In the Supreme Court of the State of Nevada

Case No. 80255

Evaristo Jonathan Garcia

Appellant,

v.

James Dzurenda, et al.,

Respondent.

Supplemental Index of Exhibits in Support of Motion to Remand

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Petitioner Garcia submits the following exhibits in support of his Motion to Remand.

No.	DATE	DOCUMENT	COURT	CASE #
C.	1/29/2020	State's Opposition to Defendant's Motion to Alter or Amend a Judgment Pursuant to Nev. R. Civ. P. 59(e)	Eighth Judicial District Court	A-19-791171-W
D.	1/30/2020	Reply to Opposition to Motion to Alter or Amend a Judgment Pursuant to Nev. R. Civ. P. 59(e)	Eighth Judicial District Court	A-19-791171-W
E.	1/31/2020	State's Supplement to Opposition to Defendant's Motion to Alter or Amend a Judgment Pursuant to Nev. R. Civ. P. 59(e)	Eighth Judicial District Court	A-19-791171-W
F.	2/6/2020	Transcript of Proceedings Re: Motion to Alter or Amend	Eighth Judicial District Court	A-19-791171-W

Dated March 20, 2020.

Respectfully submitted,
Rene L. Valladares
Federal Public Defender

/s/ S. Alex Spelman
S. Alex Spelman
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2020, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include: Alexander G. Chen.

/s/ Jessica Pillsbury
An Employee of the
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EXHIBIT C

EXHIBIT C

OPPS
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

EVARISTO GARCIA,
#2685822

Defendant.

CASE NO: A-19-791171-W

DEPT NO: 29

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO ALTER OR AMEND A JUDGMENT PURSUANT TO NEV. R. CIV. P. 59(e)

DATE OF HEARING: FEBRUARY 6, 2020
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through KAREN MISHLER, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to Alter or Amend a Judgment Pursuant to Nev. R. Civ. P. 59(e).

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On March 14, 2019, Defendant Evaristo Jonathan Garcia ("Defendant") filed, under seal, his second state Post-Conviction Petition for Writ of Habeas Corpus ("the Petition"). On August 8, 2019, the Petition was denied by this Court. On August 9, 2019, Defendant filed a Motion for Reconsideration. On September 10, 2019, this Court issued an Order denying the Petition. On September 16, 2019, the State filed a Motion to Unseal Post-Conviction Petition for Writ of Habeas Corpus and Exhibits Related Thereto, and Motion for Clarification. On September 19, 2019, this Court issued an order vacating the previous Order denying the Petition. On October 10, 2019 the State filed its Response to the Petition. On October 17, 2019, Defendant filed a Reply. On November 12, 2019, this Court denied the Petition. On November 15, 2019, this Court issued an Order denying the Petition.

On November 27, 2019, under seal, Defendant filed a Motion to Alter or Amend a Judgment Pursuant to Nev. R. Civ. P. 59(e) ("the Motion"). The State responds as follows.

ARGUMENT

I. THE NEVADA RULES OF CIVIL PROCEDURE ARE NOT APPLICABLE IN CRIMINAL CASES

Defendant asserts a claim for relief based on NRCP 59(e), rather than another motion for reconsideration, in an apparent attempt to avoid complying with the associated mandatory procedural rules. However, such a claim is misplaced because the Nevada Rules of Civil Procedure does not apply in habeas proceedings; such rules only apply to the extent they are not inconsistent with the statutes guiding habeas proceedings. See NRS 34.780(1); State v. Powell, 122 Nev. 751, 757, 138 P.3d 453, 457 (2006); Mazzan v. State, 109 Nev. 1067, 1069, 863 P.2d 1035, 1038 (1993). Defendant's attempt to bypass the statutory and procedural rules by relying on NRCP 59(e) is impermissible because allowing such action would cause NRCP 59(e) to be at odds with the statutory provisions. Pursuant to NRS 34.750, other than an answer or a response to a pleading, "[n]o further pleadings may be filed except as ordered by the court." Moreover, adding another layer of litigation by invoking NRCP 59(e) runs afoul of the

policy favoring the finality of convictions. See State v. Eighth Judicial Dist. Court ex rel. Cty. of Clark (hereinafter "Riker"), 121 Nev. 225, 112 P.3d 1070, (2005); Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001).

II. DEFENDANT'S MOTION IS A PROCEDURALLY IMPROPER, THINLY-VEILED MOTION FOR RECONSIDERATION

Even if the Motion were construed as a motion for reconsideration pursuant to Eighth Judicial District Court Rule (EJDCR) 2.24, the Motion still fails. The rules of this Court are clear that a litigant must request permission prior to filing a motion for reconsideration. EJDCR 2.24 reads in relevant part:

> (a) No motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, *unless by leave of the court granted upon motion* therefore, after notice of such motion to the adverse parties.
> (b) A party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to NRCP 50(b), 52(b), 59, or 60, *must file a motion for such relief within 10 days after service of written notice of the order or judgment* unless the time is shortened or enlarged by order.
> (c) A motion for rehearing or reconsideration must be served, noticed, filed and heard as is any other motion. A motion for reconsideration does not toll the 30-day period for filing a notice of appeal from a final order or judgment.

(emphasis added). Thus, a defendant *must* obtain leave of the court before filing a motion to reconsider. EJDCR 2.24(a). A defendant also must file such motion within 10 days of service of the Order or Judgment. EJDCR 2.24(b). Here, Defendant has failed to request or receive leave from this Court to have his motion heard. Additionally, Defendant did not file the Motion within 10 days of the written notice of the Order. The Order denying the Petition was filed on November 15, 2019, and the Motion was not filed until 12 days later.

Further, EDCR 7.12 bars multiple applications for relief:

> When an application or a petition for any writ or order shall have been made to a judge and is pending or has been denied by such judge, the same application, petition or motion may not again be made to the same or another district judge, except in accordance with any applicable statute and upon the consent in writing of the judge to whom the application, petition or motion was first made.

Additionally, EJDCR 13(7) prohibits pursuit of reconsideration without leave of court:

> No motion once heard and disposed of shall be renewed in the same cause, nor shall the same matter therein embraced be reheard, unless by leave of the court granted upon motion thereof, after notice of such motion to the adverse parties.

The Nevada Supreme Court has repeatedly noted that the law does not favor multiple applications for the same relief. Whitehead v. Nevada Com'n. on Judicial Discipline, 110 Nev. 380, 388, 873 P.2d 946, 951-52 (1994) ("it has been the law of Nevada for 125 years that a party will not be allowed to file successive petitions for rehearing . . . The obvious reason for this rule is that successive motions for rehearing tend to unduly prolong litigation"); Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984), superseded by statute as recognized by Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) ("petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final."). The less than favorable view of successive applications for the same relief explains why there is no right to appeal the denial of a motion for reconsideration. See Phelps v. State, 111 Nev. 1021, 1022, 900 P.2d 344, 346 (1995). It also justifies why a motion for reconsideration does not toll the time for filing a notice of appeal. See In re Duong, 118 Nev. 920, 923, 59 P.3d 1210, 1212 (2002).

Therefore, Defendant is not entitled to reconsideration and his motion should be denied. However, even if this Court considers the substance of Defendant's Motion, it still must fail.

III. DEFENDANT'S MOTION FAILS ON THE MERITS

In addition to improperly citing to NRCP 59(e) when this is a criminal case, Defendant's motion is without merit and must be denied. Examining the substance of Defendant's arguments, Defendant simply re-argues facts and authorities already submitted in his Petition and alleges no new legal arguments. It is only in "very rare instances" that a Motion to Reconsider should be granted, as movants bear the burden of producing new issues of fact and/or law supporting a ruling contrary to a prior ruling. Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). In his Motion, Defendant reiterates his previous

argument that evidence of another alternative suspect at trial could have established reasonable doubt.

In its Order, this Court correctly stated that the Petition time-barred, with no good cause justifying the delay in filing. Order, Nov. 15, 2019, at 1. This Court stated that the Defendant's Brady allegation did not amount to good cause, because the CCSDPD reports were not exculpatory. Id. at 2. This Court noted that trial counsel presented evidence and arguments regarding three alternative suspects, and the possibility of presenting evidence of yet another alternative suspect, which witness Betty Graves would testify was not the shooter, was likely of little value, and trial counsel likely would have made a strategic decision not to present such evidence. Id. at 2-3.

Defendant's Motion, and the attached affidavits, do nothing to undermine this Court's correct conclusion that the CCSDPD reports were not exculpatory. The attached affidavits from trial counsel stating that they would have made use of this information at trial are without legal relevance. The CCSDPD reports were not exculpatory, as at most they would have provided another alternative suspect, when trial counsel already argued to the jury that there were multiple alternative suspects who could have committed the crime. The assertions of trial counsel that such evidence could have amounted to reasonable doubt are disingenuous at best, as such information does nothing to undermine the substantial evidence of guilt presented at trial, which came from fingerprint evidence and numerous other eyewitnesses. Defendant's argument that Betty Graves' description of the shooter as having facial hair would have led to the jury's rejection of her testimony, is pure speculation. "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)). Further, much of the overwhelming evidence of Defendant's guilt presented at trial had no connection to Betty Graves. Even if her testimony were discounted, there would be sufficient evidence remaining to prove Defendant's guilt beyond a reasonable doubt. Accordingly, Defendant's Motion is without merit. As

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Defendant has brought the instant Motion on legally unsustainable grounds, and is untimely and legally meritless, this Court should deny the Motion outright.

CONCLUSION

Based on the foregoing, the State respectfully requests that Defendant's Motion to Alter or Amend a Judgment Pursuant to Nev. R. Civ. P. 59(e) be denied.

DATED this 29th day of January, 2020.

Respectfully submitted,

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BY /s/ KAREN MISHLER
KAREN MISHLER
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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the foregoing, was made this 29th day of January, 2020, by Electronic Filing to:

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/s/ Laura Mullinax
Secretary for the District Attorney's Office

KM/lm/GU

EXHIBIT D

EXHIBIT D

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

FUS

Evaristo Jonathan Garcia, Petitioner, v. James Dzurenda, *et al.*, Respondents.	Case No. A-19-791171-W Dept. No. 29 Hearing date: February 6, 2020 Hearing time: 8:30 AM **Reply to Opposition to Motion to Alter or Amend a Judgment pursuant to Nev. R. Civ. P. 59(e)** (FILED UNDER SEAL PER 9/19/2019 ORDER, PAGE 3)

Respondents ask this court to rule that habeas cases are "criminal" and that as such, Rule 59(e) motions are not available in such cases. This argument fails to alert this Court to clear, contrary authority and should be rejected.

Further, the merits of the 59(e) motion warrant relief: the totality of the record shows the denial of the petition was erroneous based on material errors of law and fact. Accordingly, Evaristo Garcia respectfully requests relief.

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POINTS AND AUTHORITIES

I. The merits of the motion warrant an amended judgment granting Evaristo Garcia relief and a new trial due to the State's nondisclosure of explicitly-requested, exculpatory, material evidence.

The Nevada Supreme Court has noted Rule 59(e) permits a movant to request the original judgment be vacated rather than merely amended, and "cover[s] a broad range of motions, with the only real limitation on the type of motion permitted being that it must request a substantive alteration of the judgment, not merely correction of a clerical error, or relief of a type wholly collateral to the judgment."[1] Among the "basic grounds" for a Rule 59(e) motion are "correct[ing] manifest errors of law or fact," "newly discovered or previously unavailable evidence," the need "to prevent manifest injustice," or a "change in controlling law."[2] The Rule 59(e) motion is merited for several of these reasons.

Particularly, Evaristo filed this Rule 59(e) motion to correct manifest errors of law and fact in this Court's November 15, 2019 final order. Namely, the final order incorrectly concludes that trial counsel's strategy is somehow relevant to the inquiry of whether this suppressed evidence was exculpatory. However, the parties (apparently) agree that this is not relevant—instead, all that is relevant to the exculpatory inquiry is whether the evidence was favorable to the defense.[3]

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[1] *AA Primo Builders, LLC v. Washington*, 245 P.3d 1190, 1192–93 (Nev. 2010) (alterations omitted) (quoting 11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2810.1, at 119, 121 (2d ed. 1995)).

[2] *See id.* (citation omitted).

[3] *See* Opp. at 5 ("The attached affidavits from trial counsel stating that they would have made use of this information at trial are without legal relevance."). *But see* 11/15/19 Order at 2–3 ("Petitioner's trial counsel presented alternative suspects, and likely chose not to pursue the suspect that Ms. Graves conclusively stated was not the shooter. As a result, the Court finds that the CCSDPD reports do not provide exculpatory evidence."). Thus, apparently both parties agree that this Court's legal conclusion was erroneous—trial counsel's strategy was legally irrelevant.

Next, this Court's final judgment rests on the manifest error of fact that defense counsel at trial "presented three alternative suspects who were never ruled out by an eye witness."[4] This, however, was manifest error, critical to the ultimate outcome of this habeas case: in fact, the primary alternative suspect (Giovanni Garcia) ***was*** ruled out by Betty Graves, an eyewitness, and the suppressed police reports demonstrate why Graves's ability to exclude Giovanni was seriously unreliable (given her previously undisclosed inconsistent description of the shooter). Had this Court been aware that one witness *was* excluded by Graves, and that this evidence would have allowed the defense to impeach Graves's reliability for excluding this witness, the outcome of this habeas case would have flipped: these facts show a reasonable possibility (and probability) of a different result at trial. There is a reasonable possibility that it would have been enough to raise reasonable doubt in the minds of the jury.

Next, this Court's final judgment rests of the manifest error of fact that trial counsel made a strategic decision to forgo pursuing the alternative suspect identified by the suppressed police reports.[5] In addition to this being legally irrelevant, it's a manifest error of fact: the record shows that trial counsel wasn't even aware of the existence of this alternative suspect, so they did not make a strategic decision to forgo this investigation. Further, their declarations, attached to the Rule 59(e) motion, now conclusively establish that had they known about this suspect, they would have pursued it further and utilized this information in Evaristo's defense.

If this Court requires further factual development of this case—for instance, to hear from trial counsel directly—Evaristo requests an evidentiary hearing.

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[4] *See* 11/15/19 Order at 2 lns. 22–23.

[5] *See id.* at 2–3.

II. Nevada Rule of Civil Procedure 59(e) is applicable in post-conviction habeas corpus cases.

Respondents' opposition misconstrues multiple procedural rules and makes several incorrect legal assertions to their advantage.

A. Post-conviction habeas corpus cases are neither civil nor criminal cases, and they apply the civil rules.

First, Respondents assert that habeas proceedings are "criminal."[6] This assertion contradicts the Nevada Supreme Court's repeated observation that these proceedings are neither civil nor criminal; rather, they fall into a unique category of their own. As the Nevada Supreme Court explained in *Mazzan v. State*, "habeas corpus is a proceeding which should be characterized as **neither civil nor criminal** for all purposes. It is a special statutory remedy which is essentially unique."[7] Although Respondents were apparently aware of *Mazzan*—they cited it on page 2 of their opposition—they nonetheless failed to alert this Court to *Mazzan*'s holding that habeas is actually neither civil nor criminal.

Insisting this is a "criminal" case, to which the civil rules do not apply, is an especially strange position to take where the Eighth Judicial District Court has applied a civil case number to this case. Whatever the abstract, academic merit that may support Respondents' belief that these are "criminal" proceedings (despite the Nevada Supreme Court's holding otherwise), at a minimum, Evaristo still should not be penalized for following the procedural rules that apply to the type of case that *this Court* has designated it to be. If for no other reason, Rule 59(e) applies.

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[6] Opp. at 2 (The Nevada Rules of Civil Procedure are not Applicable in Criminal Cases"); Opp. at 4 ("In addition to improperly citing to NRCP 59(e) when this is a criminal case . . . .").

[7] *Mazzan v. State*, 863 P.2d 1035, 1036 (Nev. 1993) (emphasis added) (quoting *Hill v. Warden*, 96 Nev. 38, 40, 604 P.2d 807, 808 (1980)). Indeed, in the federal system, habeas corpus cases are "technically civil in nature," though they are not "automatically subject to all the rules governing ordinary civil actions." *See Hill v. Warden, Nevada State Prison*, 604 P.2d 807, 808 (Nev. 1980) (quoting *Schlanger v. Seamans*, 401 U.S. 487, 490 n.4 (1970)).

B. Rule 59(e) applies to post-conviction habeas cases because it is a civil rule and it is consistent with habeas statutes.

Second, despite Respondents' implication to the contrary, whether these proceedings are classified as "criminal," "civil," or "other" is a red-herring issue that places form over function. This abstract question does not control the outcome of this motion. The question here is simply whether Rule 59(e) applies to habeas proceedings, which an on-point statute directly governs. That statute states explicitly that the civil rules *do* apply *unless* the civil rule is inconsistent with the habeas statutes.[8] Rule 59(e) is not inconsistent with any habeas rule.

Yet Respondents assert that "The Nevada Rules of Civil Procedure are not Applicable in Criminal Cases,"[9] that Evaristo "improperly cit[ed] to NRCP 59(e) when this is a criminal case,"[10] and "the Nevada Rules of Civil Procedure do[ ] not apply in habeas proceedings; such rules only apply to the extent they are not inconsistent with the statutes guiding habeas proceedings."[11] This framing suggests that application of the civil rules is the exception, rather than the rule. However, the opposite is true: the civil rules govern habeas proceedings *unless* they are inconsistent with the habeas statutes:

> 34.780 Applicability of Nevada Rules of Civil Procedure; discovery
>
> 1. The Nevada Rules of Civil Procedure, to the extent that they are not inconsistent with NRS 34.360 to 34.830, inclusive, apply to proceedings pursuant to NRS 34.720 to 34.830 [the post-conviction habeas corpus statutes].[12]

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[8] NRS 34.780(1) (emphasis added).

[9] Opp. at 2.

[10] Opp. at 4.

[11] Opp. at 2.

[12] NRS 34.780(1) (emphasis added).

That is, application of the civil rules is the rule, not the exception; if a specific civil rule is "inconsistent" with something within the habeas statutes, *that* is the exception. Further, the rules of criminal procedure do not apply at all. This makes sense because (a) the habeas statute itself says that it works this way, incorporating only the *civil* rules, not the criminal rules, and (b) the civil rules *should* apply because they cover a broader array of procedural considerations that may arise in a habeas case than the habeas statutes cover alone, and that would not apply to a criminal proceeding whatsoever. The habeas statutes cover only a few key concerns of habeas procedure, such as pleading standards unique to habeas and the unique rules governing when discovery is available in habeas. They are not written to cover every procedural question that might occur in a habeas case, which is why NRS 34.780 expressly incorporates the Rules of ***Civil*** Procedure into habeas cases.

Only where the Nevada Supreme Court has held a civil rule to be *inconsistent* with the habeas statutes does the rule *not* apply. Usually, the civil rules do apply. The Nevada Supreme Court has never held Rule 59(e) to be inconsistent with the habeas statutes. This is for good reason.

The starting presumption is that Rule 59(e) applies to post-conviction habeas cases because it is a civil rule, which NRS 34.780(1) expressly incorporates, and it is neither facially inconsistent nor directly contradictory to any of the habeas statutes found within NRS 34.360 to 34.830. There is nothing about a request for a court to correct a manifest error or law or fact in its final judgment inconsistent with the habeas statutes. Based on the plain language of NRS 34.780(1), then, this should be the end of the inquiry.[13] Perhaps, then, Respondents mean to argue that application of Rule 59(e) would be impliedly inconsistent with the habeas statutes. Not so.

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[13] "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the

In fact, Rule 59(e) is consistent with the habeas rules. It provides the district court an opportunity to correct manifest errors in its final judgment before the case proceeds. Allowing this opportunity facilitates judicial economy, because the district court may make a correction to its final judgment that may render an appeal moot, or may render a reversal and remand unnecessary. All told, just as in civil cases, Rule 59(e) motions promote judicial economy and thus, promote finality.

Respondents' contrary arguments that Rule 59(e) is inconsistent with the habeas statutes fail because (a) Respondents have misread NRS 34.750, and ignore the difference between "pleadings" and "motions"—they incorrectly assert NRS 34.750's prohibition of further "pleadings" means there can be literally no *motion* practice in habeas cases, which is not correct—and (b) allowing 59(e) motions in habeas cases does not run afoul of the policy favoring the finality of convictions.[14] Taking this one at a time, neither of Respondents' arguments holds water.

1. Rule 59(e) "motions" are not "pleadings" (at least when they do not assert new claims); thus, NRS 34.750 does not restrict a party's ability to file one.

Respondents argue that Rule 59(e) can't apply to habeas proceedings because "[p]ursuant to NRS 34.750, other than an answer or a response to a pleading, '[n]o further ***pleadings*** may be filed except as ordered by the court."[15] This is incorrect for multiple reasons. First, this argument relies on a common—and wrong—conflation of the terms "pleading" and "motion." A "pleading" is a term of art with limited function: a "pleading" is simply the party's official documents initiating a

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sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The only exception Nevada recognizes to this plain-meaning rule is inapplicable here—where there is clear evidence that the legislature did not intend on a literal application of the plain language of the rule. *See A.J. v. Eighth Judicial Dist. Ct.*, 133 Nev. 202, 206–07, 394 P.3d 1209, 1213–14 (2017).

[14] *See* Opp. at 2–3.

[15] Opp. at 2–3.

new case and stating the allegations and claims that will control the case going forward, and the opposing party's response/answer to the initiating document. In a civil case, the "pleadings" are the complaint and the answer:

> **pleading** *n.* (16c) **1.** A formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses. • In federal civil procedure, the main pleadings are the plaintiff's complaint and the defendant's answer.[16]

In a criminal case, a "pleading" is the criminal complaint, information, or indictment.[17]

In a post-conviction habeas corpus case—according to the very statute that Respondents cited, NRS 34.750—the pleadings are the habeas corpus petition and the answer (sometimes called a "response") to the petition (and the petitioner's reply to the answer). The statute's prohibition of further pleadings simply means that the petitioner may not amend his original petition or file a supplemental petition to state new grounds for relief without leave of court. Here, Evaristo has not requested to add any new claim for relief; he's simply asking the Court to correct manifest errors with the final judgment on the claims he already raised in his pleadings.

A Rule 59(e) "motion"—the document Evaristo filed here—is not a pleading, it is a "motion," according to the language of Rule 59(e) itself:

> (e) **Motion to Alter or Amend a Judgment.** A motion to alter or amend a judgment must be filed no later than

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[16] Pleading, Black's Law Dictionary (11th ed. 2019); *see also* Pleadings, *How Courts Work: Steps in a Trial*, American Bar Association (Sep. 9, 2019) (available at https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleadings/) ("This first step begins what is known as the pleadings stage of the suit. Pleadings are certain formal documents filed with the court that state the parties' basic positions.").

[17] Accusatory Pleading, Black's Law Dictionary (11th ed. 2019) ("An indictment, information, or complaint by which the government begins a criminal prosecution").

> 28 days after service of written notice of entry of judgment.[18]

A "motion" is distinct from a "pleading"— "***Motions are not pleadings*** but are requests for the judge to make a legal ruling."[19] That is, a "motion" is "[a] written or oral application requesting a court to make a specified ruling or order," usually taking place "in the progress of litigation" which has already begun.[20] In other words, *pleadings* set out the claims and defenses in a case, thereby initiating the proceedings, while *motions* request the court to take specific action within that case that the pleadings initiated. For example, in a civil case, after the complaint is filed, a defendant may *move* to dismiss the case because the plaintiff's *pleading* (the complaint) failed to state a claim.[21]

Section III of the Nevada Rules of Civil Procedure—entitled "Pleadings and Motions"—makes it clear that these terms are *not* interchangeable in Nevada law. Like the rule Respondents cite in the habeas statutes, there is a civil rule that specifies the only "pleadings" that are allowed in a civil case, Rule 7(a). And subsection (b) of Rule 7 describes the different rules that govern "motions." The language and structure of Rule 7, then, clarify that "pleadings" and "motions" are two different, legally significant terms—they are not interchangeable.

By its own terms, a Rule 59(e) motion is *not* a pleading. Instead, it's a motion, which requests the court to alter its final judgment. The limitations NRS 34.750 sets out about when parties may file *pleadings* in a habeas case do not limit motion

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[18] Nev. R. Civ. P. 59(e).

[19] Motions, *How Courts Work: Steps in a Trial*, American Bar Association (Sep. 9, 2019) (available at https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/motions/).

[20] *See* Motion, Black's Law Dictionary (11th ed. 2019).

[21] *See* Nev. R. Civ. P. 12(b).

practice. Thus, they do not restrict a petitioner's ability to file a Rule 59(e) motion. That is, perhaps, unless that so-called "motion" is really a pleading in disguise.

An argument could be made—though Respondents do not make the argument here—that in certain cases, a party's Rule 59(e) motion might be better characterized as an attempt to file a new or supplemental *pleading* because the motion actually raises new claims for relief than those already pleaded in the petition. This arguably would not be an appropriate use of a Rule 59(e) motion. In such a case, per NRS 34.750, that party would likely need to first seek leave of the court to file this pleading-in-disguise. Indeed, such a situation is similar to that being considered by the United States Supreme Court currently, for federal proceedings, in *Bannister v. Davis*,[22] for which oral argument was held on December 4, 2019. But this issue is not present here.

Respondents do not allege that Evaristo is trying to raise any new claims here, and thus, that his motion should really be reconstrued as a pleading. To the contrary, Respondents claim, "Defendant simply re-argues facts and authorities already submitted in his Petition and alleges no new legal arguments."[23] Evaristo disputes this claim to the extent that Respondents are overlooking the arguments Evaristo raises that are appropriate for a Rule 59(e) motion—for example, that the final judgment made manifest errors of fact and law. In any event, Respondents' own characterization of Evaristo's Rule 59(e) motion shows, in fact, that he is *not* filing a document that should be construed as an unwarranted "pleading." It's a regular, post-judgment motion.

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[22] *See Bannister v. Davis*, No. 18-6943. The issue in *Bannister* is whether and under what circumstances a timely Rule 59(e) motion in federal habeas corpus practice should be recharacterized as a second or successive habeas petition.

[23] Opp. at 4.

What Evaristo's Rule 59(e) motion *does* do is argue that the Court's final judgment rests on manifest errors of fact and law. This is exactly what a Rule 59(e) motion is designed to address, to give the district court a chance to fix or at least address those errors before the case proceeds to appeal.[24] Until the Court made these manifest errors of fact and law, there was no occasion to raise the issues. Hence, the arguments raised with the Rule 59(e) motion address issues that did not exist before this Court's final judgment—the errors discussed in the motion were introduced by the court, argued by neither party. Therefore, Evaristo followed the appropriate remedy for these issues by filing a Rule 59(e) motion to alter or amend the judgment at his first possible opportunity to do so.

This is not inconsistent with the habeas statutes at all—making sure a final judgment does not rest of manifest error is consistent with the purpose of the post-conviction habeas corpus statute, which is, generally, to ensure a prisoner's judgment and continued incarceration does not violate state or federal law.

2. Merited Rule 59(e) motions advance the interest of finality by preventing piecemeal litigation.

The second argument Respondents advance is that Rule 59(e) motions, generally, run afoul of the policy favoring finality of convictions.[25] This is not true. Generally speaking, if a Rule 59(e) motion is merited, then it *serves* the interest of finality: it provides the district court the opportunity to correct a manifest error introduced by its final judgment in the first instance. The correction of such a material error may prevent the necessity of a reversal and remand to correct an error the district could have corrected on its own. Or, if the correction results in relief to the movant, it may render an appeal moot altogether.

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[24] *See* subsection C, *infra*.

[25] Opp. at 3.

Better, then, and more consistent with the policies animating the habeas rules, would be to allow the district court to correct its own manifest errors of fact and law in the first instance, before the Nevada Supreme Court needs to correct them on appeal, in an appeal that may have been wholly unnecessary. Rule 59(e) allows this important corrections process to occur, at least when the manifest error for which the motion seeks review is something introduced for the first time in the final judgment (as here). In this way, then, merited Rule 59(e) motions *advance* the policy in favor of finality because it prevents piecemeal litigation.

Indeed, the Rule 59(e) motion advances the interests of finality in this very case. Here, the Rule 59(e) motion points out new manifest errors introduced into this case by this Court's final, written order, which formed the foundation for the Court's final decision. Were this Court inclined to correct those errors, it should flip the outcome of these proceedings entirely and result in habeas relief for Evaristo in the form of a new trial.

Further, Evaristo presented to the Nevada Supreme Court the fact that this Rule 59(e) motion is still pending before this Court, and asked the Supreme Court to stay the briefing schedule on appeal so this Court can consider the Rule 59(e) motion first. The Supreme Court, ruling on the motion to stay, expressly ruled that this Court *does* have jurisdiction to consider this Rule 59(e) motion, and ordered the appeal stayed to allow this Court to consider the 59(e) motion first. This shows that, at least in this case, the Rule 59(e) motion before this Court will advance the interests of finality and is consistent with the habeas rules.

Were Rule 59(e) motions not cognizable in habeas corpus proceedings, it would stand to reason that the Nevada Supreme Court would not have granted the motion to stay the appeal, ruling instead that Rule 59(e) motions simply are not available in these proceedings. Instead, the Nevada Supreme Court ruled that Evaristo filed a "timely" motion to alter or amend the judgment in the district

court,[26] and that "[t]he district court presently has jurisdiction to consider and deny the pending motion to alter or amend," or, if it is inclined to grant the motion, the court "should enter and transmit to this court a written order certifying that it is inclined to grant the motion."[27] This order would make little sense if Rule 59(e) motions did not apply to habeas corpus cases. They do.

The Nevada Supreme Court considered an appeal from the denial of a Rule 59(e) motion in a post-conviction habeas corpus case in *Klein v. Warden*.[28] In that case, the Court held that Rule 59(e) motions do not toll the 30-day deadline to file a notice of appeal in a post-conviction habeas corpus case.[29] Thus, a petitioner filing a Rule 59(e) motion in a habeas case needs to file a notice of appeal within 30 days of the notice of entry of final order (which is what Evaristo did here, and then sought a stay of the appeal pending the outcome of the Rule 59(e) motion). That is, rather than take the opportunity to declare Rule 59(e) motions to be inconsistent with the habeas rules, the Supreme Court simply ruled that *tolling* for Rule 59(e) motions is inconsistent. This implies that there is nothing inconsistent with seeking Rule 59(e) relief in general, as long as the petitioner still files his notice of appeal on time and seeks a stay of the appeal from the Nevada Supreme Court, under circumstances warranting a stay (like here).

Finally, lest there be any remaining doubt that Rule 59(e) motions are consistent with post-conviction habeas corpus practice, this Court may look to federal caselaw. Nevada courts may look to federal caselaw to interpret Nevada

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[26] *Garcia v. Director*, Case No. 80255, Dkt. No. 20-02117, at *1 (Nev. Jan. 16, 2020) (Order Regarding Motion).

[27] *See id.*

[28] 118 Nev. 305, 43 P.3d 1029 (Nev. 2002).

[29] *See generally id.*

Rule of Civil Procedure 59(e), because it mirrors Federal Rule of Civil Procedure 59(e).[30]

In federal habeas practice, the United States Supreme Court has long recognized that Rule 59 motions are "thoroughly ***consistent*** with the spirit of the habeas corpus statutes," and is therefore "applicable in habeas corpus proceedings."[31] So too in Nevada: Rule 59 motions are consistent with the habeas rules. Therefore, there is no limitation on their application here.

C. A Rule 59(e) motion is the correct motion for relief here.

A Rule 59(e) motion is a broad post-judgment remedy, limited primarily by its short deadline to file after a final judgment.[32] The Nevada Supreme Court has noted Rule 59(e) permits a movant to request the original judgment be vacated rather than merely amended, and "cover[s] a broad range of motions, with the only real limitation on the type of motion permitted being that it must request a substantive alteration of the judgment, not merely correction of a clerical error, or relief of a type wholly collateral to the judgment."[33] Among the "basic grounds" for a Rule 59(e) motion are "correct[ing] manifest errors of law or fact," "newly discovered or previously unavailable evidence," the need "to prevent manifest injustice," or a "change in controlling law."[34]

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[30] *AA Primo Builders, LLC v. Washington*, 245 P.3d 1190, 1192–93 (Nev. 2010).

[31] *Browder v. Director, Dep't of Corrs. of Ill.*, 434 U.S. 257, 270–71 (1978) (emphasis added).

[32] *See* Nev. R. Civ. P. 59(e).

[33] *AA Primo Builders, LLC v. Washington*, 245 P.3d 1190, 1192–93 (Nev. 2010) (alterations omitted) (quoting 11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2810.1, at 119, 121 (2d ed. 1995)).

[34] *See id.* (citation omitted).

Evaristo's Rule 59(e) motion falls directly into these basic functions.[35] Thus, it is the appropriate vehicle for his post-judgment request for relief.

III. EDCR 2.24 is inapplicable to this motion.

Respondents maintain that Evaristo filed the wrong motion, and he should have filed a motion for reconsideration under local rule ECDR 2.24. In fact, Respondents imply he is somehow attempting to skirt the applicable rules by falsely characterizing his motion as a Rule 59(e) motion. Respondents then assert that under ECDR 2.24, Evaristo's motion is two days late.[36]

As a threshold matter, assuming *arguendo* that EDCR 2.24 did apply to this motion (it does not), Respondents argument fails on its face because, contrary to their assertion, the motion actually would have been timely per local rule. EDCR 2.24 grants parties **10 days** from the notice of entry of order to move for reconsideration. According to EDCR 1.14, "[w]hen the period of time prescribed or allowed is **less than 11 days**, intermediate Saturdays, Sundays, and non-judicial days must be **excluded** in the computation." Between the day of the final order (October 15, 2019) and the day Evaristo filed his Rule 59(e) motion, only 8 judicial (business) days elapsed.

Further, EDCR 2.24 requires the motion to be filed "within 10 days after service of written ***notice*** of the order or judgment," not within 10 days of the final order itself. This court apparently did not enter *notice* of the final order until November 18, 2019.[37] When Evaristo filed his Rule 59(e) motion on November 27, 2019, only 9 calendar days—and just 7 judicial/business days—had elapsed. Even if

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[35] *See* Section I, *supra.*

[36] *See* Opp. at 3.

[37] Evaristo still has not received a copy of this notice, to counsel's knowledge, but is aware that it was entered by looking at the court's electronic docket.

Respondents were correct, then, and EDCR 2.24 applies to this motion, the motion was nonetheless timely.

Moreover, even if the rule did apply, the rule's requirement that a party must first seek leave before requesting the same relief requested in an earlier motion is satisfied by the act of filing the motion for reconsideration itself. A party does not need to file a separate motion for leave to file a motion for reconsideration—the motion for reconsideration is exactly the document that EDCR 2.24 requires. Thus, even if EDCR 2.24 did apply here, Evaristo has therefore complied with it.

To be clear, however, EDCR 2.24 does not apply here. It doesn't have anything to do with the type of motion Evaristo filed. EDCR 2.24—by its own terms—does not apply to motions that can be addressed by Nevada Rule of Civil Procedure 59: "(b) A party seeking reconsideration of a ruling of the court, **other than** any order which may be addressed by motion pursuant to N.R.C.P. 50(b), 52(b), **59** or 60, must file a motion for such relief within 10 days . . . ." An order which Rule 59 may address is a final, appealable order, such as this Court's November 15, 2019 order denying Evaristo's petition. Thus, by its own terms, EDCR does not apply to post-final-order/judgment motions like this one. Thus, EDCR 2.24 doesn't apply to this motion at all.

Another reason EDCR 2.24 does not apply here is because it relates to motions for reconsideration of *prior motions*, not post-judgment motions challenging the final judgment itself. Thus, the limitation on reconsideration found in EDCR 2.24(a) does not apply here—EDCR 2.24 regards the situation in which a party files a *motion*, the court resolves that motion, and then a party wants to the court to reconsider its decision on that original motion. Evaristo is not seeking reconsideration of a prior motion; he's seeking review of the final judgment on the petition itself. The appropriate motion for this request is a Rule 59(e) motion, for all the reasons described at length above.

Finally, as the Nevada Supreme Court noted here, Evaristo's Rule 59(e) motion was timely filed, and this Court has jurisdiction to consider it. There is no procedural bar to this Court's consideration of the merits of Evaristo's Rule 59(e) motion. Evaristo respectfully requests this Court do so.

Conclusion

The request for relief Evaristo ultimately requests is that this Court vacate its final order dated November 15, 2019, pursuant to Rule 59(e), and grant habeas relief. Alternatively, he respectfully requests this Court vacate the November 15 order and set an evidentiary hearing in this matter to resolve any outstanding factual issues that, if resolved in Evaristo's favor, would entitle him to habeas relief.

The Nevada Supreme Court's order in this case details a specific procedure that must be followed to grant the request for relief here. Before this Court may grant this motion, it must "enter and transmit to [the Nevada Supreme Court] a written order certifying that it is inclined to grant the motion. Upon receipt of such an order, [the Nevada Supreme Court] will remand the matter to the district court so that jurisdiction to grant the motion will be properly vested in [this] court."[38]

The errors identified in Evaristo's Rule 59(e) motion warrant vacatur of the final judgment and the entry of a judgment granting habeas relief. The evidence the State withheld from Evaristo's counsel at the time of trial demonstrated that their star eyewitness gave an inconsistent description of the shooter directly after the shooting occurred, which substantially undermines her ability to identify or exclude suspects as the shooter. The jury never heard this. This alone would have been material evidence at trial. Further, the suppressed evidence reveals a previously

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[38] *Garcia v. Director*, Case No. 80255, Dkt. No. 20-02117, at *1–2 (Nev. Jan. 16, 2020) (Order Regarding Motion).

unknown alternative shooter who matched the description of the shooter and was discovered fleeing in the direction witnesses saw the shooter flee. This, too, would have been material evidence for the defense at trial. For either or both reasons, this far exceeds Nevada's reasonable-possibility standard and the federal reasonable-probability standard mandating a new trial, especially where the trial judge had commented that the evidence was not particularly strong in this case to begin with.

Evaristo requests this relief simply to receive the fair trial to which he was entitled. Evaristo maintains he is entitled to present this material evidence to a jury before they decide whether to label him a murderer and before he is given a life sentence.

Under these unique circumstances, Evaristo submits a new trial is warranted. Accordingly, he respectfully requests this Court certify to the Nevada Supreme Court that it is inclined to grant the Rule 59(e) motion.

Dated January 30, 2019.

Respectfully submitted,
Rene L. Valladares
Federal Public Defender

S. Alex Spelman
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on January 30, 2019, he served a true and accurate copy of the foregoing by placing it in the United States mail, first-class postage paid, addressed to:

Karen Mishler
Noreen DeMonte
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200 Lewis Ave.
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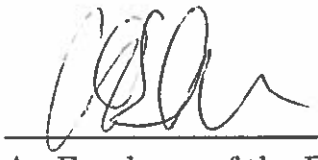

An Employee of the Federal Public Defender, District of Nevada

EXHIBIT E

EXHIBIT E

OPPS
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Nevada Bar #001565
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

EVARISTO GARCIA,
#2685822

Defendant.

CASE NO: A-19-791171-W

DEPT NO: 29

STATE'S SUPPLEMENT TO OPPOSITION TO DEFENDANT'S MOTION TO ALTER OR AMEND A JUDGMENT PURSUANT TO NEV. R. CIV. P. 59(e)

DATE OF HEARING: FEBRUARY 6, 2020
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through KAREN MISHLER, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to Alter or Amend a Judgment Pursuant to Nev. R. Civ. P. 59(e).

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

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POINTS AND AUTHORITIES

ARGUMENT

The State wishes to modify its position contained in its Opposition filed on January 29, 2020. In sections I and II of that Opposition, the State alleged that Defendant's filing of a motion pursuant to Rule 59(e) of the Nevada Rules of Civil Procedure was procedurally improper, and that Defendant was attempting to circumvent the applicable procedural rules. However, upon further research and consideration, Nevada law appears unclear as to whether or not a motion pursuant to Nev. R. Civ. P. 59(e) may be filed in post-conviction proceedings. Thus, the State no longer contends that Defendant engaged in wrongdoing by filing the Motion, and hereby states that it no longer puts forth the arguments contained in sections I and II of its Opposition. However, the State stands by its arguments made in section III of that Opposition, and contends that the Motion to Alter or Amend a Judgment Pursuant to Nev. R. Civ. P. 59(e) fails on its merits.

DATED this 31st day of January, 2020.

Respectfully submitted,

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

BY /s/ KAREN MISHLER
KAREN MISHLER
Deputy District Attorney
Nevada Bar #013730

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the foregoing, was made this 31st day of January, 2020, by Electronic Filing to:

S. ALEX SPELMAN,
Assistant Federal Public Defender
E-mail Address: alex_spelman@fd.org

/s/ Laura Mullinax
Secretary for the District Attorney's Office

KM/lm/GU

EXHIBIT F

EXHIBIT F

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Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

EVARISTO GARCIA, Petitioner(s), vs. JAMES DZURENDA, Respondent(s).	Case No. A-19-791171-W DEPT. XXIX

BEFORE THE HONORABLE DAVID M. JONES,
DISTRICT COURT JUDGE

THURSDAY, FEBRUARY 6, 2020

TRANSCRIPT OF PROCEEDINGS RE:
MOTION TO ALTER OR AMEND

APPEARANCES:
For the Petitioner(s): CHARLES W. THOMAN, ESQ.
Deputy District Attorney

For the Respondent(s): STEPHEN ALEX SPELMAN, ESQ.
JEREMY BARON, ESQ.
Assistant Federal Public Defenders

RECORDED BY: MELISSA MURPHY-DELGADO, COURT RECORDER

LAS VEGAS, NEVADA, THURSDAY, FEBRUARY 6, 2020

[Proceeding commenced at 8:46 a.m.]

THE COURT: Page 5, A-19-791171, Garcia versus Dzurenda.

MR. SPELMAN: Good morning, Your Honor. Alex Spelman with the Federal Public Defender. We have Jeremy Baron as well this morning.

THE COURT: Okay. Go ahead. This is your Motion to Alter or Amend the Judgment.

MR. SPELMAN: Yes, Your Honor.

Without belaboring what's in the filings before you, Motion to Alter or Amend the Judgment 59(e), basically, what we've brought forth to Your Honor is we just believe that there were factual and legal errors in the final judgment and that that's the function of the 59(e) motion.

And just, if I could, we focused last time on the -- in the last argument on the idea of this alternative suspect that was stopped --

THE COURT: Right.

MR. SPELMAN: -- right outside the school. I did want to highlight today just the other way that this evidence would have been -- would have given rise to reasonable doubt at the trial. And that's namely that Betty Graves -- the reports show two things about her ability to reliably identify the suspect. One is that she --

we now know she said a mustache, and then later on she never said anything about a mustache. And I think that, you know, a mustache is right in the middle of your face, I think that's a pretty big deal to change that.

Also, the reports say that she provided -- I think the exact quote is an updated -- we've received an updated description of the shooter. So I don't know how you go from directly after the shooting having a description and then updating it. To me, I think the defense would have been able to use that all day to impeach --

THE COURT: Well, counsel, don't you ever see when a person witnesses a crime, a violent crime, that they have a certain idea of what happens and then after they have a second to recall and basically refresh it, go back and calm down, that they didn't put in additional facts in regards to that eyewitness testimony?

MR. SPELMAN: Your Honor, I think the -- typically, the description that's given right after the event is considered the most reliable, because that's the one that's -- where it's most fresh in their memory. After that, you have the risk of misremembering, or the worst-case scenario is -- and we know that witnesses do have false memories that are created, as you start to think about things more after. So I think the defense would have been able to make this argument to the jury. The most -- we don't -- we know that this witness didn't quite know what the shooter looked like. That calls into question whether she got a good look.

And the reason why that's directly relevant to this case is

she -- I think that the best one -- or at least one of the best theories that the defense would have focused on at trial with this evidence was that Giovanni Garcia, the older cousin of our client, was the actual shooter. And the reason for that is he was the one who started this whole brawl. He's the one who had the beef with the other gang members. And then he's the one who witnesses said contemporaneously exclaim, Giovanni has a gun, Giovanni has a gun. And then witnesses told law enforcement right after the crime that Giovanni was the shooter. Of course, they recanted that later.

And the reason, I think, that what the defense would have done about the witness is changing their story afterward is these were people all in a gang. And we know that with the correlated shooting of Jonathan Harper, what the leader of the gang did, who was Giovanni's brother, his name is Salvador, what he did in that case, the State proved, was he marched his foot soldiers down to the police station under -- they said that they did it because they were afraid of him, to lie to the police about what happened in the Jonathan Harper shooting. I think the defense, with that information, would have been able to show -- that's probably what happened here.

People originally were telling what they really saw and then Salvador got to everybody, Hey, we're going to protect my brother here, Giovanni, go down and tell them it was the -- or my younger cousin, Evaristo, who's a 16-year-old special education student, who we can, basically, you know, pin this whole thing on.

I think that --

THE COURT: So, counsel, all that information was available to the defense at the time. You're not creating new arguments. All of that information was available to the defense team at that time.

MR. SPELMAN: I think --

THE COURT: The only argument you talk about is this one particular "misinformation" about one witness and a possible other suspect. All of this gang retaliation, all of this marching down, all of that was available at the time of the trial.

MR. SPELMAN: I think -- that's exactly right, Your Honor. And I think the reason --

THE COURT: That's more of an ineffective counsel argument than what you're making now.

MR. SPELMAN: Sure. And that does bring me to my final point. Having said all that, the -- what we know now from the school police reports shows -- and, sorry, the -- just before I say that, the reason the jury I think did not buy that Giovanni Garcia was the actual shooter was because Betty Graves was asked at trial, Was Giovanni the shooter? And she said no. And she, of course, is being relied upon as the sole eyewitness who actually said they saw his face. And so if I'm remembering the record correctly, but I believe that's how it was. And --

THE COURT: And she was open to cross-examination about her lack of understanding and what she did or didn't see and

where she was standing and the lighting and everything else.

MR. SPELMAN: Exactly. And I think that what this would have been -- absolutely much more powerful information to show, Look, in fact, you actually provided a different description of the shooter, right after it happened. And then you change your story. So did he have a mustached or not? Did he -- you know, and just be able to impeach the witness that way.

And all we're talking about is reasonable doubt. I'm not saying that with this evidence, trial counsel would have been able to affirmatively prove innocence, which they, of course, are not expected to do at the trial. Instead, this would have been enough just to create doubt in the mind of the jury, the reasonable doubt.

And the standard now in postconviction -- because what we're talking about is evidence that was explicitly requested and not handed over, is, is there a reasonable possibility, according to the Nevada Supreme Court, or under the federal standard, is there a reasonable probability --

THE COURT: Probability.

MR. SPELMAN: -- that reasonable doubt would have arisen at trial? So it's really now we're not even talking about reasonable doubt, which is a really low threshold, but a reasonable possibility of reasonable doubt. I think that's a very low threshold.

And just to put this into context, the point of all of this is not to ask Your Honor to declare my client innocent today. Of course not. It's that this evidence would have been important at

trial, would have certainly been relied upon by trial counsel, and that, I think, would -- that is what was necessary for my client to have a fair trial.

And if on a new trial, if this petition is granted and the State retries my client, then at that point, I think all of this would be fodder to talk about whether or not they do meet that reasonable doubt standard. But without this evidence, I don't think that they met that standard through a fair trial.

THE COURT: Okay. And one other request was an evidentiary hearing. What witnesses would be put in an evidentiary hearing and what type of evidence would you hope to gain through that hearing?

MR. SPELMAN: Your Honor, certainly we would call both trial counsel to discuss what they would have done with this evidence. I think that would be --

THE COURT: But didn't you tell me in this whole entire motion that trial strategy was my error and my ruling last time, that I was deciding whether defense counsel should have done or could have done, and you basically said that was in error?

MR. SPELMAN: Your Honor, and I volunteer that, because that was the analysis that Your Honor relied upon. I do maintain that trial counsel's strategy does not relate towards whether or not the evidence itself was exculpatory, which was a holding of Your Honor.

THE COURT: So what would you gain at an evidentiary

hearing calling those legal counsel in here and just say, If you had this evidence. Because then you're going to be asking them the exact error you said I committed, because you'd be asking them, If you had this evidence, would you have presented it? Isn't that what you just said was in error anyways?

MR. SPELMAN: I think it would actually be relevant towards the prejudice prong, towards the prong of whether or not if they talk about how they would have used it, it would illuminate the Court on -- I do think it would be redundant with what I just explained to the Court. That said, to the extent that Your Honor doesn't want to take my word for it and wants to hear what would trial counsel have really done with it, that could relate to whether or not they -- to hear it from them on whether or not they would meet that reasonable doubt.

And then the -- of course, the other relevant factor is just to establish the allegation we made in the petition, which is that this evidence was, in fact, suppressed.

THE COURT: Okay.

MR. SPELMAN: And that would certainly be relevant.

THE COURT: But you can understand my quandary about your request of an evidentiary hearing, because you're basically going to get out of these attorneys what would have been your strategy, which you have told this Court is a false theory in order to make a ruling is what their strategy would have been is irrelevant.

MR. SPELMAN: Right. Yes. And then, of course, the

witness that we would consider strongly calling would be Betty Graves herself to ask about this identification issues. And to get it on the record, see how strong that impeachment might have been, in fact, with that evidence.

And, of course, the officers who -- the school officers who never testified at the trial, we would like to speak with them as well.

THE COURT: State?

MR. THOMAN: And, Judge, Betty Graves, regardless, we -- trial counsel presented -- or presented argument that there were three alternative suspects. This argument has already been made at trial. They've already said, Hey, there's another shooter out there. One, two, three, now you've got a fourth.

Counsel has completely overlooked the prejudice prong of the fingerprint evidence at trial. Page 5 of our response --

THE COURT: Response.

MR. THOMAN: -- that we -- our initial response on January 29th of this year, fingerprint evidence and numerous other eyewitnesses. One witness trying to impeach one witness on a statement she made to Clark County police officer -- student police -- excuse me, school district police officers that -- in the report that they didn't receive. The impeachment of this one witness is not going to outweigh everything else that was presented at trial. And --

THE COURT: Counsel, how do you -- how do we know that? How do we know that Betty Graves was not the star witness

in the jury's opinion as to the identification?

MR. THOMAN: That's pure speculation.

THE COURT: Okay. But since we didn't have her crossed on that particular evidence, how do we know she wouldn't have crumbled on the stand and said, Yeah, you know what? I have no idea who the shooter was.

MR. THOMAN: And --

THE COURT: And that --

MR. THOMAN: And again --

THE COURT: -- crumbling in front of a jury has a huge impact upon all the State's witnesses.

MR. THOMAN: And again, Judge, I'm going to rely on the fingerprint evidence and the other eyewitnesses in this case.

THE COURT: All right. Counsel, that was the other -- I mean, it's just -- we've hashed this out before and whether or not 59(e) is procedurally correct, I'll let the Supreme Court make that decision some day. But the question is if, in fact, this one witness was discredited, what do you do with all the rest of the evidence that was utilized by this jury? I mean, you're basically saying that the jury made their decision based upon one person's eyewitness account of who the shooter was, and you're discounting everything else. You're basically saying the jury didn't even consider all of the evidence, which would be a violation of their oath.

MR. SPELMAN: I certainly think the jury -- well, I certainly

hope that they considered it all. We're just talking about was this enough to meet the reasonable doubt standard. Would this have entered into their deliberations had they this information, had Betty Graves crumbled on the stand the way Your Honor explains, perhaps had we discussed with the school police why they thought that alternative suspect, as well, was a good match. All of these reasons I think might have given rise to reasonable doubt.

And, certainly, the fingerprint evidence, they -- I just want to make a record of two points on the fingerprint evidence. One is the client never contested that he held the gun that day. And that -- because it was established and undisputed that he was hanging out with this group, his -- it's his family, it's his --

THE COURT: Right.

MR. SPELMAN: -- older cousins and they were passing the gun around and being dumb kids, you know, holding this gun. So he did touch the gun, that's not in dispute.

So what -- fingerprints on a gun is only relevant if you can prove when they were put there.

THE COURT: Well, that's the course --

MR. SPELMAN: And so that's the inference.

THE COURT: -- the jury didn't buy your client's story as to that we, you know, just happenstance, we all touched it a few days before when we were playing pseudo Russian roulette. I mean, what if the jury didn't buy that story? And basically said, you know what? That's a likely excuse. That's a way to basically firm up why

your hand and your fingerprints were on the gun that was used in a shooting.

MR. SPELMAN: Sure. I think that's possible. And again, it's about them weighing all the evidence together, and someone shot this kid, and then just decided who it was is what the jury's task was. Was it a client that -- was it my client? And if they have a reasonable doubt, well, it really might have been Giovanni, that is what people said right after the shooting, I think that that's reasonable doubt, that's -- the law requires an acquittal in that situation, even if there is evidence pointing to my client.

And so I think I would submit on that point, Your Honor.

THE COURT: Counsel, this is what we're going to do. Based upon the gravity of the offense and charge, I'm going to allow you to have your evidentiary hearing. Okay? I'm going to give you --

MR. SPELMAN: Thank you, Your Honor.

THE COURT: -- half a day in order to do your evidentiary hearing; how long is it going to take you to get these witnesses?

MR. SPELMAN: Probably four months to -- about four months, Your Honor, I would think.

THE COURT: Okay. Friday, June 5th. Let's start it in the afternoon, we'll give them just half the day.

THE COURT CLERK: Friday, June 5th at 1:00 p.m.

MR. SPELMAN: Thank you, Your Honor.

THE COURT: Thank you.

MR. SPELMAN: The other matter I -- just before I forget, is there was a Motion to Unseal the case. And we did bring a proposed – that's unopposed, and we just brought a order, if I may.

THE COURT: Approach.

MR. SPELMAN: Thank you, Your Honor.

THE COURT: She'll log it in and give it to you.

MR. SPELMAN: Thank you, Your Honor.

THE COURT: Thank you.

Anything else, counsels?

MR. SPELMAN: No, Your Honor.

THE COURT: Thank you.

[Proceeding concluded at 9:01 a.m.]

/ / /

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

Shawna Ortega, CET*562