

Electronically Filed
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Elizabeth A. Brown
Clerk of Supreme Court

ANOAS
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*Emma L. Smith
Assistant Federal Public Defender
Nevada State Bar No. 15479C
*Amelia L. Bizzaro
Assistant Federal Public Defender
Nevada State Bar No. 14015C
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Emma_Smith@fd.org
Amelia_Bizzaro@fd.org

*Attorneys for Petitioner Evaristo J. Garcia

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY

Evaristo Jonathan Garcia,
Petitioner,
v.
James Dzurenda, *et al.*,
Respondents.

Case No. A-19-791171-W
Dept. No. 29

AMENDED NOTICE OF APPEAL

1 In line with the Nevada Supreme Court's April 10, 2020 Order of Limited
2 Remand, Amended Notice is hereby given that Petitioner Evaristo J. Garcia appeals
3 to the Nevada Supreme Court from the Order Denying Petition for Writ of Habeas
4 Corpus entered in this action on January 20, 2021. ¹ The Notice of Entry of Decision
5 or Order was filed January 22, 2021.

6
7 Dated February 2, 2021.

8 Respectfully submitted,
9 Rene L. Valladares
10 Federal Public Defender

11 /s/ Amelia L. Bizzaro
12 Emma L. Smith
13 Amelia L. Bizzaro
14 Assistant Federal Public Defenders
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24 ¹ Following suspension of the briefing in the Nevada Supreme Court, it
25 remanded the matter to the district for an evidentiary hearing. The Court further
26 held: "[A]ny party aggrieved may file an amended notice of appeal from the new
27 order." See 4/10/20 Order. This Court provided its new order to the Nevada Supreme
Court, which has already reinstated the briefing. This Amended Notice is filed out
of an abundance of caution and to comply with the April 10, 2020 Order.

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2021, I electronically filed the foregoing with the Clerk of the Court for the Eighth Judicial District by using the electronic filing system.

Participants in the case who are registered users will be served by the CM/ECF system and include: Taleen Pandukht and Noreen DeMonte.

/s/ Jessica Pillsbury

An Employee of the
Federal Public Defender

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-19-791171-W

Evaristo Garcia, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

§
§
§
§
§
§

Location: **Department 2**
Judicial Officer: **Kierny, Carli**
Filed on: **03/14/2019**
Case Number History:
Cross-Reference Case Number: **A791171**
Supreme Court No.: **80255**

CASE INFORMATION

Related Cases

10C262966-1 (Writ Related Case)

Case Type: **Writ of Habeas Corpus****Statistical Closures**

12/02/2020 Other Manner of Disposition

Case Status: **12/02/2020 Closed**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number A-19-791171-W
Court Department 2
Date Assigned 01/04/2021
Judicial Officer Kierny, Carli

PARTY INFORMATION

Plaintiff	Garcia, Evaristo Jonathan	<i>Lead Attorneys</i>
		Spelman, Stephen A <i>Retained</i> 702-388-6577(W)
Defendant	Dzurenda, James	Wolfson, Steven B <i>Retained</i> 702-455-5320(W)
	Ford, Aaron	Wolfson, Steven B <i>Retained</i> 702-455-5320(W)
	Thomas, Todd	Wolfson, Steven B <i>Retained</i> 702-455-5320(W)

DATE

EVENTS & ORDERS OF THE COURT

INDEX

EVENTS

03/14/2019



Petition for Writ of Habeas Corpus

Filed by: Plaintiff Garcia, Evaristo Jonathan

UNSEALED PER ORDER 2/13/20 Petition for Writ of Habeas Corpus (Post-Conviction)

03/14/2019



Notice of Motion

Filed By: Plaintiff Garcia, Evaristo Jonathan

UNSEALED PER ORDER 2/13/20 Notice of Motion to Seal Court File and Court Records pursuant to Nevada Rule for Sealing and Redacting Court Records 3 (1)

03/14/2019





Notice

Filed By: Plaintiff Garcia, Evaristo Jonathan

UNSEALED PER ORDER 2/13/20 Notice of Motion to take Judicial Notice of Court Records of Case Number C262966-1

CASE SUMMARY
CASE NO. A-19-791171-W

03/14/2019	 Notice of Appearance Party: Plaintiff Garcia, Evaristo Jonathan <i>UNSEALED PER ORDER 2/13/20 Notice of Appearance</i>
03/14/2019	 Motion Filed By: Plaintiff Garcia, Evaristo Jonathan <i>UNSEALED PER ORDER 2/13/20 Motion to Take Judicial Notice of Court Records for Case Number C262966-1</i>
03/14/2019	 Motion Filed By: Plaintiff Garcia, Evaristo Jonathan <i>UNSEALED PER ORDER 2/13/20 Motion to Seal Court File and Court Records Pursuant to Nevada Rule for Sealing and Redacting Court Records 3(1)</i>
03/14/2019	 Exhibits Filed By: Plaintiff Garcia, Evaristo Jonathan <i>UNSEALED PER ORDER 2/13/20 Index of Exhibits in Support of Petition for Writ of Habeas (Post-Conviction)</i>
08/09/2019	 Notice of Motion Filed By: Plaintiff Garcia, Evaristo Jonathan <i>Notice of Motion for Reconsideration and Motion to Reset Hearing</i>
08/09/2019	 Motion Filed By: Plaintiff Garcia, Evaristo Jonathan <i>Motion for Reconsideration and Motion to Reset Hearing</i>
08/09/2019	 Clerk's Notice of Hearing <i>Clerk's Notice of Hearing</i>
08/13/2019	 Notice Filed By: Plaintiff Garcia, Evaristo Jonathan <i>Notice of Supplemental Brief in Support of Motion for Reconsideration and Motion to Reset Hearing</i>
08/13/2019	 Supplemental Brief Filed By: Plaintiff Garcia, Evaristo Jonathan <i>Supplemental Brief in Support of Motion for Reconsideration and Motion to Reset Hearing</i>
08/16/2019	 Notice of Change of Hearing <i>Notice of Change of Hearing</i>
09/10/2019	 Recorders Transcript of Hearing <i>Recorders Transcript of Hearing: Habeas Corpus Petition August 8, 2019</i>
09/10/2019	 Order <i>Order Denying Defendant's Petition for Writ of Habeas Corpus</i>
09/11/2019	 Notice of Entry of Order <i>Notice of Entry of Order</i>
09/16/2019	 Notice of Motion Filed By: Defendant Dzurenda, James

CASE SUMMARY
CASE NO. A-19-791171-W

State's Notice of Motion and Motion to Unseal Post-Conviction Petition for Writ of Habeas Corpus and All Motions and Exhibits Related Thereto, and Motion for Clarification

09/17/2019	 Clerk's Notice of Hearing <i>Notice of Hearing</i>
09/19/2019	 Order <i>Order</i>
10/10/2019	 Response <i>State's Response to Petitioner's Petition for Writ of Habeas Corpus (Post Conviction)</i>
10/17/2019	 Exhibits Filed By: Plaintiff Garcia, Evaristo Jonathan <i>UNSEALED PER ORDER 2/13/20 Index of Exhibits in Support of Reply to State's Response to Petitioner's Petition for Writ of Habeas (Post- Conviction)</i>
10/17/2019	 Reply Filed by: Plaintiff Garcia, Evaristo Jonathan <i>UNSEALED PER ORDER 2/13/20 Reply to State's Response to Petitioner's Petition for Writ of Hebeas Corpus.</i>
11/15/2019	 Order <i>3/2/20 Vacated) Order on Petition for Writ of Habeas Corpus (Post-Conviction)</i>
11/18/2019	 Notice of Entry of Order <i>Notice of Entry of Order</i>
11/18/2019	 Recorders Transcript of Hearing <i>Recorders Transcript of Hearing Re: April 30, 2019</i>
11/18/2019	 Reporters Transcript <i>UNSEALED PER ORDER 2/13/20 Transcript pf Proceedings Re: All Pending Motions Hearing: Tuesday, September 10, 2019</i>
11/27/2019	 Motion <i>UNSEALED PER ORDER 2/13/20 Motion to Alter or Amend a Judgment Pursuant to Nev. R. Civ. P. 59(e)</i>
11/27/2019	 Exhibits Filed By: Plaintiff Garcia, Evaristo Jonathan <i>UNSEALED PER ORDER 2/13/20 Index of Exhibits in Support of Motion to Alter or Amend a Judgment Pursuant to Nev. R. Civ. P. 59(e) and Petition for Writ of Habeas Corpus</i>
12/11/2019	 Case Appeal Statement Filed By: Plaintiff Garcia, Evaristo Jonathan <i>Case Appeal Statement</i>
12/11/2019	 Notice of Appeal Filed By: Plaintiff Garcia, Evaristo Jonathan <i>Notice of Appeal</i>
01/21/2020	 Notice Filed By: Plaintiff Garcia, Evaristo Jonathan

CASE SUMMARY
CASE NO. A-19-791171-W

Notice of Order From Nevada Supreme Court and Request for Submission of Outstanding Nev. R. Civ. P. 59 (e) Motion

01/23/2020



Motion

Filed By: Plaintiff Garcia, Evaristo Jonathan
Unopposed Motion to Unseal Court File and Court Records

01/27/2020



Clerk's Notice of Nonconforming Document

Clerk's Notice of Nonconforming Document

01/29/2020



Clerk's Notice of Nonconforming Document and Curative Action

Clerk's Notice of Curative Action

01/29/2020



Opposition

State's Opposition to Defendant's Motion to Alter or Amend a Judgment Pursuant to Nev. R. CIV. P 59(c)

01/29/2020



Clerk's Notice of Hearing

Notice of Hearing

01/29/2020



Notice of Change of Hearing

Notice of Change of Hearing

01/30/2020



Reply to Opposition

Filed by: Plaintiff Garcia, Evaristo Jonathan
UNSEALED PER ORDER 2/13/20 Reply to Opposition to Motion to Alter or Amend Judgment pursuant to Nev. R. Civ. P. 59(e)

01/31/2020



Opposition

State's Supplement to Opposition to Defendant's Motion to Alter or Amend Judgment Pursuant to NEV. R. CIV. P. 59(e)

02/04/2020



Transcript of Proceedings

UNSEALED PER ORDER 2/13/20 Transcript of Proceedings re: Habeas Corpus Petition

02/13/2020



Order

Filed By: Plaintiff Garcia, Evaristo Jonathan
Order

03/02/2020



Order

Filed By: Plaintiff Garcia, Evaristo Jonathan
Order on Motion to Alter or Amend the Judgment Pursuant to NEV.R.CIV.P. 59(E)

03/05/2020



Order for Production of Inmate

ORDER FOR PRODUCTION OF INMATE

03/17/2020



Recorders Transcript of Hearing

Recorders Transcript of Hearing Re: February 6, 2020

04/15/2020



Notice of Hearing

Notice of Evidentiary Hearing















04/23/2020















Order

CASE SUMMARY
CASE NO. A-19-791171-W

ORDER ON MOTION TO ALTER OR AMEND THE JUDGMENT PURSUANT TO NEV. R. CIV. P. 59(E)

04/24/2020	 Amended Notice <i>Amended Notice of Evidentiary Hearing</i>
05/01/2020	 Motion for Discovery Filed By: Plaintiff Garcia, Evaristo Jonathan <i>Motion for Discovery (NRS 34.780(2))</i>
05/01/2020	 Motion to Disqualify Attorney Filed By: Plaintiff Garcia, Evaristo Jonathan <i>Motion to Disqualify Noreen DeMonte and Taleen Pandukht from Representing Respondents at the Upcoming Evidentiary Hearing (Nev. R. Prof. Cond. 3.7)</i>
05/01/2020	 Motion for Discovery Filed By: Plaintiff Garcia, Evaristo Jonathan <i>Motion for Discovery (NRS 34.780(2)) with Exhibits A and B</i>
05/04/2020	 Clerk's Notice of Hearing <i>Notice of Hearing</i>
05/04/2020	 Notice of Change of Hearing <i>Notice of Change of Hearing</i>
05/04/2020	 Clerk's Notice of Hearing <i>Notice of Hearing</i>
05/11/2020	 Opposition <i>State's Opposition to Defendant's Motion to Disqualify Noreen Demonte and Taleen Pandukht from Representing Respondents at the Upcoming Evidentiary Hearing</i>
05/11/2020	 Opposition <i>State's Opposition to Petitioner's Motion for Discovery (NRS 34.780(2))</i>
05/18/2020	 Reply in Support Filed By: Plaintiff Garcia, Evaristo Jonathan <i>Reply in Support of Motion for Discovery (NRS 34.780(2))</i>
05/18/2020	 Reply to Opposition Filed by: Plaintiff Garcia, Evaristo Jonathan <i>Reply to Opposition to Motion to Disqualify Noreen DeMonte and Taleen Pandukht from Representing Respondents' at the Upcoming Evidentiary Hearing (Nev. R. Prof. Cond. 3.7)</i>
06/05/2020	 Order Filed By: Plaintiff Garcia, Evaristo Jonathan <i>ORDER FOR TRANSCRIPT</i>
06/09/2020	 Order <i>ORDER ON MOTION FOR DISCOVERY</i>
06/18/2020	 Recorders Transcript of Hearing <i>Recorders Transcript of Hearing Re: June 2, 2020</i>






CASE SUMMARY
CASE NO. A-19-791171-W

08/28/2020	 Notice of Appearance Party: Plaintiff Garcia, Evaristo Jonathan <i>Notice of Appearance (Co-Counsel)</i>
10/07/2020	 Motion Filed By: Plaintiff Garcia, Evaristo Jonathan <i>Motion for Court to Prepare and File Order on Petition for Writ of Habeas Corpus (Post-Conviction)</i>
10/07/2020	 Clerk's Notice of Hearing <i>Notice of Hearing</i>
10/20/2020	 Order Filed By: Defendant Dzurenda, James <i>Order for Expedited 14 Day Transcript</i>
11/03/2020	 Recorders Transcript of Hearing <i>Recorders Transcript of Hearing Re: September 21, 2020</i>
11/20/2020	 Notice of Entry of Findings of Fact, Conclusions of Law Filed By: Defendant Ford, Aaron <i>Notice of Entry of Findings of Fact, Conclusions of Law and Order</i>
12/10/2020	 Notice of Entry of Findings of Fact, Conclusions of Law Filed By: Defendant Dzurenda, James <i>Notice of Entry of Findings of Fact, Conclusions of Law and Order</i>
12/15/2020	 Recorders Transcript of Hearing <i>Transcript of Proceedings Re: Motion for Court to Prepare and File Order on Petition for Writ of Habeas Corpus (Post Conviction)</i>
12/21/2020	 Order <i>ORDER</i>
01/04/2021	Case Reassigned to Department 2 <i>Judicial Reassignment to Judge Carli Kierny</i>
01/20/2021	 Findings of Fact, Conclusions of Law and Order <i>Findings of Fact, Conclusions of Law, and Order</i>
01/22/2021	 Notice of Entry of Findings of Fact, Conclusions of Law Filed By: Defendant Dzurenda, James <i>Notice of Entry of Findings of Fact, Conclusions of Law and Order</i>
02/02/2021	 Amended Notice of Appeal (Criminal) Party: Plaintiff Garcia, Evaristo Jonathan <i>Amended Notice of Appeal</i>
04/30/2019	<u>HEARINGS</u> Motion to Seal/Redact Records (8:30 AM) (Judicial Officer: Jones, David M) Events: 03/14/2019 Notice of Motion <i>Notice of Motion to Seal Court File and Court Records pursuant to Nevada Rule for Sealing and Redacting Court Records 3 (1)</i> Matter Heard;


EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-19-791171-W

04/30/2019	<p>Motion (8:30 AM) (Judicial Officer: Jones, David M) Events: 03/14/2019 Notice <i>Notice of Motion to take Judicial Notice of Court Records of Case Number C262966-1</i> Matter Heard;</p>
04/30/2019	<p> All Pending Motions (8:30 AM) (Judicial Officer: Jones, David M) Matter Heard; Journal Entry Details: <i>NOTICE OF MOTION TO TAKE JUDICIAL NOTICE OF COURT RECORDS OF CASE NUMBER C262966-1... NOTICE OF MOTION TO SEAL COURT FILE AND COURT RECORDS PURSUANT TO NEVADA RULE FOR SEALING AND REDACTING COURT RECORDS 3 (1)... ANN DUNN, Esq. Present on behalf of the Clark County District Attorney's Office for the State of Nevada. Ms. Dunn advised someone from the Gang Unit was going to be appearing, and requested the matter be trailed. MATTER TRAILED. MATTER RECALLED. Ms. Dunn advised after speaking with the other District Attorneys, the State has not received copies of the motions. Ms. Dunn requested THIRTY (30) DAYS to receive and respond to the motions. Mr. Spellman advised the motions were sent via UPS. Court advised the State will be allowed time to complete any oppositions. COURT ORDERED, State's opposition DUE in 10 DAYS (05/10/19), Defense's reply DUE 10 DAYS after State's opposition (05/21/19), and the Court's Ruling will be completed in CHAMBERS 21 DAYS after Defense's reply (06/11/19). ;</i></p>
08/05/2019	<p> Minute Order (10:55 AM) (Judicial Officer: Jones, David M) Minute Order - No Hearing Held; Journal Entry Details: <i>A hearing has been set in this matter for Thursday, August 8, 2019 at 8:30 a.m. CLERK'S NOTE: The above minute order has been distributed to: Rene L. Valladares, Esq. - 411 E. Bonneville Ave. Suite 250, Las Vegas, NV 89101 ;</i></p>
08/08/2019	<p> Status Check (8:30 AM) (Judicial Officer: Jones, David M) <i>HABEAS CORPUS PETITION</i> Denied; Journal Entry Details: <i>There being no basis for Defendant's PSI to be unsealed, COURT ORDERED, petition, DENIED.;</i></p>
09/10/2019	<p> Motion For Reconsideration (8:30 AM) (Judicial Officer: Jones, David M) <i>Motion for Reconsideration and Motion to Reset Hearing</i> Matter Heard; Journal Entry Details: <i>Mr. Spelman advised he received the notice of the hearing the day after the first hearing. Colloquy regarding the transcript for the last hearing. Mr. Spelman advised there is no order relating to the petition, and requested the Court order the State respond to the petition. Mr. Zadrowski advised the deputy handling this case was under the wrong impression regarding the case and requested 45 days for the State's response. COURT ORDERED, State's Response DUE 10/22/19 and a Hearing SET. COURT FURTHER ORDERED, CASE SEALED. ADDITIONALLY, COURT took Judicial Notice of all the other cases involved in this matter. 11/12/19 8:30 AM HEARING;</i></p>
10/22/2019	<p>CANCELED Motion (8:30 AM) (Judicial Officer: Jones, David M) <i>Vacated</i> <i>State's Notice of Motion and Motion to Unseal Post-Conviction Petition for Writ of Habeas Corpus and All Motions and Exhibits Related Thereto, and Motion for Clarification</i></p>
11/12/2019	<p> Hearing (8:30 AM) (Judicial Officer: Jones, David M) <i>HEARING: HABEAS CORPUS PETITION</i> Denied; Journal Entry Details: <i>Following the arguments of Counsel, COURT ORDERED, there being no basis or exculpatory evidence, Petition for Habeas Corpus, DENIED. COURT to prepare the order. ;</i></p>



CASE SUMMARY
CASE NO. A-19-791171-W

02/06/2020	 Motion (8:30 AM) (Judicial Officer: Jones, David M) <i>MOTION TO ALTER OR AMEND</i> Matter Heard; Journal Entry Details: <i>Arguments by Mr. Spelman. Arguments by Mr. Thoman. Court advised it would allow an Evidentiary Hearing to be set. Mr. Spelman advised the motion to unseal the case was unopposed by the State, noting he had an order already prepared for signature. COURT SO ORDERED. Order SIGNED in Open Court. COURT FURTHER ORDERED, Evidentiary Hearing SET. 06/05/20 1:00 PM EVIDENTIARY HEARING;</i>
03/04/2020	CANCELED Motion (9:00 AM) (Judicial Officer: Jones, David M) <i>Vacated - per Law Clerk</i> <i>Petitioner's Unopposed Motion to Unseal Court File and Court Records</i>
04/27/2020	 Minute Order (3:00 AM) (Judicial Officer: Jones, David M) Minute Order - No Hearing Held; Journal Entry Details: <i>Upon review of the information provided and input from counsel, the Court has rescheduled the Evidentiary Hearing to 9:00 a.m., Friday, June 26, 2020. CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve. /mt;</i>
06/02/2020	Motion for Discovery (10:15 AM) (Judicial Officer: Jones, David M) <i>Petitioner's Motion for Discovery (NRS 34.780(2))</i> Motion Denied;
06/02/2020	Motion to Disqualify Attorney (10:15 AM) (Judicial Officer: Jones, David M) <i>Petitioner's Motion to Disqualify Noreen DeMonte and Taleen Pandukht from Representing Respondents at the Upcoming Evidentiary Hearing (Nev. R. Prof. Cond. 3.7)</i> Motion Denied;
06/02/2020	 All Pending Motions (10:15 AM) (Judicial Officer: Jones, David M) Matter Heard; Journal Entry Details: <i>PETITIONER'S MOTION TO DISQUALIFY NOREEN DEMONTE AND TALEEN PANDUKHT FROM REPRESENTING RESPONDENTS AT THE UPCOMING EVIDENTIARY HEARING (NEV. R. PROF. COND. 3.7) PETITIONER'S MOTION FOR DISCOVERY (NRS 34.780(2)) Counsel indicated he had received the school district police file but believed there is outstanding video surveillance. Further, counsel noted he only has the officer reports and does not know if there are any additional witness statements. Argument by the State. COURT ORDERED, decision to issue via minute order. Argument by counsel regarding Motion To Disqualify. Argument by the State. COURT ORDERED, motion DENIED. Colloquy regarding evidentiary hearing. Ms. Pandukht advised an order for transport had been issued. Court indicated Deft. may be physically present for the hearing. NDC;</i>
08/19/2020	 Minute Order (3:00 AM) (Judicial Officer: Jones, David M) Minute Order - No Hearing Held; Journal Entry Details: <i>Due to the logistical problems with video conference availability for the in-custody individual, and the out of state witnesses who are not able to travel, the Evidentiary Hearing has been rescheduled to Monday, September 21, 2020, at 9:00 a.m. CLERK'S NOTE: This minute order has been distributed to counsel via email and mailed to the following: Elizabeth A. Brown Clerk of the Court 201 South Carson St., Ste. 201 Carson City, NV 89701-4702;</i>
09/21/2020	 Evidentiary Hearing (8:00 AM) (Judicial Officer: Jones, David M) See minute order dated 4/27/20 Matter Heard; Journal Entry Details: <i>Testimony and exhibits presented (see worksheets). Argument by counsel. Argument by the State. COURT ORDERED, decision to issue via minute order.;</i>

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-19-791171-W

09/30/2020	 Minute Order (3:00 AM) (Judicial Officer: Jones, David M) Minute Order - No Hearing Held; Journal Entry Details: <i>Upon review of the documentation provided, and input from counsel, this Court has DENIED Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) State is to prepare order. CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve. /mt;</i>
12/10/2020	 Motion (10:15 AM) (Judicial Officer: Jones, David M) <i>Motion for Court to Prepare and File Order on Petition for Writ of Habeas Corpus (Post-Conviction)</i> Motion Granted; Journal Entry Details: <i>Def. not present. Argument by counsel. Argument by Ms. Demonte. COURT ORDERED, the Findings of Fact, Conclusions of Law, and Order filed on BOTH November 18, 2020 and December 2, 2020 are STRICKEN. The Court to issue its own Findings of Fact, Conclusions of Law, and Order. NDC;</i>

DATE	FINANCIAL INFORMATION	
	Defendant Dzurenda, James	
	Total Charges	24.00
	Total Payments and Credits	24.00
	Balance Due as of 2/2/2021	0.00

DISTRICT COURT CIVIL COVER SHEET

Clark County, Nevada
Case No. _____
(Assigned by Clerk's Office)

A-19-791171-W
XXIX

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): Evaristo Jonathan Garcia, No. 1108072 Saguaro Correctional Center 1250 E Arica Rd., Eloy, AZ 85131	Defendant(s) (name/address/phone): James Dzurenda, Director of Nevada Department of Corrections; Aaron Ford, Attorney General of the State of Nevada; Todd Thomas, Warden of Saguaro Correctional Center
Attorney (name/address/phone): Alex S. Spelman Assistant Federal Public Defender 411 E. Bonneville Ave. Suite 250, Las Vegas, NV, 89101 (702) 388-6577	Attorney (name/address/phone): Steve Wolfson, Clark County District Attorney 200 Lewis Ave., Las Vegas, NV 89101, (702) 671-2500 cc: Heather Procter, Deputy Attorney General 100 North Carson Street, Carson City, NV 89701 (775) 684-1271

II. Nature of Controversy (please select the one most applicable filing type below)

Civil Case Filing Types

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ Civil Writ <input checked="" type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

A-19-791171-W
CCS
Civil Cover Sheet
4822689



Business Court filings should be filed using the Business Court civil coversheet.

03/14/2019

Date

Signature of initiating party or representative

See other side for family-related case filings.



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

1 Count 2 – MURDER WITH USE OF A DEADLY WEAPON WITH THE INTENT TO
2 PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Category A Felony – NRS
3 193.168, 193.169, 200.010, 200.030, 200.450, 193.165).

4 On March 17, 2011, pursuant to Guilty Plea Agreement, Petitioner pled guilty to
5 SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony – NRS
6 200.010, 200.030, 193.165). On April 22, 2011, Petitioner filed a Motion to Withdraw
7 Guilty Plea. On May 12, 2011, the Court granted Petitioner's motion.

8 Jury trial commenced on July 8, 2013. On July 9, 2013, the State filed its Third
9 Amended Indictment charging Petitioner with Count 1 – CONSPIRACY TO COMMIT
10 MURDER (Category B Felony – NRS 200.010, 200.030, 199.480) and Count 2 – MURDER
11 WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER
12 OR ASSIST A CRIMINAL GANG (Category A Felony – NRS 193.168, 193.169, 200.010,
13 200.030, 200.450, 193.165).

14 On July 12, 2013, the State filed its Fourth Amended Indictment charging Petitioner
15 with Count 1 – CONSPIRACY TO COMMIT MURDER (Category B Felony – NRS
16 200.010, 200.030, 199.480) and Count 2 – MURDER WITH USE OF A DEADLY
17 WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165). On July 15, 2013, the
18 jury returned a verdict of not guilty as to Count 1 and guilty of Second Degree Murder With
19 Use of a Deadly Weapon as to Count 2.

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

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

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

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

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

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

21 On November 27, 2019, under seal, Petitioner filed a Motion to Alter or Amend a
22 Judgment Pursuant to Nev. R. Civ. P. 59(e). On January 29, 2020, the State filed its
23 Opposition to the motion. On January 30, 2020, Petitioner filed a Reply. On January 31,
24 2020, the State filed a Supplement to its Opposition. On February 6, 2020, the Court set an
25 evidentiary. An order unsealing the case was also signed in open court. On March 2, 2020,
26 an Order was filed denying Petitioner's request for an Amended Judgment granting habeas
27 relief, but vacating its November 15, 2019 Order denying the Petition and granting an
28 evidentiary hearing. On May 1, 2020, Petitioner filed a Motion for Discovery (NRS

1 34.780(2)) and a Motion to Disqualify Noreen Demonte and Taleen Pandukht from
2 Representing Respondents at the Upcoming Evidentiary Hearing. The State filed
3 Oppositions on May 11, 2020. Petitioner filed Replies on May 18, 2020. On June 2, 2020,
4 the Court denied the Motion to Disqualify, and on June 9, 2020, the Court filed an Order
5 denying the Motion for Discovery.

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

9 **II. STATEMENT OF FACTS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 Harper testified at trial that in February of 2006, he was a member of Puros Locos for
25 a short time and went by the moniker Silent. On the day of the murder, he was at Salvador
26

27 ¹ 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 Garcia's apartment with Lopez, Edshel Calvillo (who went by the moniker Danger) and
2 Petitioner (who he called "E"). Harper identified Petitioner as E. Harper stated Petitioner
3 was wearing a gray hoodie. While at Salvador's apartment, Garcia called. Salvador told them
4 they had to go to the school. Before leaving, Harper noticed that Lopez had his "nine" in his
5 waistband and that he gave it to Petitioner. Harper, Lopez, Petitioner, and Lopez's girlfriend
6 Stacy got into Lopez's El Camino.

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

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

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

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

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

20 **III. PETITIONER'S CLAIMS ARE PROCEDURALLY BARRED.**

21 **a. The Petition is Time-Barred.**

22 Petitioner's Petition for Writ of Habeas Corpus is time barred pursuant to NRS
23 34.726(1):

24 Unless there is good cause shown for delay, a petition that
25 challenges the validity of a judgment or sentence must be filed
26 within 1 year of the entry of the judgment of conviction or, if an
27 appeal has been taken from the judgment, within 1 year after the
28 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.

1 The Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain
2 meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). The one-year
3 time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is
4 filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084,
5 1087, 967 P.2d 1132, 1133-34 (1998).

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

11 State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074
12 (2005). The Nevada Supreme Court found that “[a]pplication of the statutory procedural
13 default rules to post-conviction habeas petitions is mandatory,” noting:

14 Habeas corpus petitions that are filed many years after conviction
15 are an unreasonable burden on the criminal justice system. The
16 necessity for a workable system dictates that there must exist a
time when a criminal conviction is final.

17 Id. The Court noted that procedural bars “cannot be ignored [by the district court] when
18 properly raised by the State.” Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has
19 instructed the District Courts to apply the rules as clearly required by the rule.

20 In this case, the Judgment of Conviction was filed on September 11, 2013, and
21 Petitioner filed a direct appeal on October 11, 2013. The Petitioner’s conviction was
22 affirmed, and remittitur issued on October 20, 2015. Thus, the one-year time bar began to
23 run from the date remittitur issued. (The instant Petition was not filed until March 14, 2019.
24 Three (3) years after remittitur issued and absent any showing of good cause for this delay
25 and undue prejudice, Petitioner’s claim must be dismissed,

26 **a. Petitioner’s Petition is Successive.**

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

1 A second or successive petition *must* be dismissed if the judge or
2 justice determines that it fails to allege new or different grounds
3 for relief and that the prior determination was on the merits or, if
4 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).

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

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

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

1
2 **IV. PETITIONER CANNOT DEMONSTRATE GOOD CAUSE TO OVERCOME**
3 **THE PROCEDURAL BARS.**

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

19 Petitioner claims he has recently discovered a Clark County School District Police
20 Department (“CCSDPD”) report that should have been disclosed under Brady v. Maryland,
21 373 U.S. 83, 83 S. Ct. 1194 (1963). He claims this failure provides good cause to overcome
22 the procedural bars. Due Process does not require simply the disclosure of “exculpatory”
23 evidence. The alleged evidence must also be disclosed if it provides grounds for the defense
24 to attack the reliability, thoroughness, and good faith of the police investigation or to
25 impeach the credibility of the State’s witnesses. See Kyles v. Whitley, 514 U.S. 419, 442,
26 445-51, 1115 S. Ct. 1555, 1555 n. 13 (1995). Evidence cannot be regarded as “suppressed”
27 by the government when the defendant has access to the evidence before trial by the exercise
28 of reasonable diligence. United States v. White, 970 F.2d 328, 337 (7th Cir. 1992). “While

1 the [United States] Supreme Court in Brady held that the [g]overnment may not properly
2 conceal exculpatory evidence from a defendant, it does not place any burden upon the
3 [g]overnment to conduct a defendant's investigation or assist in the presentation of the
4 defense's case." United States v. Marinero, 904 F.2d 251, 261 (5th Cir. 1990); *accord* United
5 States v. Pandozzi, 878 F.2d 1526, 1529 (1st Cir. 1989); United States v. Meros, 866 F.2d
6 1304, 1309 (11th Cir. 1989). "Regardless of whether the evidence was material or even
7 exculpatory, when information is fully available to a defendant at the time of trial and his
8 only reason for not obtaining and presenting the evidence to the Court is his lack of
9 reasonable diligence, the defendant has no Brady claim." United States v. Brown, 628 F.2d
10 471, 473 (5th Cir. 1980).

11 The Nevada Supreme Court has followed the federal line of cases in holding that
12 Brady does not require the State to disclose evidence which was available to the defendant
13 from other sources, including diligent investigation by the defense. Steese v. State, 114 Nev.
14 479, 495, 960 P.2d 321, 331 (1998).

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

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

28 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

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

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

21 In addition, Petitioner failed to demonstrate the State affirmatively withheld the
22 information. In order to qualify as good cause, Petitioner must demonstrate that the State
23 affirmatively withheld information favorable to the defense. State v. Bennett, 119 Nev. 589,
24 600, 81 P.3d 1, 8 (2003). The defense bears the burden of proving that the State withheld
25 information, and it must prove specific facts that show as much. Id. A mere showing that
26 evidence favorable to the defense exists is not a constitutional violation under Brady. See
27 Strickler v. Greene, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 1948 (1999) (“there is never a
28 real ‘Brady violation’ unless the nondisclosure was so serious that there is a reasonable

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

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

14 In fact, at the evidentiary hearing, retired CCSDPD Lieutenant Roberto Morales
15 confirmed that, as of approximately the year 2000, the NRS was amended to require
16 CCSDPD to contact and advise the local jurisdiction, in this case LVMPD, of any incidents
17 involving Category A felonies. Recorder’s Transcript of Hearing (“Transcript”), September
18 21, 2020, p. 7-8. Here, Petitioner was charged with a Category A Felony and, thus, CCSDPD
19 did not have jurisdiction over Petitioner’s case. Therefore, LVMPD was the sole agency,
20 outside of the Clark County District Attorney’s Office (CCDA), that the prosecutor had a
21 duty from which to procure any information favorable to Petitioner. See Kyles, 514 U.S. at
22 437–38, 115 S. Ct. at 1567–68 (explaining that the prosecutor has a duty to learn of
23 information favorable to the accused secured by *others acting on the State’s behalf in the*
24 *case*) (emphasis added). Moreover, Morales testified that CCSDPD documents were only
25 provided to the CCDA *upon request*. Transcript at 12, 15. Morales also testified that he had
26 no direct knowledge of the CCDA ever requesting these documents. Id. at 15. Petitioner has
27 neither asserted nor set forth facts to show that the CCDA or the LVMPD possessed the
28 impeachment evidence that Petitioner discusses in his Petition. Petitioner’s failure to show

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

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

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

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

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

13 Moreover, even if Petitioner could demonstrate good cause to overcome the
14 procedural time bar, he cannot show prejudice. It is well-settled that Brady and its progeny
15 require a prosecutor to disclose evidence favorable to the defense when that evidence is
16 material either to guilt or to punishment. See Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d
17 25 (2000); Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687 (1996). “[T]here are three
18 components to a Brady violation: (1) the evidence at issue is favorable to the accused; (2) the
19 evidence was withheld by the state, either intentionally or inadvertently; and (3) prejudice
20 ensued, i.e., the evidence was material.” Mazzan 116 Nev. at 67. “Where the state fails to
21 provide evidence which the defense did not request or requested generally, it is constitutional
22 error if the omitted evidence creates a reasonable doubt which did not otherwise exist. In
23 other words, evidence is material if there is a reasonable probability that the result would
24 have been different if the evidence had been disclosed.” Id. at 66 (internal citations omitted).
25 “In Nevada, after a specific request for evidence, a Brady violation is material if there is a
26 reasonable *possibility* that the omitted evidence would have affected the outcome. Id.
27 (original emphasis), *citing Jimenez*, 112 Nev. at 618-19, 918 P.2d at 692; Roberts v. State,
28 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994).

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

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

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

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

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

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

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

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

16 **ORDER**

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

19 DATED this 20 day of January, 2021.

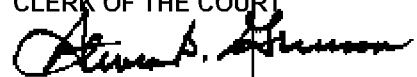
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EVARISTO GARCIA, BAC #1108072
HIGH DESERT STATE PRISON
P. O. BOX 650
INDIAN SPRINGS, NEVADA 89070-0650

Nevada Supreme Court

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



1 NEFF

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4 EVARISTO GARCIA,

5
6 Petitioner,

Case No: A-19-791171-W

Dept No: II

7 vs.

8 JAMES DZURENDA; ET.AL.,

9 Respondent,

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

10
11 **PLEASE TAKE NOTICE** that on January 20, 2021, the court entered a decision or order in this matter,
12 a true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
15 mailed to you. This notice was mailed on January 22, 2021.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

17 /s/ Amanda Hampton

18 Amanda Hampton, Deputy Clerk

19 **CERTIFICATE OF E-SERVICE / MAILING**

20 I hereby certify that on this 22 day of January 2021, I served a copy of this Notice of Entry on the
21 following:

22 ☒ By e-mail:

23 Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

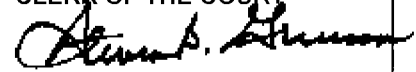
24 ☒ The United States mail addressed as follows:

25 Evaristo Garcia # 1108072
P.O. Box 650
Indian Springs, NV 89070

26 Rene L. Valladares
Federal Public Defender
411 E. Bonneville, Ste 250
Las Vegas, NV 89101

27 /s/ Amanda Hampton

28 Amanda Hampton, 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

1 Count 2 – MURDER WITH USE OF A DEADLY WEAPON WITH THE INTENT TO
2 PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Category A Felony – NRS
3 193.168, 193.169, 200.010, 200.030, 200.450, 193.165).

4 On March 17, 2011, pursuant to Guilty Plea Agreement, Petitioner pled guilty to
5 SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony – NRS
6 200.010, 200.030, 193.165). On April 22, 2011, Petitioner filed a Motion to Withdraw
7 Guilty Plea. On May 12, 2011, the Court granted Petitioner's motion.

8 Jury trial commenced on July 8, 2013. On July 9, 2013, the State filed its Third
9 Amended Indictment charging Petitioner with Count 1 – CONSPIRACY TO COMMIT
10 MURDER (Category B Felony – NRS 200.010, 200.030, 199.480) and Count 2 – MURDER
11 WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER
12 OR ASSIST A CRIMINAL GANG (Category A Felony – NRS 193.168, 193.169, 200.010,
13 200.030, 200.450, 193.165).

14 On July 12, 2013, the State filed its Fourth Amended Indictment charging Petitioner
15 with Count 1 – CONSPIRACY TO COMMIT MURDER (Category B Felony – NRS
16 200.010, 200.030, 199.480) and Count 2 – MURDER WITH USE OF A DEADLY
17 WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165). On July 15, 2013, the
18 jury returned a verdict of not guilty as to Count 1 and guilty of Second Degree Murder With
19 Use of a Deadly Weapon as to Count 2.

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

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

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

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

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

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

21 On November 27, 2019, under seal, Petitioner filed a Motion to Alter or Amend a
22 Judgment Pursuant to Nev. R. Civ. P. 59(e). On January 29, 2020, the State filed its
23 Opposition to the motion. On January 30, 2020, Petitioner filed a Reply. On January 31,
24 2020, the State filed a Supplement to its Opposition. On February 6, 2020, the Court set an
25 evidentiary. An order unsealing the case was also signed in open court. On March 2, 2020,
26 an Order was filed denying Petitioner's request for an Amended Judgment granting habeas
27 relief, but vacating its November 15, 2019 Order denying the Petition and granting an
28 evidentiary hearing. On May 1, 2020, Petitioner filed a Motion for Discovery (NRS

1 34.780(2)) and a Motion to Disqualify Noreen Demonte and Taleen Pandukht from
2 Representing Respondents at the Upcoming Evidentiary Hearing. The State filed
3 Oppositions on May 11, 2020. Petitioner filed Replies on May 18, 2020. On June 2, 2020,
4 the Court denied the Motion to Disqualify, and on June 9, 2020, the Court filed an Order
5 denying the Motion for Discovery.

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

9 **II. STATEMENT OF FACTS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 Harper testified at trial that in February of 2006, he was a member of Puros Locos for
25 a short time and went by the moniker Silent. On the day of the murder, he was at Salvador
26

27 ¹ 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 Garcia's apartment with Lopez, Edshel Calvillo (who went by the moniker Danger) and
2 Petitioner (who he called "E"). Harper identified Petitioner as E. Harper stated Petitioner
3 was wearing a gray hoodie. While at Salvador's apartment, Garcia called. Salvador told them
4 they had to go to the school. Before leaving, Harper noticed that Lopez had his "nine" in his
5 waistband and that he gave it to Petitioner. Harper, Lopez, Petitioner, and Lopez's girlfriend
6 Stacy got into Lopez's El Camino.

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

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

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

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

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

20 **III. PETITIONER'S CLAIMS ARE PROCEDURALLY BARRED.**

21 **a. The Petition is Time-Barred.**

22 Petitioner's Petition for Writ of Habeas Corpus is time barred pursuant to NRS
23 34.726(1):

24 Unless there is good cause shown for delay, a petition that
25 challenges the validity of a judgment or sentence must be filed
26 within 1 year of the entry of the judgment of conviction or, if an
27 appeal has been taken from the judgment, within 1 year after the
28 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.

1 The Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain
2 meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). The one-year
3 time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is
4 filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084,
5 1087, 967 P.2d 1132, 1133-34 (1998).

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

11 State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074
12 (2005). The Nevada Supreme Court found that “[a]pplication of the statutory procedural
13 default rules to post-conviction habeas petitions is mandatory,” noting:

14 Habeas corpus petitions that are filed many years after conviction
15 are an unreasonable burden on the criminal justice system. The
16 necessity for a workable system dictates that there must exist a
time when a criminal conviction is final.

17 Id. The Court noted that procedural bars “cannot be ignored [by the district court] when
18 properly raised by the State.” Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has
19 instructed the District Courts to apply the rules as clearly required by the rule.

20 In this case, the Judgment of Conviction was filed on September 11, 2013, and
21 Petitioner filed a direct appeal on October 11, 2013. The Petitioner’s conviction was
22 affirmed, and remittitur issued on October 20, 2015. Thus, the one-year time bar began to
23 run from the date remittitur issued. (The instant Petition was not filed until March 14, 2019.
24 Three (3) years after remittitur issued and absent any showing of good cause for this delay
25 and undue prejudice, Petitioner’s claim must be dismissed,

26 **a. Petitioner’s Petition is Successive.**

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

1 A second or successive petition *must* be dismissed if the judge or
2 justice determines that it fails to allege new or different grounds
3 for relief and that the prior determination was on the merits or, if
4 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).

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

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

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

1
2 **IV. PETITIONER CANNOT DEMONSTRATE GOOD CAUSE TO OVERCOME**
3 **THE PROCEDURAL BARS.**

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

19 Petitioner claims he has recently discovered a Clark County School District Police
20 Department (“CCSDPD”) report that should have been disclosed under Brady v. Maryland,
21 373 U.S. 83, 83 S. Ct. 1194 (1963). He claims this failure provides good cause to overcome
22 the procedural bars. Due Process does not require simply the disclosure of “exculpatory”
23 evidence. The alleged evidence must also be disclosed if it provides grounds for the defense
24 to attack the reliability, thoroughness, and good faith of the police investigation or to
25 impeach the credibility of the State’s witnesses. See Kyles v. Whitley, 514 U.S. 419, 442,
26 445-51, 1115 S. Ct. 1555, 1555 n. 13 (1995). Evidence cannot be regarded as “suppressed”
27 by the government when the defendant has access to the evidence before trial by the exercise
28 of reasonable diligence. United States v. White, 970 F.2d 328, 337 (7th Cir. 1992). “While

1 the [United States] Supreme Court in Brady held that the [g]overnment may not properly
2 conceal exculpatory evidence from a defendant, it does not place any burden upon the
3 [g]overnment to conduct a defendant's investigation or assist in the presentation of the
4 defense's case." United States v. Marinero, 904 F.2d 251, 261 (5th Cir. 1990); *accord* United
5 States v. Pandozzi, 878 F.2d 1526, 1529 (1st Cir. 1989); United States v. Meros, 866 F.2d
6 1304, 1309 (11th Cir. 1989). "Regardless of whether the evidence was material or even
7 exculpatory, when information is fully available to a defendant at the time of trial and his
8 only reason for not obtaining and presenting the evidence to the Court is his lack of
9 reasonable diligence, the defendant has no Brady claim." United States v. Brown, 628 F.2d
10 471, 473 (5th Cir. 1980).

11 The Nevada Supreme Court has followed the federal line of cases in holding that
12 Brady does not require the State to disclose evidence which was available to the defendant
13 from other sources, including diligent investigation by the defense. Steese v. State, 114 Nev.
14 479, 495, 960 P.2d 321, 331 (1998).

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

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

28 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

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

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

21 In addition, Petitioner failed to demonstrate the State affirmatively withheld the
22 information. In order to qualify as good cause, Petitioner must demonstrate that the State
23 affirmatively withheld information favorable to the defense. State v. Bennett, 119 Nev. 589,
24 600, 81 P.3d 1, 8 (2003). The defense bears the burden of proving that the State withheld
25 information, and it must prove specific facts that show as much. Id. A mere showing that
26 evidence favorable to the defense exists is not a constitutional violation under Brady. See
27 Strickler v. Greene, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 1948 (1999) (“there is never a
28 real ‘Brady violation’ unless the nondisclosure was so serious that there is a reasonable

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

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

14 In fact, at the evidentiary hearing, retired CCSDPD Lieutenant Roberto Morales
15 confirmed that, as of approximately the year 2000, the NRS was amended to require
16 CCSDPD to contact and advise the local jurisdiction, in this case LVMPD, of any incidents
17 involving Category A felonies. Recorder’s Transcript of Hearing (“Transcript”), September
18 21, 2020, p. 7-8. Here, Petitioner was charged with a Category A Felony and, thus, CCSDPD
19 did not have jurisdiction over Petitioner’s case. Therefore, LVMPD was the sole agency,
20 outside of the Clark County District Attorney’s Office (CCDA), that the prosecutor had a
21 duty from which to procure any information favorable to Petitioner. See Kyles, 514 U.S. at
22 437–38, 115 S. Ct. at 1567–68 (explaining that the prosecutor has a duty to learn of
23 information favorable to the accused secured by *others acting on the State’s behalf in the*
24 *case*) (emphasis added). Moreover, Morales testified that CCSDPD documents were only
25 provided to the CCDA *upon request*. Transcript at 12, 15. Morales also testified that he had
26 no direct knowledge of the CCDA ever requesting these documents. Id. at 15. Petitioner has
27 neither asserted nor set forth facts to show that the CCDA or the LVMPD possessed the
28 impeachment evidence that Petitioner discusses in his Petition. Petitioner’s failure to show

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

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

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

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

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

13 Moreover, even if Petitioner could demonstrate good cause to overcome the
14 procedural time bar, he cannot show prejudice. It is well-settled that Brady and its progeny
15 require a prosecutor to disclose evidence favorable to the defense when that evidence is
16 material either to guilt or to punishment. See Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d
17 25 (2000); Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687 (1996). “[T]here are three
18 components to a Brady violation: (1) the evidence at issue is favorable to the accused; (2) the
19 evidence was withheld by the state, either intentionally or inadvertently; and (3) prejudice
20 ensued, i.e., the evidence was material.” Mazzan 116 Nev. at 67. “Where the state fails to
21 provide evidence which the defense did not request or requested generally, it is constitutional
22 error if the omitted evidence creates a reasonable doubt which did not otherwise exist. In
23 other words, evidence is material if there is a reasonable probability that the result would
24 have been different if the evidence had been disclosed.” Id. at 66 (internal citations omitted).
25 “In Nevada, after a specific request for evidence, a Brady violation is material if there is a
26 reasonable *possibility* that the omitted evidence would have affected the outcome. Id.
27 (original emphasis), *citing Jimenez*, 112 Nev. at 618-19, 918 P.2d at 692; Roberts v. State,
28 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994).

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

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

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

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

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

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

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

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

16 **ORDER**

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

19 DATED this 20 day of January, 2021.

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

Nevada Supreme Court

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

April 30, 2019

A-19-791171-W	Evaristo Garcia, Plaintiff(s)
	vs.
	James Dzurenda, Defendant(s)

April 30, 2019	8:30 AM	All Pending Motions
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HEARD BY: Jones, David M	COURTROOM: RJC Courtroom 15A
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COURT CLERK: Nancy Maldonado

RECORDER: Melissa Delgado-Murphy

REPORTER:

PARTIES

PRESENT:	Spelman, Stephen A	Attorney
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JOURNAL ENTRIES

- NOTICE OF MOTION TO TAKE JUDICIAL NOTICE OF COURT RECORDS OF CASE NUMBER C262966-1... NOTICE OF MOTION TO SEAL COURT FILE AND COURT RECORDS PURSUANT TO NEVADA RULE FOR SEALING AND REDACTING COURT RECORDS 3 (1)...

ANN DUNN, Esq. Present on behalf of the Clark County District Attorney's Office for the State of Nevada.

Ms. Dunn advised someone from the Gang Unit was going to be appearing, and requested the matter be trailed. MATTER TRAILED.

MATTER RECALLED. Ms. Dunn advised after speaking with the other District Attorneys, the State has not received copies of the motions. Ms. Dunn requested THIRTY (30) DAYS to receive and respond to the motions. Mr. Spellman advised the motions were sent via UPS. Court advised the State will be allowed time to complete any oppositions. COURT ORDERED, State's opposition DUE in 10 DAYS (05/10/19), Defense's reply DUE 10 DAYS after State's opposition (05/21/19), and the Court's Ruling will be completed in CHAMBERS 21 DAYS after Defense's reply (06/11/19).

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

August 05, 2019

A-19-791171-W Evaristo Garcia, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

August 05, 2019 10:55 AM Minute Order

HEARD BY: Jones, David M **COURTROOM:** Chambers

COURT CLERK: Nancy Maldonado

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- A hearing has been set in this matter for Thursday, August 8, 2019 at 8:30 a.m.

CLERK'S NOTE: The above minute order has been distributed to:

Rene L. Valladares, Esq. - 411 E. Bonneville Ave. Suite 250, Las Vegas, NV 89101

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

August 08, 2019

A-19-791171-W Evaristo Garcia, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

August 08, 2019 8:30 AM Status Check

HEARD BY: Jones, David M **COURTROOM:** RJC Courtroom 15A

COURT CLERK: Nancy Maldonado

RECORDER: Melissa Delgado-Murphy

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- There being no basis for Defendant's PSI to be unsealed, COURT ORDERED, petition, DENIED.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

September 10, 2019

A-19-791171-W Evaristo Garcia, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

**September 10, 2019 8:30 AM Motion For
Reconsideration**

HEARD BY: Jones, David M **COURTROOM:** RJC Courtroom 15A

COURT CLERK: Nancy Maldonado

RECORDER: Melissa Delgado-Murphy

REPORTER:

PARTIES

PRESENT: Spelman, Stephen A Attorney

JOURNAL ENTRIES

- Mr. Spelman advised he received the notice of the hearing the day after the first hearing. Colloquy regarding the transcript for the last hearing. Mr. Spelman advised there is no order relating to the petition, and requested the Court order the State respond to the petition. Mr. Zadrowski advised the deputy handling this case was under the wrong impression regarding the case and requested 45 days for the State's response. COURT ORDERED, State's Response DUE 10/22/19 and a Hearing SET. COURT FURTHER ORDERED, CASE SEALED. ADDITIONALLY, COURT took Judicial Notice of all the other cases involved in this matter.

11/12/19 8:30 AM HEARING

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

November 12, 2019

A-19-791171-W Evaristo Garcia, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

November 12, 2019 8:30 AM Hearing

HEARD BY: Jones, David M **COURTROOM:** RJC Courtroom 15A

COURT CLERK: Nancy Maldonado

RECORDER: Gail Reiger

REPORTER:

PARTIES

PRESENT: Demonte, Noreen C. Attorney
 Spelman, Stephen A Attorney

JOURNAL ENTRIES

- Following the arguments of Counsel, COURT ORDERED, there being no basis or exculpatory evidence, Petition for Habeas Corpus, DENIED. COURT to prepare the order.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

February 06, 2020

A-19-791171-W Evaristo Garcia, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

February 06, 2020 8:30 AM Motion

HEARD BY: Jones, David M **COURTROOM:** RJC Courtroom 15A

COURT CLERK: Nancy Maldonado

RECORDER: Melissa Delgado-Murphy

REPORTER:

PARTIES

PRESENT: Spelman, Stephen A Attorney
 Thoman, Charles W. Attorney

JOURNAL ENTRIES

- Arguments by Mr. Spelman. Arguments by Mr. Thoman. Court advised it would allow an Evidentiary Hearing to be set. Mr. Spelman advised the motion to unseal the case was unopposed by the State, noting he had an order already prepared for signature. COURT SO ORDERED. Order SIGNED in Open Court. COURT FURTHER ORDERED, Evidentiary Hearing SET.

06/05/20 1:00 PM EVIDENTIARY HEARING

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

April 27, 2020

A-19-791171-W	Evaristo Garcia, Plaintiff(s)
	vs.
	James Dzurenda, Defendant(s)

April 27, 2020	3:00 AM	Minute Order
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HEARD BY: Jones, David M	COURTROOM: Chambers
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COURT CLERK: Michaela Tapia

RECORDER:

REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- Upon review of the information provided and input from counsel, the Court has rescheduled the Evidentiary Hearing to 9:00 a.m., Friday, June 26, 2020.

CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve. /mt

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

June 02, 2020

A-19-791171-W Evaristo Garcia, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

June 02, 2020 10:15 AM All Pending Motions

HEARD BY: Jones, David M **COURTROOM:** RJC Courtroom 15C

COURT CLERK: Michaela Tapia

RECORDER: Melissa Delgado-Murphy

REPORTER:

PARTIES

PRESENT: Bizzaro, Amelia L. Attorney
Demonte, Noreen C. Attorney
Pandukht, Taleen R Attorney
Spelman, Stephen A Attorney

JOURNAL ENTRIES

- PETITIONER'S MOTION TO DISQUALIFY NOREEN DEMONTE AND TALEEN PANDUKHT FROM REPRESENTING RESPONDENTS AT THE UPCOMING EVIDENTIARY HEARING (NEV. R. PROF. COND. 3.7) PETITIONER'S MOTION FOR DISCOVERY (NRS 34.780(2))

Counsel indicated he had received the school district police file but believed there is outstanding video surveillance. Further, counsel noted he only has the officer reports and does not know if there are any additional witness statements. Argument by the State. COURT ORDERED, decision to issue via minute order. Argument by counsel regarding Motion To Disqualify. Argument by the State. COURT ORDERED, motion DENIED. Colloquy regarding evidentiary hearing. Ms. Pandukht advised an order for transport had been issued. Court indicated Deft. may be physically present for the hearing.

NDC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

August 19, 2020

A-19-791171-W	Evaristo Garcia, Plaintiff(s)
	vs.
	James Dzurenda, Defendant(s)

August 19, 2020	3:00 AM	Minute Order
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HEARD BY: Jones, David M	COURTROOM: Chambers
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COURT CLERK: Michaela Tapia

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Due to the logistical problems with video conference availability for the in-custody individual, and the out of state witnesses who are not able to travel, the Evidentiary Hearing has been rescheduled to Monday, September 21, 2020, at 9:00 a.m.

CLERK'S NOTE: This minute order has been distributed to counsel via email and mailed to the following:

Elizabeth A. Brown
Clerk of the Court
201 South Carson St., Ste. 201
Carson City, NV 89701-4702

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

September 21, 2020

A-19-791171-W Evaristo Garcia, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

September 21, 2020 8:00 AM Evidentiary Hearing

HEARD BY: Jones, David M **COURTROOM:** RJC Courtroom 15A

COURT CLERK: Michaela Tapia

RECORDER: Angelica Michaux

REPORTER:

PARTIES

PRESENT:	Bizzaro, Amelia L.	Attorney
	Demonte, Noreen C.	Attorney
	Garcia, Evaristo Jonathan	Plaintiff
	Pandukht, Taleen R	Attorney
	Smith, Emma Lauren	Attorney

JOURNAL ENTRIES

- Testimony and exhibits presented (see worksheets). Argument by counsel. Argument by the State.
COURT ORDERED, decision to issue via minute order.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

September 30, 2020

A-19-791171-W Evaristo Garcia, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

September 30, 2020 3:00 AM Minute Order

HEARD BY: Jones, David M **COURTROOM:** Chambers

COURT CLERK: Michaela Tapia

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Upon review of the documentation provided, and input from counsel, this Court has DENIED
Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction)

State is to prepare order.

CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey
File & Serve. /mt

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

December 10, 2020

A-19-791171-W Evaristo Garcia, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

December 10, 2020 10:15 AM Motion

HEARD BY: Jones, David M **COURTROOM:** RJC Courtroom 15A

COURT CLERK: Michaela Tapia

RECORDER: Melissa Delgado-Murphy

REPORTER:

PARTIES

PRESENT:	Bizzaro, Amelia L.	Attorney
	Demonte, Noreen C.	Attorney
	Pandukht, Taleen R	Attorney

JOURNAL ENTRIES

- Deft. not present.

Argument by counsel. Argument by Ms. Demonte. COURT ORDERED, the Findings of Fact, Conclusions of Law, and Order filed on BOTH November 18, 2020 and December 2, 2020 are STRICKEN. The Court to issue its own Findings of Fact, Conclusions of Law, and Order.

NDC

Petitioner's Proposed Exhibit List

Petitioner: Evaristo Garcia

Petitioner's Counsel:
Amelia Bizzaro, Esq.
Emma Smith, Esq.

Respondent: James Dzurenda, et al.,

Respondent Counsel:
Noreen DeMonte, Esq.
Taleen Pandukht, Esq.

Judge David M. Jones

Case No: A-19-791171-W

Dept. No: 29

Date: September 21, 2020

Ex. No.	Date	Description	Date Offered	objection	Date Admitted	
1.	2/19/10	Photos	9/21/20	Strip	9/21/20	WJ
2.	2/6/2006	Certified Records from Clark County School District Police Department (originally received 11/26/2018) (P.Ex. 1)				WJ
3.	2/6/2006	Voluntary Statement of Betty Graves (P.Ex. 3)				WJ
4.	2/6/2006	Handwritten Voluntary Statement of Betty Graves (P.Ex. 6)				WJ
5.	2/6/2006	Las Vegas Metropolitan Police Department Incident Report				WJ
6.	2/6/2006	Las Vegas Metropolitan Police Department Officer's Report				WJ
7.	2/7/2006	Las Vegas Metropolitan Police Department-CAD Log (P.Ex. 8)				WJ
8.	6/15/2006	Declaration of Warrant/Summons (Evaristo Garcia)				WJ
9.	8/25/2010	Defendant's Motion for Discovery (P.Ex. 19)				WJ
10.	2/24/2011	State's Notice of Witnesses				WJ
11.	7/9/2013	Transcript — Jury Trial, Day 2				WJ
12.	7/10/2013	Transcript — Jury Trial, Day 3	↓	↓	↓	WJ

Petitioner's Proposed Exhibit List

Petitioner: Evaristo Garcia

Petitioner's Counsel:
Amelia Bizzaro, Esq.
Emma Smith, Esq.

Respondent: James Dzurenda, et al.,

Respondent Counsel:
Noreen DeMonte, Esq.
Taleen Pandukht, Esq.

Judge David M. Jones

Case No: A-19-791171-W Dept. No: 29 Date: September 21, 2020

Ex. No.	Date	Description	Date offered	objection	Date Admitted	
13.	7/11/2013	Transcript — Jury Trial, Day 4	9/21/20	stip	9/21/20	WA
14.	7/12/2013	Transcript — Jury Trial, Day 5	↓	↓	↓	WA
15.	7/15/2013	Transcript — Jury Trial, Day 6	↓	↓	↓	WA
16.	10/25/18	Request to Clark County School District Police Department for records	↓	↓	↓	WA
17.	2/5/2019	Declaration of Tammy R. Smith (P.Ex. 31)	↓	↓	↓	WA
18.	11/18/2019	Declaration of Dayvid Figler (P.Ex. 34)	↓	↓	↓	WA
19.	11/27/2019	Declaration of Ross Goodman (P.Ex. 35)	↓	↓	↓	WA
20.	6/9/2020	Declaration of Kathy Pezdek, Ph.D.	9/21/20	no obj	9/21/20	WA
21.	6/9/2020	VITA-Kathy Pezdek, Ph.D.	9/21/20	no obj	9/21/20	WA
22.	9/8/20	Demonstrative Exhibit — Dr. Pezdek's list of factors	↓	stip	↓	WA

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

AMENDED NOTICE OF APPEAL; DISTRICT COURT DOCKET ENTRIES;
CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER; NOTICE
OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; DISTRICT COURT
MINUTES; EXHIBITS LIST

EVARISTO JONATHAN GARCIA,

Plaintiff(s),

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,

Defendant(s),

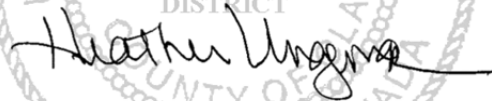
Case No: A-19-791171-W

Dept No: II

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 2 day of February 2021.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk