 1, 4-9). The State made no specific allegation that Parks had attempted to contact witnesses, nor any specific concern that he would did so in this case. The State cited no cases in support of its position. Finally, the State adduced no evidence. The district court's failure to comport with the discovery statute was an error.

Here, the record reflects that Parks vigorously objected to not being granted full access to the discovery via his pro-se and subsequent motions for Discovery. (T25; T62). But, the record is bare as to the district court's reasoning. However, it if fair to assume that the denials were based on the status quo in Douglas County, whereby attorneys, without their client's knowledge or consent, sign contracts with the State prohibiting them from granting their clients direct access to discovery materials – i.e., clients can review discovery materials with counsel, but cannot have direct access, themselves, to discovery materials at the jail. Parks argues that upholding the status quo is insufficient justification for denying him his constitutional right to a fair trial.

Parks views the routine practice of denying defendant's their discovery as a conspiracy between the Public Defender's Office, the State, and the court to deny defendants an ability to defend themselves. There is nothing in the discovery statute suggesting that defendants do not have a personal right to discovery. There was nothing in the district court's order suggesting that Parks was not allowed to personally possess is discovery. There was no case cited by the State on the record to support the denial. Thus, it is only the policy of the Douglas County Prosecutor that supports the denial of Parks' statutory right to discovery. When the court rubberstamps the State's objections without doing any statutory analysis, the only conclusion left for Parks is that the system itself is skewed against him.

The circumstances in this case implicate Parks due process rights under the 14th Amendment guaranteeing criminal defendants a meaningful opportunity to present a complete defense. *See generally State v. Henderson*, 289 Neb. 271, 296, 854 N.W.2d 616, 637 (2014). Parks' due process rights were violated because, lacking access to discovery, he could not present a proper defense. Parks maintains that he did not shoot the victims, but that a 3rd party did. He believes that 3rd party was either checked into the same hotel, or was in close vicinity to the hotel when the shooting occurred. Parks wanted access to discovery to scrutinize the surveillance videos for signs of the shooter. He felt that it was essential to his defense. Additionally, Parks believed that officers with body cam activated may have had contact with the shooter or their associates. Reports and testimony by Officer Wucher indicated that "there were a couple suspicious parties that were unwilling to talk to [Officer Wucher] and took off in a hurry in the parking lot". (BOE Vol. 5, 1314:18-1315:8). Law enforcement did not conduct any follow up with those suspicious individuals. *Id*. Parks felt strongly that only he, a eyewitness to the events that day, and not his appointed or trial counsel, was in a position to extract details from those videos relevant to his defense.

Finally, Parks had personal knowledge that Harbour was not looking at videos on his phone around 7am that morning, contrary to what Wucher's report indicated. Specifically, the State's theory of the case, initially, revolved around its belief that Parks viewed a video of his son's death in Harbour's phone, which led to Parks, twenty-five (25) minutes later, killing both Harbour and Hatten. (BOE. Vol. 5, 1243:13-1251:2). That theory was derived from a scientific report drafted by Wucher, which purportedly established that the alleged video was viewed by Parks shortly before the homicide. *Id.* Counsel took the State and Wucher's factual contentions at face value about the video evidence, which inevitably led to trial counsel formulating a theory of defense to contest the video evidence. Thus, the defense strategy involved eliciting testimony from Officer Dempsey concerning the homicide of Parks' son. (BOE Vol. 5, 894:8-897:15). The sole reason for that testimony, according to trial counsel, was to combat the State's theory about the video. (BOE Vol. 5, 1246:2-6).

Parks' genuine belief that only he, not his trial counsel, would be able to glean exculpatory evidence from review of his discovery, particularly the videos, is supported by the representations of trial counsel. His trial counsel made it abundantly clear that he did not "have the time to go read over word-for-word 1,000 pages worth of police reports and review literally hundreds of hours of videos. It's just not practical." (BOE Vol. 1, 44:14-23).

Trial counsel did file a motion in limine during trial arguing that the video on Harbour's phone lacked foundation, was irrelevant, and unfairly prejudicial. (T98-99). The district court originally denied that motion following representations by the State, many of which were later shown to be erroneous. (BOE Vol. 5, 1080:18-21).

After Dempsey's testimony, the State brought to the court's attention that their arguments on the motion in limine were based on a mistake that they only just realized. (BOE Vol. 5, 1106:12-1108:8). As the district court

noted, this was "a pretty significant change." *Id*. Parks may well have been able to catch the error in Wucher's report had he been allowed time to view his discovery. Had Parks done so, the prejudice he experienced from the irrelevant evidence of the details of his son's murder could have been excluded pretrial.

Similar to the balancing test required to analyze the prejudice to a defendant resulting from a delay in being brough to trial, the district courts repeated refusal to grant Parks request that discovery be available for review strikes at the heart of a defendant's right to defend himself, "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Doggett v. United States*, 505 U.S. 647, 654 (1992) (quoting Barker for same proposition).

It must be noted, that granting criminal defendants access to discovery materials in jail is not a logistically far-fetched, untenable proposition. For example, recently, in *U.S. v. Sean Combs*, Case No. 24-CR-542(AS) (S.D. NY 2024), the district court granted an incarcerated criminal defendant direct access to his discovery materials under specifically enumerated conditions. Combs was granted access to his discovery materials, notwithstanding the fact that there was evidence presented of him tampering with witness. See Docket 92, pg. 2. If Sean "P Diddy" Combs can have discovery while detained – why can't Parks?

Ultimately, Parks ability to defend himself was prejudiced by the non-disclosure of discovery to him personally. Parks asks this court to vacate his conviction and sentence, and remand his case back to the district court with directions to (1) schedule a new trial; and (2) grant Parks direct access to the discovery materials.

IV. The district court erred in denying Parks' motion for mistrial

The State's theory going into trial was that Parks killed his longtime friends because he saw a video on Harbour's phone that led him to conclude that Harbour was involved in his son's murder. During trial, Parks motioned the court to exclude evidence of a video found on Harbour's phone that depicted a shooting. That motion was initially denied, but later granted once Wucher's error in calculating the time the video was accessed was undiscovered. At that point, the State essentially conceded that the video was not relevant because there was no indication that it was viewed the morning in question. (BOE Vol. 5. 1107:10-11)

Parks contends that, in light of the video being excluded as irrelevant, the evidence and arguments adduced regarding the specific circumstances of his son's murder were unfairly prejudicial to him. There were three instances where the circumstances of that shooting were addressed: 1) During the State's opening (BOE Vol. 5, 315:2-9); 2) During the State's direct examination of Officer Demsey (BOE Vol. 5, 886:12-20); and 3) during trial counsel's cross of Dempsey. (BOE Vol. 5, 894:897:17).

Trial counsel argued that this issue required a mistrial because the jury heard irrelevant and prejudicial information suggesting a motive for the killings. (BOE Vol 5,. 1249:5-19). Additionally, trial counsel requested a continuance to review the report, and to hire his own experts to do so, to no avail (BOE Vol 5,.1248:5-1250).

Thus, the record reflects that Parks was unfairly prejudiced by the irrelevant evidence adduced regarding his son's murder and that the district court erred by not granting that mistrial.

V. The district court erred by continuing numerous pretrial hearings without Parks knowledge and consent, and directly contrary to his directives to appointed counsel, based solely on oral motions to

continue and then finding that the continuances tolled his speedy trial rights; the appellate court erred by affirming those errors

Parks appointed counsel requested multiple continuances not only without his knowledge or consent, but directly contrary to his express wishes. Those continuances robbed Parks of his personally held constitutional right to a speedy trial. Further, the oral motions to continue made by appointed counsel did not meet the requirements of *Neb. Rev. Stat.* § 25-1148 (Reissue 2016) and *Neb. Rev. Stat.* § 29-1206 (Reissue 2016) and cannot be utilized as a basis for exclusion of speedy trial time. Furthermore, the lack of record including the lack of good cause shown for continuance, and the lack of compliance with §§ 25-1148 and 29-1206, the time that passed between the scheduled pretrial hearings should not have been excluded. Additionally, the time period between June 25 and November 29, 2021, is not excludable time because he had no knowledge those continuances were requested, and did not personally consent them. The court also erred in excluding the entirety of the time which has elapsed since November 29, 2021, the date that Parks filed his two motions for depositions because there were not ruled in a timely fashion. Finally, the district court should not have excluded the time which elapsed from September 27, 2021, when he filed his pro se "Motion of Discovery" until November 29 when it was resolved.

The district court's failure to ensure that Parks' was brought to court, advised of his rights, and given an opportunity to assert or waive those rights resulted in the violation of Parks' constitutional right to a speedy trial.

VI. Parks received ineffective assistance of counsel.

Amendment VI of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST, Amend. VI. Additionally, Article I, Section 11 of the Constitution of the State of

Nebraska provides: “In all criminal prosecutions the accused shall have the right to . . . defend by counsel.” Neb. Const. Art. I, § 11.

In order to establish relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel’s performance was deficient; that is, counsel’s performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007). Next, the defendant must show that counsel’s deficient performance prejudiced the defense in his or her case. *Id*. at 741.

a. Parks’ appointed counsel was ineffective in refusing to assert Parks’ statutory and constitutional rights to a speedy trial.

The conduct of Parks’ appointed counsel was inconsistent with their obligations under the Nebraska Rules of Professional Conduct § 3-501.2, which states that a lawyer “shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.” Those enumerated rights are constitutional and personal, just like the right to a speedy trial.

By continuing multiple pre trials without Parks knowledge or consent, and against his expressly stated wishes, his appointed counsel undercut his person right to a speedy trial. Similarly, appointed counsel was ineffective for failing to abide by Nebraska Rules of Professional Conduct § 3-501.4 by failing to procure informed consent for the waiver of his speedy trial rights.

Similarly, appointed counsel’s refusal to withdraw their motions to depose in the face of Parks speedy trial objections constituted ineffective

assistance. As previously argued, Parks experienced prejudice as a result because witnesses and potential witnesses were subject to threats and coercion that effected their testimony or willingness to participate in Parks' defense.

The ineffectiveness of counsel prevented Parks from achieving an absolute discharge based on a statutory violation of is speedy trial rights, and Parks was therefore prejudiced.

b. Parks' appointed and trial counsel were ineffective for entering into a contractual agreement with the State without Parks knowledge or consent prohibiting him from having direct access to his discovery .

The relationship between attorney and client is one of agency, and the general agency rules of law apply to the relation of attorney and client. *State v. Brown*, 312 Neb. 654, 980 N.W.2d 834 (2022). An agent has an obligation to refrain from doing any harmful act to the principal, to act solely for the principal's benefit in all matters connected with the agency, and to adhere faithfully to the instructions of the principal, even at the expense of the agent's own interest.

Parks never consented to, nor had knowledge of his attorneys signing an agreement with the State to prohibit his personal possession of discovery. (*See* BOE Vol. 1, 42:2-10). Parks should not be bound by those agreements because Park's attorney-client relationship are governed by agency law. Indeed, both attorneys had an obligation to Parks to not only acquire his consent before making such decisions, but also, make decisions on his behalf that were not adverse to his interests. Thus, both of Parks' attorneys failed to meet the standard of effective counsel.

Although the district court failed to make a record as to why it denied Parks' motions for discovery, it can be assumed that it did so out of

deference for the common practice of prosecutors requiring defense attorneys to sign these agreements in order to receive discovery. Parks was prejudiced by counsel's conduct, because signing the unauthorized agreement with the State formed the legal basis upon which his motions for discovery were presumably denied. Again, the fact that Parks did not have access to discovery prejudiced his ability to defend himself.

c. Parks' trial counsel was ineffective by failing to withdraw the motions to depose.

Parks trial counsel never acted to finalize the motions to depose filed by appointed counsel despite numerous reminders that those motions were indefinitely tolling Parks' speedy trial clock. In light of the paramount importance Parks placed on his speedy trial right, it was incumbent upon his trial counsel to protect that right. Furthermore, the fact that the parties moved forward with depositions notwithstanding the lack of a judicial order on the motions to depose meant that there was no legitimate reason not to withdraw those motions. That occurred prior to the interlocutory appeal. By failing to withdraw those motions prior to the interlocutory appeal, trial counsel fell short of the standard for effective counsel. That ineffectiveness was compounded by trial counsel's failure to withdraw the motions after the interlocutory appeal concluded. As a result, Parks was prejudiced, because but-for his trial council's negligence, Parks' statutory speedy trial clock would indisputably have run before he was brought to trial.

d. Parks' trial counsel was ineffective by failing to petition for further review of the interlocutory appeal.

Following the decision of the appellate court on Parks' interlocutory appeal, Parks trial counsel failed to petition for further review pursuant to Nebraska Supreme Court Rule § 2-102(F). *See* State v. Justin N Rashad, S 22-97. That inaction prejudiced Parks because it denied him an important

avenue to obtain redress for the constitutional violations of his right to a speedy trial. As evidenced by the ruling in *State v. Rashad*, absolute discharge was a possibility based on the same type of constitutional arguments Parks assigns here that the district court's poor procedural practices resulted in a speedy trial clock violation. 316 Neb. 101, 113, 3 N.W.3d 325, 334 (2024).

e. Parks' appointed and trial counsel were ineffective for failing to review the discovery

As previously discussed at length, Parks ability to defend himself depended on his counsel bringing discovery to jail in order to review it. Neither appointed nor trial counsel brought the videos in discovery to Sarpy County Jail to review with Parks. Thus, Parks was denied the ability to defend himself adequately. Parks was prejudiced because, as previously argued, evidence and argument regarding a video in Harbour's phone that was irrelevant and unfairly prejudicial was presented to the jury. Effective counsel would have reviewed those videos with Parks in order to craft a a constitutionally adequate defense.

CONCLUSION

Parks prays that this Court uphold his statutory and constitutional rights to a speedy trial and to remand this case to the district court with instructions to grant Parks and absolute discharge.

JOHN L. PARKS SR., Appellant,

BY:*s/Stuart Dornan*_____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that an original of the foregoing was E-filed with the Clerk of the Nebraska Court of Appeals, 2413 State Capitol, Lincoln, Nebraska 68509, with notice going to the Office of the Attorney General, 2115 State Capitol Building, Lincoln, Nebraska 68509, this 3rd day of January, 2025.

*s/Stuart Dornan*_____

CERTIFICATE OF WORD-COUNT COMPLIANCE

The undersigned hereby certifies this brief complies with the typeface requirements of the rule and that the word count using the latest version of Microsoft Word software is 14,044 words including this certificate.

*s/Stuart Dornan*_____

Certificate of Service

I hereby certify that on Friday, January 03, 2025 I provided a true and correct copy of this *Brief of Appellant Parks* to the following:

State of Nebraska represented by Michael Thomas Hilgers (24483) service method: Electronic Service to **katie.beiermann@nebraska.gov**

Signature: /s/ Dornan,Stuart,Jay (18553)