No. 80255

IN THE NEVADA SUPREME COURT

Evaristo Jonathan Garcia,

Appellant,

v.

James Dzurenda, et al.,

Respondents.

On Appeal from the Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District, Clark County (Case No. A-19-791171-W)
Honorable David M. Jones, District Court Judge

Petitioner-Appellant's Opening Brief

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NRAP 26.1 DISCLOSURE

The names of the following law firms must be disclosed to the Court under Nevada Rule of Appellate Procedure 26.1(a), so the judges of this Court may evaluate possible disqualification or recusal.

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JURISDICTIONAL STATEMENT

This is an appeal from the final order denying Evaristo Garcia's petition for writ of habeas corpus, which was filed March 14, 2019.[1] The court filed the Notice of Entry of Findings of Fact, Conclusions of Law, and Order on January 22, 2021.[2] Garcia timely filed a notice of appeal on February 2, 2021.

This Court has jurisdiction under Nevada Revised Statute. § 34.575.

ROUTING STATEMENT

Because this post-conviction appeal involves a conviction for second-degree murder, a Category A felony, the appeal falls into a category of cases presumptively assigned to this Court. *See* Nev. R. App. P. 17(b)(3). This Court should retain jurisdiction because this case involves important issues regarding, among other things, what the State's obligations are under *Brady v. Maryland*, 373 U.S. 83 (1963), when a school police department conducts investigation and whether *Brady* includes a diligence requirement for the defense.

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[1] VIII.App.1669–98.

[2] X.App.2217–37.

STATEMENT OF THE ISSUES

Evaristo Garcia was convicted of crimes arising from a shooting at a school. Clark County School District Police Department ("CCSDPD") officers were the first to respond to the scene. School police conducted some investigation before the Las Vegas Metropolitan Police Department ("LVMPD") took over the case. This investigation included gathering a description of the shooter from campus monitor Betty Graves as well as stopping a suspect and asking Graves if he was the shooter. The school officers authored reports.

The State did not disclose the CCSDPD reports to the defense before trial, violating their obligation under *Brady v. Maryland*, 373 U.S. 83 (1963). The reports show that Graves gave a previously unknown description of the shooter that was inconsistent with her later descriptions. Armed with this information, the defense could have impeached Graves at trial based on the unreliability of her memory of the shooter to combat the State's presentation of her as a disinterested, reliable witness. The key part of her testimony was her affirmative exclusion of a suspect in the case, Giovanni Garcia, as the shooter. Other evidence pointed to Giovanni as the most likely alternate suspect.

Therefore, if the defense had the CCSDPD reports, they could have impeached Graves's exclusion of Giovanni as the shooter, making the defense that he was the shooter viable.

Garcia raised a *Brady* claim in a successive post-conviction petition, filed shortly after he found the hidden evidence, arguing he could overcome any default because the State suppressed material evidence. After an evidentiary hearing, the district court denied Garcia's petition in a minute order that contained no reasoning. The State prepared an order, which the court adopted. After a motion by Garcia, the court ruled that it would write its own order. However, the final order by the court is materially indistinguishable from the order drafted by the State.

The issues on appeal are:

1. Did Garcia establish cause and prejudice to overcome any procedural bars upon proving at an evidentiary hearing that the State suppressed material evidence related to the impeachment of one of its key witnesses at trial?

2. Did the State violate its *Brady* obligations when it failed to disclose favorable police reports drafted by the Clark County School

District Police Department that would have impeached a key witness at trial?

3. Can the district court properly adopt a State-drafted order as its own after providing no explanation of its denial of a post-conviction petition, including findings of fact following an evidentiary hearing?

STATEMENT OF THE CASE

Garcia's six-day jury trial started July 8, 2013, at which he was represented by Ross Goodman and Dayvid Figler.[3] The Fourth Amended Indictment, filed in open court on July 12, 2013, charged Garcia with Conspiracy to Commit Murder (Count 1) and Murder with Use of a Deadly Weapon (Count 2).[4] The jury found Garcia not guilty of conspiracy but guilty of second-degree murder.[5] The court sentenced him to ten years to life plus an equal and consecutive ten years to life.[6]

After Garcia appealed, this Court affirmed his conviction.[7] Garcia filed a pro se post-conviction petition raising four grounds:

1. Counsel was ineffective at trial for failing to adequately investigate witness Edshell Cavillo.

2. Counsel was ineffective for allowing illegal sentencing.

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[3] *See* II.App.182–453; III.App.454–745; IV.App.746–993; VI.App.997–1330; VII.App.1367–1489.

[4] V.App.994–96. The State originally included a gang enhancement for both counts, but it was dropped in this fourth and final indictment. *See* VII.App.1504 (discussing gang enhancement).

[5] VII.App.1490–91.

[6] VII.App.1492–93.

[7] *See* VIII.App.1646–52, 1654–58.

3. Counsel was ineffective for failing to ask for a new trial or mistrial.

4. Ineffective assistance of appellate counsel.[8]

The district court denied his petition on October 25, 2016.[9] On appeal, Garcia, once again proceeding pro se, raised the same four issues.[10] The case was transferred to Nevada's Court of Appeals, which affirmed.[11]

Garcia mailed a pro se habeas petition under 28 U.S.C. § 2254 to the federal district court on December 13, 2017.[12] The court appointed the Federal Public Defender to represent Garcia.[13] Garcia moved to stay the proceedings so he could return to state court.[14] The federal district

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[8] VIII.App.1594–1606.

[9] VIII.App.1630–39.

[10] VIII.App.1646–52.

[11] VIII.App.1653–58.

[12] ECF No. 1-1. Garcia cites to documents filed in federal district court case, *Garcia v. Nevada Department of Corrections,* No. 2:17-cv-03095 (D. Nev.), by their ECF number. The Court should take judicial notice of these documents, which are from a federal case challenging the criminal conviction at issue in this appeal. *See Mack v. Estate of Mack*, 125 Nev. 80, 91–92, 206 P.3d 98, 106 (2009).

[13] ECF No. 9.

[14] ECF No. 24.

court granted Garcia's request on April 4, 2019.[15]

Garcia filed a successive post-conviction petition in the Eighth Judicial District Court on March 14, 2019.[16] After the State's Response[17] and Garcia's Reply,[18] the court denied Garcia's petition on November 15, 2019.[19] The court ruled the petition was time barred and the CCSDPD reports were not exculpatory.[20] Garcia filed a motion to alter or amend the judgment pursuant to Nevada Rule of Civil Procedure 59(e).[21] After argument, the court granted the motion and ordered an evidentiary hearing on Garcia's *Brady* claim.[22]

The evidentiary hearing was held September 21, 2020. Garcia presented testimony from Robert Morales, a former lieutenant at the CCSDPD, trial counsel Dayvid Figler, and Dr. Kathy Pezdek, an

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[15] ECF No. 26.

[16] VIII.App.1669–98.

[17] VIII.App.1705–23.

[18] VIII.App.1729–46.

[19] VIII.App.1766–69.

[20] *Id.*

[21] VIII.App.1773–78.

[22] IX.App.1829–45.

eyewitness identification expert. The State did not call any witnesses. At the end of the hearing, the court took the issue under advisement.[23]

On September 30, 2020 at 3 a.m., the court entered a minute order denying the petition, which contained no reasoning[24] Garcia followed with a motion for the court to prepare and file its own order.[25] Approximately one month later, the court filed a Findings of Fact, Conclusions of Law, and Order prepared by the State,[26] which it refiled on December 2, 2020.[27] The court heard argument on Garcia's motion to have the court prepare its own order on December 15, 2020, and granted the motion.[28] The court filed a new Findings of Fact, Conclusions of Law, and Order on January 20, 2021, which was nearly identical to the State's

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[23] X.App.2024–2149.

[24] X.App.2150. The total substance of the order read: "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."

[25] X.App.2151–62.

[26] X.App.2163–84.

[27] X.App.2191–2214.

[28] X.App.2186–90, 2215–16.

original order.[29] The court ruled that Garcia's petition was time barred and successive.[30] Garcia timely appealed.[31]

STATEMENT OF THE FACTS

This case arose out of a shooting at a night school, Morris Sunset Academy. Because of the location and gravity of the offense, two police departments were involved: first the CCSDPD, then the LVMPD. Before trial, the State provided the defense police reports from only the LVMPD, not from the CCSDPD.[32]

Testimony at trial established a fight occurred in front of Morris Sunset Academy at the end of the school day on February 6, 2006, at about 8:30 p.m.[33] Leading up to the fight, Giovanni Garcia, a member of the Puros Locos gang, and Crystal Perez, who was friends with members of Brown Pride gang, had been arguing.[34] At the end of the fight, Victor

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[29] X.App.2217–37.

[30] *Id.*

[31] X.App.2238–40.

[32] *See, e.g.*, VIII.App.1668 ¶ 5.

[33] III.App.547–49.

[34] II.App.312–21; III.App.594, 600, 616–24, 627–29.

Gamboa was shot.[35] A police officer testified the description of the shooter was of a Hispanic male around nineteen years old who was wearing a gray hoodie.[36]

Betty Graves, a campus monitor, testified that when school let out, there were about twenty kids standing in the front of the school.[37] She observed one who was "the strangest looking young man because he was standing right in front [of] me, and he had on a gray hoody, and all the time he's standing there, he had his right hand in his pocket."[38] She observed this young man start to fight, but he would not take his hand out of his pocket.[39] She told her fellow campus monitor she believed he had a gun.[40] She described him as nineteen or twenty, Hispanic, and with "little black hair." She stated the hood of his hoodie was up.[41] Graves testified she did not see the shooting, but assumed the young man she

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[35] *See* II.App.185.

[36] V.App.1100.

[37] III.App.575.

[38] III.App.576.

[39] III.App.576–77.

[40] III.App.577–78.

[41] III.App.578–79.

was observing was the shooter.[42] She further testified Giovanni was not the shooter.[43]

The defense argued at trial that Garcia had been wrongly identified as the shooter by members of Puros Locos to cover up the involvement of gang members.[44] Salvador Garcia, Giovanni's brother, was the head of the Puros Locos gang.[45] Garcia was not a member.[46]

At trial, only a single witness identified Garcia as the shooter—Jonathan Harper, a member of Puros Locos.[47] According to Harper, on the day of the shooting, he and a group, including Garcia, were at Salvador's apartment. After a call from Giovanni, Salvador told them they were going to the school for a fight.[48] Harper testified he saw Manuel Lopez, another gang member, hand Garcia a gun.[49] Harper testified he

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[42] III.App.580.

[43] III.App.584.

[44] *See* VII.App.1414–22.

[45] III.App.465; *see* II.App.193.

[46] III.App.478.

[47] IV.App.750.

[48] IV.App.755–59.

[49] IV.App.760.

saw Garcia shoot the victim multiple times.[50] Harper testified after the shooting, he returned to Salvador's apartment where Garcia said "I got him."[51] Harper claimed Garcia was wearing a gray hoodie.[52]

Harper was not a disinterested witness. After the shooting at Morris Sunset, Salvador shot Harper in the head.[53] Harper suffered brain damage as a result.[54] Harper did not tell police Garcia was at Salvador's house the day of the school shooting until police interviewed him in connection with his own shooting, about five weeks after he was shot.[55] It was only after Harper's interview that the police focused on Garcia as the shooter,[56] and it was Harper who supplied them Garcia's name.[57]

Moreover, Harper's testimony was not consistent. Harper testified differently at Garcia's trial than he did at the preliminary hearing in

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[50] IV.App.766.

[51] IV.App.766–67.

[52] IV.App.762.

[53] *See* IV.App.799.

[54] *See* V.App.1234–47.

[55] IV.App. 774, 776–77, 791, 796–97.

[56] IV.App.874.

[57] V.App.1108.

important respects. At the preliminary hearing, he did not say he saw Lopez hand Garcia the gun and testified Garcia was wearing a top with black sleeves, not a gray hoodie.[58] Further, he testified before the grand jury that he did not see who the shooter was. He did not testify Garcia was at Salvador's apartment and stated he did not speak to Garcia after the shooting.[59]

Additionally, Harper testified at Garcia's trial he had been promised he would not be prosecuted if he testified[60] and told members of the defense team he was sick of the prosecution putting words in his mouth.[61] Finally, the forensic evidence showed the victim was shot once. He was not shot additional times at close range,[62] despite Harper's testimony he saw Garcia shoot Gamboa several times.

Only two other witnesses implicated Garcia directly. First, the

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[58] IV.App.778–79, 781.

[59] IV.App.787, 790.

[60] IV.App.797–98, 800–01.

[61] IV.App.806.

[62] IV.App.851–52.

victim's sister, Melissa Gamboa, testified she saw the shooting.[63] She had previously identified Garcia in court,[64] but could not identify Garcia as the shooter during trial.[65] At the preliminary hearing she agreed her description of the shooter did not match Garcia.[66] And she could not pick Garcia out of a photographic lineup.[67]

The second witness was Edshell Cavillo, another member of Puros Locos.[68] He testified he was at Salvador's house the night of the shooting with friends, including Garcia, when Giovanni called and told them members of another gang were waiting for him after school.[69] The group left Salvador's house and headed to the school.[70] Cavillo testified that before leaving, he saw Lopez with a gun; he then saw Garcia with the

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[63] III.App.651.

[64] III.App.655.

[65] *Id.*

[66] III.App.673–74.

[67] V.App.1139.

[68] *See* II.App.335.

[69] II.App.352, 355–5.

[70] II.App.357.

same gun.[71] When Cavillo arrived at the school, he heard gunshots. He did not see the shooting.[72] Cavillo testified he went back to Salvador's house, as did Garcia.[73] According to Cavillo, Garcia said he thought he had shot someone.[74]

However, Cavillo told different versions of when Garcia made incriminating statements and also was inconsistent about whether he had in fact heard Garcia make the statements or if he had been told about them by Harper and Giovanni.[75] Importantly, Cavillo had previously lied at Salvador's behest when he gave false information about who shot Harper in order to protect the gang.[76] In this case, Cavillo did not tell the police anything about Garcia's involvement in his first statement to police; he provided this information after Giovanni had been arrested.[77]

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[71] II.App.359–61.

[72] II.App.361–62.

[73] II.App.363–64.

[74] II.App.365.

[75] *See* II.App.365–67; III.App.492, 501, 512.

[76] III.App.475–76.

[77] III.App.477; V.App.1112.

This was over five months after the incident.[78] Cavillo testified that at the time of the shooting, fellow gang members like Salvador were "like family."[79] At the time of Garcia's trial, however, Cavillo testified he was afraid of Salvador.[80]

Turning to the physical evidence presented at Garcia's trial, the gun the State argued was used in the shooting was recovered from a toilet at a construction site[81] where Lopez had previously worked.[82] Lopez tried to go back and get the gun after police had seized it.[83] He acknowledged the gun was his.[84]

Garcia's fingerprints and palm print were found on the gun.[85] Several people, including Garcia, had previously played with the gun

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[78] *See* VII.App.1420.

[79] II.App.377; III.App.460.

[80] III.App.509–10.

[81] II.App.289; III.App.696–98.

[82] IV.App.906; V.App.1134.

[83] V.App.1135.

[84] V.App.1133.

[85] *See* V.App.1162–1220.

while at Salvador's house.[86] Although Garcia's right ring fingerprint was found on the gun, its placement was in an unusual spot, on the top of the grip.[87] The part of the grip that would have been held by the shooter, the textured part, did not yield any fingerprints.[88] Additionally, Garcia was excluded for the fingerprint taken from the toilet where the gun was stashed.[89]

No one from the CCSDPD testified at Garcia's trial. And no one else testified about CCSDPD's investigation before LVMPD took over.

After the Federal Public Defender was appointed to the case, it received reports from the CCSDPD.[90] First, the CCSDPD provided Officer Arambula's report, which revealed he was the "closest officer to the scene" and "responded and assisted in looking for the suspect" shooter.[91] In the course of that search, Officer Arambula "observed a Hispanic Juvenile" he described as "matching the description given by

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[86] III.App.502; *see* II.App.201–02.

[87] V.App.1196, 1210.

[88] V.App.1213.

[89] V.App.1199.

[90] *See* I.App.27–34.

[91] I.App.32.

dispatch" near the scene of the school shooting.[92]

A second CCSDPD report was authored by Officer Gaspardi. It revealed school police decided to stop and secure this juvenile, whom they considered a "possible suspect."[93] The encounter ended only after a one-on-one identification with an eyewitness, Betty Graves, who law enforcement trusted as a reliable source.[94] Graves "advised that [he] was not the shooter."[95] Officer Gaspardi's report included a description by Graves, which predated other descriptions in the record, wherein she described the shooter as having a moustache, a medium build, and dark skin.[96]

Neither of Garcia's attorneys received these reports from the prosecution.[97] Figler confirmed this at the post-conviction evidentiary hearing.[98] He further testified he would have used the reports to impeach

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[92] *Id.*
[93] I.App.31.
[94] *See id.*
[95] *Id.*
[96] *Id.*
[97] VIII.App.1770–72, 1782–83.
[98] X.App.2100.

Graves, which he was not able to do at trial.[99] He explained that Graves "excluded" Giovanni as an alternate suspect, and presenting alternate suspects "was the theory of defense."[100]

Lieutenant Robert Morales also testified at the hearing. He explained the structure and duties of the CCSDPD.[101] He testified that the CCSDPD officers are "Category 1 officer[s], so we have full range of NRS statute and application of the law."[102] Officers attend the police academy and have authority to investigate crimes, write reports, make arrests, and refer someone for charges.[103]

Finally, Dr. Kathy Pezdek, and eyewitness identification expert, testified at the hearing.[104]. She identified inconsistencies between the description of the shooter Graves gave in the CCSDPD reports and in subsequent statements. She explained these inconsistencies, and other

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[99] *See* X.App.2105, 2127–28.

[100] X.App.2128.

[101] *See* X.App.2029–40.

[102] X.App.2030.

[103] X.App.2029–2031.

[104] *See* X.App.2042–95; *see also* IX.App.1983–2009 (Dr. Pezdek's declaration).

factors, suggest both that Graves's initial memory of the shooter was weak and that her memory deteriorated over time, meaning her description is not likely to be accurate.[105] The same is true of her exclusion of Giovanni as the shooter.[106]

SUMMARY OF THE ARGUMENT

The State violated its *Brady* obligation by failing to disclose the CCSDPD reports to the defense before trial. Armed with these reports, the defense could have impeached Betty Graves's memory of the event. By doing so, the defense would have impeached her exclusion of Giovanni as the shooter. Giovanni was the most likely alternate suspect, but this argument was undermined at trial by Graves's testimony. With the suppressed reports and resultant impeachment evidence, the defense that Giovanni was the real shooter would have been compelling.

The district court ruled that Garcia's petition was untimely and successive. It further ruled Garcia had not shown good cause and prejudice to overcome these procedural barriers. The district court erred in its ruling. It incorrectly determined the State was not responsible for

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[105] *See* X.App.2073, 2080–81; *see also* IX.App.2003–05, 2008–09.

[106] X.App.2081–82; *see also* IX.App.2004.

disclosing CCSDPD reports and *Brady* includes a diligence requirement for the petitioner, which Garcia had not met. The court further erred by ruling Garcia did not prove materiality, ignoring the importance of Graves's testimony to the defense theory. Of course, none of this reasoning was in the court's original order denying the petition. Instead, this reasoning came from the State's proposed order, signed and filed *after* Garcia asked the court to provide its own reasoning in lieu of a two-sentence minute order. Though the court eventually granted that request, the order it filed is indistinguishable to the one drafted by prosecutors—the same prosecutors who tried Garcia and who Garcia accused of violating its *Brady* obligations.

Because Garcia instead presented a winning *Brady* claim, he has overcome the procedural bars imposed by the district court and is entitled to relief. This Court should reverse the district court's denial of Garcia's petition.

ARGUMENT

I. Garcia has shown good cause and prejudice to overcome the procedural bars.

Garcia raised one claim in his petition—a *Brady* claim related to the State's failure to disclose the CCSDPD reports. To succeed on a claim

that the State's suppression of evidence violated his due process rights, Garcia had to show the evidence is favorable to the defense, the government either willfully or inadvertently failed to produce the evidence, and the suppressed evidence was material in that the suppression prejudiced him. *See Banks v. Dretke*, 540 U.S. 668, 691 (2004).

The district court ruled Garcia's petition was untimely and successive.[107] The court rejected Garcia's argument that he could show good cause and prejudice to overcome these procedural obstacles because of the State's suppression of material evidence.[108]

"To show 'good cause,' a petitioner must demonstrate that an impediment external to the defense prevented him from raising his claims earlier." *Pellegrini v. State*, 117 Nev. 860, 886, 34 P.3d 519, 537 (2001). To show prejudice, the petitioner must show the challenged errors "worked to the petitioner's actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions."

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[107] X.App.2225–27.

[108] X.App.2228–36.

Id. at 887, 34 P.3d at 537 (internal quotation marks and alteration omitted).

This Court has made clear if a petitioner can establish two of the three *Brady* prongs—suppression and materiality—then good cause and prejudice, respectively, have been shown. *State v. Huebler*, 128 Nev. 192, 198, 275 P.3d 91, 95–96 (2012).

This Court reviews the district court's factual findings for clear error and the application of the law to the facts de novo. *See id.* at 197, 275 P.3d at 95.

A. Garcia established that the State suppressed the CCSDPD reports and thereby proved good cause to excuse the procedural defaults.

The district court's determination that Garcia did not prove the State suppressed the CCSDPD reports was based on two incorrect premises. First, the court erroneously found that the CCSDPD was not an agency that was encompassed by the term "the State" in the *Brady* context, meaning the State did not have possession of the reports.[109] Second, the court imposed a diligence requirement on Garcia, in

[109] X.App.2230–33.

contravention of clear United States Supreme Court precedent.[110] The district court's rationale for ruling Garcia had not shown suppression, and therefore good cause, cannot stand.

1. The prosecution had constructive possession of the reports.

Much of the district court's reasoning that Garcia had not proven suppression rested on the unsupportable finding that "[t]here is no evidence that CCSDPD is a state actor for Brady purposes."[111] According to the court's reasoning, the State did not have possession of, and thus no duty to disclose, the reports in question. This is unsupported by the law and the specific record in this case.

Whether an individual prosecutor had actual possession of the reports and so willfully suppressed them is not determinative. Instead, suppression under *Brady* has occurred even when the nondisclosure is inadvertent. As the United States Supreme Court has established:

> the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or

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[110] X.App.2229–30, 2235.

[111] X.App.2231.

> fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Kyles v. Whitley, 514 U.S. 419, 437–38 (1995) (internal citation omitted); *see also Strickler v. Greene*, 527 U.S. 263, 275 n.12 (1999).

This Court applied this principle in *State v. Bennett*, and ruled a Nevada prosecutor was responsible for evidence known to a Utah detective because the "Utah police assisted in the investigation." 119 Nev. 589, 603, 81 P.3d 1, 10 (2003). Therefore, even if a prosecutor is personally unaware of favorable and material evidence, if it is in the possession of those who assisted in the investigation, it is in possession of the State. Non-disclosure then violates *Brady*.

The court here instead treated "the State" as synonymous with "the prosecutors" when analyzing possession. For example, the court stated:

> Petitioner nonetheless argues that the State unconstitutionally violated his rights because the State did not take steps to affirmatively investigate CCSDPD's involvement in a case investigated by LVMPD. He claims he had a right to rely upon the State to disclose all CCSDPD reports that were in existence, anywhere, even if

the State did not possess or know about it.[112]

The court cannot erase the distinction between the State as a whole and individual prosecutors in this manner. Garcia unquestionably had a right to rely on the prosecutors to disclose all favorable and material reports in the possession of those who assisted in the investigation. That the prosecutors failed in their duty to collect such evidence does not defeat Garcia's claim. To hold otherwise would mean the State could suppress favorable, material evidence without violating the constitution by having the police keep the evidence and not inform the prosecutors of it. That the constitution requires more should be beyond dispute. *See, e.g.*, *Bennett*, 119 Nev. at 603, 81 P.3d at 10 ("The State argues that it lacked actual knowledge of the evidence, but the state attorney is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers."(internal quotation marks omitted)); *Jimenez v. State*, 112 Nev. 610, 620, 918 P.2d 687, 693 (1996); *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013) ("The prosecutor is charged with knowledge of any *Brady*

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[112] X.App.2232.

material of which the prosecutor's office or the investigating police agency is aware." (citing *Youngblood v. West Virginia*, 547 U.S. 867, 869–70 (2006) (per curiam))).

The court relied on an incorrect reading of this Court's precedent in *Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001), *overruled in part by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015), to support its misstatement of the law.[113] In *Evans*, the Court ruled that the State was not required to conduct investigation that could have generated helpful, though not material, evidence for the defense. *Id.* at 626–27, 28 P.3d at 510–11. This holding is inapplicable here. Garcia is not arguing that the State—again, the State as a whole as opposed to the individual prosecutors—should have conducted additional investigation. Instead, his argument is that the prosecutors had a duty to turn over materials that had already been created by an investigating agency.

The determinative analysis therefore is not whether the individual prosecutors knew about the CCSDPD reports,[114] but whether the

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[113] X.App.2232–33.

[114] *See* X.App.2232 (discussing Figler's perception of the trustworthiness of the individual prosecutors).

CCSDPD is an agency whose materials the prosecution was responsible for disclosing. The answer is unavoidable. CCSDPD is a police department. *See* Nev. Rev. Stat. § 289.190(1) ("A person employed or appointed to serve as a school police officer . . . has the powers of a peace officer.").[115] At the evidentiary hearing, Lieutenant Morales confirmed this.[116] He testified that the CCSDPD officers are "Category 1 officer[s], so we have full range of NRS statute and application of the law."[117] Officers attend the police academy and have authority to investigate crimes, write reports, make arrests, and refer someone for charges.[118] As a police entity, the CCSDPD's reports unquestionably qualify as within the possession of the State.

Instead of recognizing this, the court came to the unsupported finding that "[t]he only law enforcement agency that collaborated on behalf of the State of Nevada in Petitioner's case was LVMPD."[119] The

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[115] *See also* VIII.App.1724–28.

[116] X.App.2029–30.

[117] X.App.2030.

[118] X.App.2029–31.

[119] X.App.2231.

district court seized on Lieutenant Morales's testimony that in the case of a Category A felony, such as the crime here, the CCSDPD was required to contact the local police agency.[120] According to the court, this meant that the CCSDPD did not have jurisdiction over the case.[121]

But the record is undeniable that the CCSDPD conducted some investigation in this case. The suppressed reports, for example, show that CCSDPD stopped a potential suspect, secured him, and conducted a one-on-one identification with Graves.[122] And CCSDPD officers were the first on the scene.[123] Even though the CCSDPD officers contacted the LVMPD, which took over the investigation, the CCSDPD participated in the investigation. The CCSDPD therefore should be viewed as the equivalent of the LVMPD for *Brady* purposes. At the very least, the CCSDPD "assisted in the investigation" such that the prosecution was responsible for evidence in its possession. *See Bennett*, 119 Nev. at 603, 81 P.3d at

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[120] *Id.*; *see* X.App.2030–31.

[121] X.App.2231.

[122] I.App.30–31.

[123] *See* I.App.32, 52, 156.

10–11. The court even recognized as much at the evidentiary hearing.[124]

The court also relied on Lieutenant Morales's testimony that CCSDPD reports are provided to the LVMPD or the District Attorney's Office upon request.[125] Despite the district court's contrary finding, this supports Garcia's argument. The LVMPD or the District Attorney's Office could have easily obtained the CCSDPD reports documenting the beginning of the investigation by simply asking for them. Indeed, the prosecution was on notice that such reports likely existed. An LVMPD report said that a CCSDPD officer was the first on the scene, as did the CAD log and the declaration of warrant.[126] Moreover, the prosecution listed CCSDPD personnel as witnesses.[127] The prosecutors undeniably were aware of the CCSDPD's involvement in the case. They could have easily fulfilled their obligation to collect the CCSDPD reports. That the

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[124] *See* X.App.2143 ("[T]hey definitely got involved. They did a report . . . I mean, it's not like they just said, Well, there's a gang shooting, we'll wait for Metro . . . We're just going to keep our heads down in our car. They went out and actually did a report.").

[125] X.App.2231; *see* X.App.2035–36.

[126] I.App.52 (officer's report); I.App.156 (declaration of warrant); I.App.79–89 (CAD log).

[127] I.App.172–75.

prosecutors may not have actually obtained the reports does not defeat Garcia's suppression argument.

In sum, the district court found the CCSDPD did not qualify as an agency from which the prosecution had a duty to gather favorable information. This finding was contradicted by the law and the record. As a result of this incorrect finding, the court ruled that Garcia had not proven suppression because he did not prove actual possession on the part of the prosecutors. But the court erred in its analysis of constructive possession, which also satisfies *Brady*. Garcia proved those who assisted in the investigation had the CCSDPD reports, triggering the prosecution's disclosure duty.

2. The district court imposed a diligence requirement on Garcia, contrary to clear United States Supreme Court precedent.

The district court also concluded Garcia had not proven suppression because he could have independently discovered the CCSDPD reports through the exercise of due diligence.[128] The imposition of a diligence requirement flips *Brady* on its head and contradicts United States

[128] X.App.2229–30, 2235.

Supreme Court precedent.

The State has an affirmative duty to disclose favorable, material evidence, a duty that is distinct from any duty on the part of defense counsel. Even if the defense did not request the State turn over any evidence, the obligation would still stand. *See, e.g.*, *United States v. Bagley*, 473 U.S. 667, 680–83 (1985). But here, before trial the defense asked for production of:

> copies of statements given by any State witness on any case, specifically including any reports of said information provided prepared by *any law enforcement agency*[;] . . . Copies of all police reports, medical reports in the actual *or constructive possession* of the District Attorney's Office, the Las Vegas Metropolitan Police Department, Nevada Department of Corrections, the Clark County Sheriff's Office, and *any other law enforcement agency*.[129]

Figler testified at the evidentiary hearing that this request should have covered reports by the CCSDPD.[130] It is undisputed the defense was not given the CCSDPD reports. The defense was entitled, under *Brady*, to rely on the prosecutors' representation that they provided all requested

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[129] I.App.170–71 (emphasis added).

[130] X.App.2130.

material. As the United States Supreme Court explained, "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks*, 540 U.S. at 695; *see also Strickler*, 527 U.S. at 285.

The Ninth Circuit has closely examined the issue of whether a *Brady* claim includes a diligence requirement for the petitioner, and its analysis is instructive. The court evaluated a *Brady* claim in a federal habeas petition where the state court had rejected the claim in part because the petitioner had not shown his counsel could not have discovered the evidence with the exercise of due diligence. *Amado v. Gonzalez*, 758 F.3d 1119 (9th Cir. 2014). The Ninth Circuit ruled that the imposition of a diligence requirement by the state court was contrary to clearly established United States Supreme Court precedent and "would flip" the *Brady* obligation. *Id.* at 1136–37. The court further rejected comparisons to cases where it had held there was no *Brady* violation because the defense had access to the supposedly suppressed material. The court made the distinction that those cases held "defense counsel cannot ignore that which is given to him or of which he otherwise is

aware, and not that he is obliged to conduct interviews or investigations himself." *Id.* at 1137.

The district court here relied on a series of cases to reach the opposite conclusion,[131] but none of them support a different analysis than the one undertaken by the Ninth Circuit. The court emphasized *Steese v. State*, 114 Nev. 479, 960 P.2d 321 (1998), but overread this Court's language.[132] In *Steese*, the relevant alleged *Brady* material was phone records of collect calls made by the defendant. *See id.* at 495, 960 P.2d at 331. In finding there was no *Brady* violation because the evidence was available to the defense from sources other than the government, this Court did not apply a different rule than the Ninth Circuit. Steese was aware of the calls because he participated in them, so the existence of the calls and corresponding records were not unknown to the defense.

The same is true of the other cases cited by the district court. In *United States v. White*, 970 F.2d 328, 337 (7th Cir. 1992), the defendants used two of the documents they claimed were suppressed at trial and the

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[131] X.App.2228–29.

[132] X.App.2229.

other two documents came from the same bankruptcy file. The court therefore found no *Brady* violation because the defense actually had or already had access to the documents in question but had failed to realize their value.

Similarly, in *United States v. Meros*, 866 F.2d 1304, 1308–09 (11th Cir. 1989), the court rejected a *Brady* claim based on two sets of evidence. The first contested evidence was included in court transcripts of which the prosecution made the defense aware in response to a *Brady* motion. The second was plea negotiations of a witness in separate cases that were ongoing out of state, of which the defense also was aware.

Next, in *United States v. Marrero*, 904 F.2d 251, 260–61 (5th Cir. 1990), a psychologist convicted of crimes related to false billing practices argued the government violated *Brady* by failing to provide her with a survey of the billing of her clients that showed some of the billing was accurate. The court rejected the claim because the defendant could have produced the evidence that her billing of some clients was accurate by interviewing her own clients.

Finally, in *United States v. Pandozzi*, 878 F.2d 1526, 1528–30 (1st Cir. 1989), the evidence in question was a memorandum of an interview

written by a police officer. The defense argued if it had the memorandum, it would have called the police officer as a witness. The court found there likely was no suppression because the defense had another memorandum about the interview listing the officer as one of the authors and included the same information as the non-disclosed memo. But the court ultimately rejected the claim on materiality grounds.

This Court should recognize the distinction made by the Ninth Circuit between evidence the defense might have been able to find and evidence the defense was actually aware of. The former category can still be suppressed evidence, and there is no support for the district court instead imposing a diligence requirement as part of the *Brady* inquiry. Doing so effectively relieves the prosecution of its *Brady* obligation. The evidence at issue is police reports Garcia's attorneys did not know existed. By the district court's logic, the prosecution would never have to disclose any favorable, material evidence gathered by the police because the defense could ask the police department for it directly. Such a rule flies in the face of the Supreme Court's *Brady* precedent.

Moreover, here the defense did all it had to do to discover the

reports—it asked the prosecution for them.[133] When the prosecutors did not turn any over, Figler did what any other defense attorney would do and took them at their word that none existed.[134] And the only diligence Garcia has to show relates to how quickly he filed his state post-conviction petition after uncovering the suppressed evidence. *See Huebler*, 128 Nev. at 198 & n.3, 275 P.3d at 95 & n.3. Because he filed within four months,[135] he satisfied the only relevant diligence requirement.

3. Conclusion

The district court erred in finding that Garcia had not proven suppression. The relevant considerations were whether those acting on the government's behalf possessed the reports and whether they were disclosed to the defense. It cannot be seriously disputed that the CCSDPD was acting on the government's behalf. And Figler testified the State never disclosed the CCSDPD reports to the defense,[136] which is

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[133] I.App.170–71.

[134] X.App.2099–2100.

[135] *See* VIII.App.1668 ¶6, 1669.

[136] X.App.2100.

undisputed. Garcia therefore established suppression and thus good cause to overcome the procedural bars.

B. Garcia established the suppressed evidence was material under *Brady*, thus proving prejudice to excuse the procedural defaults.

In order to satisfy the materiality prong of *Brady*, Garcia had to show either a reasonable possibility or a reasonable probability the suppressed evidence would have affected the outcome of his trial. The former standard applies "[i]n Nevada, after a specific request for evidence." *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). As explained above, the defense requested all reports prepared by any law enforcement agency, which included the CCSDPD. The reasonable possibility standard therefore applies.

The latter standard applies when "a defendant makes no request or only a general request for information." *Bennett*, 119 Nev. at 600, 81 P.3d at 8. If this Court instead concludes Garcia must meet the reasonable probability standard, Garcia has to show confidence in the trial is undermined. *See Kyles*, 514 U.S. at 434. He can meet either standard.

In order to rule that Garcia had not shown materiality under *Brady*, and so failed to establish prejudice to overcome the procedural bars, the

court ignored Garcia's actual materiality argument. Garcia's main materiality argument is that Graves was the non-interested witness who excluded the prime alternate suspect, Giovanni, as the shooter. However, the suppressed reports reveal she gave a prior inconsistent statement that shows she did not have a good memory for the suspect at any point, and in particular at the time of trial. With this evidence the defense would have been able to impeach her and cast doubt on the quality of her memory and, thus, her exclusion of Giovanni. Without Graves's exclusion, the defense that Giovanni was the real shooter becomes compelling and there is a reasonable possibility or probability that at least one juror would have voted to acquit Garcia.

1. The evidence implicated Giovanni as the shooter.

The trial centered on whether the State had identified the correct person as the shooter. Figler testified at the evidentiary hearing that the defense was misidentification.[137] A key alternate suspect was Giovanni because there was a great deal of evidence inculpating him. He started the fight at the school that ended in the shooting, and he called fellow

[137] X.App.2103.

gang members to back him up in the fight.[138] On the night of the shooting, there were twenty calls between Giovanni and Lopez.[139] The gun used belonged to Lopez.[140] Lopez was the one who went back to try to retrieve the gun from where it was hidden.[141] And the location where the gun was stashed was a construction site where Lopez had previously worked.[142]

Detective Mogg testified that a witness told him he heard someone yell Giovanni had a gun before hearing gunshots.[143] Crystal Perez also initially identified Giovanni as the shooter, though she later retracted this.[144] And Melissa Gamboa initially stated the shooter was wearing a black sweatshirt. [145] Giovanni was seen wearing black.[146]

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[138] *See* II.App.355–56; III.App.627–28.

[139] VI.App.1102–03.

[140] VI.App.1133.

[141] VI.App.1135.

[142] IV.App.906.

[143] VI.App.1129.

[144] III.App.635.

[145] Hrg. III.App.668–70. Although Gamboa later identified Garcia, the identification was not reliable, as explained above in the Statement of the Facts.

[146] III.App.610, 631.

Even the evidence used against Garcia cast suspicion on Giovanni. The case against Garcia rested in large part on the testimony of gang members looking out for each other instead of Evaristo, who was not a member of the gang.[147] Only two witnesses who actually knew Garcia implicated him as the shooter: Jonathan Harper and Edshell Cavillo. The State argued at the evidentiary hearing, as they had at trial, that these identifications were strong evidence of Garcia's guilt.[148] But they were both flawed witnesses whose testimony suggests it was influenced by the gang.

Harper had been shot in the head by fellow gang member Salvador Garcia.[149] Salvador and Giovanni are brothers.[150] Before he was shot, Harper did not implicate Garcia in the shooting.[151] Only after he was shot by Salvador did Harper claim Garcia's involvement, at which point

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[147] *See* III.App.478; X.App.2104.

[148] *See* X.App.2123, 2127, 2144.

[149] *See* IV.App.799.

[150] *See* II.App.193.

[151] *See* IV.App.774, 776–77, 779, 781, 790–91, 796–97.

Garcia became a suspect for the first time.[152] And at trial, Harper's testimony contradicted some of the forensic evidence, such as how many shots hit Gamboa.[153] Therefore, Harper only implicated Garcia after Salvador, Giovanni's brother, shot him in the head, at which point he was suffering from brain damage[154] and offered testimony that did not line up with all of the evidence.

Cavillo, another gang member, only blamed Garcia for the crime after Giovanni was arrested.[155] Cavillo had previously lied about Harper's shooting at the direction Salvador.[156] Cavillo testified he had considered Salvador family.[157] It is a reasonable inference that Cavillo was again lying at the behest of Salvador in order to save Giovanni. Garcia was not in the gang and was in special education classes.[158] It was therefore easy to pin the shooting on him in order to protect Giovanni.

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[152] IV.App.874; V.App.1108.

[153] *See* IV.App.766, 851–52.

[154] *See* V.App.1234–47.

[155] III.App.477; VI.App.1112.

[156] III.App.475–76.

[157] III.App.460.

[158] *See* III.App.478, 490.

2. Betty Graves absolved Giovanni, but the suppressed reports cast doubt on her testimony.

The State agreed that Giovanni was involved in the shooting, and he pleaded guilty to conspiracy to commit murder.[159] However, there was one impartial witness at Garcia's trial who removed Giovanni from consideration as the shooter: Betty Graves. She testified she knew Giovanni from school and he was not the shooter.[160] Graves was presented as an impartial, reliable witness, and she went unimpeached.[161] This testimony undermined the defense's ability to present Giovanni as an alternate suspect.

The suppressed CCSDPD reports, however, show Graves's exclusion is likely not accurate. They provide Graves's first documented description of the shooter. She stated he "was a dark skin Hispanic male with short hair wearing a [gray] hoodie and dark pants. She also advised that the suspect had a moustache and was of medium build and approx[imately] 5-7"."[162]

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[159] *See* IX.1855 (discussing Giovanni's plea).

[160] III.App.584.

[161] *See* III.App.584–85.

[162] I.App.31.

This report revealed for the first time that Graves gave inconsistent descriptions of the shooter. For example, in the CCSDPD reports, she described the suspect as having a medium build,[163] but testified he was "heavy set."[164] Graves also described the suspect as having a moustache in the CCSDPD report, but not thereafter.[165] Similarly, she described the suspect as having dark skin in the CCSDPD report, but not again.[166] Finally, at trial Graves described the suspect as "the strangest looking young man," but had not similarly described him before.[167]

Dr. Pezdek explained these inconsistencies between Graves's initial description of the shooter and her later descriptions suggest both that her initial memory of the shooter was weak and her memory deteriorated over time. Her description was not likely to be accurate initially and then was even less so at the time of trial.[168]

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[163] *Id.*

[164] III.App.587.

[165] I.App.31.

[166] *Id.*

[167] III.App.576.

[168] *See* IX.App.2003–08; X.App.2073, 2080–81.

This finding is supported by the specific psychological factors Dr. Pezdek looks at when evaluating an eyewitness's testimony. She identified eleven factors as impacting Graves's testimony.[169] Several factors—exposure duration, distraction, distance and lighting, weapon focus, cross-race identification, disguise, familiarity of the perpetrator, and stress—suggest Graves's initial memory of the shooter was weak.[170] She viewed him briefly, from a distance, at night, amidst a chaotic scene.[171] She was focused on his hand because she thought he was holding a gun, which would have diminished her ability to see his face clearly enough and long enough to form a good memory.[172] This was a cross-racial description and the suspect may have had part of his head covered, both of which make identifications less reliable.[173] The remaining factors—time delay, memory as a reconstructive process, and post-event contamination—suggest Graves's initial, weak memory was

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[169] IX.App.1990; X.App.2055.

[170] *See* IX.App.1991–98, 2008–09; X.App.2058–74.

[171] *See* I.App.31, 36–38, 44; III.App.549, 575–78.

[172] I.App.37, 39, 45; III.App.576–77, 580; IX.App.1995; X.App.2066–67.

[173] IX.App.1995–96; X.App.2067–69; *see also* I.App.31, 35, 41; III.App.578–79.

even less likely to be accurate years later when she testified at trial due to the passage of time and information she learned from other sources.[174]

Moreover, Graves had another documented error in her memory. Graves was shown a series of photographs, including one of Garcia. Under his picture she wrote "attend Sunset."[175] Garcia did not, however, attend Morris Sunset Academy. Graves therefore mistook him for someone else.[176] The fact there was one such memory error—the misidentification of Garcia as a familiar student—makes another error more likely.[177] Ultimately, Dr. Pezdek concluded if Graves "never saw the shooter clearly to begin with, her ability to match her perception of the shooter with any other suspect—whether to confirm a match or, in the case of Giovanni Garcia, to disconfirm a match—would be dubious."[178]

Next, Figler's testimony made clear why the CCSDPD reports would have mattered at trial. As he explained, Graves "excluded"

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[174] *See* IX.App.1998–2003; X.App.2074–79.

[175] I.App.165.

[176] *See* IX.App.1997.

[177] *See* X.App.2071–73.

[178] IX.App.2004; *see also* X.App.2081–82.

Giovanni as an alternate suspect, and presenting alternate suspects "was the theory of defense."[179] He viewed Graves as "the trickiest witness" for the defense to grapple with.[180] Because she presented well to the jury and was impartial, he had nothing with which to effectively impeach her.[181] Figler testified Graves:

> was able to, essentially, take away one of our prime alternative suspects that we were pushing the jury towards. And she did it in a very folks and pleasant demeanor in which it would have been virtually—it was—it would have been very hard for us to beat up on her or to, in any way, sort of diminish her impact more than the very light cross-examination that I did. And I did a very light cross-examination, because I didn't have anything hard or fast to sort of take Ms. Graves and make her a defense witness.[182]

With the reports, he would have been able to impeach Graves and cast doubt on the quality of her memory and exclusion of Giovanni. Therefore, with the CCSDPD reports, the defense could have convincingly argued that Giovanni was the shooter. Because of the importance of Graves's

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[179] X.App.2128.

[180] X.App.2104–05.

[181] X.App.2105.

[182] *Id.*

testimony as the disinterested, reliable witness to exclude the prime alternate suspect, Garcia proved materiality.

3. The district court's materiality ruling is unsupportable.

The court dismissed Garcia's materiality argument by ignoring it. Instead of engaging with the argument laid out above, the court found Garcia had not proven materiality because the police reports showed that Graves excluded the detained suspect and because, "most importantly, Ms. Graves never identified Petitioner at trial."[183] Both of these reasons ignore Garcia's entire argument that it was Graves's exclusion of Giovanni that needed to be impeached and could have been with the suppressed reports.

Moreover, the fact that there was another alternate suspect who was detained by police because he matched the description of the shooter would have sown seeds of doubt with the jury. He was excluded only by Graves, whose initial perception of the shooter was weak, and so also could have been presented as a potential alternate suspect. The location at which school police stopped this suspect was highly probative—it was

[183] X.App.2235.

in the direction witnesses saw the shooter flee and was just past the location the shooter stashed the murder weapon.[184] That Graves excluded this suspect at the scene therefore does not mean he could not have been presented as an alternate suspect.

The court tried to bolster its ruling by pointing to the supposed strength of the State's case.[185] But the State's evidence that Garcia was involved and was in fact the shooter actually was weak. The court here relied primarily on the testimony of Harper and Cavillo,[186] but their testimony was suspect, as outlined above. The court also pointed to the fact that several witnesses testified the shooter was wearing a gray hoodie.[187] But no impartial witness testified Garcia had been wearing a gray hoodie.[188] The court finally relied on the fact that Garcia's fingerprints were found on the gun.[189] But the evidence established

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[184] *See, e.g.*, III.App.568–69; VIII.App.1661.

[185] X.App.2235–36.

[186] X.App.2236.

[187] X.App.2235.

[188] *See* IV.App.762 (Harper testifying Garcia was in gray hoodie).

[189] X.App.2236.

Garcia likely had held this gun on occasions prior to this shooting. Moreover, although Garcia's right ring fingerprint was found on the gun, its placement was in an unusual spot, on the top of the grip.[190] The part of the grip that would have been held by the shooter, the textured part, did not yield any fingerprints.[191] Additionally, Garcia was excluded for the fingerprint taken from the toilet where the gun was stashed.[192] Therefore, when the State presented evidence that Garcia's fingerprint and palm print were on the gun, it proved only what no one was disputing: that Garcia has held this gun at some point in time.[193] It did not prove he fired it.

The verdict also shows the weakness of the State's case. The gang enhancement was dropped mid-trial.[194] Then Garcia was convicted of second-degree murder instead of first-degree murder.[195] Figler testified

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[190] V.App.1196, 1210.

[191] V.App.1213.

[192] V.App.1199.

[193] *See* II.App.202–03.

[194] *See* VII.App.1504 (discussing gang enhancement).

[195] *See* VII.App.1491; X.App.2103.

the second-degree murder conviction was a kind of "compromise verdict that was not supported by either side's theory."[196] If the jury had believed the State's theory that Garcia shot the victim with premeditation and deliberation, then Garcia would have been guilty of first-degree murder.[197] The jury also rejected the State's argument that Garcia conspired with others to commit murder.[198] In the words of the trial judge, now-Justice Silver, this was "obviously not the strongest case that we see in the criminal justice system."[199]

Finally, the court discounted Dr. Pezdek's opinion and her importance to the materiality analysis by misstating her testimony. The court first stated that Dr. Pezdek "could not apply her research" to this case specifically because information that would have been probative of particular psychological factors was not gathered at the time of the crime.[200] But Dr. Pezdek explained the factors she identified "were

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[196] X.App.2103.

[197] *See id.*

[198] *See* VII.App.1490; X.App.2102–03.

[199] *See* VIII.App.1680 (quoting 8/1/13 Tr. at 15).

[200] X.App.2234.

certainly present in this case"; the missing information "would have clarified the full extent to which they impaired the accuracy of Ms. Graves's memory."[201]

Next the court discounted Dr. Pezdek's testimony because she did not testify "to a reasonable degree of medical or psychiatric certainty or even probability that Ms. Graves misidentified" Garcia.[202] Again, Graves never identified Garcia, which the court acknowledged in the same paragraph.[203] Garcia's argument is that her exclusion of Giovanni was impeachable based on the condition of her memory.

Third, the court faulted Dr. Pezdek for not offering an opinion about Graves as a witness,[204] but she explained that she offers an opinion about the reliability of memory and identification specifically and not of a witness in general.[205] Lastly, the court discounted Dr. Pezdek's expert

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[201] IX.App.1989; *see also* X.App.2065–66.

[202] X.App.2234.

[203] X.App.2235.

[204] X.App.2234.

[205] X.App.2056–57, 2090–91.

opinion because she did not review the entire trial record.[206] But Dr. Pezdek was evaluating only the reliability of Graves's memory; she was not tasked with assessing the importance of Graves's testimony in the context of other evidence at trial.[207] The court's reasons for not valuing Dr. Pezdek's expert opinion are unsupported by the record.

4. Conclusion.

In order to rule Garcia had not proven materiality, the court largely ignored his materiality argument and took testimony from the evidentiary hearing out of context. Garcia showed that with the suppressed CCSDPD reports Graves and her memory of the shooter could have been impeached. This means her exclusion of Giovanni Garcia as the shooter would have been undermined and because she was the disinterested witness to exclude him, he would have become a viable alternate suspect.

II. Garcia proved his *Brady* claim and so is entitled to relief.

Because the showing of good cause and prejudice is co-extensive

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[206] X.App.2234–35.

[207] *See* X.App.2095.

with suppression and materiality under *Brady*, once Garcia has overcome the procedural default of his claim, he only needs to prove the final prong: that the suppressed evidence was favorable to the defense. "Any evidence that would tend to call the government's case into doubt is favorable for *Brady* purposes." *Milke*, 711 F.3d at 1012. This includes impeachment evidence. "Such evidence is evidence favorable to an accused, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676 (internal citations and quotations omitted).

As explained above, the suppressed CCSDPD reports could have been used to impeach Graves and her exclusion of Giovanni. Figler confirmed as much at the evidentiary hearing.[208] That the evidence is favorable to the defense therefore cannot be seriously disputed. Indeed, the district court made no separate favorability finding, instead collapsing the favorability and materiality prongs of *Brady*.[209] Because Garcia proved that the State failed to disclose favorable, material

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[208] *See* X.App.2097–2132.

[209] *See, e.g.*, X.App.2230 (explaining CSDPD reports were "neither exculpatory nor material").

evidence, he proved the merits of his *Brady* claim in addition to good cause and prejudice to overcome the procedural bars. Accordingly, he is entitled to relief.

III. The district court violated Garcia's constitutional rights by adopting the State's order as its own.

Following the evidentiary hearing, the district court entered a minute order stating in full: "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."[210] After this order, Garcia filed a motion requesting the court write its own order instead of delegating the responsibility to the State.[211] However, on November 18, 2020, the court filed a Findings of Fact, Conclusions of Law, and Order that was drafted by the State.[212] The State never provided Garcia with a copy before it submitted. Instead, Garcia saw it for the first time when the court filed a signed copy.

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[210] X.App.2150 (original capitalization).

[211] X.App.2151–62.

[212] X.App.2163–84. The court later refiled the same document on December 2, 2020, though Garcia does not know why. *See* X.App.2191–2214.

On December 10, 2020, the hearing on Garcia's motion proceeded. The court rescinded the order and ruled it would issue its own findings of fact and order.[213] On January 20, 2021, the court filed a new Findings of Fact, Conclusions of Law, and Order. It is materially indistinguishable from the one prepared by the State.[214] Therefore, although the court in the end filed a new order, it in fact adopted the one written by the State, violating Garcia's constitutional rights.

The initial minute order denying Garcia's petition referred only to "input from counsel," not even recognizing the evidentiary hearing held on September 21, 2020, on the merits of Garcia's *Brady* claim or the three witnesses who testified. The district court needed to make findings of fact regarding the testimony—something only the trier of fact can do. Thus, the court should have written the order itself instead of adopting the State's order. Such assignment of its judicial function to a member of the executive branch violates the Nevada Constitution's explicit separation-of-powers clause, in addition to the separation-of-powers

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[213] X.App.2186–90.

[214] X.App.2217–37.

principle from the federal constitution applied to the states through the Fourteenth Amendment. On top of that, such abdication of judicial responsibility violates the Due Process Clauses of the State and Federal Constitutions. But even if the Court could assign such duties to a party, especially the party that was the subject of the *Brady* claim at issue, it could not do so here because the court did not provide any guidance regarding its decision, as required by *Byford v. State*, 123 Nev. 67, 69–70, 156 P.3d 691, 692–93 (2007). Practically, prevailing-party-drafted orders rarely represent the neutral findings and holdings to which the losing party is entitled. This case is a perfect example of that. To date, no court has issued findings of fact following the testimony of three witnesses at an evidentiary hearing because the findings in the operative order were manufactured by the same party that violated *Brady*.

A. Those charged with the exercise of executive powers "shall not" exercise any function appertaining to the judicial branch—that is, prosecutors may not draft judicial orders.

Under the Nevada Constitution, persons charged with carrying out powers of the executive branch of the Nevada government, such as respondents and the attorneys of the Clark County District Attorney's

Office, may not perform judicial functions, such as drafting judicial orders. Nev. Const. art. 3 §1 cl. 1. It is nonetheless common practice in certain judicial districts in this state for prevailing parties to be ordered to draft the final Findings of Fact, Conclusions of Law, and Order. But it should not be—this practice is roundly criticized and rejected around the United States. "The cases admonishing trial courts for the verbatim adoption of proposed orders drafted by litigants are legion." *In re Colony Square Co. v. Prudential Insurance Co. of America*, 819 F.2d 272, 274–75 (11th Cir. 1987) (*citing, inter alia*, *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 571–72 (1985)); *cf. Alcock v. SBA*, 50 F.3d 1456, 1459 n.2 (9th Cir. 1995) ("Findings of fact prepared by counsel and adopted by the trial court are subject to greater scrutiny than those authored by the trial judge.").

Whatever the arguable merits of such a practice in other areas of law, the Nevada Constitution outright forbids this practice when the prevailing party and/or counsel for the prevailing party is a person or entity who exercises powers of the executive branch of the Nevada government, such as respondents and the attorneys of the Clark County District Attorney's Office. The Nevada Constitution contains an explicit

and straightforward separation-of-powers clause. Article 3 states that the powers of the government "shall be divided into three separate departments," the executive, legislative, and judicial, and "no persons charged with the exercise of powers belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution." Nev. Const. art. 3 §1 cl. 1.

Nevada's founders did not trust the members of the legislative and executive branches to carry out the powers of the judicial branch. This Court has explained why:

> [T]here can be no liberty . . . if the power of judging be not separated from the legislative and executive powers . . . .Were the power of judging . . . joined to the executive power the judge might behave with all the violence of an oppressor.

Galloway v. Truesdell, 83 Nev. 13, 19, 422 P.2d 237, 241 (1967) (quoting Montesquieu). Although the court in *Galloway* was discussing the inverse of the problem here—the judiciary usurping executive powers—the same logic applies to this situation. The founders intended to prevent the risk of oppression they foresaw by permitting the executive and judicial powers to reside in the same person or entity. Therefore, Section 1 of

Article 3 of the Nevada Constitution expressly forbids it.

The founders of the federal constitution also feared and sought to foreclose the centralization of power in a single, potentially-flawed entity. Therefore, they separated the three major functions of government into distinct branches. Separating powers like this allows each branch to serve as a check on the other and is a necessary means to keep the three branches of government "in their proper places." Federalist No. 51 (Hamilton or Madison). This structural design of the federal and Nevada constitutions was vital to the founders of each because it places structural barriers on the power of those governing who, after all, are merely human; "If angels were to govern men, neither external nor internal controls on government would be necessary." *Id.*

It goes without saying that respondents and the Clark County District Attorney are persons charged with the exercise of executive powers. Their function is not to legislate nor adjudicate cases and controversies. Rather, they are charged with the "executive power," which the Nevada Supreme Court has defined as the power of "carrying out and enforcing the laws enacted by the legislature." *Del Papa v. Steffan*, 112 Nev. 369, 377, 915 P.2d 245, 250–51 (1996) (citation and

quotation marks omitted). This is exactly what respondents and the District Attorney do.

Yet drafting a judicial order, especially those containing specific findings of fact, conclusions of law, and case-ending adjudications, is a quintessential *judicial* function. *See id.* This Court has defined the "judicial power" as the authority to "hear and determine justiciable controversies," and to "enforce any valid judgment, decree, or order." *Id.* (quotation marks and citation omitted). To this end, judging is not just the act of declaring winners and losers—crucial to its functioning, a court must do much more. Namely, in order to "hear and determine justiciable controversies," the court must first make findings of fact, decide upon the law, and apply the law to those facts. And in Nevada, it is by the *written* order that judges complete these judicial functions: "an oral pronouncement of judgment is not valid for any purpose; therefore, only a written judgment has any effect." *Div. of Child & Family Servs., Dep't of Human Res., State of Nevada v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 120 Nev. 445, 452, 92 P.3d 1239, 1243–44 (2004) (alteration, internal quotation marks, citation omitted). Thus, it is true in Nevada as it is elsewhere: "Judicial opinions are the core work-product of judges."

Bright v. Westmoreland Cnty., 380 F.3d 729, 732 (3rd Cir. 2004).

Yet "[w]hen a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions." *Id.; see also Chicopee Mfg. Co. v. Kendall Co.*, 288 F.2d 719, 724–25 (4th Cir. 1961) (criticizing a district court's adoption of an opinion prepared by the prevailing party as "the failure of the trial judge to perform his judicial function"). That is, "[t]he quality of judicial decision making suffers when a judge delegates the drafting of orders to a party; the writing process requires a judge to wrestle with the difficult issues before him and thereby leads to stronger, sounder judicial rulings." *In re Colony Square*, 819 F.2d at 275; *accord Cuthbertson v. Biggers Bros., Inc.,* 702 F.2d 454, 458–59 (4th Cir. 1983) (explaining the court has repeatedly condemned "the practice of adopting the prevailing party's proposed findings of facts and conclusions of law"); *see also In re Discipline of Schaeffer*, 117 Nev. 496, 502, 25 P.3d 191, 195–96 (2001) (per curiam) (disbarring an attorney in part for submitting a proposed order that contradicted a prior oral ruling). This is especially true where, as here, the court did not provide any guidance to the State about what to put in the order before the State drafted it and the court ultimately adopted it.

Having judges draft judicial opinions is important in a material way, not simply in the abstract. The exact language a court settles upon for resolution of the factual and legal issues before it may impact the life, liberty, and property interests of the parties far beyond the "win" or "loss" designation at the end of the order. For instance, exactly how factual findings are worded may mean affirmance or reversal on appeal and may impact future proceedings and cases by operation of res judicata. *See, e.g.*, *Jackson v. Groenendyke*, 132 Nev. 296, 300, 369 P.3d 362, 365 (2016) ("This court reviews a district court's factual findings for an abuse of discretion and will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence.") Or if a petitioner needs to proceed to the federal judiciary after the conclusion of his state-court litigation, the specific wording of the state court's findings of fact and legal conclusions may be entitled to deference in the federal courts. *See* 28 U.S.C. § 2254(d). Thus, the specific language of the court's order may affect a petitioner's liberty for the rest of his life. This is why the act of drafting the judicial order is a judicial function and should not be left to a motivated party to complete.

This case is a prime example of why the Nevada founders feared

allowing the executive branch to perform judicial functions. While the judiciary's interest is in determining the truth, it is easy to see how a prosecutor—an agent of one of the political branches of government, who is also operating in an adversarial legal system—may instead be pressured or motivated to draft a judicial order in such a way that best protects the prosecutor's "win" from reversal, as opposed to simply writing nuanced factual findings in a way that best reflects a neutral arbiter's view of the evidence. This especially a concern here because the claim at issue is a *Brady* claim involving the very prosecutors who drafted the court's order.

Ordering the same prosecutors who were the subject of Garcia's *Brady* claim to draft the judicial order in this case is unconstitutional, in direct contradiction with the express prohibition of executive branch personnel performing judicial functions found in Article 3, Section 1 of the Nevada Constitution, and also in violation of the separation-of-powers doctrine inherent in the federal constitution, imposed upon the states by incorporation into the Fourteenth Amendment. The separation-of-powers requirement is vital to our system of constitutionally-limited government—it does not yield to the day's

demands of expediency. Regardless of whether this practice is endorsed by local rule or common practice, it is unconstitutional.

B. Prevailing-party-drafted orders violate due process.

On top of the separation-of-powers problem, the district court adopting the order drafted without guidance by the prosecutors violated the Nevada and federal due process clauses. Nev. Const. Art. 1 Sec. 8(2); U.S. Const. amend. XIV. It denied Garcia his right to have his case decided by a neutral and detached magistrate—including the right to one that *appears* neutral—as is otherwise guaranteed by the state and federal constitutions. This is particularly true where, as here, the court did not articulate any findings or conclusions of law to guide the State in drafting the order.

Further, the quality of judicial decision making suffers by this process. The United States Supreme Court has "criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties." *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985). Many decades ago, the Supreme Court stated:

> Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign

> them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules.

United States v. El Paso Natural Gas Co., 376 U.S. 651, 656 n.4 (1964); *see also United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 615 n.13 (1974) (noting that the lower court's verbatim adoption of the prevailing party's proposed findings of fact "failed to heed this Court's admonition voiced a decade ago").

The United States Supreme Court is only one of a chorus of courts admonishing this practice. For instance, the Third Circuit stated, "Judicial opinions are the core work-product of judges . . . . When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions." *Bright*, 380 F.3d at732. Similarly, the Fourth Circuit has criticized a district court's adoption of an opinion prepared by the prevailing party as "the failure of the trial judge to perform his judicial function." *Chicopee Mfg. Co.*, 288 F.2d at 724–25.

While the federal judiciary has not held this practice to be unconstitutional, the concerns about this practice the federal judiciary has raised for decades represent the exact reasons why this practice is,

indeed, a denial of due process. Due process requires a case or controversy to be resolved by an impartial tribunal. And beyond the requirement of *actual* neutrality, due process requires the tribunal to *appear* neutral. *See Marshall v. Jerrico*, 446 U.S. 238, 242 (1980).

The written order is the central, core work-product of the judiciary. Indeed, the Nevada Supreme Court gives legal effect to the written order only—in this state, it is the only source to find the Court's final conclusions about a case. *See Div. of Child & Family Servs.*, 120 Nev. at 452, 92 P.3d at 1243–44. It is through only the written order, then, that the public and future courts scrutinize the proceedings in the district court. And this review is critical to the vitality and reliability of a well-functioning court system. But when a final order is drafted by one of the parties—as opposed to the court itself—the appearance of neutrality that due process requires is undermined. This is never more true than under these circumstances, in which the court provided no guidance on the contents of the order, which was drafted by prosecutors who were the subject of the *Brady* claim at issue. Thus, allowing a prevailing party to draft a final order is a denial of due process.

C. The court's adoption of the State's order goes against the requirements of *Byford v. State*.

Aside from the constitutional implications of the court's adoption of an order the State wrote without any guidance by the court, the court's actions went against this Court's ruling in *Byford v. State*, 123 Nev. 67, 156 P.3d 691 (2007). In *Byford*, the Court held that a district court erred when it adopted a proposed order that was not founded in the court's rulings and findings of fact and conclusions of law. *See id.* at 69–70, 156 P.3d at 692. The Court explained that "the district court must make a ruling and state its findings of fact and conclusions of law before the State can draft a proposed order for the district court's review." *Id.* at 69, 156 P.3d at 692.

The district court failed to do so here. The initial minute order denying Garcia's petition offered no supporting reasoning.[215] The State then prepared an order before hearing from the court again. The State therefore came up with its own reasons for denying Garcia's petition. When the court finally issued its own order, it was materially

[215] X.App.2150.

indistinguishable from the State's order.[216] Therefore, this was an exercise in form over substance. Although the court filed the order itself, it was drafted by the State. The court attempted to sidestep this issue by including the following disclaimer: "The Court acknowledges it's [sic] 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."[217] This does not cure the constitutional issues here. Nor does it comply with the spirit of *Byford*.

This case shows why the *Byford* procedures are important. The order the State drafted was at odds with signals from the court about how it viewed the case. For example, the court ordered an evidentiary hearing on the merits of Garcia's *Brady* claim,[218] but the ultimate order denied the petition on procedural grounds.[219] Additionally, as mentioned above, some of the factual findings conflict with the court's observations at the

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[216] *Compare* X.App.2163–84, *and* X.App.2191–2214, *with* X.App.2217–37.

[217] X.App.2218.

[218] *See* IX.App.1845 (granting hearing "to hear evidence on the merits of petitioner's post-conviction claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963)").

[219] *See* X.App.2217–37.

hearing. Crucially, the court's questioning suggested that it viewed the CCSDPD as part of the investigation, which would mean the prosecution had a duty to disclose its reports: "[T]hey definitely got involved. They did a report . . . I mean, it's not like they just said, Well, there's a gang shooting, we'll wait for metro . . . We're just going to keep our heads down in our car. They went out and actually did a report." [220] However, the order reasoned that Garcia had not proven suppression in part because the CCSDPD is not a state actor, as discussed above. Because the court made no ultimate findings, it left the State to make its own with no guarantee that the State's order reflected the court's opinion.

In the end, after granting Garcia's motion and ruling that it would draft its own order denying Garcia's petition, it simply adopted the order the State drafted. The State's order was drafted without any guidance from the court. This procedure is effectively the one disallowed by this Court in *Byford*.

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[220] *See* X.App.2143.

IV. Conclusion

The State violated Garcia's due process rights because it did not disclose favorable, material evidence in the form of reports from the Clark County School District Police Department. These reports revealed that a key State witness had provided an early description of the shooter that differed from her later description. This information would have allowed the defense to impeach this witness and her exclusion of the prime alternate suspect as the shooter.

Instead of recognizing that Garcia presented a winning claim, the district court ruled, in an order essentially drafted by the State, that Garcia had failed to show suppression and materiality under *Brady*. Therefore, the court ruled Garcia had not shown cause and prejudice to overcome procedural bars. The court's ruling was unsupported by the law and the record. This Court should reverse the district court's denial of Garcia's petition.

Dated May 3, 2021.

Respectfully submitted,

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1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14 point font: or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is either:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate

Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated May 3, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2021, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

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

/s/ Jessica Pillsbury
An Employee of the
Federal Public Defender