



**EIGHTH JUDICIAL DISTRICT COURT  
CLERK OF THE COURT**

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Nov 30 2020 03:12 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Steven D. Grierson  
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Court Division Administrator

November 30, 2020

Elizabeth A. Brown  
Clerk of the Court  
201 South Carson Street, Suite 201  
Carson City, Nevada 89701-4702

RE: STATE OF NEVADA vs. EVARISTO JONATHAN GARCIA

**S.C. CASE: 80255**

D.C. CASE: A-19-791171-W

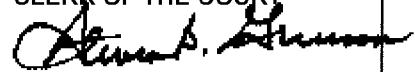
Dear Ms. Brown:

Pursuant to your Order of Limited Remand, dated April 10, 2020 and the Order, dated August 13, 2020, enclosed is a certified copy of the Findings of Fact, Conclusions of Law, and Order filed November 18, 2020 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,  
STEVEN D. GRIERSON, CLERK OF THE COURT

A handwritten signature in black ink, reading "Heather Ungermann".

Heather Ungermann, Deputy Clerk



**FCL**  
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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**EVARISTO JONATHAN GARCIA,**  
#2685822,

Petitioner,

-vs-

**THE STATE OF NEVADA,**

Respondent.

CASE NO: A-19-791171-W

10C262966-1

DEPT NO: XXIX

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

DATE OF HEARING: SEPTEMBER 21, 2020  
TIME OF HEARING: 8:00 AM

This cause having come on for hearing before the Honorable DAVID M. JONES, District Judge, on September 21, 2020, the Petitioner being present, represented by Federal Public Defenders AMELIA BIZZARRO and EMMA SMITH, the Respondent being represented by STEVEN B. WOLFSON, District Attorney, through TALEEN PANDUKHT and NOREEN DEMONTE, Chief Deputy District Attorneys, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, testimony of Roberto Morales, Dr. Kathy Pezdek and Dayvid Figler, Esq. and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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1 On August 29, 2013, Petitioner was sentenced to the Nevada Department of Corrections  
2 to Life with the Possibility of Parole after a minimum of ten (10) years had been served plus  
3 an equal and consecutive term of Life with a Possibility of Parole after a minimum of ten (10)  
4 years has been served for the use of the deadly weapon. The Judgment of Conviction was filed  
5 on September 11, 2013.

6 On October 11, 2013, Petitioner filed a Notice of Appeal. On May 18, 2015, the Nevada  
7 Supreme Court affirmed Petitioner's conviction and remittitur issued on October 20, 2015.

8 On June 10, 2016, Petitioner filed his first Petition for Writ of Habeas Corpus and  
9 Motion for Appointment of Counsel. The State filed its Opposition on September 12, 2016.  
10 On September 29, 2016, Petitioner's Motion and Petition were denied. The Court entered its  
11 Findings of Fact, Conclusions of Law and Order on October 25, 2016.

12 On October 13, 2016, Petitioner filed a Notice of Appeal. On May 16, 2017, the Nevada  
13 Supreme Court affirmed the Court's denial of Petitioner's first Petition and remittitur issued  
14 on June 12, 2017.

15 On March 14, 2019, Petitioner filed, under seal, his second state Post-Conviction  
16 Petition for Writ of Habeas Corpus ("the Petition"). On August 8, 2019, the Petition was  
17 denied by this Court. On August 9, 2019, Petitioner filed a Motion for Reconsideration. On  
18 September 10, 2019, this Court issued an Order denying the Petition. On September 16, 2019,  
19 the State filed a Motion to Unseal Post-Conviction Petition for Writ of Habeas Corpus and  
20 Exhibits Related Thereto, and Motion for Clarification. On September 19, 2019, this Court  
21 issued an order vacating the previous Order denying the Petition. On October 10, 2019, the  
22 State filed its Response to the Petition. On October 17, 2019, Petitioner filed a Reply. On  
23 November 12, 2019, this Court denied the Petition. On November 15, 2019, this Court issued  
24 an Order denying the Petition. On December 11, 2019, Petitioner filed a Notice of Appeal.

25 On November 27, 2019, under seal, Petitioner filed a Motion to Alter or Amend a  
26 Judgment Pursuant to Nev. R. Civ. P. 59(e). On January 29, 2020, the State filed its Opposition  
27 to the motion. On January 30, 2020, Petitioner filed a Reply. On January 31, 2020, the State  
28 filed a Supplement to its Opposition. On February 6, 2020, the Court advised it would allow

1 an evidentiary hearing to be set. An order unsealing the case was also signed in open court.  
2 On March 2, 2020, an Order was filed denying Petitioner's request for an Amended Judgment  
3 granting habeas relief, but vacating its November 15, 2019 Order denying the Petition and  
4 granting an evidentiary hearing. On May 1, 2020, Petitioner filed a Motion for Discovery  
5 (NRS 34.780(2)) and a Motion to Disqualify Noreen Demonte and Taleen Pandukht from  
6 Representing Respondents at the Upcoming Evidentiary Hearing. The State filed Oppositions  
7 on May 11, 2020. Petitioner filed Replies on May 18, 2020. On June 2, 2020, the Court  
8 denied the Motion to Disqualify, and on June 9, 2020, the Court filed an Order denying the  
9 Motion for Discovery.

10 On September 21, 2020, this matter came before the Court for evidentiary hearing and  
11 argument. Roberto Morales, Dr. Kathy Pezdek and Dayvid Figler, Esq. testified, and the Court  
12 took the matter under advisement. On September 30, 2020, the Court denied the Petition. The  
13 Court now rules as follows.

#### 14 **STATEMENT OF FACTS**

15 Crystal Perez was attending Morris Sunset East High School in February of 2006.  
16 Among her classmates were Giovanni Garcia aka "Little One", Gena Marquez, and Melissa  
17 Gamboa. Perez was friends with Gamboa's boyfriend, Jesus Alonso, an active member of  
18 Brown Pride who went by the moniker Diablo. Perez was aware of Garcia's membership in  
19 the Puros Locos gang. The week prior to February 6, 2006, Perez had gotten into a  
20 confrontation with Garcia over a book. Following this confrontation, Alonso approached  
21 Garcia and revealed his gang membership. Perez then observed Garcia make the Puros Locos  
22 hand signal to Alonso.

23 On February 6, 2006, Perez observed Garcia talking on his cell phone and heard him  
24 say "bring Stacy." Following this call, Perez and Marquez left school early, fearing an  
25 altercation would take place. Perez and Marquez went to Marquez's house to get help from  
26 Marquez's brother Bryan Marquez. Bryan Marquez was with Gamboa's younger brother  
27 Victor Gamboa. Perez, Marquez, Bryan Marquez, and Victor returned to the school. Bryan  
28 Marquez approached Garcia and hit him. From there, a large group of students began fighting.

1           Perez got knocked to the ground but observed a person run past her with a gun. Perez  
2 then heard shots. Perez admitted she initially lied to the police and said that Garcia was the  
3 shooter because she believed he caused the fight which lead to Victor's death. She "wanted it  
4 to be him."

5           Gamboa saw Victor outside of the school but did not see him fighting. During the fight,  
6 she observed a gray El Camino carrying two males and one female park at the school. One of  
7 the occupants got out of the car and proceeded to the fight. One of the males was wearing a  
8 gray hooded sweatshirt. The fight broke up and everyone fled. Gamboa was running behind  
9 Victor when she saw the male in the gray hoodie with a gun in his right hand and watched as  
10 he shot her brother. Gamboa could not identify the shooter at trial, over seven (7) years later,  
11 but she had previously identified Petitioner as the shooter at the Preliminary Hearing on  
12 December 18, 2008.

13           During the fight, Campus Monitor Betty Graves observed a Hispanic male with black  
14 hair in a gray hooded sweatshirt holding his right hand in his pocket as he attempted to throw  
15 punches with his left hand. Graves stated to her co-worker, "that boy's got a gun." Graves  
16 called Principal Dan Eichelberger.

17           Principal Eichelberger came out of the school and observed "total mayhem." Principal  
18 Eichelberger yelled loudly for the fighting to stop and many participants ran to cars and left.  
19 He then began escorting the others off school property when he saw a smaller kid running  
20 away from a taller male in a gray hoodie. The male in the hoodie pulled the hoodie over his  
21 head and "fired away."

22           Joseph Harris was at the school to pick up his girlfriend. As he was waiting, he observed  
23 a young male running across the street. A male in a gray hoodie pointed a gun at the boy as he  
24 ran away, holding the gun in his right hand. Harris heard five to six shots, and saw the victim  
25 fall against a wall face-first, before sliding down to the ground.

26           Vanessa Grajeda had been watching the fight and observed a male in a gray hoodie.  
27 She noticed something black in his pocket and watched him as he ran to the middle of the  
28 street, pulled out a gun, and shot the gun.

1 Daniel Proietto, a Crime Scene Analyst with the Las Vegas Metropolitan Police  
2 Department ("LVMPD"), responded to the school to document the crime scene and collect  
3 evidence. On Washington, Proietto located four (4) bullets and six (6) expended cartridge  
4 cases. All six (6) of the cartridge cases were head stamped Wolf 9mm caliber Makarov. On  
5 the North side of Washington, across from the school, Proietto located four (4) bullet strikes  
6 on the wall adjacent to the sidewalk and one bullet embedded in the wall.

7 Officer Richard Moreno began walking in the direction the shooter had been seen  
8 fleeing and located an Imez 9mm Makarov pistol hidden upside down in a toilet tank that had  
9 been left curbside outside 865 Parkhurst.<sup>1</sup> Proietto collected and impounded the firearm.

10 Dinnah Angel Moses, an LVMPD Forensics Examiner, examined the firearm, bullets,  
11 and cartridge cases recovered at the crime scene. Moses testified that all of the cartridge cases  
12 were consistent with the impounded firearm and was able to identify two (2) of the recovered  
13 bullets as being fired by the Imez pistol. The remaining two (2) bullets were too damaged to  
14 identify, but bore similar characteristics to the other bullets.

15 LVMPD Detective Mogg interviewed Garcia. Garcia was photographed wearing the  
16 same all black clothing he was wearing during the school day. Detective Mogg collected  
17 Garcia's cellular telephone and discovered that just prior to the shooting, Garcia placed twenty  
18 calls to Manuel Lopez (Lopez), a fellow member of Puros Locos who went by the moniker  
19 Puppet, and twelve calls to Melinda Lopez, the girlfriend of Salvador Garcia, another member  
20 of Puros Locos.

21 In late March of 2006, Detective Mogg received a call from Detective Ed Ericson with  
22 the LVMPD's Gang Unit. Detective Ericson was investigating a shooting of Puros Locos  
23 member Jonathan Harper that had occurred on February 18, 2006 at the home of Salvador  
24 Garcia. Detective Ericson believed that Harper might have information regarding the homicide  
25 at Morris Sunset East High School.

26  
27 <sup>1</sup> Russell Carr, the owner of the home where the toilets were outside, testified that the gun found in  
28 the toilet by Officer Moreno had never been inside his house and he did not know how it got there.

1 Detectives Mogg and Hardy interviewed Harper on April 1, 2006. Harper provided the  
2 moniker of the shooter in the gray hoodie, which led the LVMPD to Petitioner.

3 Harper testified at trial that in February of 2006, he was a member of Puros Locos for  
4 a short time and went by the moniker Silent. On the day of the murder, he was at Salvador  
5 Garcia's apartment with Lopez, Edshel Calvillo (who went by the moniker Danger) and  
6 Petitioner (who he called "E"). Harper identified Petitioner as E. Harper stated Petitioner was  
7 wearing a gray hoodie. While at Salvador's apartment, Garcia called. Salvador told them they  
8 had to go to the school. Before leaving, Harper noticed that Lopez had his "nine" in his  
9 waistband and that he gave it to Petitioner. Harper, Lopez, Petitioner, and Lopez's girlfriend  
10 Stacy got into Lopez's El Camino.

11 Once they arrived, Harper saw a big brawl in front of the school. A kid ran from the  
12 fight. Garcia and Petitioner chased the kid and were fighting over the gun. They were yelling  
13 loud enough that Harper could hear it. Harper heard Petitioner say, "I got it." Then Petitioner  
14 shot the victim, and "dumped . . . the whole clip in the kid." Harper testified that later Petitioner  
15 told him, "I got him." Harper overheard several people at Salvador's apartment talking about  
16 the gun being hidden.

17 In May of 2006, Detective Mogg received an anonymous tip via "Crime Stoppers." The  
18 tip led him to the 4900 block of Pearl Street. Detective Mogg began investigating residents for  
19 any connection to Petitioner and located Maria Garcia and Victor Tapia. Maria Garcia worked  
20 at the Stratosphere, and listed Petitioner, her son, as an emergency contact with her employer.

21 On July 26, 2006, Calvillo came forward because the fact that a young boy had been  
22 killed "weighed heavy on his conscience." Calvillo testified that on February 6, 2006, he was  
23 at Salvador Garcia's apartment with Lopez, Harper and Petitioner. They received a call from  
24 Garcia to "back him up" at the school. Calvillo testified that Lopez gave the gun to Petitioner.  
25 Harper, Petitioner, Lopez, and "Puppet's girl" left in Lopez's El Camino. Calvillo got into  
26 another car with Sal and followed Lopez's car. Sal's car got stuck at a light and by the time  
27 they got to the school everyone was running and they heard shots. After the shooting, he spoke

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1 with Petitioner. Petitioner admitted he shot a boy and laughed. Petitioner also told Calvillo  
2 that he hid the gun in a toilet. Calvillo stated Harper told him he saw the whole thing.

3 An arrest warrant was issued on October 10, 2006. FBI Special Agent T. Scott  
4 Hendricks, of the Criminal Apprehension Team (CAT), a joint task force of the FBI and local  
5 law enforcement, was granted pen register warrants for the cellular telephones of Petitioner's  
6 parents. On April 23, 2007, Detective Mogg spoke to Petitioner's parents. Shortly after that  
7 conversation, Petitioner's parents placed a call to Vera Cruz, Mexico. Petitioner was arrested  
8 on April 23, 2008 and was extradited to the United States on October 16, 2008.

9 Alice Maceo, a Latent Print Examiner and the Lab Manager of the Latent Prints Section  
10 of the LVMPD, examined the firearm. Maceo was able to lift three (3) latent prints from the  
11 upper grip below the slide (L1), the back strap (L2) and the grip (L3). The print from the grip  
12 (L3) was not of sufficient quality to make any identification. Maceo was able to exclude  
13 Giovanni Garcia and Manuel Lopez as to the remaining two (2) prints. After Petitioner was  
14 taken into custody, Maceo was then able to compare his prints to L1 and L2. Maceo identified  
15 Petitioner's right ring finger on the upper left side of the grip (L1). She also identified  
16 Petitioner's right palm print, the webbing between the thumb and the index finger, on the back  
17 strap of the gun just above the grip (L2). Maceo demonstrated at trial that the print on the back  
18 strap is consistent with holding the firearm in a firing position, and the location of the print on  
19 the upper grip could be consistent with placing the gun in the toilet in the position in which it  
20 was found.

## 21 ANALYSIS

### 22 **I. PETITIONER'S CLAIMS ARE PROCEDURALLY BARRED.**

#### 23 **a. Petitioner's Petition is Time-Barred.**

24 Petitioner's Petition for Writ of Habeas Corpus is time barred with no good cause  
25 shown for delay. Pursuant to NRS 34.726(1):

26 Unless there is good cause shown for delay, a petition that  
27 challenges the validity of a judgment or sentence must be filed  
28 within 1 year of the entry of the judgment of conviction or, if an  
appeal has been taken from the judgment, within 1 year after the  
Supreme Court issues its remittitur. For the purposes of this

subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

- (a) That the delay is not the fault of the petitioner; and
- (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit.

Furthermore, the Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that “[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory,” noting:

Habeas corpus 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.

Id. Additionally, the Court noted that procedural bars “cannot be ignored [by the district court] when properly raised by the State.” Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

In the instant case, the Judgment of Conviction was filed on September 11, 2013, and Petitioner filed a direct appeal on October 11, 2013. The Petitioner’s conviction was affirmed, and remittitur issued on October 20, 2015. Thus, the one-year time bar began to run from the

1 date remittitur issued. The instant Petition was not filed until March 14, 2019. This is over  
2 three (3) years after remittitur issued and in excess of the one-year time frame. Absent a  
3 showing of good cause for this delay and undue prejudice, Petitioner's claim must be  
4 dismissed because of its tardy filing.

5 **b. Petitioner's Petition is Successive.**

6 Petitioner's Petition is procedurally barred because it is successive. NRS 34.810(2)  
7 reads:

8 A second or successive petition *must* be dismissed if the judge or  
9 justice determines that it fails to allege new or different grounds  
10 for relief and that the prior determination was on the merits or, if  
11 new and different grounds are alleged, the judge or justice finds  
that the failure of the petitioner to assert those grounds in a prior  
petition constituted an abuse of the writ.

12 (emphasis added). Second or successive petitions are petitions that either fail to allege new or  
13 different grounds for relief and the grounds have already been decided on the merits or that  
14 allege new or different grounds, but a judge or justice finds that the petitioner's failure to assert  
15 those grounds in a prior petition would constitute an abuse of the writ. Second or successive  
16 petitions will only be decided on the merits if the petitioner can show good cause and  
17 prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

18 The Nevada Supreme Court has stated: "Without such limitations on the availability of  
19 post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-  
20 conviction remedies. In addition, meritless, successive and untimely petitions clog the court  
21 system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950.  
22 The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require  
23 a careful review of the record, successive petitions may be dismissed based solely on the face  
24 of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words,  
25 if the claim or allegation was previously available with reasonable diligence, it is an abuse of  
26 the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991).  
27 Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

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1           Petitioner filed his first Petition for Writ of Habeas Corpus on June 10, 2016. On  
2   September 29, 2016, the first Petition was denied. The Court entered its Findings of Fact,  
3   Conclusions of Law and Order on October 25, 2016. On October 13, 2016, Petitioner filed a  
4   Notice of Appeal. On May 16, 2017, the Nevada Supreme Court affirmed the Court's denial  
5   of Petitioner's first Petition and remittitur issued on June 12, 2017. As this Petition is  
6   successive, pursuant to NRS 34.810(2), it cannot be decided on the merits absent a showing  
7   of good cause and prejudice. NRS 34.810(3).

8       **II.   PETITIONER CANNOT DEMONSTRATE GOOD CAUSE TO OVERCOME**  
9       **THE PROCEDURAL BARS.**

10           A showing of good cause and prejudice may overcome procedural bars. "To establish  
11   good cause, Petitioners *must* show that an impediment external to the defense prevented their  
12   compliance with the applicable procedural rule. A qualifying impediment might be shown  
13   where the factual or legal basis for a claim was not reasonably available at the time of default."  
14   Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court  
15   continued, "Petitioners cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at  
16   526. In order to establish prejudice, the Petitioner must show "not merely that the errors of  
17   [the proceedings] created possibility of prejudice, but that they worked to his actual and  
18   substantial disadvantage, in affecting the state proceedings with error of constitutional  
19   dimensions." Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United  
20   States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there  
21   must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev.  
22   248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229,  
23   1230 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the  
24   petitioner. NRS 34.726(1)(a).

25           In this case, Petitioner claimed he has recently discovered a Clark County School  
26   District Police Department ("CCSDPD") report that should have been disclosed under Brady  
27   v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963) and that provides good cause to overcome  
28   the procedural bars. Due Process does not require simply the disclosure of "exculpatory"

1 evidence. Evidence must also be disclosed if it provides grounds for the defense to attack the  
2 reliability, thoroughness, and good faith of the police investigation or to impeach the  
3 credibility of the State's witnesses. See Kyles v. Whitley, 514 U.S. 419, 442, 445-51, 1115 S.  
4 Ct. 1555, 1555 n. 13 (1995). Evidence cannot be regarded as "suppressed" by the government  
5 when the defendant has access to the evidence before trial by the exercise of reasonable  
6 diligence. United States v. White, 970 F.2d 328, 337 (7th Cir. 1992). "While the [United  
7 States] Supreme Court in Brady held that the [g]overnment may not properly conceal  
8 exculpatory evidence from a defendant, it does not place any burden upon the [g]overnment  
9 to conduct a defendant's investigation or assist in the presentation of the defense's case."  
10 United States v. Marinero, 904 F.2d 251, 261 (5<sup>th</sup> Cir. 1990); accord United States v. Pandozzi,  
11 878 F.2d 1526, 1529 (1<sup>st</sup> Cir. 1989); United States v. Meros, 866 F.2d 1304, 1309 (11<sup>th</sup> Cir.  
12 1989). "Regardless of whether the evidence was material or even exculpatory, when  
13 information is fully available to a defendant at the time of trial and his only reason for not  
14 obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the  
15 defendant has no Brady claim." United States v. Brown, 628 F.2d 471, 473 (5<sup>th</sup> Cir. 1980).

16 The Nevada Supreme Court has followed the federal line of cases in holding that Brady  
17 does not require the State to disclose evidence which was available to the defendant from other  
18 sources, including diligent investigation by the defense. Steese v. State, 114 Nev. 479, 495,  
19 960 P.2d 321, 331 (1998). In Steese, the undisclosed information stemmed from collect calls  
20 that the defendant made. This Court held that the defendant certainly had knowledge of the  
21 calls that he made and through diligent investigation the defendant's counsel could have  
22 obtained the phone records independently. Id. Based on that finding, this Court found that  
23 there was no Brady violation when the State did not provide the phone records to the defense.  
24 Id.

25 Petitioner could have obtained the impeachment evidence in question through his own  
26 diligent discovery. "Brady does not require the State to disclose evidence which is available  
27 to the defendant from other sources, including diligent investigation by the defense." Steese,  
28 114 Nev. at 495, 960 Nev. at 331. Even if the prosecution or one of the agencies acting on its

1 behalf had the impeachment evidence, there was no duty to disclose it because Petitioner could  
2 have discovered this information on his own. The CCSDPD report could have been discovered  
3 through submitting a request to CCSD, as it apparently eventually was. Further, Petitioner  
4 could have discovered this information by contacting CCSD as an earlier date. The State did  
5 not in any way prevent or hinder Petitioner from making such contact, thus Petitioner could  
6 have discovered such information through reasonably diligent efforts. In fact, Petitioner  
7 admitted as much in the instant Petition, which states:

8       The FPD assigned an investigator to this case. As part of her investigation, she  
9       reviewed the LVMPD's computer aided dispatch (CAD) log for this case. ...the  
10      investigator discovered this log "indicates that school police took down a suspect  
11      at gunpoint in a neighborhood near the crime scene.... Following this lead, the  
12      investigator reviewed an LVMPD Officer's Report which lists seven CCSDPD  
13      personnel who were at the scene.

14      Petition, pg. 15-16. The CAD log as well as the referenced LVMPD Officer's Report were  
15      disclosed by the State pursuant to its Brady obligations. "Regardless of whether the evidence  
16      was material or even exculpatory, when information is fully available to a defendant at the  
17      time of trial and his only reason for not obtaining and presenting the evidence to the Court is  
18      his lack of reasonable diligence, the defendant has no Brady claim." Brown, 628 F.2d at 473.  
19      Petitioner had the ability to discover this evidence prior to trial through his own diligent  
20      investigation. The admission that his own attorneys could have found this information with an  
21      adequate investigation at the time of trial divests Petitioner of the ability now to claim  
22      otherwise. Petitioner's own voluntary choice not to perform this discovery himself was strictly  
23      an internal decision—not an impediment external to the defense and, thus, does not constitute  
24      good cause to overcome the procedural bars.

25      Moreover, the CCSDPD reports are not Brady material. In Evans v. State, 117 Nev.  
26      609, 625-27, 28 P.3d 498, 510-11 (2001), overruled on other grounds by Lisle v. State, 131  
27      Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015), the defendant, on appeal, argued that the  
28      State had the obligation to continue investigating alternate suspects of the crime, and  
29      speculated the State had evidence one of the victims had been an informant previously, which

1 would have demonstrated others had motive to kill her. Id. at 626, 28 P.3d at 510-11. The  
2 Court found that the defendant had not demonstrated that such an investigation would have  
3 led to exculpatory information. Id. at 626, 28 P.3d at 510. To undermine confidence in a trial's  
4 outcome, a defendant would have to allege the nondisclosure of specific information that not  
5 only linked alternate suspects to the crime, but also indicate the defendant was not involved.  
6 Id. at 626, 28 P.3d at 510. Further, the Court found that the victim's mere acting as an  
7 informant, without at least some evidence that she had received actual threats against her,  
8 would not implicate the State's affirmative duty to disclose potentially exculpatory information  
9 to the defense because such information must be material. Id. at 627, 28 P.3d at 511.

10 Here, the CCSDPD police reports indicate an individual by the name of Jose Bonal, a  
11 student from a different school, was stopped on a different street nearby. Bonal was stopped  
12 for approximately fourteen (14) minutes while Betty Graves was brought to make an  
13 identification. The report indicated Ms. Graves had seen the fight and the shooting and she  
14 would be able to identify the suspect. Ms. Graves did a show-up and definitively stated that  
15 Bonal was not the shooter. Further, Ms. Graves also stated she witnessed the fight and did not  
16 identify Bonal as a participant in the fight. Bonal was also a Hispanic male wearing a gray  
17 hoodie. However, he did not match the rest of the description given by Ms. Graves. The fact  
18 that another young Hispanic male was stopped in the area, and then definitively *excluded* as  
19 the shooter by an eyewitness, is neither exculpatory nor material. To undermine confidence in  
20 a trial's outcome, Petitioner would need to demonstrate this report linked Bonal to the crime,  
21 and indicated the Petitioner was not involved. Evans, 117 Nev at 626, 28 P.3d at 510. Petitioner  
22 has merely demonstrated that a report existed which definitively stated Bonal was not the  
23 shooter. Therefore, this report was not exculpatory or material.

24 Further, Petitioner failed to demonstrate that the State affirmatively withheld the  
25 information. In order to qualify as good cause, Petitioner must demonstrate that the State  
26 affirmatively withheld information favorable to the defense. State v. Bennett, 119 Nev. 589,  
27 600, 81 P.3d 1, 8 (2003). The defense bears the burden of proving that the State withheld  
28 information, and it must prove specific facts that show as much. Id. A mere showing that

1 evidence favorable to the defense exists is not a constitutional violation under Brady. See  
2 Strickler v. Greene, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 1948 (1999) (“there is never a real  
3 ‘Brady violation’ unless the nondisclosure was so serious that there is a reasonable probability  
4 that the suppressed evidence would have produced a different verdict.”). Rather, a Brady  
5 violation only exists if each of three separate components exist for a given claim—first, that  
6 the evidence at issue is favorable to the defense; second, that the *evidence was actually*  
7 *suppressed* by the State; and third, that the *prejudice from such suppression* meets the Kyles  
8 standard of there being a reasonable probability of a different result, had the evidence reached  
9 the jury. Id.; Kyles, 514 U.S. at 434–35, 115 S. Ct. at 1566.

10         Petitioner sets forth no facts or evidence to demonstrate that the evidence in question  
11 was exclusively in the State’s control at the time of trial. To constitute a Brady/Giglio  
12 violation, the evidence at issue must have been in the State’s exclusive control. See Thomas  
13 v. United States, 343 F.2d 49, 54 (9th Cir. 1954). There is no evidence that CCSDPD is a state  
14 actor for Brady purposes and, for that reason, Petitioner has failed to show evidence was  
15 “withheld” by the State. The only law enforcement agency that collaborated on behalf of the  
16 State of Nevada in Petitioner’s case was LVMPD.

17         In fact, at the evidentiary hearing, retired CCSDPD Lieutenant Roberto Morales  
18 confirmed that, as of approximately the year 2000, the NRS was amended to require CCSDPD  
19 to contact and advise the local jurisdiction, in this case LVMPD, of any incidents involving  
20 Category A felonies. Recorder’s Transcript of Hearing (“Transcript”), September 21, 2020, p.  
21 7-8. Here, Petitioner was charged with a Category A Felony and, thus, CCSDPD did not have  
22 jurisdiction over Petitioner’s case. Therefore, LVMPD was the sole agency, outside of the  
23 Clark County District Attorney’s Office (CCDA), that the prosecutor had a duty from which  
24 to procure any information favorable to Petitioner. See Kyles, 514 U.S. at 437–38, 115 S. Ct.  
25 at 1567–68 (explaining that the prosecutor has a duty to learn of information favorable to the  
26 accused secured by *others acting on the State’s behalf in the case*) (emphasis added).  
27 Moreover, Morales testified that CCSDPD documents were only provided to the CCDA *upon*  
28 *request*. Transcript at 12, 15. Morales also testified that he had no direct knowledge of the



1 CCD A ever requesting these documents. Id. at 15. Petitioner has neither asserted nor set forth  
2 facts to show that the CCD A or the LVMPD possessed the impeachment evidence that  
3 Petitioner discusses in his Petition. Petitioner’s failure to show such exclusive possession is  
4 critical because if the State did not suppress, conceal, or exclusively control the CCSDPD  
5 reports, then no impediment external to the defense existed sufficient to constitute good cause.  
6 As Petitioner fails to substantiate this crucial point, his claim is denied.

7 Here, Petitioner has not alleged – let alone proved – that the State had any Brady/Giglio  
8 information and failed to disclose it. In fact, Petitioner has not even pled generally that the  
9 State affirmatively withheld information. Petitioner also has not asserted—nor does the  
10 alleged impeachment evidence evince—facial indicia that the State necessarily, or even should  
11 have had, knowledge of the evidence’s existence.

12 Moreover, trial counsel, Dayvid Figler, Esq., testified at the evidentiary hearing that he  
13 had worked with both of the prosecutors before and he believed them to be “reliable and  
14 professional individuals.” Mr. Figler further testified that he would have no reason to believe  
15 that they would not turn over all of the discovery that was either previously ordered or which  
16 they felt was important for the defense. Transcript at 76-77. Despite the Strickler-Bennett  
17 requirement of proving affirmative State “suppression” for there to be a constitutional  
18 violation, Petitioner nonetheless argues that the State unconstitutionally violated his rights  
19 because the State did not take steps to affirmatively investigate CCSDPD’s involvement in a  
20 case investigated by LVMPD. He claims that he had a right to rely upon the State to disclose  
21 all CCSDPD reports that were in existence, anywhere, even if the State did not possess or  
22 know about it. Yet, such a claim directly contradicts the rule set forth in Evans, which rejected  
23 a similar argument by a defendant. 117 Nev. at 627, 28 P.3d at 511.

24 In Evans, the Court held, “[The Petitioner] seems to assume that the State has a duty to  
25 compile information or pursue an investigative lead simply because it would conceivably  
26 develop evidence helpful to the defense, but he offers no authority for this proposition, and we  
27 reject it.” Id. Similarly, Petitioner has not offered any authority for this proposition either.  
28 Further, Petitioner’s proposed rule would contravene the rule set forth by the U.S. Supreme

1 Court in United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397 (1976) explaining that  
2 Brady violations *only occur* when information was known—actually or constructively—by  
3 the prosecution. The new rule Petitioner seemingly requests would impute to the State any and  
4 all knowledge that Petitioner’s post-conviction counsel discovers ad infinitum, regardless of  
5 the State’s actual or constructive knowledge of such evidence’s existence at the time of the  
6 original trial. Fashioning such a broad rule would be unreasonable. See Daniels v. State, 114  
7 Nev. 261, 267, 956 P.2d 111, 115 (1998); Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424,  
8 435 (2001). To require the State in future cases to search out, gather, and package every shred  
9 of possible impeachment evidence, nationwide, would essentially lead to the anomalous result  
10 that the prosecution has to develop the defense for a defendant. It would also impose an  
11 “unreasonable and likely cost-prohibitive burden upon the State.” As such, Petitioner has not  
12 demonstrated good cause to overcome the fact that his successive Petition was filed over two  
13 (2) years late, and his Petition is denied.

14 Moreover, even if Petitioner could demonstrate good cause to overcome the procedural  
15 time bar, he cannot show prejudice. It is well-settled that Brady and its progeny require a  
16 prosecutor to disclose evidence favorable to the defense when that evidence is material either  
17 to guilt or to punishment. See Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25 (2000);  
18 Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687 (1996). “[T]here are three components  
19 to a Brady violation: (1) the evidence at issue is favorable to the accused; (2) the evidence was  
20 withheld by the state, either intentionally or inadvertently; and (3) prejudice ensued, i.e., the  
21 evidence was material.” Mazzan 116 Nev. at 67. “Where the state fails to provide evidence  
22 which the defense did not request or requested generally, it is constitutional error if the omitted  
23 evidence creates a reasonable doubt which did not otherwise exist. In other words, evidence  
24 is material if there is a reasonable probability that the result would have been different if the  
25 evidence had been disclosed.” Id. at 66 (internal citations omitted). “In Nevada, after a specific  
26 request for evidence, a Brady violation is material if there is a reasonable *possibility* that the  
27 omitted evidence would have affected the outcome. Id. (original emphasis), *citing Jimenez*,

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1 112 Nev. at 618-19, 918 P.2d at 692; Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1, 8  
2 (1994).

3 “The mere possibility that an item of undisclosed information might have helped the  
4 defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the  
5 constitutional sense.” United States v. Agurs, 427 U.S. 97, 108, 96 S. Ct. 2392, 2399-400  
6 (1976). Favorable evidence is material, and constitutional error results, “if there is a reasonable  
7 probability that the result of the proceeding would have been different.” Kyles, 514 U.S. at  
8 433-34, 115 S. Ct. at 1565, *citing* United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375,  
9 3383 (1985). A reasonable probability is shown when the nondisclosure undermines  
10 confidence in the outcome of the trial. Kyles at 434, 115 S. Ct. 1565. Petitioner is unable to  
11 demonstrate prejudice and, thus, his claim fails.

12 First, as discussed *supra*, the evidence was neither favorable to the accused nor  
13 material. Instead, this evidence only suggests “[t]he mere possibility that an item of  
14 undisclosed information might have helped the defense, or might have affected the outcome  
15 of the trial....” Agurs, 427 U.S. at 108, 96 S. Ct. at 2399-400. To undermine confidence in a  
16 trial’s outcome, Petitioner would need to demonstrate this report linked Bonal to the crime and  
17 indicated the Petitioner was not involved. Evans, 117 Nev at 626, 28 P.3d at 510. Petitioner  
18 has merely demonstrated that a report existed which definitively stated Bonal was not the  
19 shooter. Moreover, Petitioner presented four (4) alternate suspects to the jury at the time of  
20 trial – Giovanni Garcia, Salvatore Garcia, Manuel Lopez and Edshel Calvillo. Merely adding  
21 a fifth alternate suspect would not have made it less likely the jury would find Petitioner guilty  
22 beyond a reasonable doubt.

23 At the evidentiary hearing, Petitioner’s expert, Dr. Kathy Pezdek, testified that she  
24 could not determine whether an eyewitness identification factor affected Ms. Graves’  
25 testimony and, therefore, she could not apply her research to Ms. Graves or Petitioner’s case  
26 specifically. Transcript at 42-43. In fact, Dr. Pezdek never testified to a reasonable degree of  
27 medical or psychiatric certainty or even probability that Ms. Graves misidentified Petitioner  
28 or that the CCSDPD report would have demonstrated such a fact. See Id. at 42. She even

1 testified that she cannot offer an opinion about the reliability of any eyewitness. Id. at 68.  
2 Further, Dr. Pezdek did not review any of the other evidence in Petitioner's case which  
3 identified him as the shooter, including the trial testimony and/or witness statements of Edshel  
4 Calvillo, Jonathan Harper, Manuel Lopez, Melissa Gamboa, Crystal Perez or the latent  
5 fingerprint report. Id. at 64-65. When asked regarding Ms. Graves' role in this investigation  
6 being relatively minor, Dr. Pezdek testified that she cannot evaluate that because she did not  
7 review the totality of the evidence this case. Id. at 68. But most importantly, Ms. Graves  
8 never identified Petitioner at trial. Id. at 63, 100. Therefore, Petitioner cannot demonstrate  
9 prejudice and his claims fail.

10 Most importantly, as discussed *supra*, Petitioner had the ability to obtain the  
11 information on his own through diligent investigation. "Brady does not require the State to  
12 disclose evidence which is available to the defendant from other sources, including diligent  
13 investigation by the defense." Steese, 114 Nev. at 495, 960 Nev. at 331. "Regardless of  
14 whether the evidence was material or even exculpatory, when information is fully available to  
15 a defendant at the time of trial and his only reason for not obtaining and presenting the  
16 evidence to the Court is his lack of reasonable diligence, the defendant has no Brady claim."  
17 Brown, 628 F.2d at 473. The admission that his own attorneys could have found this  
18 information with an adequate investigation at the time of trial divests Petitioner of the ability  
19 now to claim otherwise.

20 Additionally, at the evidentiary hearing, Mr. Figler admitted that he did not specifically  
21 request the CCSDPD report. He further admitted that there was only a general request  
22 contained in the Special Public Defender's discovery motion filed on August 25, 2010.  
23 Transcript at 93. However, trial counsel testified that he recalled the school principal, Danny  
24 Eichelberger, testifying regarding the school police being at the school on the day of the  
25 incident. Id. at 95. Petitioner's own voluntary choice not to perform this discovery himself  
26 cannot constitute prejudice and, thus, his claim fails.

27 Finally, even if Petitioner could demonstrate prejudice, given the strength of the State's  
28 case, any prejudice from the stop of a non-suspect pales in comparison to the overwhelming

1 evidence of his guilt. Numerous witnesses testified that they saw a Hispanic man of  
2 Petitioner's approximate age wearing a gray hooded sweatshirt shoot the victim during the  
3 fight at the school. Jonathan Harper testified that he rode in the car with Petitioner to the fight,  
4 that Manuel Lopez handed his gun to Petitioner before getting into the car, that Petitioner was  
5 wearing a gray hooded sweatshirt that night, that he saw Petitioner chase and shoot the victim  
6 in the back and "dumped . . . the whole clip in the kid," and that he saw Petitioner run into the  
7 neighborhood where the gun was later found. Harper testified that Petitioner told him later  
8 that "I got him." Harper also overheard several people at Salvador's apartment talking about  
9 the gun being hidden. Edshel Calvillo testified that Petitioner told him that Petitioner shot a  
10 boy and that he hid the gun in a toilet. Officer Richard Moreno testified that he found the gun  
11 in the tank of a toilet left on the curb as garbage one block from the school. The Firearms  
12 Examiner identified two (2) of the bullets recovered at the scene as having being fired by the  
13 gun found in the toilet. Finally, the Latent Fingerprint Lab Manager identified two (2) latent  
14 prints on the gun that were matched to Petitioner. There was more than enough evidence for  
15 a jury to determine Petitioner committed the crime beyond a reasonable doubt and, thus, any  
16 prejudice to Petitioner would be outweighed by the overwhelming evidence of his guilt and  
17 would therefore be harmless.

18       Therefore, Petitioner's meritless claims are procedurally barred, and his Petition is  
19 denied.

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**ORDER**

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 18 day of November, 2020.

  
DISTRICT JUDGE

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

BY /s/ TALEEN PANDUKHT  
TALEEN PANDUKHT  
Chief Deputy District Attorney  
Nevada Bar #5734

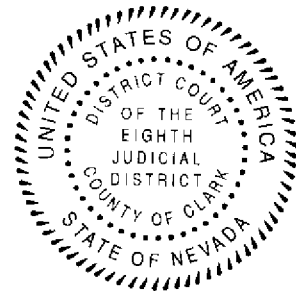
**CERTIFICATE OF SERVICE**

I certify that on the 17th day of November, 2020, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

EVARISTO GARCIA, BAC #1108072  
HIGH DESERT STATE PRISON  
P. O. BOX 650  
INDIAN SPRINGS, NEVADA 89070-0650

BY /s/ J. HAYES  
Secretary for the District Attorney's Office

November 30, 2020



CERTIFIED COPY  
ELECTRONIC SEAL (NRS 1.190(3))

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