EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT

REGIONAL JUSTICE CENTER
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Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

January 25, 2021

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

RE: EVARISTO JONATHAN GARCIA vs. JAMES DZURENDA, Director of Nevada Department of Corrections; AARON FORD, Attorney General of the State of Nevada; TODD THOMAS, Warden of Saguaro Correctional Center

S.C. CASE: 80255

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

Dear Ms. Brown:

Pursuant to your Order, dated December 31, 2020, enclosed is a certified copy of the Findings of Fact, Conclusions of Law, and Order filed January 20, 2021 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

Heather Ungermann, Deputy Clerk

FFCO

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 matter 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 after the Court having considered the matter, testimony of Roberto Morales, Dr. Kathy Pezdek and Dayvid Figler, Esq. including briefs, transcripts, arguments of counsel, now therefore, the Court makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(The Court acknowledges it's use of language set forth by the District Attorney in prior pleadings and pursuant to EDCR 5.521, which allows the Court to have a party's attorney draft an order.)

I. PROCEDURAL TIME LINE OF THE CASE

On March 19, 2010, EVARISTO JONATHAN GARCIA (hereinafter "Petitioner") was charged by way of Indictment with: Count 1 – CONSPIRACY TO COMMIT MURDER WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Category B Felony – NRS 200.010, 200.030, 199.480, 193.168, 193.169); and

Count 2 – MURDER WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Category A Felony – NRS 193.168, 193.169, 200.010, 200.030, 200.450, 193.165).

On March 17, 2011, pursuant to Guilty Plea Agreement, Petitioner pled guilty to SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony – NRS 200.010, 200.030, 193.165). On April 22, 2011, Petitioner filed a Motion to Withdraw Guilty Plea. On May 12, 2011, the Court granted Petitioner's motion.

Jury trial commenced on July 8, 2013. On July 9, 2013, the State filed its Third Amended Indictment charging Petitioner with Count 1 – CONSPIRACY TO COMMIT MURDER (Category B Felony – NRS 200.010, 200.030, 199.480) and Count 2 – MURDER WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Category A Felony – NRS 193.168, 193.169, 200.010, 200.030, 200.450, 193.165).

On July 12, 2013, the State filed its Fourth Amended Indictment charging Petitioner with Count 1 – CONSPIRACY TO COMMIT MURDER (Category B Felony – NRS 200.010, 200.030, 199.480) and Count 2 – MURDER WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165). On July 15, 2013, the jury returned a verdict of not guilty as to Count 1 and guilty of Second Degree Murder With Use of a Deadly Weapon as to Count 2.

On July 22, 2013, Petitioner filed a Motion for Acquittal or, in the Alternative, Motion for New Trial. The State filed its Opposition on July 29, 2013. On August 1, 2013, Petitioner's motion was denied.

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

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

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

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

On March 14, 2019, Petitioner filed, under seal, a second 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, Petitioner 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, Petitioner 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 December 11, 2019, Petitioner filed a Notice of Appeal.

On November 27, 2019, under seal, Petitioner filed a Motion to Alter or Amend a Judgment Pursuant to Nev. R. Civ. P. 59(e). On January 29, 2020, the State filed its Opposition to the motion. On January 30, 2020, Petitioner filed a Reply. On January 31, 2020, the State filed a Supplement to its Opposition. On February 6, 2020, the Court set an evidentiary. An order unsealing the case was also signed in open court. On March 2, 2020, an Order was filed denying Petitioner's request for an Amended Judgment granting habeas relief, but vacating its November 15, 2019 Order denying the Petition and granting an evidentiary hearing. On May 1, 2020, Petitioner filed a Motion for Discovery (NRS

34.780(2)) and a Motion to Disqualify Noreen Demonte and Taleen Pandukht from Representing Respondents at the Upcoming Evidentiary Hearing. The State filed Oppositions on May 11, 2020. Petitioner filed Replies on May 18, 2020. On June 2, 2020, the Court denied the Motion to Disqualify, and on June 9, 2020, the Court filed an Order denying the Motion for Discovery.

On September 21, 2020, this matter came before the Court for evidentiary hearing and argument. Roberto Morales, Dr. Kathy Pezdek and Dayvid Figler, Esq. testified, and the Court took the matter under advisement. The Court hereby rules as follows:

II. STATEMENT OF FACTS

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

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

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

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

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

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

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

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

Daniel Proietto, a Crime Scene Analyst with the Las Vegas Metropolitan Police Department ("LVMPD"), responded to the school to document the crime scene and collect evidence. On Washington, Proietto located four (4) bullets and six (6) expended cartridge cases. All six (6) of the cartridge cases were head stamped Wolf 9mm caliber Makarov. On

the North side of Washington, across from the school, Proietto located four (4) bullet strikes on the wall adjacent to the sidewalk and one bullet embedded in the wall.

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

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

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

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

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

Harper testified at trial that in February of 2006, he was a member of Puros Locos for a short time and went by the moniker Silent. On the day of the murder, he was at Salvador

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

Garcia's apartment with Lopez, Edshel Calvillo (who went by the moniker Danger) and Petitioner (who he called "E"). Harper identified Petitioner as E. Harper stated Petitioner was wearing a gray hoodie. While at Salvador's apartment, Garcia called. Salvador told them they had to go to the school. Before leaving, Harper noticed that Lopez had his "nine" in his waistband and that he gave it to Petitioner. Harper, Lopez, Petitioner, and Lopez's girlfriend Stacy got into Lopez's El Camino.

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

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

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

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

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

III. PETITIONER'SCLAIMS ARE PROCEDURALLY BARRED.

a. The Petition is Time-Barred.

Petitioner's Petition for Writ of Habeas Corpus is time barred pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed 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). 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 time limit for preparing petitions for post-conviction relief under NRS 34.726 is to be 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.

State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Nevada Supreme 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. 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 instructed the District Courts to apply the rules as clearly required by the rule.

In this 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 date remittitur issued. (The instant Petition was not filed until March 14, 2019. Three (3) years after remittitur issued and absent any showing of good cause for this delay and undue prejudice, Petitioner's claim must be dismissed,

a. Petitioner's Petition is Successive.

Petitioner's Petition is also barred because it clearly violates NRS 34.810(2) which reads:

> A second or successive petition *must* be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if 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. (emphasis added).

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

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

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

IV. PETITIONER CANNOT DEMONSTRATE GOOD CAUSE TO OVERCOME THE PROCEDURAL BARS.

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

Petitioner claims he has recently discovered a Clark County School District Police Department ("CCSDPD") report that should have been disclosed under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). He claims this failure provides good cause to overcome the procedural bars. Due Process does not require simply the disclosure of "exculpatory" evidence. The alleged evidence must also be disclosed if it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation or to impeach the credibility of the State's witnesses. See Kyles v. Whitley, 514 U.S. 419, 442, 445-51, 1115 S. Ct. 1555, 1555 n. 13 (1995). Evidence cannot be regarded as "suppressed" by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence. United States v. White, 970 F.2d 328, 337 (7th Cir. 1992). "While

the [United States] Supreme Court in Brady held that the [g]overnment may not properly conceal exculpatory evidence from a defendant, it does not place any burden upon the [g]overnment to conduct a defendant's investigation or assist in the presentation of the defense's case." United States v. Marinero, 904 F.2d 251, 261 (5th Cir. 1990); *accord* United States v. Pandozzi, 878 F.2d 1526, 1529 (1st Cir. 1989); United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989). "Regardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no Brady claim." United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980).

The Nevada Supreme Court has followed the federal line of cases in holding that Brady does not require the State to disclose evidence which was available to the defendant from other sources, including diligent investigation by the defense. Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998).

The Petitioner could have obtained the evidence in question through his own diligent discovery. Even if the prosecution or one of the agencies acting on its behalf had the impeachment evidence, there was no duty to disclose it because Petitioner could have discovered this information on his own. The CCSDPD report could have been discovered through submitting a request to CCSD, as it apparently eventually was. Further, Petitioner could have discovered this information by contacting CCSD at an earlier date. Petitioner had knowledge of CCSDPD's involvement in the case:

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

Petition, pg. 15-16. The CAD log as well as the referenced LVMPD Officer's Report were disclosed by the State pursuant to its Brady obligations. "Regardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the

time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no Brady claim." Brown, 628 F.2d at 473. Petitioner had the ability to discover this evidence prior to trial through his own diligent investigation. The admission that his own attorneys could have found this information with an adequate investigation at the time of trial divests Petitioner of the ability now to claim otherwise. Petitioner's own voluntary choice not to perform this discovery himself was strictly an internal decision—not an impediment external to the defense and, thus, does not constitute good cause to overcome the procedural bars.

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

In addition, Petitioner failed to demonstrate the State affirmatively withheld the information. In order to qualify as good cause, Petitioner must demonstrate that the State affirmatively withheld information favorable to the defense. State v. Bennett, 119 Nev. 589, 600, 81 P.3d 1, 8 (2003). The defense bears the burden of proving that the State withheld information, and it must prove specific facts that show as much. Id. A mere showing that evidence favorable to the defense exists is not a constitutional violation under Brady. See Strickler v. Greene, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 1948 (1999) ("there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable

probability that the suppressed evidence would have produced a different verdict."). Rather, a Brady violation only exists if each of three separate components exist for a given claim—first, that the evidence at issue is favorable to the defense; second, that the *evidence was actually suppressed* by the State; and third, that the *prejudice from such suppression* meets the Kyles standard of there being a reasonable probability of a different result, had the evidence reached the jury. Id.; Kyles, 514 U.S. at 434–35, 115 S. Ct. at 1566.

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

In fact, at the evidentiary hearing, retired CCSDPD Lieutenant Roberto Morales confirmed that, as of approximately the year 2000, the NRS was amended to require CCSDPD to contact and advise the local jurisdiction, in this case LVMPD, of any incidents involving Category A felonies. Recorder's Transcript of Hearing ("Transcript"), September 21, 2020, p. 7-8. Here, Petitioner was charged with a Category A Felony and, thus, CCSDPD did not have jurisdiction over Petitioner's case. Therefore, LVMPD was the sole agency, outside of the Clark County District Attorney's Office (CCDA), that the prosecutor had a duty from which to procure any information favorable to Petitioner. See Kyles, 514 U.S. at 437–38, 115 S. Ct. at 1567–68 (explaining that the prosecutor has a duty to learn of information favorable to the accused secured by *others acting on the State's behalf in the case*) (emphasis added). Moreover, Morales testified that CCSDPD documents were only provided to the CCDA *upon request*. Transcript at 12, 15. Morales also testified that he had no direct knowledge of the CCDA ever requesting these documents. Id. at 15. Petitioner has neither asserted nor set forth facts to show that the CCDA or the LVMPD possessed the impeachment evidence that Petitioner discusses in his Petition. Petitioner's failure to show

such exclusive possession is critical because if the State did not suppress, conceal, or exclusively control the CCSDPD reports, then no impediment external to the defense existed sufficient to constitute good cause. As Petitioner fails to substantiate this crucial point, his claim must be denied.

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

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

In Evans, the Court held, "[The Petitioner] seems to assume that the State has a duty to compile information or pursue an investigative lead simply because it would conceivably develop evidence helpful to the defense, but he offers no authority for this proposition, and we reject it." Id. Similarly, Petitioner has not offered any authority for this proposition either. Further, Petitioner's proposed rule would contravene the rule set forth by the U.S. Supreme Court in United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397 (1976) explaining

that Brady violations *only occur* when information was known—actually or constructively—by the prosecution. The new rule Petitioner seemingly requests would impute to the State any and all knowledge that Petitioner's post-conviction counsel discovers ad infinitum, regardless of the State's actual or constructive knowledge of such evidence existence at the time of the original trial. Fashioning such a broad rule would be unreasonable. See Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998); Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). To require the State in future cases to search out, gather, and package every shred of possible impeachment evidence, nationwide, would essentially lead to the anomalous result that the prosecution has to develop the defense for a defendant. It would also impose an "unreasonable and likely cost-prohibitive burden upon the State." As such, Petitioner has not demonstrated good cause to overcome the fact that his successive Petition was filed over two (2) years late, and his Petition must be denied.

Moreover, even if Petitioner could demonstrate good cause to overcome the procedural time bar, he cannot show prejudice. It is well-settled that Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. *See* Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25 (2000); Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687 (1996). "[T]here are three components to a Brady violation: (1) the evidence at issue is favorable to the accused; (2) the evidence was withheld by the state, either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material." Mazzan 116 Nev. at 67. "Where the state fails to provide evidence which the defense did not request or requested generally, it is constitutional error if the omitted evidence creates a reasonable doubt which did not otherwise exist. In other words, evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed." Id. at 66 (internal citations omitted). "In Nevada, after a specific request for evidence, a Brady violation is material if there is a reasonable *possibility* that the omitted evidence would have affected the outcome. Id. (original emphasis), *citing* Jimenez, 112 Nev. at 618-19, 918 P.2d at 692; Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994).

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

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

At the evidentiary hearing, Petitioner's expert, Dr. Kathy Pezdek, testified that she could not determine whether an eyewitness identification factor affected Ms. Graves' testimony and, therefore, she could not apply her research to Ms. Graves or Petitioner's case specifically. Transcript at 42-43. In fact, Dr. Pezdek never testified to a reasonable degree of medical or psychiatric certainty or even probability that Ms. Graves misidentified Petitioner or that the CCSDPD report would have demonstrated such a fact. See Id. at 42. She even testified that she cannot offer an opinion about the reliability of any eyewitness. Id. at 68. Further, Dr. Pezdek did not review any of the other evidence in Petitioner's case which

identified him as the shooter, including the trial testimony and/or witness statements of Edshel Calvillo, Jonathan Harper, Manuel Lopez, Melissa Gamboa, Crystal Perez or the latent fingerprint report. Id. at 64-65. When asked regarding Ms. Graves' role in this investigation being relatively minor, Dr. Pezdek testified that she cannot evaluate that because she did not review the totality of the evidence in this case. Id. at 68. But most importantly, Ms. Graves never identified Petitioner at trial. Id. at 63, 100. Therefore, Petitioner cannot demonstrate prejudice and his claims fail.

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

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

Finally, even if Petitioner could demonstrate prejudice, given the strength of the State's case, any prejudice from the stop of a non-suspect pales in comparison to the overwhelming evidence of his guilt. Numerous witnesses testified that they saw a Hispanic man of Petitioner's approximate age wearing a gray hooded sweatshirt shoot the victim

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

ORDER

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

DATED this 20 day of January, 2021.

DISTRICT JUDGE

January 25, 2021

UNITED STATES OF AMERICA DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT COUNTY OF CLARK STATE OF NEVADA

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ELECTRONIC SEAL (NRS 1.190(3))

CERTIFICATE OF SERVICE

I certify that on the date filed, this Order was either electronically served, pursuant to N.E.F.C.R. Rule 9 to all registered parties in the Eighth Judiciual District Court Electronic Filing Program, hand delivered and/or mailed to the properson as follows::

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Nevada Supreme Court

/s/ Susan Linn
Susan Linn
Judicial Executive Assistant
Department XXIX