No. 80255

IN THE NEVADA SUPREME COURT

Evaristo Jonathan Garcia,

Petitioner-Appellant,

v.

James Dzurenda, et al.

Respondents-Appellees.

On Appeal from the Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District, Clark County (A-19-791171-W)
Honorable David M. Jones, District Court Judge

Petitioner-Appellant's Appendix in Support of Brief
Volume 8 of 10

Rene Valladares
Federal Public Defender,
District of Nevada
*Emma L. Smith
Amelia L. Bizzaro
Assistant Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Emma_Smith@fd.org

*Counsel for Evaristo Garcia

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Dated May 3, 2021.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ Emma L. Smith
Emma L. Smith
Amelia L. Bizzaro
Assistant Federal Public Defender

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

EVARISTO GARCIA, Appellant, vs. THE STATE OF NEVADA, Respondent.	CASE NO. 64221

APPELLANT'S REPLY BRIEF

(Direct Appeal from Judgment of Conviction – Jury Verdict)

ROSS GOODMAN, ESQ.
Nevada Bar No. 007722
Goodman Law Firm
520 S. 4th Street
Las Vegas, NV 89101
(702) 384-5563

Attorney for Appellant

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the District Attorney
200 South Third Street - 7th Floor
Las Vegas, NV 89155
(702) 671-2750

CATHERINE CORTEZ-MASTO, ESQ.
Attorney General
Nevada Bar No. 003926
555 E. Washington Ave., #3900
Las Vegas, NV 89101
(702) 486-3420

Attorneys for Respondent

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APPELLANT'S REPLY BRIEF

I. CORRECTION OF MATERIAL FACTS INCORRECTLY REPRESENTED IN THE ANSWERING BRIEF

The State in its Answering Brief makes two obviously incorrect statements of fact that are material to the averments of error by the Appellant, Evaristo Garcia (hereinafter "Evaristo").

A. THERE WERE NOT OTHER PEOPLE IN THE JURY BOX WHEN MS. GAMBOA SAW THE DEFENDANT NOR DID SHE IDENTIFY HIM WHILE SITTING IN THE JURY BOX WITH OTHER DEFENDANTS.

Foremost, the State claims at multiple points in its Answering Brief that Melissa Gamboa was able to identify Evaristo at the preliminary hearing under circumstances that were lacking in the indicia of improper and excludable suggestiveness. Specifically, the State indicates "Gamboa's pre-trial identification of Appellant was not unduly prejudicial because she identified Appellant while he was sitting in the jury box with other defendants." (Answering Brief, page 12).

Unsurprisingly, this "fact" is not in the Statement of Facts, nor is there a record citation. Later in the brief, the State suggests "The court *found* that the preliminary hearing identification was not unduly suggestive because Gamboa first recognized Appellant while he was sitting in the jury box with other in-custody defendants, nobody talked to her about who he was, and there was a reliable basis for the identification based on her statement to police that she saw him, could identify him, and described what he was wearing." (Answering Brief, Page 20). This time, the State cited Volume II of the Appellants Appendix, Page 253 for this proposition; however, a reading of the citation offers no such support because it is patently incorrect.

First, the trial court only indicated as the record supports that after Ms. Gamboa had already testified under oath that the only person who was in custody was the shooter, she later testified on re-direct that she also recognized Evaristo while he was in the jury box awaiting the case to be called moments earlier. Secondly, it has *never* been established that there were "other in-custody defendants" in the jury box and the Court never ruled that there were other in-custody defendants in the jury box. The Answering Brief just presents that salient and vital fact as true when, in fact, there is no evidence whatsoever in the record.

It seems a review of what happened at the preliminary hearing is appropriate. Ms. Gamboa did indeed testify at the preliminary hearing that

occurred almost three years after the incident. (I AA 60). The entire direct examination concerning identity of the shooter was boiled down to two questions: what was he wearing on the day in question (A: grey hoodie) and do you see him here in court (A: "He's in custody, wearing blue"). (I AA 63). Ms. Gamboa also mentioned the very quick and sudden timeframe when her brother was unexpectedly shot. (I AA 62-64). There is no mention of seeing Evaristo in the jury box or identifying him with other people around.

On cross-examination, Ms. Gamboa admitted that the description of Evaristo that she had given the police almost three years earlier, and closer in time to the shooting did not match the description of Evaristo Garcia. (I AA 66). She also claimed that she had not seen a picture of Evaristo Garcia in the interim. (I AA 66). There was no evidence that she had ever met Evaristo Garcia or knew what he looked like prior to the shooting.

On redirect examination, the State established that *prior* to Ms. Gamboa's testimony that Ms. Gamboa had entered into the courtroom and she had also "recognized" Evaristo in the front row of the jury box. I AA 66. This was the only thing established by the State. In sum, the State asked in addition to just identifying Evaristo at counsel table, did you also recognize him earlier when he was sitting in the jury box; and after she had already identified him at counsel table, she said yes.

Of important note, there is no indication whatsoever in the record that there was anyone but Evaristo Garcia in the courtroom in blue or in custody.

B. THERE WAS NEVER A FINDING THAT "PUROS LOCOS" WAS A GANG AND THE STATE NEVER HAD RELIABLE INFORMATION THAT EVARISTO GARCIA WAS IN A GANG

In its Answering Brief, the State indicates "There was also no prosecutorial misconduct regarding the State's decision to bring a gang enhancement since it was supported by the facts and was correctly withdrawn after an adverse ruling." (Answering Brief, page 13). The State also suggests that there should be no finding of prejudice since "The gang enhancement was a viable charge until Appellant successfully argued that the State should be precluded from calling a gang expert to testify. (Answering Brief page 28 citing VII AA 1361). A careful reading of that citation, however, reveals that the trial court made no ruling on the "viability" of the gang enhancement, only that the gang expert as it related tot eh Puros Locos was stricken and that the State had some ambiguous concern about proceeding. VII AA 1361. The State continues in its Answering Brief, "the district court found that the State had proceeded in good faith and that the loss of the enhancement was due to changes in the testimony of witnesses and new information not available to the State when the case was charged." (Answering Brief, pages 28-29, citing VII AA 1353-57). And while it is true that the trial court

did not find bad faith,[1] and it did comment that witnesses often "flip flop" – there was never a finding or showing that "new information" was not available to the State or what evidence the State relied upon to proceed in the first place.

The State seems to suggest in its Answering Brief that the Writ submitted by counsel provided cover for the State to proceed, though the individual averments do not rise to level of establishing Puros Locos as a gang, nor is there any mention of the so-called gang's common activities of felonious activity. (See Answering Brief, page 28, citing RA 114). Indeed, and to the extent it was not made clear in the Opening Brief, Evaristo is averring that the State never had a sufficient basis to proceed with the gang enhancement and that the trial court was in error in denying his early efforts to preclude this specious and highly prejudicial suggestion. The State attempts a second time to salvage its position by calling Puros Locos a gang, to wit: "Based on discovery, the State had reason to believe that Appellant shot Victor as a result of a gang dispute between Brown Pride and Puros Locos. Statements from Harper led the State to believe that Calvillo, Appellant, Lopez, Garcia, and Salvador Garcia were in Puros Locos. RA 69. At the preliminary hearing Harper testified that they were going to fight Brown Pride. RA 7. In a

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[1] A review of the record, however, shows that it was bad faith since there was no possible way the State could establish a gang, let alone a gang enhancement, as such and to the extent the district court ruled this was not done in the bad faith, the

recorded statement on March 30, 2006, Lopez also stated that Appellant ran with Puros Locos and was a member of a gang. RA 68." (Answering Brief, page 29). But again, calling it a "gang" does not make it a gang under the law. The State is in error after it was exposed that Puros Locos is not a gang, and that Evaristo Garcia is not a gang member from still making this argument. Indeed, all "gang" references in the Answering Brief as it relates to Puros Locos or Evaristo Garcia as quantums of proof or good faith should be stricken as they are unsupported by the record.

II. REPLY TO EACH ISSUE RAISED IN OPENING BRIEF

A. THERE WAS AN INSUFFICIENCY OF EVIDENCE TO SUSTAIN A VERDICT OF GUILT FOR SECOND DEGREE MURDER.

Evaristo hereby incorporates by reference his legal argument on this Issue set forth in the Appellant's Opening Brief, but would add that the State does not attempt to distinguish the deficiencies and the contradictions that so overwhelmed the State's case at trial, that a conviction cannot hold. Instead, the State recites numerous facts that are undisputed (the shooter wore a grey hoodie) and heavilt relies on the discredited and insufficient accomplice testimony of Jonathan Harper and Edshel Calvillo. (Answering Brief, page 15). It is agreed that numerous witnesses identified the shooter as wearing a grey hoodie and one of the witnesses,

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Appellant avers that this Court has the record to determine whether there was a bad faith basis to proceed given the known facts.

Betty Graves, testified that she stared directly into the face of the boy she attributed as the shooter, and yet she did not identify Evaristo as being that boy. (VI AA 1095-1098).

Clearly, the State chooses to ignore the quantum of evidence that makes this anything but a strong case supporting a finding of reasonable doubt. The State, again, does not attempt to counter the contradictions that Harper's testimony was wrought with, or the incredulity of Calvillo's testimony. Once the improper gang references and the weak, prior identification of Melissa Gamboa is removed all that remains is Evaristo's fingerprint on the weapon, when even the State's witnesses acknowledged that many people touched that gun. . (V AA 878, VI AA 1024, VII AA 1282). In the end, the State has done little to support uncertain references and fail to establish reasonable doubt in support that 16 year old Evaristo Garcia shot anyone. Woodall v. State, 97 Nev. 235, 236, 627 P.2d 402 (1981).

B. THE DISTRICT COURT ERRED IN ALLOWING A PRIOR SUGGESTIVE IN-COURT IDENTIFICATION WHEN THE WITNESS FAILED TO IDENTIFY THE DEFENDANT AT TRIAL

Evaristo hereby incorporates by reference his legal argument on this Issue set forth in the Appellant's Opening Brief, but would add that after the State's incorrect factual averment is corrected, it is clear that their application of Perry v. New Hampshire, ___ U.S. ___, ___, 132 S.Ct. 716, 720 (2012) is misplaced.

In sum, there is ample support for the exclusion of Melissa Gamboa weak, suggestive, prior identification of Evaristo at the preliminary hearing when she was unable to identify him at trial. Melissa Gamboa had only seen the shooter for a fleeting; she had never seen Evaristo Garcia before that night and was only able to identify him in custody in a courtroom almost three years later despite admitting that Evaristo did not fit the description of the shooter. The State suggests that cross-examination was a sufficient remedy, but this is typically true in the caselaw cited, when there is an identification. Here, the Defense had no ability to cross-examine her on why she made the bad identification in the first place because she was not endorsing it; the State was. In other words, there is no cross-examination that will sufficiently relieve the prejudice of the State's suggestion by introduction that the current lack of identification is in error, but a prior one (despite its suggestiveness) was accurate. The Defense cannot cross-examine a void – here, Ms. Gamboa was not holding on to the prior identification in ways subject to cross-examination, but the State was able to offer it anyway despite its obvious legal inadequacies. Both the State and the Defense offer Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) and Baker v. State, 88 Nev. 369, 498 P.2d 1310 (1972)) for the test as to whether "the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken

identification that (the defendant is) denied due process of law." No argument by the State's Answering Brief alters analysis of these facts in favor of the defense.

C. THE DISTRICT COURT ERRED BY ALLOWING AN INCOMPETENT WITNESS TO TESTIFY.

Evaristo hereby incorporates by reference his legal argument on this Issue set forth in the Appellant's Opening Brief, but would add that the Witness' ability to go "toe-to-toe" with the Defense Counsel (Answering Brief, page 22) is belied by the testimony of Dr. Norton Roitman (IX AA 1760-1766) which was not even addressed by the State in its Answering Brief.

D. THE DISTRICT COURT ERRED IN ALLOWING A MATERIAL WITNESS WARRANT TO ISSUE ENGENDERING SYMPATHY AND/OR CREDIBILITY FOR A STATE'S WITNESS.

Evaristo hereby incorporates by reference his legal argument on this Issue set forth in the Appellant's Opening Brief but would add that the record is devoid of the reasons why a Material Witness warrant was necessary and to the extent that this Court finds it necessary to make its full analysis, Evaristo would suggest that pursuant to **NRAP 10(c)**, the matter could be submitted to the district court to be settled.

E. IT WAS PROSECUTORIAL MISCONDUCT TO PROCEED WITH A PREJUDICIAL GANG ENHANCEMENT ONLY TO DROP IT MIDTRIAL.

Evaristo hereby incorporates by reference his legal argument on this Issue set forth in the Appellant's Opening Brief but would add that the proper factual

analysis of the record as set forth above reveals that there was never a good-faith belief that the State could prove that Puros Locos was a gang, let alone that the gang enhancement was proper or that Evaristo Garcia was in the gang. The trial court acknowledged this when it said "I don't think legally, as a matter of law, that it's even close to what is in the definition." (VII AA 1357). It is of no moment that the trial court gave "cover" to the State in suggesting that the State did not act in bad faith, the record is clear. The State never makes a sufficient record establishing these facts irrespective of the specious and improper gang expert they tried to hoist upon the jury. Further, the trial court continually makes special note of the prejudice, to wit: "At this point, I'm going to stop any *further* prejudice…." (VII AA 1357)(emphasis added). Indeed, during the vast and comprehensive analysis of its ruling, the trial court repeatedly states that there is no evidence of a gang, no evidence that Evaristo Garcia is in a gang, and prejudice. (VII AA 1356-1361). In sum, the State cannot point to any actual evidence of any of this. There was no "new information"; there were no facts, and yet the State proceeded any how to the absolute prejudice and detriment of a fair trial.

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/ / /

CONCLUSION

As a result of the error at the trial admixed with prosecutorial misconduct, the convictions must be reversed.

DATED this 8th day of December, 2014.

/s/: Ross Goodman

ROSS GOODMAN, ESQ.
Nevada Bar No. 007722
520 S. 4th Street
Las Vegas, NV 89101
(702) 384-5563

CERTIFICATE OF COMPLIANCE

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman type style; or

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 proportionately spaced, has a typeface of 14 points or more, contains no more than 7,000 words, and does not exceed 11 pages. And in fact contains 3050 words and is 10 pages.

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 this 8th day of December, 2014.

/s/: Ross Goodman
ROSS GOODMAN, ESQ.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 8th day of December, 2014, the foregoing **APPELLANT'S REPLY BRIEF** was served upon the appropriate parties hereto via the Supreme Court's notification system in accordance to the Master Service List.

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
200 South Third Street - 7th Floor
Las Vegas, NV 89155
Attorney for Respondent

CATHERINE CORTEZ MASTO, ESQ.
Nevada Attorney General
Nevada Bar No. 003986
555 E. Washington Ave., #3900
Las Vegas, NV 89101

/s/: Ross Goodman
ROSS GOODMAN, ESQ.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

EVARISTO JONATHAN GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64221

FILED

MAY 18 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Abbi Silver, Judge. Appellant Evaristo Jonathan Garcia raises five issues.

First, Garcia contends that the evidence presented at trial was insufficient to support the jury's finding of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). Numerous witnesses testified that they saw a Hispanic man of Garcia's approximate age wearing a gray hooded sweatshirt shoot Victor Gamboa during a schoolyard brawl. JH testified that he rode in a car with Garcia to the fight, that ML handed his gun to Garcia before getting into the car, that Garcia was wearing a gray hooded sweatshirt that night, that he saw Garcia shoot Gamboa in the back as Gamboa attempted to run away, and that he saw Garcia run into the neighborhood where the gun was found. EC testified that Garcia told him that he shot a boy and that he hid the gun in a toilet. A police officer testified that he found a gun in the tank of a toilet left on the curb as

garbage, one block from the school. Latent fingerprint analysis identified two prints on the gun that were matched to Garcia. Cartridge casings from the scene of the shooting matched the gun to Gamboa's shooting. We conclude that the jury could reasonably infer from the evidence presented that Garcia intentionally killed Victor Gamboa with malice aforethought. *See* NRS 200.030(2); *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975) ("[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness.").

Second, Garcia contends that the district court erred in denying his motion to suppress evidence of MG's identification of Garcia at the preliminary hearing on the ground that the identification was not reliable. We review a district court's ruling on a motion to suppress identification testimony for abuse of discretion because it is an evidentiary decision. *See Mclellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008). An in-court identification must be unnecessarily or impermissibly suggestive, creating a risk of irreparable misidentification, to warrant suppression under *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967), and this risk is less present when an identifying witness is subject to immediate challenge by cross-examination. *Baker v. Hocker*, 496 F.2d 615, 617 (9th Cir. 1974); *see United States v. Domina*, 784 F.2d 1361, 1368 (9th Cir. 1986) (noting problem with suggestive pretrial identifications is that witness later identifies individual in court on basis of prior suggestive identification, rather than from personal recollection); *Baker v. State*, 88 Nev. 369, 374 n.3, 498 P.2d 1310, 1313 n.3 (1972) (observing that other jurisdictions had reversed where a suggestive identification at preliminary hearing tainted witness's trial identification). MG did not identify Garcia at trial as the perpetrator—rather, she acknowledged that she identified

the shooter at the 2008 preliminary hearing and stated that she did not recognize him at the 2013 trial—and, accordingly, MG's prior identification did not taint her trial testimony. The district court considered the issue of MG's prior identification moot because she did not identify him at trial. MG's identification of Garcia at the preliminary hearing did not constitute a reversible due process violation when MG was subject to immediate and thorough cross-examination at the preliminary hearing and at trial and did not identify Garcia at trial. We conclude that the district court did not abuse its discretion.

Third, Garcia argues that the district court erred in denying his motion to compel a psychological examination of JH, who he argued was rendered incompetent to testify by a brain injury. This court will uphold the district court's finding of competency absent a clear abuse of discretion, *Evans v. State*, 117 Nev. 609, 624, 28 P.3d 498, 509 (2001), and its decision whether to deny a request for a psychological examination for an abuse of discretion, *Abbott v. State*, 122 Nev. 715, 723, 138 P.3d 462, 467 (2006). The district court should order an examination when a defendant demonstrates a compelling need for an examination, taking into account whether there is little or no corroboration of the offense beyond the challenged testimony and whether reasonable grounds support that the victim's mental state has affected his veracity. *Id.* at 723-25, 138 P.3d at 468-69. The district court found that JH was able to perceive an event and competently relate it back and that contradictory assertions in his statements were subjects for cross-examination. The district court further ordered disclosure of JH's medical records for examination by Garcia's expert. In his testimony, JH demonstrated an ability to present his personal recollections without becoming confused and did not exhibit

difficulties when Garcia's counsel attempted to confuse him during cross-examination, such that no compelling need for a psychological examination was evident. Having considered the record, we conclude that the district court did not abuse its discretion in denying Garcia's motion for a psychological examination.

Fourth, Garcia argues that his due process rights were violated when EC testified in shackles pursuant to a material witness warrant because this bolstered EC's credibility. Courts should not compel an incarcerated witness to appear in prisoner attire absent unusual circumstances. *Hightower v. State*, 123 Nev. 55, 59, 154 P.3d 639, 642 (2007). The defendant bears the burden to timely request that an incarcerated witness not appear in prisoner attire. *Id.* Garcia failed to timely object to EC's appearance or request that he appear without shackles. We therefore review his allegations of error for plain error. *Gallego v. State*, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. Adv. Op. 69, 263 P.3d 235 (2011). Garcia offers no support for his argument that the jury would give EC *greater* credibility because he appeared in shackles. *See Hightower*, 123 Nev. at 58, 154 P.3d at 641 (noting this court's prior observation that courts have almost uniformly recognized that appearing in prison clothing may undermine the witness's credibility). Further, Garcia's counsel drew attention to EC's detention in beginning cross-examination and his handcuffs during closing argument. We conclude that Garcia has not demonstrated plain error.

Fifth, Garcia argues that the State committed prosecutorial misconduct by presenting prejudicial evidence in support of a gang enhancement when the trial evidence did not meet the statutory criteria

for a criminal gang. We review claims of prosecutorial misconduct for improper conduct and then for whether reversal is warranted. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). A group of persons may constitute a criminal gang when it has (1) a common name or identifying symbol; (2) particular conduct, status, and customs; and (3) felonious activities as one of its common activities.[1] NRS 193.168(8). The record shows that the discovery supported the State's decision to initially charge Garcia with a gang enhancement: (1) in separate recorded statements, EC, JH, and ML stated that Garcia was in their gang named "Puros Locos" or "PL," and several purported members had "Puros Locos" tattoos; (2) JH testified that he would participate in fights and spray paint "PL" on walls as part of the gang; and (3) JH testified in an earlier trial that he and ML had committed the felonious acts of giving away controlled substances to other gang members who were under the age of 18, and further that another gang member ordered him to kill someone. The State promptly amended the indictment to remove the gang enhancement when the district court concluded that trial testimony did not support the gang enhancement and prevented the State's gang expert from testifying. We conclude that the State's conduct was not improper because discovery reasonably suggested that the evidence supported a gang enhancement, *cf. Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) (holding that a prosecutor may not argue facts or inferences not supported by the evidence), and the State withdrew the enhancement when it could no longer reasonably argue that the evidence satisfied NRS 193.168(8).

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[1]Garcia's argument that the evidence did not show the felony convictions necessary to establish a gang misstates the law, which requires felonious acts, not convictions. NRS 193.168(8)(c).

Having considered Garcia's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

Parraguirre, J.

Douglas, J.

Cherry, J.

cc: Eighth Judicial District Court Dept. 15
Goodman Law Group
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

EVARISTO JONATHAN GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 64221
District Court Case No. C262966

FILED

NOV 05 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: October 20, 2015

Tracie Lindeman, Clerk of Court

By: Joan Hendricks
Deputy Clerk

cc (without enclosures):
Eighth Judicial District Court Dept. 15, District Judge
Goodman Law Group
Clark County District Attorney
Attorney General/Carson City

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on OCT 23 2015.

RECEIVED
OCT 28 2015
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

Deputy District Court Clerk

RECEIVED
OCT 23 2015
CLERK OF THE COURT

15-31885

IN THE SUPREME COURT OF THE STATE OF NEVADA

EVARISTO JONATHAN GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 64221
District Court Case No. C262966

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of conviction AFFIRMED."

Judgment, as quoted above, entered this 18th day of May, 2015.

"Rehearing Denied."

Judgment, as quoted above, entered this 25th day of September, 2015.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this October 20, 2015.

Tracie Lindeman, Supreme Court Clerk

By: Joan Hendricks
Deputy Clerk

PPaw
OA
PP

Case No. C-262966
Dept. No. XV

Electronically Filed
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CLERK OF THE COURT

IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

Evaristo Jonathan Garcia.
#1108072 Petitioner,

v.

State of Nevada
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: High Desert State Prison

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court Clark County of Nevada

3. Date of judgment of conviction: August 15, 2013

4. Case number: C-262966

5. (a) Length of sentence: two consecutive ten to Life's

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(b) If sentence is death, state any date upon which execution is scheduled:....

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes ..... No ..✓...

If "yes," list crime, case number and sentence being served at this time: .....

.....

.....

7. Nature of offense involved in conviction being challenged: murder. Evaristo J. Garcia 16, Accused of Shooting and Killing a other

8. What was your plea? (check one)

(a) Not guilty ..✓...

(b) Guilty .....

(c) Guilty but mentally ill .....

(d) Nolo contendere .....

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: .....

.....

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury ..✓...

(b) Judge without a jury .....

11. Did you testify at the trial? Yes .....No ..✓...

12. Did you appeal from the judgment of conviction? Yes ..✓.... No .....

13. If you did appeal, answer the following:

(a) Name of court: Nevada Supreme Court

(b) Case number or citation: 64221

(c) Result: AFFirmance of judgment

(d) Date of result: May 18, 2015

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: .....

.....

.....

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ..... No ...✓...

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: .....

(2) Nature of proceeding: .....

.....

(3) Grounds raised: .....

.....

.....

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No .....

(5) Result: .....

(6) Date of result: .....

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

.....

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: .....

(2) Nature of proceeding: .....

(3) Grounds raised: .....

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No .....

(5) Result: .....

(6) Date of result: .....

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

.....

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ..... No .....

Citation or date of decision: .....

(2) Second petition, application or motion? Yes ..... No .....

Citation or date of decision: .....

(3) Third or subsequent petitions, applications or motions? Yes ..... No .....

Citation or date of decision: .....

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.).....

.....

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: no.....

.....

(b) The proceedings in which these grounds were raised: .....

.....

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) .....

.....

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) ...no.....

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) no

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ..... No ✓

If yes, state what court and the case number: .....

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Ross Goodman and Dayvid J. Figlar

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ..... No ✓

If yes, specify where and when it is to be served, if you know: .....

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground ONE: counsel was ineffective AT trial For

Supporting FACTS (Tell your story briefly without citing cases or law.): counsel was ineffective For Failing to Adequately investigate state witness, Edshel Calvillo, BeFor trial counsel didn't even know he was In custody For material witness warrant.

2) counsel Had years to Locate witness, Edshel Calvillo, and question Him BeFor trial also to Be ready For there cross-examination at trial.

3) counsel should have Brought up the the Facts of His prejury on the Last case he was testiFing In Salvador Garcia case In a motion BeFor a judge BeFor we where In trial.

(b) Ground TWO: counsel was ineffective for allowing Illegal sentenceing on, sentenceing after jury conviction

Supporting FACTS (Tell your story briefly without citing cases or law.):

1) at trial the jury found me guilty in july 16.2013 of second Degree murder and a weapon enhancement. at senteceing I got a 10 to LiFe for the murder, plus an equal and consevtive term for 10 to LiFe for the weapon enhancement.

2) the new weapon enhancement Case states that case from 2008 and up are to be sentence to anything in between, no less then 1 year and no more then 20 years I got charged on this case in 2008 and on july 16 2013 convicted by jury.

(c) Ground THREE: counsel was ineffective for not asking for a new trial or mistrial

Supporting FACTS (Tell your story briefly without citing cases or law.): 1) After counsel seen and Heard that the DA's Facts persented at trial about the gang enhancement where not enough to Hold the enhancement 2) two of DA's witnesses that where gang members testified at trial Jonathan Harper, and Edshel Calvillo, admitted to Being gang members of Puros Locos, they testified at trial that the defendant was not in there gang or had any part of it. 3) the DA was so prejudice with there opening statements about the defendant Be a gang member and the victim as well. just to drop the enhancement at the middle of trial when there was a issue with the jury members witch is on record where they Say they didn't want to wait outside the courtroom Because guys in the hallway where giveing them meon stares another jury member said that she was sceard Because a bald young guy walked pass her.

(d) Ground FOUR: Counsel was ineffctive on defendant with direct appeal

Supporting FACTS (Tell your story briefly without citing cases or law.): the Hole time defendant was on direct appeal attorney Ross Goodman in the 2 1/2 years of appeal defendants Lawyer did not speak to him about what grounds he was going to file on appeal. we never talked on the phone, I have a number of letters I copyed that I wrote to him and never got a responds From Ross Goodman. I didn't even know my time was runing out for me to file my habeas corpus (Postconviction) till I worte the supreme court clerk asking for my docket sheet.

WHEREFORE, petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

EXECUTED at **High Desert State Prison** on the 3 day of the month of JUNE, 2016.

Evaristo Garcia #1108072*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

VERIFICATION

Under penalty of perjury, the undersigned declares that the undersigned is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

Evaristo Garcia #1108072*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceeding PETITION FOR WRIT OF HABEAS CORPUS filed in District Court Case Number C-267966 Does not contain the social security number of any person.

Evaristo Garcia #1108072*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

CERTIFICATE OF SERVICE BY MAIL

I, Evaristo Garcia, hereby certify pursuant to N.R.C.P. 5(b), that on this ____ day of the month of _____, 20___, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

D.W. Neven, Warden High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070

Attorney General of Nevada
100 North Carson Street
Carson City, Nevada 89701

Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155

Evaristo Garcia #1108072*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

*Print your name and NDOC back number and sign

CERTIFICATE OF SERVICE BY MAILING

I, Evaristo J. Garcia, hereby certify, pursuant to NRCP 5(b), that on this 3 day of JUNE, 2016 I mailed a true and correct copy of the foregoing, " Petition For writ of Habeas Corpus Postconviction

by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

to: Evaristo Garcia #1108072
High Desert State Prison
P.O. Box 650
Indian Springs NV 89070

DAVID ROGER
District Attorney
200 LEWIS AVE
P.O. BOX 552212
Las Vegas NV 89155-2212

Catherine Cortez
Nevada Attorney General
100 North carson Street
Carson City NV 89701-4717

STEVEN D. GRIERSON
CLERK OF THE ~~COURT~~ court
200 LEWIS AVE. 3rd Floor
Las Vegas NV. 89155-1160

D.W. NEVEN
Warden H.D.S.P
High Desert State Prison
P.O. Box 650
Indian Springs NV 89070

CC:FILE

DATED: this 3 day of JUNE, 2016.

Evaristo Garcia #1108072
/In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

Evaristo Garcia #1108072
High Desert State Prison
P.O. BOX 650
Indian Springs NV 89070

Pitney Bowes
08/06/2018
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Steven D. Grierson
Clerk of the Court
200 Lewis Ave 3rd Floor
Las Vegas NV 89155

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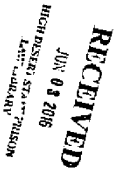
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Case No. C-262966

Dept. No. XV

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CLERK OF THE COURT

IN THE 8TH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK.

EVARISTO J. GARCIA
#1108072
Petitioner,

-vs-

STATE OF NEVADA,
Respondents.

MOTION FOR THE APPOINTMENT OF COUNSEL

REQUEST FOR EVIDENTIARY HEARING

COMES NOW, the Petitioner, EVARISTO GARCIA, proceeding pro se, within the above entitled cause of action and respectfully requests this Court to consider the appointment of counsel for Petitioner for the prosecution of this action.

This motion is made and based upon the matters set forth here, N.R.S. 34.750(1)(2), affidavit of Petitioner, the attached Memorandum of Points and Authorities, as well as all other pleadings and documents on file within this case.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

This action commenced by Petitioner EVARISTO GARCIA, in state custody, pursuant to Chapter 34, et seq., petition for Writ of Habeas Corpus (Post-Conviction).

II. STATEMENT OF THE FACTS

To support the Petitioner's need for the appointment of counsel in this action, he states the following:

1. The merits of claims for relief in this action are of Constitutional dimension, and Petitioner is likely to succeed in this case.

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HIGH DESERT, INDIAN SPRINGS,

2. Petitioner is incarcerated at the [redacted] State Prison in [redacted], Nevada. Petitioner is unable to undertake the ability, as an attorney would or could, to investigate crucial facts involved within the Petition for Writ of Habeas Corpus.
3. The issues presented in the Petition involves a complexity that Petitioner is unable to argue effectively.
4. Petitioner does not have the current legal knowledge and abilities, as an attorney would have, to properly present the case to this Court coupled with the fact that appointed counsel would be of service to the Court, Petitioner, and the Respondents as well, by sharpening the issues in this case, shaping the examination of potential witnesses and ultimately shortening the time of the prosecution of this case.
5. Petitioner has made an effort to obtain counsel, but does not have the funds necessary or available to pay for the costs of counsel, see Declaration of Petitioner.
6. Petitioner would need to have an attorney appointed to assist in the determination of whether he should agree to sign consent for a psychological examination.
7. The prison severely limits the hours that Petitioner may have access to the Law Library, and as well, the facility has very limited legal research materials and sources.
8. While the Petitioner does have the assistance of a prison law clerk, he is not an attorney and not allowed to plead before the Courts and like Petitioner, the legal assistants have limited knowledge and expertise.
9. The Petitioner and his assisting law clerks, by reason of their imprisonment, have a severely limited ability to investigate, or take depositions, expand the record or otherwise litigate this action.
10. The ends of justice will be served in this case by the appointment of professional and competent counsel to represent Petitioner.

II. ARGUMENT

Motions for the appointment of counsel are made pursuant to N.R.S. 34.750, and are addressed to the sound discretion of the Court. Under Chapter 34.750 the Court may request an attorney to represent any

such person unable to employ counsel. On a Motion for Appointment of Counsel pursuant to N.R.S. 34.750, the District Court should consider whether appointment of counsel would be of service to the indigent petitioner, the Court, and respondents as well, by sharpening the issues in the case, shaping examination of witnesses, and ultimately shortening trial and assisting in the just determination.

In order for the appointment of counsel to be granted, the Court must consider several factors to be met in order for the appointment of counsel to be granted; (1) The merits of the claim for relief; (2) The ability to investigate crucial factors; (3) whether evidence consists of conflicting testimony effectively treated only by counsel; (4) The ability to present the case; and (5) The complexity of the legal issues raised in the petition.

III. CONCLUSION

Based upon the facts and law presented herein, Petitioner would respectfully request this Court to weigh the factors involved within this case, and appoint counsel for Petitioner to assist this Court in the just determination of this action

Dated this ____ day of _____, 20 __.

[redacted]
HIGH DESERT STATE PRISON
P.O. BOX-650
INDIAN SPRINGS, NV. 89070

EVARISTO GARCIA #1108072
Petitioner.

VERIFICATION

I declare, affirm and swear under the penalty of perjury that all of the above facts, statements and assertions are true and correct of my own knowledge. As to any such matters stated upon information or belief, I swear that I believe them all to be true and correct.

Dated this 3 day of JUNE, 20 16

Petitioner, pro per.

CERTIFICATE OF SERVICE BY MAIL

I, EVARISTO GARCIA, hereby certify pursuant to N.R.C.P. 5(b), that on this 3 day of JUNE, of the year 20 16 I mailed a true and correct copy of the foregoing, MOTION FOR THE APPOINTMENT OF COUNSEL; REQUEST FOR EVIDENTIARY HEARING, to the following:

DIST. ATTORNEY DAVID ROGER Name	NEVADA ATTORNEY GENERAL Name	WARDEN H.D.S.P D.W. NEVEN Name
200 LEWIS AVENUE P.O. BOX 552212 LAS VEGAS NV 89156 Address	CATHERINE CORTEZ 100 North CARSON ST. CARSON CITY NV. 89701-3717 Address	High Desert State Prison P.O. Box 650 Indian Springs NV 89070 Address

Evaristo Garcia #1108077
Petitioner

OPPS
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KRISTA D. BARRIE
Chief Deputy District Attorney
Nevada Bar #010310
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

EVARISTO JONATHAN GARCIA,
#2685822

Defendant.

CASE NO: 10C262966-1

DEPT NO: II

STATE'S OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS AND MOTION FOR APPOINTMENT OF COUNSEL

DATE OF HEARING: AUGUST 16, 2016
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through KRISTA D. BARRIE, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Opposition for Writ of Habeas Corpus and Motion for Appointment of Counsel.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Under Case Number C226218, the original case number in this case, Defendant EVARISTO JONATHAN GARCIA (hereinafter "Garcia") was charged by way of Criminal Complaint filed on June 19, 2006 with Conspiracy to Commit Murder and Murder with Use of a Deadly Weapon with Co-Defendant Giovanny Garcia. At the time of the filing of the complaint, Garcia had fled to Mexico. An Arrest warrant was issued for Garcia on June 21, 2006. Following a lengthy extradition process, Garcia was booked into the Clark County Detention Center on October 16, 2008. An Amended Criminal Complaint charging one count of Murder with Use of a Deadly Weapon with the Intent to Promote, Further, or Assist a Criminal Gang was filed on November 26, 2008.

A Preliminary Hearing was held on December 18, 2008, and Garcia was bound over on the charge. Garcia was represented by Bill Terry, Esq. at the Preliminary Hearing, but was not retained for trial.

On February 2, 2009, Scott Bindrup, Esq. of the Special Public Defender's Office ("SPD") confirmed as new counsel for Garcia. Trial was initially scheduled for June 1, 2009. Garcia filed a Petition for Writ of Habeas Corpus on February 17, 2009, which was set for hearing on March 3, 2009, and which the Court denied in its Order filed on March 9, 2009. At the defense request, the June 1, 2009 trial date was continued and the trial was reset for February 16, 2010. On February 9, 2010, the February 16, 2010 trial date was continued two weeks to February 22, 2010.

On February 18, 2010, John Momot, Esq. was appointed as co-counsel with SPD Scott Bindrup and the February 22, 2010 trial date was continued at the defense request to May 3, 2010. On March 25, 2010, the May 3, 2010 trial date was continued at the State's request to November 8, 2010. On May 25, 2010, at the State's request, the Court dismissed Case Number C226218.

In the current case, Case Number C262966, the State presented the evidence of the same offense charged in Case Number C226218 to the Clark County Grand Jury on March 4,

2010, and March 18, 2010. On March 19, 2010, the grand jury returned an indictment charging Garcia and a co-defendant, Manuel Lopez, as follows: 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, 199.168, 193.169), and COUNT 2 – Murder With Use of a Deadly Weapon With the Intent to Promote, Further, or Assist a Criminal Gang (Category A Felony – NRS 193.168, 193.169, 200.010, 200.030, 200.450, 193.165) for crimes committed on February 6, 2006. Garcia filed a second Petition for Writ of Habeas Corpus on April 30, 2010, which was set for hearing on May 25, 2010, and which this Court denied on that date. Garcia filed a Motion to Sever Trials on May 4, 2010, which was denied on September 21, 2010.

On October 12, 2010, the November 8, 2010 trial date was vacated and continued at the defense request and reset for March 21, 2011. At Calendar Call on March 17, 2011, Garcia entered a plea of guilty to Second Degree Murder with Use of a Deadly Weapon, with the State retaining the right to argue. Soon thereafter, Garcia retained Ross Goodman, Esq. and filed a pre-sentence Motion to Withdraw Guilty Plea on April 22, 2011, which was granted by this Court on May 12, 2011.

The Court gave a new trial date of May 7, 2012. At the Calendar Call on April 26, 2012, the May 7, 2012 trial date was continued at the defense request. The trial was reset for September 17, 2012. On September 11, 2012, Garcia filed a Motion to Continue Trial for independent re-examination of the State's fingerprint evidence by defense expert Joi Dickerson, which was granted and the trial was reset for July 8, 2013.

The case proceeded to trial in this Court on July 8, 2013. On June 12, 2013, after the District Court's ruling that a State's witness could not testify, the State filed an Amended Information that did not include the gang enhancement. The jury returned a verdict on July 15, 2013, finding Defendant guilty of Second Degree Murder with Use of a Deadly Weapon and not guilty of Conspiracy to Commit Murder. Garcia filed a motion for acquittal, or in the alternative, for new trial on July 22, 2013. The Court denied that motion on August 1, 2013.

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Garcia appeared for sentencing on August 29, 2013, and the Court sentenced him as follows: LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS plus an EQUAL and CONSECUTIVE term of LIFE with TEN (10) YEARS MINIMUM for Use of a Deadly Weapon. He received ONE THOUSAND NINE HUNDRED FIFTY-NINE (1,959) DAYS Credit for Time Served. The Court entered the Judgment of Conviction on September 11, 2013.

Garcia filed a Notice of Appeal on October 11, 2013, and filed Appellant's Opening Brief on June 25, 2014, raising the following claims before the Nevada Supreme Court: 1) That there was insufficient evidence to sustain a verdict of guilt for Second Degree Murder, 2) the District Court erred in allowing a prior suggestive in-court identification when the witness failed to identify the defendant at trial, 3) the District Court erred by allowing an incompetent witness to testify, 4) the District Court erred in allowing a material witness warrant to issue engendering sympathy and/or credibility for a state's witness, and 5) that it was prosecutorial misconduct to proceed with a prejudicial gang enhancement only to drop it midtrial. The State filed its Answering Brief on October 7, 2014, and the Nevada Supreme Court filed an Order of Affirmance on May 18, 2015. The date of remittitur was October 20, 2015.

Garcia filed the instant Petition for Writ of Habeas Corpus and Motion for Appointment of Counsel on June 10, 2016. The State now responds as follows:

ARGUMENT

Garcia raises four claims in his Petition alleging ineffective assistance of counsel, three claims pertaining to trial counsel's performance and one pertaining to appellate counsel's performance. Specifically, Garcia alleges that trial counsel was ineffective for the following reasons: failure to investigate State's witness Edshel Calvillo, failure to challenge the imposition of an illegal sentence for use of a deadly weapon, and failure to move for a mistrial due to the circumstances surrounding the gang enhancement. He further alleges that his appellate counsel was ineffective for failing to communicate about his direct appeal.

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On each of these claims, Garcia has failed to meet the high burden set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) and his first and third claims are belied by the record. Thus, this Court should deny the Petition.

Moreover, Garcia asks this Court to appoint him counsel. But he has failed to demonstrate any need for counsel. Therefore, this Court should also deny the Motion for Appointment of Counsel.

I. GARCIA'S TRIAL COUNSEL WAS NOT INEFFECTIVE.

Ineffective assistance of counsel claims are analyzed under a two-prong test set forth in Strickland v. Washington, wherein the defendant must show: 1) that counsel's performance was deficient, and 2) that the deficient performance prejudiced the defense. Id. at 687.

"Surmounting *Strickland*'s high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356. 371,130 S. Ct. 1473, 1485 (2010). The issue is whether the attorney's representation amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). Further, "[e]ffective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)). The burden in ineffective assistance of counsel claims lies with the defendant. A Court begins with a presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011-12, 103 P.3d 25, 32-33 (2004). The role of a court in considering alleged ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

In considering whether trial counsel was effective, this Court must determine whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case,"

and then whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996) (citing Strickland, 466 U.S. at 690–91, 104 S. Ct. at 2066).

Strategic and tactical decisions are "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280. Trial counsel "has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Wainwright v. Sykes, 433 U.S. 72, 93, 97 S. Ct. 2497, 2510 (1977); accord Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Furthermore, this analysis does not indicate that a court should "second guess reasoned choices between trial tactics, nor does it mean that trial counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). In essence, a court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. However, counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

In order to meet the "prejudice" prong of the test, the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

A. Trial Counsel Was Not Ineffective For Not Investigating Edshel Calvillo.

Garcia first claims that trial counsel was ineffective for "failing to adequately investigate state witness, Edshel Calvillo." Petition at 6. He claims that counsel had "years to locate" Calvillo, and had he done so, he could have brought up the fact that Calvillo committed perjury in the last case in which he testified. Id. These claims are belied by the record, and Garcia fails to demonstrate deficient performance or prejudice.

Garcia's trial counsel informed the Court, outside the presence of the jury on the second day of trial (first day of testimony), that he attempted to find and interview Calvillo, but that he had been unable to locate him. Reporter's Transcript, 06/09/2013 ("RT1"), pp. 198-99. Defense counsel even hired a private investigator to find Cavillo, but to no avail. RT1, p.233. In fact, no one had been able to locate Calvillo, and he was only made available after being arrested on a material witness warrant. RT1, p. 199. Garcia's counsel then requested that the Court permit him to interview the witness before cross-examination, which the Court granted, telling the defense that they could speak with Calvillo all night if they wanted.[1] Id., RT1, p. 233.

The parties and the Court then had a lengthy discussion about the alleged perjury. RT1, p. 230-235. The next morning, defense counsel thoroughly questioned Calvillo about his alleged perjury in a prior case for impeachment purposes. Reporter's Transcript, 06/10/2013 ("RT2"), pp. 4-24.

In order to satisfy the Strickland standard and establish ineffectiveness for failure to investigate, a defendant must allege *in the pleadings* what information would have resulted from a better investigation or the substance of the missing witness' testimony. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004); State v. Haberstroh, 119 Nev. 173, 185, 69 P.3d 676, 684 (2003). It must be clear from the "record what it was about the defense case that a more adequate investigation would have uncovered." Id. A defendant must also show how a better investigation probably would have rendered a more favorable outcome. Id.

It simply cannot be said that trial counsel did not make sufficient inquiries into information about Cavillo and his testimony. The record belies Garcia's claim of failure to investigate and shows that counsel did everything Garcia claims should have been done. He raises only one fact about Calvillo that he claims would have been discovered through a more thorough investigation – that Calvillo allegedly perjured himself during testimony in a previous case. However, the record shows that counsel already knew that information and used it to impeach Calvillo.

[1] Defense counsel did choose to interview Calvillo, and indicated that they would do so on the morning of June 10, 2013. RT1, p. 236.

Accordingly, Garcia has fallen well short of demonstrating deficient performance under the Strickland standard. Furthermore, he makes no allegation of how the result of his trial would have been different if trial counsel had undertaken an alternative course of action in investigating Calvillo and thus has failed to demonstrate prejudice.

Moreover, his claim is belied by the record. In post-conviction petitions, claims must be supported with specific factual allegations, which if true, would entitle the defendant to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. When a claim is belied by the record, a district court may properly reject it without conducting an evidentiary hearing. McConnell v. State, 125 Nev. 243, 257, 212 P.3d 307, 317 (2009). Therefore, this Court should deny this claim.

B. Trial Counsel Was Not Ineffective For Failing To Challenge The Imposed Sentence.

Next, Garcia claims that trial counsel was ineffective for failing to challenge the imposition of an equal and consecutive sentence for use of a deadly weapon, which he claims is in direct violation of the applicable statute. Though he has confused some dates, Garcia argues that his sentence is illegal because the version of NRS 193.165 applicable since 2007 limits the deadly weapon enhancement to one to 20 years and that his 10 to Life sentence on the enhancement violates the statute. He claims counsel was ineffective for failing to object to or challenge the sentence. Petition at 7. However, his sentence is not illegal and his counsel was not ineffective in failing to object to a legal sentence.

The Nevada Supreme Court has unequivocally stated that "'the general rule is that the proper penalty is that in effect at the time of the commission of the offense' unless the Legislature demonstrates clear legislative intent to apply a criminal statute retroactively." State v. Second Judicial Dist. Court of Nev., 124 Nev. 564, 572, 188 P.3d 1079, 1084 (2008) (citing Sparkman v. State, 95 Nev. 76, 81-82, 590 P.2d 151, 155 (1979)).

The applicable version of NRS 193.165, in this case, is that which was in effect on February 6, 2006. That version, which was last amended in 1995, stated:

> Except as otherwise provided in NRS 193.169, any person who uses a firearm or other deadly weapon or a weapon containing or capable of emitting tear gas, whether or not its possession is permitted by NRS 202.375, in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for the crime. The sentence prescribed by this section runs consecutively with the sentence prescribed by statute for the crime.

1995 Nev. Stat., ch. 455, §1, at 1431. Thus, it was not only proper, but mandatory for the Court to sentence Garcia to a term of imprisonment equal and consecutive to the sentence for the Second Degree Murder conviction.

As stated in the State's Strickland analysis supra, "counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments." Ennis, 122 Nev. 694, 706, 137 P.3d 1095, 1103. Even though trial counsel did not put the proceedings through an exercise in futility by objection to the legality of the imposition of the equal and consecutive sentence for use of a deadly weapon, he did present an equity argument to the Court regarding the lesser sentence Garcia would face if the crime had been committed after the statute was amended, claiming that "while legally the Court can't go back retroactively, even though we raised that issue, certainly the Court can be cognizant of the disparity, so that the equal portionality [sic] at sentence of people who just happened to be different offense within two or three months." Reporter's Transcript, 08/29/2013 ("Sentencing Transcript") p. 6.

Challenging the legality of the imposed sentence would have been futile since the District Court was mandated by law to impose that specific sentence, and counsel cannot be found to have performed deficiently for failing to make futile motions.

C. Contrary to Garcia's Claim, Trial Counsel Did In Fact Move for a Mistrial and, Therefore, Cannot Have Been Ineffective for Failing To Do So.

Garcia argues further that his trial counsel was ineffective for failing to move for a mistrial on the grounds that the State had prejudiced him by introducing evidence of gang involvement before dismissing the gang enhancement. But this claim is also belied by the record.

A defendant's request for a mistrial constitutes a clear and deliberate election to forgo one's valued right to a trial by the first jury. United States v. Scott, 437 U.S. 82, 93, 98 S.Ct. 2187 (1978); see also Rudin v. State of Nevada, 120 Nev. 121, 86 P.3d 572, 586 (2004); Melchor-Gloria v. State of Nevada, 99 Nev. 174, 178, 660 P.2d 109, 112 (1983) (noting that, when the defense seeks a motion for a mistrial, an exception to the general rule that the mistrial removes any double jeopardy bars to reprosecution arises where "the prosecutor intended to provoke a mistrial or otherwise engaged in 'overreaching' or 'harassment'").

Under NRS 193.168(1), a criminal gang enhancement may be added for "any person who is convicted of a felony committed knowingly for the benefit of, at the direction of, or in affiliation with, a criminal gang, with the specific intent to promote, further or assist the activities of the criminal gang." The criminal gang enhancement must be found beyond a reasonable doubt by the trier of fact. NRS 193.168(4)(b). The trier of the fact makes the decision as to whether the elements of the gang enhancement have been met.

NRS 193.168(7) and (8) further provides:

> 7. In any proceeding to determine whether an additional penalty may be imposed pursuant to this section, expert testimony is admissible to show particular conduct, status and customs indicative of criminal gangs, including, but not limited to:
>
> (a) Characteristics of persons who are members of criminal gangs;
>
> (b) Specific rivalries between criminal gangs;
>
> (c) Common practices and operations of criminal gangs and the members of those gangs;
>
> (d) Social customs and behavior of members of criminal gangs;
>
> (e) Terminology used by members of criminal gangs;
>
> (f) Codes of conduct, including criminal conduct, of particular criminal gangs; and
>
> (g) The types of crimes that are likely to be committed by a particular criminal gang or by criminal gangs in general.
>
> 8. As used in this section, "criminal gang" means any combination of persons, organized formally or informally, so constructed that the organization will continue its operation even if individual members enter or leave the organization, which:
>
> (a) Has a common name or identifying symbol;
>
> (b) Has particular conduct, status and customs indicative of it; and
>
> (c) Has as one of its common activities engaging in criminal activity punishable as a felony, other than the conduct which constitutes the primary offense.

Both under the original Case Number, C226218, and the current case, Garcia filed a Petition for Writ of Habeas Corpus challenging the gang enhancement. This Court denied both petitions. The evidence found to be sufficient to support the gang enhancement in this case was derived from Detective Michael Souder's testimony as a Gang Expert at the grand jury proceedings. However, during the fourth day of trial, July 11, 2013, the Court precluded Detective Souder, whom the State had noticed as a gang expert, from testifying because no one testified that Garcia was a member of the Puros Locos gang during the trial and the testimony would be overly prejudicial. Reporter's Transcript, 07/11/2013 ("RT3"), pp. 66-91.

Thereafter, believing that without Detective Souder's testimony it could not prove the gang enhancement under the standard set forth by Origel-Candido v. State, 114 Nev. 378, 956 P.2d 1378 (1998), the State informed the Court and the Defense that it would file a Fourth Amended Indictment that did not include the gang enhancement.[2] Then, contrary to Garcia's claims, defense counsel made an oral motion for a mistrial "based on the fact that the prosecution proceeded with all that information about gangs and gang activity." RT3, pp. 206-08. The State filed an opposition in response to that motion on June 15, 2013, citing information discovered during the grand jury proceedings and through further investigation into the case that indicated Garcia had been involved in gang activity. The Court denied the motion after closing arguments. Reporter's Transcript, 07/15/2013, p. 71.

Garcia's claim is belied by the record. He has failed to make a single factual allegation regarding this claim that is true, and thus has not demonstrated that trial counsel was deficient in performance. As stated supra, because Garcia's claim is belied by the record, this Court may deny his claim without an evidentiary hearing. See Hargrove and McConnell. The Court should do just that.

Garcia has failed to demonstrate deficient performance under the Strickland standard on any of his ineffective assistance of counsel claims, has failed to demonstrate prejudice, and has made claims belied by the record. Garcia has failed to demonstrate deficient performance or prejudice on any of these three claims against trial counsel, and therefore has failed to meet

[2] That Fourth Amended Indictment was filed on June 12, 2013.

his high burden set forth by Strickland. Therefore, this Court should find that his trial counsel was effective and should deny each these claims.

II. GARCIA'S APPELLATE COUNSEL WAS NOT INEFFECTIVE.

Garcia's final ineffective assistance claim brings the actions of his appellate counsel before the Court. Garcia alleges that his appellate counsel was ineffective because "in the 2½ years of appeal defendants [sic] lawyer did not speak to him about what grounds he was going to file on appeal." Petition at 9. He claims that he never spoke to counsel by phone, never got responses from letters, and was never informed that time was running out for him to file this Petition for Writ of Habeas Corpus. Id. Even if the facts surround this claim are as Garcia alleges, he has failed to demonstrate any prejudice, and therefore has failed to demonstrate that his appellate counsel was ineffective.

The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 387, 396-97 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The Nevada Supreme Court has held that the standard set forth in Strickland applies to evaluations of the effectiveness of appellate counsel. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

There is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990). The Nevada Supreme Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at 1368, 887 P.2d at 268. Finally, in order to prove that appellate counsel's alleged error was prejudicial, a defendant must show that an omitted issue would have had a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

Garcia has failed to meet the prejudice prong of Strickland on this claim. He has not made single allegation of how the result of his appeal would have been different if he had been given more opportunity to communicate with his appellate counsel. Garcia's petition is devoid

of any mention of a claim that he feels should have been raised on appeal and was neglected by counsel as a result of the alleged lack of communication. The only effect Garcia claims the alleged lack of communication had was that he "didn't even know [his] time was running out" to file this Petition for Writ of Habeas Corpus. However, it is clear that Garcia was not prejudiced by that as he has filed the instant petition in a timely manner and forced the State to respond on the merits.

Because Garcia has failed to demonstrate prejudice, he has failed to meet the high Strickland burden. Therefore, this Court should deny his claim of ineffective assistance on the part of appellate counsel.

III. GARCIA IS NOT ENTITLED TO AN APPOINTMENT OF COUNSEL.

Finally, Garcia asks this Court to appoint him counsel. However, he is not entitled to such an appointment because he cannot show that there are difficult issues, proceedings he cannot comprehend, or discovery with which he would need assistance.

In Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991), the United States Supreme Court ruled that the Sixth Amendment provides no right to counsel in post-conviction proceedings. In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution . . . does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution."

NRS 34.750 provides, in pertinent part:

> "[a] petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily,* the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
>
> a. The issues are difficult;
>
> b. The Defendant is unable to comprehend the proceedings; or
>
> c. Counsel is necessary to proceed with discovery." (emphasis added).

//

Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel. McKague specifically held that with the exception of cases in which appointment of counsel is mandated by statute[3], one does not have "[a]ny constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164.

The Nevada Supreme Court has observed that a petitioner "must show that the requested review is not frivolous before he may have an attorney appointed." Peterson v. Warden, Nevada State Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS 177.345(2)). Garcia has not met that burden.

As demonstrated supra, there are no difficult issues in this case, and there is no need for future proceedings to be set on Garcia's claims. To this point, he has demonstrated that he is able to comprehend the proceedings – as he filed this Petition in a timely manner and in the right form – and because there should be no other proceedings on this Petition, there should be no proceedings that he would be unable to comprehend. Finally, there is no discovery for which counsel would be needed.

Garcia has no need for counsel and it would be frivolous for this Court to grant his request for appointment. Therefore, the Court should deny his request.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny Garcia's Petition for Writ of Habeas Corpus in its entirety and deny his Motion for Appointment of Counsel.

DATED this 12th day of September, 2016.

Respectfully submitted,

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

BY /s/ 10747 for
KRISTA D. BARRIE
Chief Deputy District Attorney
Nevada Bar #010310

[3] See NRS 34.820(1)(a) [entitling appointed counsel when petition is under a sentence of death].

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 12th day of September, 2016, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

EVARISTO JONATHAN GARCIA #1108072
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV 89018

BY R. Johnson
R. JOHNSON
Secretary for the District Attorney's Office

AR/KDB/rj/M-1

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Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. EVARISTO JONATHAN GARCIA, Defendant.	CASE#: 10C262966-1 DEPT. 2

BEFORE THE HONORABLE RICHARD SCOTTI, DISTRICT COURT JUDGE

THURSDAY, SEPTEMBER 29, 2016

RECORDER'S TRANSCRIPT OF HEARING: DEFENDANT'S PRO PER PETITION FOR WRIT OF HABEAS CORPUS; DEFENDANT'S PRO PER MOTION FOR APPOINTMENT OF COUNSEL; DEFENDANT'S PRO PER MOTION TO WITHDRAW COUNSEL

APPEARANCES:

For the State:	NOREEN C. DEMONTE, ESQ. Chief Deputy District Attorney
For the Defendant	ROSS GOODMAN, ESQ. (Not Present)

RECORDED BY: DALYNE EASLEY, COURT RECORDER

Las Vegas, Nevada, Thursday, September 29, 2016

[Hearing began at 9:13 a.m.]

THE COURT: C262966, this is Defendant's Pro Per Petition for Writ of Habeas Corpus, the Defendant's Pro Per Motion for Appointment of Counsel, and Defendant's Pro Per Motion to Withdraw Existing Counsel.

I have read all the paperwork. Ms. DeMonte, I saw the State's opposition. Anything more you wanted to say on that?

MS. DEMONTE: Not in the absence of the Defendant, so.

THE COURT: Alright. So, initially I can grant the Pro Per Motion to Withdraw Counsel, so that is granted.

As to the other issues though, I am going to deny to Petition for Writ of Habeas Corpus and the Writ will be discharged. The Court finds that trial counsel was not ineffective for investigating the witness, Edshel Cavillo. The Court agrees with the position of the State that the record belies Garcia's claim of failure to investigate, and shows that counsel did do everything that Garcia claims should have been done.

There was an issue about whether more investigation would have revealed that Cavillo perjured himself. The record shows that the parties and the Court did have a lengthy discussion about the alleged perjury. And then defense counsel, the following day, was able to thoroughly question Cavillo about the alleged perjury in a prior case for impeachment purposes. So there was appropriate

investigation.

The allegation by the Defendant of ineffective assistance of counsel is belied by the facts. There's no need for any evidentiary hearing on this matter.

Then there's the issue of the allegation of the error in the sentence. The Court finds that trial counsel was not ineffective for failing to challenge the imposed sentence. The imposed sentence was not only proper but it was mandatory pursuant to the applicable statute. And any challenge by counsel to the legality of the sentence would have been futile since the Court was required by law to impose the sentence that it did.

The next, there was an issue of trial counsel failing to move for a mistrial and allegedly being ineffective for failing to do so. The Court finds from the record that trial counsel did move for a mistrial on the grounds that the Defendant thought should have been moved. So that's plainly belied by the record and there's no need for an evidentiary hearing.

Defendant also contends that appellate counsel was ineffective. Again, applying the *Strickland* test, the Court finds that the Defendant has not met the requirements of *Strickland* to show there was ineffective assistance of counsel for the primary reason that the Defendant has failed to show how a different appeal -- I'm sorry, he claims that he didn't have proper communication with his appellate counsel and yet he fails to demonstrate how additional communication would have resulted in anything different on appeal.

For those reasons, the petition is frivolous, belied by the record, and denied.

And the Court also denies the appointment of counsel as there's no legitimate issues here presented and no complicated issues that would warrant the appointment of counsel; alright?

MS. DEMONTE: Thank you. We will prepare the findings.

THE COURT: Thank you.

[Hearing concluded at 9:17 a.m.]

* * * * * *

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

Dalyne Easley

DALYNE EASLEY
Court Recorder/Transcriber

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CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

EVARISTA J. GARCIA,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 10C262966-1

Dept No: II

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

PLEASE TAKE NOTICE that on October 25, 2016, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on October 26, 2016.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 26 day of October 2016, I placed a copy of this Notice of Entry in:

☑ The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Evaristo J. Garcia # 1108072
P.O. Box 1989
Ely, NV 89301

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KRISTA D. BARRIE
Chief Deputy District Attorney
Nevada Bar #010310
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

EVARISTO JONATHAN GARCIA, #2685822

Defendant.

CASE NO: 10C262966-1

DEPT NO: II

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: SEPTEMBER 29, 2016
TIME OF HEARING: 9:00 A.M.

THIS CAUSE having come on for hearing before the Honorable RICHARD F. SCOTTI, District Judge, on the 16th day of August, 2016, the Defendant not being present, proceeding in forma pauperis, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through NOREEN DEMONTE, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

Under C226218, the original case number in this case, EVARISTO JONATHAN GARCIA ("Garcia") was charged by way of Criminal Complaint filed on June 19, 2006 with Conspiracy to Commit Murder and Murder with Use of a Deadly Weapon with Co-Defendant

Giovanny Garcia. At the time of the filing of the complaint, Garcia had fled to Mexico. An Arrest warrant was issued for Garcia on June 21, 2006. Following a lengthy extradition process, Garcia was booked into the Clark County Detention Center (CCDC) on October 16, 2008. An Amended Criminal Complaint charging one count of Murder with Use of a Deadly Weapon with the Intent to Promote, Further, or Assist a Criminal Gang was filed on November 26, 2008.

A Preliminary Hearing was held on December 18, 2008, and Garcia was bound over on the charge. Garcia was represented by Bill Terry, Esq. at the Preliminary Hearing, but was not retained for trial.

On February 2, 2009, Scott Bindrup, Esq. of the Special Public Defender's Office ("SPD") confirmed as new counsel for Garcia. Trial was initially scheduled for June 1, 2009. Garcia filed a Petition for Writ of Habeas Corpus on February 17, 2009, which was set for hearing on March 3, 2009, and which the Court denied in its Order filed on March 9, 2009. At the defense request, the June 1, 2009 trial date was continued and the trial was reset for February 16, 2010. On February 9, 2010, the February 16, 2010 trial date was continued two weeks to February 22, 2010.

On February 18, 2010, John Momot, Esq. was appointed as co-counsel with SPD Scott Bindrup and the February 22, 2010 trial date was continued at the defense request to May 3, 2010. On March 25, 2010, the May 3, 2010 trial date was continued at the State's request to November 8, 2010. On May 25, 2010, at the State's request, the Court dismissed Case Number C226218.

In the current case, Case Number C262966, the State presented the evidence of the same offense charged in Case Number C226218 to the Clark County Grand Jury on March 4, 2010, and March 18, 2010. On March 19, 2010, the grand jury returned an indictment charging Garcia and a co-defendant, Manuel Lopez, as follows: 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, 199.168, 193.169), and COUNT 2 – Murder With Use of a Deadly Weapon With the Intent to Promote, Further, or Assist a Criminal Gang (Category A

Felony – NRS 193.168, 193.169, 200.010, 200.030, 200.450, 193.165) for crimes committed on February 6, 2006. Garcia filed a second Petition for Writ of Habeas Corpus on April 30, 2010, which was set for hearing on May 25, 2010, and which this Court denied on that date. Garcia filed a Motion to Sever Trials on May 4, 2010, which was denied on September 21, 2010.

On October 12, 2010, the November 8, 2010 trial date was vacated and continued at the defense request and reset for March 21, 2011. At Calendar Call on March 17, 2011, Garcia entered a plea of guilty to Second Degree Murder with Use of a Deadly Weapon, with the State retaining the right to argue. Soon thereafter, Garcia retained Ross Goodman, Esq. and filed a pre-sentence Motion to Withdraw Guilty Plea on April 22, 2011, which was granted by this Court on May 12, 2011.

The Court gave a new trial date of May 7, 2012. At the Calendar Call on April 26, 2012, the May 7, 2012 trial date was continued at the defense request. The trial was reset for September 17, 2012. On September 11, 2012, Garcia filed a Motion to Continue Trial for independent re-examination of the State's fingerprint evidence by defense expert Joi Dickerson, which was granted and the trial was reset for July 8, 2013.

The case proceeded to trial in this Court on July 8, 2013. On June 12, 2013, after the District Court's ruling that a State's witness could not testify, the State filed an Amended Information that did not include the gang enhancement. The jury returned a verdict on July 15, 2013, finding Defendant guilty of Second Degree Murder with Use of a Deadly Weapon and not guilty of Conspiracy to Commit Murder. Garcia filed a motion for acquittal, or in the alternative, for new trial on July 22, 2013. The Court denied that motion on August 1, 2013. Garcia appeared for sentencing on August 29, 2013, and the Court sentenced him as follows: LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS plus an EQUAL and CONSECUTIVE term of LIFE with TEN (10) YEARS MINIMUM for Use of a Deadly Weapon. He received ONE THOUSAND NINE HUNDRED FIFTY-NINE (1,959) DAYS Credit for Time Served. The Court entered the Judgment of Conviction on September 11, 2013.

Garcia filed a Notice of Appeal on October 11, 2013, and filed Appellant's Opening Brief on June 25, 2014, raising the following claims before the Nevada Supreme Court: 1) that there was insufficient evidence to sustain a verdict of guilt for Second Degree Murder, 2) the District Court erred in allowing a prior suggestive in-court identification when the witness failed to identify the defendant at trial, 3) the District Court erred by allowing an incompetent witness to testify, 4) the District Court erred in allowing a material witness warrant to issue engendering sympathy and/or credibility for a state's witness, and 5) that it was prosecutorial misconduct to proceed with a prejudicial gang enhancement only to dismiss it midtrial. The State filed its Answering Brief on October 7, 2014, and the Nevada Supreme Court filed an Order of Affirmance on May 18, 2015. The date of remittitur was October 20, 2015.

Garcia filed the instant Petition for Writ of Habeas Corpus and Motion for Appointment of Counsel on June 10, 2016. The State responded on September 12, 2016. This Court now orders the Petition DENIED.

Garcia raised four claims in his Petition alleging ineffective assistance of counsel, three claims pertaining to trial counsel's performance and one pertaining to appellate counsel's performance. Specifically, Garcia alleged that trial counsel was ineffective for the following reasons: failure to investigate State's witness Edshel Calvillo, failure to challenge the imposition of an illegal sentence for use of a deadly weapon, and failure to move for a mistrial due to the circumstances surrounding the gang enhancement. He further alleged that his appellate counsel was ineffective for failing to communicate about his direct appeal.

On each of these claims, Garcia has failed to meet the high burden set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show: 1) that counsel's performance was deficient, and 2) that the deficient performance prejudiced the defense. 466 U.S. at 687, 104 S.Ct. at 2064.

I. Trial Counsel's Alleged Failure to Investigate Edshel Calvillo

Defendant's first claim, that counsel was ineffective for failure to investigate Edshel Calvillo, is belied by the record.

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In post-conviction petitions, claims must be supported with specific factual allegations, which if true, would entitle the defendant to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. When a claim is belied by the record, a district court may properly reject it without conducting an evidentiary hearing. McConnell v. State, 125 Nev. 243, 257, 212 P.3d 307, 317 (2009).

Garcia's trial counsel informed the Court, outside the presence of the jury on the second day of trial (first day of testimony), that he attempted to find and interview Calvillo, but that he had been unable to locate him. Reporter's Transcript, 06/09/2013 ("RT1"), pp. 198-99. Defense counsel even hired a private investigator to find Cavillo, but to no avail. RT1, p.233. In fact, no one had been able to locate Calvillo, and he was only made available after being arrested on a material witness warrant. RT1, p. 199. Garcia's counsel then requested that the Court permit him to interview the witness before cross-examination, which the Court granted, telling the defense that they could speak with Calvillo all night if they wanted.[1] Id., RT1, p. 233.

For those reasons, this Court finds that this claim is belied by the record and must be denied.

II. Trial Counsel's Alleged Failure to Challenge the Imposed Sentence

Garcia next claimed that counsel was ineffective for failing to challenge the imposition of an equal and consecutive sentence for use of a deadly weapon. He argued that his sentence is illegal because the version of NRS 193.165 applicable since 2007 limits the deadly weapon enhancement to one to 20 years and that his 10 to Life sentence on the enhancement violates the statute.

The Nevada Supreme Court has unequivocally stated that "'the general rule is that the proper penalty is that in effect at the time of the commission of the offense' unless the Legislature demonstrates clear legislative intent to apply a criminal statute retroactively."

[1] Defense counsel did choose to interview Calvillo, and indicated that they would do so on the morning of June 10, 2013. RT1, p. 236.

State v. Second Judicial Dist. Court of Nev., 124 Nev. 564, 572, 188 P.3d 1079, 1084 (2008) (citing Sparkman v. State, 95 Nev. 76, 81-82, 590 P.2d 151, 155 (1979)).

The applicable version of NRS 193.165, in this case, is that which was in effect on February 6, 2006. That version, which was last amended in 1995, stated:

> Except as otherwise provided in NRS 193.169, any person who uses a firearm or other deadly weapon or a weapon containing or capable of emitting tear gas, whether or not its possession is permitted by NRS 202.375, in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for the crime. The sentence prescribed by this section runs consecutively with the sentence prescribed by statute for the crime.

1995 Nev. Stat., ch. 455, §1, at 1431. Thus, it was not only proper, but mandatory for this Court to sentence Garcia to a term of imprisonment equal and consecutive to the sentence for the Second Degree Murder conviction.

Therefore, it would have been futile for trial counsel to challenge this sentence because the result would have been the same. Thus, counsel was not deficient in performance and Defendant was not prejudiced. This claim is denied.

III. Trial Counsel's Alleged Failure to Request a Mistrial

Defendant also argued that trial counsel was ineffective for failing to move for a mistrial on the grounds that the State had prejudiced him by introducing evidence of gang involvement before it dismissed the gang enhancement. But this claim is also belied by the record.

Contrary to Garcia's claims, defense counsel made an oral motion for a mistrial "based on the fact that the prosecution proceeded with all that information about gangs and gang activity." Reporter's Transcript, 07/11/2013, pp. 206-08. As this belies Defendant's claim, it must be denied.

IV. Appellate Counsel's Alleged Failure to Communicate

Lastly, Defendant argued that appellate counsel was ineffective for failure to communicate. There is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990). The Nevada Supreme Court has held that all

appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at 1368, 887 P.2d at 268. Finally, in order to prove that appellate counsel's alleged error was prejudicial, a defendant must show that an omitted issue would have had a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

Here, Defendant never alleged how different or additional communication from his appellate counsel would have yielded a different result. Therefore, he has failed to demonstrate prejudice. This claim, then, must also be denied.

V. Motion to Appoint Counsel

Garcia also moved for this Court to appoint him counsel. In Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991), the United States Supreme Court ruled that the Sixth Amendment provides no right to counsel in post-conviction proceedings. In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution . . . does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution."

NRS 34.750 provides, in pertinent part:

> [a] petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily,* the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
>
> a. The issues are difficult;
>
> b. The Defendant is unable to comprehend the proceedings; or
>
> c. Counsel is necessary to proceed with discovery.

NRS 34.750 (emphasis added).

Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel. McKague specifically held that with the exception of cases in which

appointment of counsel is mandated by statute[2], one does not have "[a]ny constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164.

The Nevada Supreme Court has observed that a petitioner "must show that the requested review is not frivolous before he may have an attorney appointed." Peterson v. Warden, Nevada State Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS 177.345(2)).

This Court finds that there are no difficult issues, proceedings for Defendant to comprehend, or discovery for which counsel would be necessary. Therefore, Defendant is not entitled to counsel.

ORDER

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

DATED this 20th day of October, 2016.

DISTRICT JUDGE

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

BY
KRISTA D. BARRIE
Chief Deputy District Attorney
Nevada Bar #010310

[2] See NRS 34.820(1)(a) [entitling appointed counsel when petition is under a sentence of death].

CERTIFICATE OF SERVICE

I certify that on the 17th day of October, 2016, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

EVARISTO JONATHAN GARCIA #1108072
ELY STATE PRISON
4569 NORTH STATE ROUTE 490
P.O. BOX 1989
ELY, NV 89301

BY R. JOHNSON
R. JOHNSON
Secretary for the District Attorney's Office

AWR/KDB/rj/M-1

Case No. 10C262966-1 Dept. No. 11

IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

Electronically Filed
11/16/2016 11:10:55 AM

Steven D. Grierson
CLERK OF THE COURT

State of Nevada

Petitioner/Plaintiff,

vs.

Evaristo J. Garcia #1108072

Respondent/Defendant.

NOTICE OF APPEAL

Notice is hereby given that Evaristo J. Garcia, Petitioner/Defendant above named, hereby appeals to the Court of Appeals for the State of Nevada from the final judgment / order (of the denial on His Habeas corpus (post conviction

Entered in this action on the 10 day of November, 2016.

Dated this 10 day of November, 2016.

Evaristo Garcia #1108072

NDOC # 1108072
Appellant – Pro Per
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

RECEIVED
NOV 16 2016
CLERK OF THE COURT

#53

(4)

CERTIFICATE OF SERVICE BY MAIL

I, Evaristo J. Garcia, hereby certify pursuant to Rule 5(b) of the NRCP, that on this 10 day of November, 20 16, I served a true and correct copy of the above-entitled Notice of Appeal postage prepaid and addressed as follows:

Clerk of the Court
200 Lewis Ave, 3RD Floor
Las Vegas NV 89155-2212

Steven B. Wolfson
Clark County District Attorney
200 Lewis Ave. 3RD Floor
P.O. Box 552212
Las Vegas NV 89155

Signature Evaristo Garcia #1101072

Print Name Evaristo J. Garcia #1101072
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

AFFIRMATION PURSUANT TO NRS 239B.030

I, Evaristo J. Garcia, NDOC# 1109072,

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE

ATTACHED DOCUMENT ENTITLED Notice of Appeal

_____,

DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY

PERSONS, UNDER THE PAINS AND PENALTIES OF PERJURY.

DATED THIS 10 DAY OF November, 2016.

SIGNATURE: _____

INMATE PRINTED NAME: Evaristo J Garcia #1109072

INMATE NDOC # 1109072

INMATE ADDRESS: ELY STATE PRISON
P. O. BOX 1989
ELY, NV 89301

Evaristo Garcia #1108072
Ely State Prison
P.O. Box 1989
Ely NV 89301

LAS VEGAS NV 890
14 NOV 2016 PM 4 L

Steven D. Grierson
Clerk of the Court
200 Lewis Ave, 3RD Floor
Las Vegas NV 89155-1160

89101-630000

NOV 13 2016

App.1643

Electronically Filed
11/17/2016 11:14:21 AM

CLERK OF THE COURT

ASTA

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

STATE OF NEVADA,

Plaintiff(s),

vs.

EVARISTO J. GARCIA,

Defendant(s),

Case No: 10C262966-1

Dept No: II

CASE APPEAL STATEMENT

1. Appellant(s): Evaristo Garcia

2. Judge: Richard F. Scotti

3. Appellant(s): Evaristo Garcia

Counsel:

Evaristo Garcia #1108072
P.O. Box 1989
Ely, NV 89301-1989

4. Respondent: The State of Nevada

Counsel:

Steven B. Wolfson, District Attorney
200 Lewis Ave.
Las Vegas, NV 89101

(702) 671-2700

5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A

6. Appellant Represented by Appointed Counsel In District Court: Yes

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A

9. Date Commenced in District Court: March 19, 2010

10. Brief Description of the Nature of the Action: Criminal

Type of Judgment or Order Being Appealed: Post-Conviction Relief

11. Previous Appeal: Yes

Supreme Court Docket Number(s): 64221, 71525

12. Child Custody or Visitation: N/A

Dated This 17 day of November 2016.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Evaristo Garcia

To The supreme court of the state of Nevada

Evaristo Jonathan Garcia #1108072 Appellant,
v.
The State of Nevada Respondent

case # 71525

FILED
DEC 20 2016
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

Appeal
(Direct Appeal From Petition For writ of Habeas Corpus Postconviction)

No counsel

Appellant's opening

1. Counsel was ineffective At trial For Failing to Adequately Investigate State witness Edshel Calvillo.

2. Counsel was ineffective For allowing Illegal sentenceing after jury conviction on weapon enhancement.

RECEIVED
DEC 19 2016
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

16-39565

3. Counsel was ineffective for not asking for a new trial or mistrial

4. Counsel was ineffective with defendant with direct appeal for not contacting defendant.

Jurisdictional Statement

A) This is an appeal Petition for writ of Habeas corpus (Postconviction)

B) Habeas (Postconviction) was Filed on June 10, 2016 in the District court A Notice of Appeal was timely Filed on Novemeber 17, 2016.

Statements of the Case

Frist Let me start By saying Sorry For any dates that are not accurate In there time Frime. and For not stateing cases I Find myself In ely State Prison with out being able to properly use a Law Libaray. I Have no Attorney to Help me out to write my Appeal and or ~~Hh~~ to Help me Investigate my appeal IF you guys can assiast me In a Attorney to properly Help me out with my appeal I Have no money For one I Have a Low IQ and no Help what so ever.

this Is on case of Murder Second Degree, with use of a deadly weapon Count II-Conspiracy to Commit Murder Found not Guilty Count 3-Weapon enhancements. when defendant was 16 years old on 2-6-06.

Statements of Facts

1.) Counsel was ineffective at Trial For not properly investigateing state witness Edshel Calvillo

1. Counsel was ineffective For Failing to Advately investigte state witness, Edshel Calvillo, Befor trial, Counsel didn't even Know He was in custody For a material witness warrent

2. Counsel Had yeqars to locate State witness, Edshel Calvillo and question Him Befor trial also to Be Ready For there cross-examination at trial even though Attorney Had a Few Hours with Him in a Holding cells Befor cross-examination defendant Feels they would of Been a diFFernt outcome at trial when all His statements where Hearsay

3. Counsel should Have Brought up the Facts of His Prejury on the last case He was testifing in Salvador Garcia Case in a motion to discredit Him Befor a judge Befor trial.

2.) Counsel was ineffective For allowing defendants illegal sentenceing on jury conviction.

1. At trial the jury found defendant guilty on july 16.2013 of Second degree Murder and weapon enhancement at sentenceing defendant got a ten to Life inprisament and a equal and consecative term For ten to life on the weapon enhancement
2. the new weapon enhancement law states diFferant it only carrys a 1 to 20 yeears defendant was charged and put in custody on Oct, 23, 2008 and was sentence on Aug 22, 2013.

3.) Counsel was ineffective For not asking For a new trial or mistrial.

1.) After counsel seen and Heard DA's opening statements and jurys questionnaires on the gang enhancements where Fales and not enough to Hold to the gang enhancements

2. Two of The DA's witnesses presented at trial to testifie at trial that where gang member ~~the~~ of so called street gang Puros Lokas and admitted them self of Being gang members. testified at trial that defendant Had no ties to there gang and was not a gang member of Puros Lokas

3. Counsel and the DA, was so prejudice with there opening statements about defendant Being a gang member with no proof what so ever and the victim as well. just to drop the gang enhancement at the middle of trial when there was an issue with the jury members witch is on record where they say they didn't want to wait outside of the courtroom Because bold guys where giving them mean stares. defendant Belives that counsel could Have prevented this and there would of Been a different outcome at trial.

4.) Counsel was ineffective on defendant with His direct Appeal

1. the Hole time defendant was on His direct appeal Attorney Ross Goodman

In 2 ½ years of appeal, counsel did not speak to Him about grounds He was going to use on the direct appeal witch defendant Feel He could of Been of Help. Attorney Ross Goodman never talked to defendant on Phone or visit He to discusse what was going on defendant Has a number of Letters asking Him question and never got no Responds From counsel defenand Feels if counsel would Have Listen to some of His Ideas things would Have gone differant at trial and direct appeal.

c.c Filed By Inmate
no counsel if you can please Help me with a Attorney to Help me out cause I Realy don't know what Im doing

Respectfully
Evaristo Garcia #1108072
Evaristo Garcia #1108072
Date this December 15, 2016
Evaristo Garcia #1108072

IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

EVARISTO JONATHAN GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 71525
District Court Case No. C262966

NOTICE OF TRANSFER TO COURT OF APPEALS

TO: Hon. Richard Scotti, District Judge
Evaristo Jonathan Garcia
Clark County District Attorney \ Steven S. Owens, Chief Deputy District Attorney
Attorney General/Carson City \ Adam Paul Laxalt, Attorney General
Steven D. Grierson, Eighth District Court Clerk

Pursuant to NRAP 17(b), the Supreme Court has decided to transfer this matter to the Court of Appeals. Accordingly, any filings in this matter from this date forward shall be entitled "In the Court of Appeals of the State of Nevada." NRAP 17(e).

DATE: March 02, 2017

Elizabeth A. Brown, Clerk of Court

By: Amanda Ingersoll
Chief Deputy Clerk

Notification List
Electronic
Clark County District Attorney \ Steven S. Owens, Chief Deputy District Attorney
Attorney General/Carson City \ Adam Paul Laxalt, Attorney General

Paper
Hon. Richard Scotti, District Judge
Evaristo Jonathan Garcia
Steven D. Grierson, Eighth District Court Clerk

17-07139

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EVARISTO JONATHAN GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71525

FILED

MAY 16 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Evaristo Jonathan Garcia appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Garcia argues the district court erred in denying his claims of ineffective assistance of counsel raised in his June 10, 2016, petition. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner

[1]This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

First, Garcia argued his attorneys were ineffective for failing to investigate a State's witness. Garcia asserted counsel did not know the witness was in State custody as a material witness and counsel did not have sufficient time to prepare to cross-examine the witness. Garcia failed to demonstrate his attorneys' performances were deficient or resulting prejudice. During trial, a State's witness was held in custody pursuant to a material witness warrant. After the State questioned the witness and the jury members were excused for the evening, Garcia's counsel informed the district court the defense had spent a considerable amount of resources attempting to locate that witness prior to trial and had been unable to locate him. The State acknowledged it had the opportunity to talk to the witness after he had been taken into custody and the defense requested the district court to permit the defense attorneys to question the witness that evening so as to permit them to be prepared to cross-examine him the next day. The district court granted that request. The following day, the defense attorneys informed the district court they had had sufficient time with the witness and were prepared to cross-examine him.

Under these circumstances, Garcia failed to demonstrate these were the actions of objectively unreasonable defense attorneys. As the attorneys informed the district court they had attempted to locate the witness, and following their discussion with him after he was taken into custody, were prepared to cross-examine the witness, Garcia did not demonstrate a reasonable probability of a different outcome had counsel further investigated the witness or prepared to cross-examine him. Therefore, we conclude the district court did not err in denying this claim.

Second, Garcia argued his attorneys were ineffective for failing to request a mistrial or a new trial due to introduction of prejudicial gang information. Garcia failed to demonstrate his attorneys' performances were deficient or resulting prejudice. Garcia cannot demonstrate his attorneys' performances were deficient in this regard because they orally moved for a mistrial during the trial and filed a motion for new trial after the jury's verdict due to introduction of the gang information. Further, the Nevada Supreme Court has already concluded introduction of the gang information was not improper because the pretrial discovery reasonably suggested the evidence supported a gang enhancement, but the State promptly withdrew the enhancement when it could not reasonably argue the evidence supported it. *Garcia v. State*, Docket No. 64221 (Order of Affirmance, May 18, 2015). Under these circumstances, Garcia failed to demonstrate a reasonable probability of a different outcome had counsel made further attempts to gain a mistrial or new trial due to introduction of gang information. Therefore, we conclude the district court did not err in denying this claim.

Third, Garcia argued his counsel was ineffective for failing to object when the district court sentenced him to serve an equal and consecutive term for the deadly weapon enhancement. Garcia asserted the proper sentence for the deadly weapon enhancement was only a term of 1 to 20 years in prison. Garcia failed to demonstrate either deficiency or prejudice for this claim because the proper penalty for the use of a deadly weapon is the penalty that was in effect when the offense was committed. *See State v. Second Judicial Dist. Court (Pullin)*, 124 Nev. 564, 572, 188 P.3d 1079, 1084 (2008). Garcia committed the murder in 2006 and at that time "NRS 193.165 mandated that a defendant serve an equal and

consecutive sentence for the use of a deadly weapon in the commission of the primary offense." *Id.* at 567, 188 P.3d at 1081; *see also* 1995 Nev. Stat., ch. 455, § 1, at 1431. Therefore, we conclude the district court did not err in denying this claim.

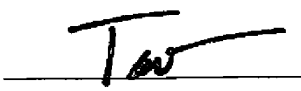
Next, Garcia argued his appellate counsel was ineffective. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Garcia argued his appellate counsel was ineffective for failing to contact him during the direct appeal proceedings. Garcia asserted he could have advised counsel of additional claims which could have been raised on appeal. Garcia failed to demonstrate his counsel's performance was deficient or resulting prejudice. Garcia failed to identify any claims he would have sought to raise on appeal that would have had a reasonable probability of success. A bare claim, such as this one, is insufficient to demonstrate a petitioner is entitled to relief. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, we conclude the district court did not err in denying this claim.

Finally, Garcia appears to assert the district court erred in declining to appoint postconviction counsel to represent him. The

appointment of postconviction counsel was discretionary in this matter. *See* NRS 34.750(1). After a review of the record, we conclude the district court did not abuse its discretion in this regard as this matter was not sufficiently complex so as to warrant the appointment of postconviction counsel.

Having concluded Garcia is not entitled to relief, we ORDER the judgment of the district court AFFIRMED.[2]



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Richard Scotti, District Judge
Evaristo Jonathan Garcia
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[2]The Honorable Abbi Silver, Chief Judge, did not participate in the decision in this matter.

IN THE SUPREME COURT OF THE STATE OF NEVADA

EVARISTO JONATHAN GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 71525
District Court Case No. C262966

FILED
JUN 30 2017
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: June 12, 2017

Elizabeth A. Brown, Clerk of Court

By: Jessica Rodriguez
Deputy Clerk

cc (without enclosures):
Hon. Richard Scotti, District Judge
Evaristo Jonathan Garcia
Clark County District Attorney
Attorney General/Carson City

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on JUN 20 2017.

Deputy District Court Clerk

RECEIVED
JUN 16 2017
CLERK OF THE COURT

RECEIVED
JUN 23 2017
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

EVARISTO JONATHAN GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 71525
District Court Case No. C262966

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED."

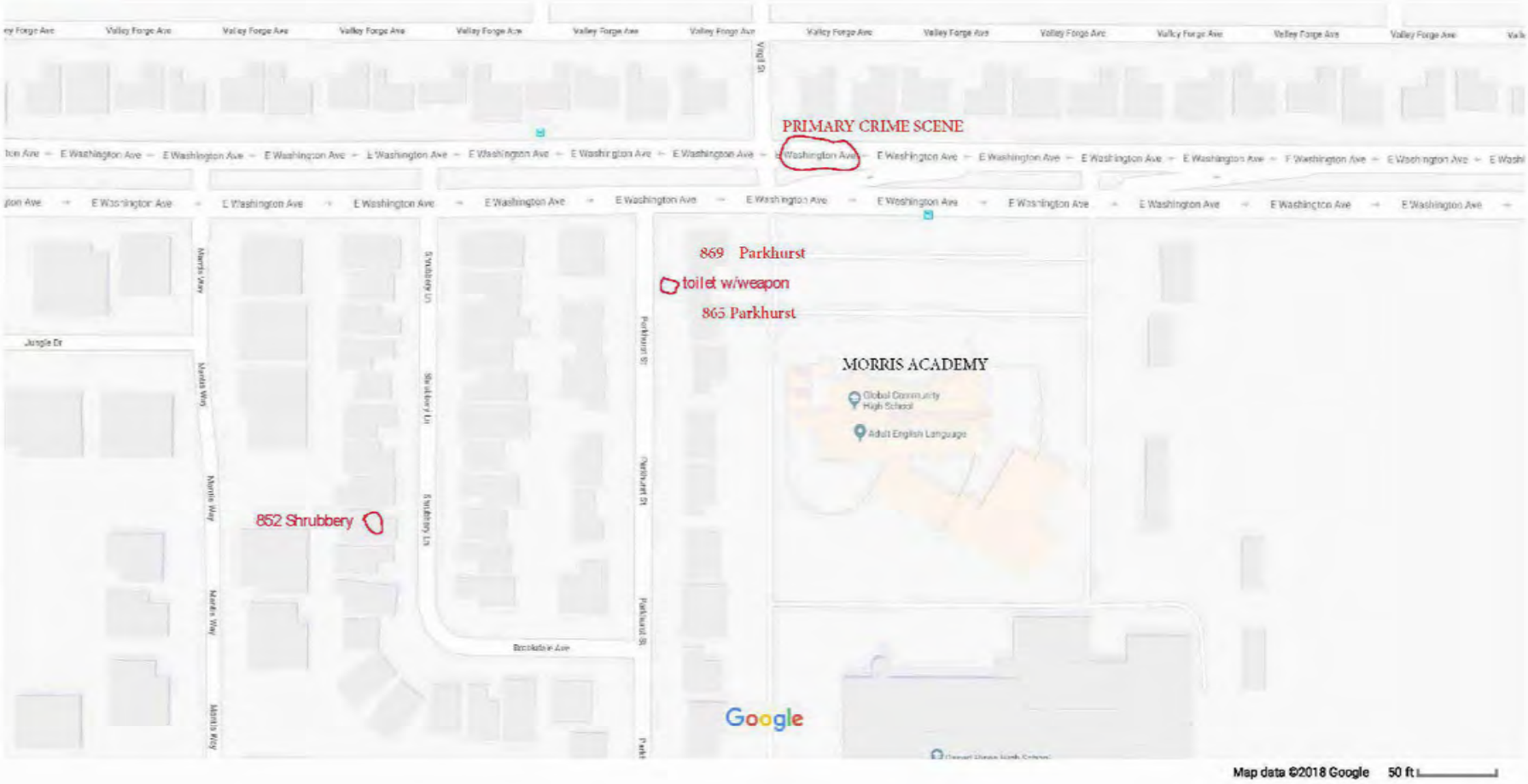
Judgment, as quoted above, entered this 16th day of May, 2017.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this June 12, 2017.

Elizabeth A. Brown, Supreme Court Clerk

By: Jessica Rodriguez
Deputy Clerk

Google Maps



Rene L. Valladares
Federal Public Defender
District of Nevada

Lori C. Teicher
First Assistant

Tammy R. Smith
Investigator

FEDERAL PUBLIC DEFENDER
District of Nevada

411 E. Bonneville Ave.
Suite #250
Las Vegas, NV 89101
Tel: 702-388-6577

October 25, 2018

Clark Co. School District Police Dept.
ATTN: Records Unit
120 Corporate Park Drive
Henderson, NV 89074

Re: Garcia v. NDOC, et al., U.S. District Court Case No: 2:17-cv-03095-JCM-CWH

Dear Records Custodian:

The Federal Public Defender, District of Nevada, has been appointed to represent Evaristo Jonathan Garcia in his federal habeas corpus proceedings. The Assistant Federal Public Defender assigned to Mr. Garcia's case is S. Alex Spelman, and I am the staff investigator assisting on it.

Evaristo Jonathan Garcia (DOB [redacted]1989), was convicted of the murder of Victor Hugo Gamboa (DOB [redacted]1991) following a physical altercation occurring at Morris Academy, 3801 E. Washington Ave., Las Vegas, on 2/6/2006. Accordingly, we request copies of the CCSD Police Department's file(s) pertaining to the incident(s), to include reports (incident, officer's, investigation, supplemental, etc.), notes, video surveillance, statements, memoranda, and any other related documents or materials.[1] We are aware of the involvement of the following CCSDPD officers: Lt. K Young #601, Sgt. R. Morales #708, Off. A. Gaspardi #251, Off. F. Arambula #103, Off C. Diaz #206, Off. Harris #11, and Off A. Sturdivant #192.

I enclose a signed release from our client, as well as a Notice of Representation filed in federal district court. If you require additional information or need to discuss this request further, please do not hesitate to contact me or Assistant Federal Public Defender S. Alex Spelman at (702) 388-6577. I appreciate your assistance in this matter.

Sincerely,

TAMMY R. SMITH
Investigator, Non-Capital Habeas Corpus Unit

Enclosures: Signed Release, Notice of Representation

[1] The companion Las Vegas Metropolitan Police Department event number is 060206-2820.

DECLARATION OF EVARISTO JONATHAN GARCIA

1. I, Evaristo Jonathan Garcia, am currently in custody of the Nevada Department of Corrections. My date of birth is [redacted]984 and my social security number is [redacted]2609. I'm currently pursuing my appeal in United States District Court, District of Nevada in *Garcia v. NDOC, et al.*, Case No. 2:17-cv-03095-JCM-CWH. The Law Offices of the Federal Public Defender has been appointed to represent me in the above entitled case.

2. I authorize any associates, representatives, and/or agents of the Federal Public Defender's Office to inspect and/or obtain copies of any and all records and reports of any kind which they may request, including but not limited to, academic, adoption, birth certificates, death certificates, autopsy records and findings, marriage certificates, dissolution files, correctional files, employment, unemployment, worker's compensation, social security and earnings information, prison and law enforcement (including but not limited to arrest and incident reports), financial, probation, correctional employment, military, as well as any files prepared in connection with prior civil or criminal litigation (including attorney and investigator files) and any other correspondence pertaining to me.

3. This document also authorizes any attorneys, social workers, experts, or other personnel to discuss their otherwise confidential information with said legal representatives. In consideration of such disclosure, I release you, in your individual and/or institutional capacity, from any and all liability arising from the disclosure of otherwise confidential information to said legal representatives.

4. You are specifically authorized to photocopy these records and release certified copies to said legal representatives. I request that all persons cooperate fully in providing said legal representatives such information.

///

///

5. Nevada Revised Statute 208.165 provides that an inmate may execute any instrument by signing a declaration, under penalty of perjury, with the same legal effect as a notarized oath. Therefore, inmates do not require the services of a notary public to execute any Nevada instrument as provided in this procedure. Federal Statute 28 USC § 1746 also provides for unsworn declarations in all federal jurisdictions.

6. A copy of this authorization shall have the same force and effect as the original and will remain in effect until the above legal proceedings have concluded.

SIGNED this 6 day of Feb, 2017, under penalty of perjury.

#1108072
EVARISTO JONATHAN GARCIA
Saguaro Correctional Center
1252 E. Arica Road
Eloy, AZ 85131

RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
S. ALEX SPELMAN
Assistant Federal Public Defender
Nevada State Bar No. 14278
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (fax)
Alex_Spelman@fd.org

Attorneys for Petitioner Evaristo Jonathan Garcia

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

EVARISTO JONATHAN GARCIA,

Petitioner,

v.

NEVADA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

Case No. 2:17-cv-03095-JCM-CWH

NOTICE OF APPEARANCE

NOTICE IS HEREBY GIVEN that Assistant Federal Public Defender S. Alex Spelman will now serve as counsel for Petitioner Evaristo Jonathan Garcia. Atty. Spelman is replacing Megan C. Hoffman, Assistant Federal Public Defender, as counsel for Petitioner. Counsel requests the court to direct all further pleadings and court filings to counsel at the address noted below and further requests that Petitioner's name and address be removed from the court's proof of service.

Counsel's address is as follows:

S. Alex Spelman
Assistant Federal Public Defender
411 East Bonneville Ave. Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-6419 (fax)
Alex_Spelman@fd.org

Dated this 10th day of May, 2018.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

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

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States District Court, District of Nevada by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system and include: Heather D. Procter.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

Evaristo Jonathan Garcia
No. 1108072
Saguaro Correctional Center
1252 E. Arica Road
Eloy, AZ 85131

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

DECLARATION OF TAMMY R. SMITH

I, Tammy R. Smith, hereby declare as follows:

1. I am a staff investigator at the Federal Public Defender, District of Nevada (FPD).

2. The FPD represents Evaristo Garcia in his federal habeas case, which he is litigating in the U.S. District Court for the District of Nevada. *Garcia v. Nevada Department of Corrections, et al.*, Case No. 2:17-cv-03095-JCM-CWH. I have been assigned to assist with the investigation of the case.

3. On September 20, 2018, I reviewed LVMPD's CAD (computer aided dispatch) log pertaining to event #060206-2820. The document was part of the Clark County Special Public Defender's case file requested and received by my office. The log indicates that school police took down a suspect at gunpoint in a neighborhood near the crime scene, specifically in the area of 852 Shruberry. The log further indicates a "one on one" was conducted with "NEG" results.

4. On the same date, I also reviewed an LVMPD Officer's Report signed by K. Hardy #3031 (date and time of report is illegible). The document was also part of the Clark County Special Public Defender's case file requested and received by my office. Page 2 of the Officer's Report lists the following Clark County School District Police Department (CCSDPD) personnel at the scene: Lt. K. Young #601, Sgt. R. Morales #708, Off. A. Gaspardi #251 ("first officer to arrive"), Off. F. Arambula #103, Off. C. Diaz #206, Off. Harris #311, and Off. A. Sturdivant #192.

5. The Clark County Special Public Defender case file requested and received by my office does not contain any CCSDPD records, nor does the case file provided by Ross Goodman to my office.

6. On October 25, 2018, I requested CCSDPD records pertaining to the incident. On November 26, 2018, I received from the CCSDPD a letter dated November 20, 2018, along with records pursuant to my request.

7. On January 9, 2019, I requested by telephone a Nevada Department of Motor Vehicles photo for Jose Bonal, DOB [redacted]90. The oldest image on file for Mr. Bonal was dated July 3, 2006. I received said image on January 15, 2019. The DMV record also lists Mr. Bonal's height (5'8") and weight (145 lbs.) as of July 3, 2006.

I declare under penalty of perjury that the foregoing information is true and correct.

Executed on this 5th day of February, 2019, in Las Vegas, NV

Tammy R. Smith

PET
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*S. Alex Spelman
Assistant Federal Public Defender
Nevada State Bar No. 14278
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
alex_spelman@fd.org

*Attorney for Petitioner Evaristo J. Garcia

FILED
MAR 14 2019
CLERK OF COURT

FUS

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Evaristo Jonathan Garcia,

Petitioner,

v.

James Dzurenda, Director of Nevada Department of Corrections;

Aaron Ford, Attorney General of the State of Nevada;

Todd Thomas, Warden of Saguaro Correctional Center.

Respondents.

Case No. A-19-791171-W

Dept. No. 29

Date of Hearing:

Time of Hearing:

(Not a Death Penalty Case)

Petition for Writ of Habeas Corpus
(Post-Conviction)
FILED UNDER SEAL

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Saguaro Correctional Center, Arizona (by contract with the Nevada Department of Corrections).

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court, Clark County, Nevada

3. Date of judgment of conviction: 9/11/2013

4. Case Number: C262966-1

5. (a) Length of Sentence: Life with a minimum parole eligibility of ten (10) years plus an equal and consecutive term of life with ten (10) years minimum for use of a deadly weapon, with one thousand nine hundred fifty-nine (1,959) days credit for time served. (Total: 20 years to life).

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes [ ] No [x]

If "yes", list crime, case number and sentence being served at this time: Nature of offense involved in conviction being challenged: N/A

7. Nature of offense involved in conviction being challenged:

8. What was your plea?

(a) Not guilty x (c) Guilty but mentally ill _____

(b) Guilty _____ (d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (a) Jury x (b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No x

12. Did you appeal from the judgment of conviction? Yes x No __

13. If you did appeal, answer the following:

(a) Name of Court: Nevada Supreme Court

(b) Case number or citation: 64221

(c) Result: Affirmance

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes x No _____

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of Court: Eighth Judicial District Court (Nevada)

(2) Nature of proceeding: Post-conviction habeas corpus petition

(3) Ground raised:

I. Counsel was ineffective at trial for failing to adequately investigate state witness, Edshel Calvillo, before trial. Counsel should have impeached this witness with prior perjury.

II. Counsel was ineffective for allowing illegal sentencing after jury conviction.

III. Counsel was ineffective for not moving for a new trial or mistrial.

IV. Counsel was ineffective on direct appeal (lack of communication).

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No x

(5) Result: Petition denied

(6) Date of Result: October 27, 2016.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

8JDC final order: 10/25/16

8JDC notice of final order: 10/26/16

Nev. Ct. App. Order of Affirmance (No. 71525): 05/16/17

Nev. Sup. Ct. Remittitur: 6/12/17

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: United States District Court (D. Nev.)

(2) Nature of proceeding: Federal Habeas Corpus Petition (28 U.S.C. § 2254)

(3) Grounds raised:

I. The prosecution violated the Due Process Clause of the Fourteenth Amendment by suppressing material and exculpatory evidence from the defense at the time of trial.

II. The state presented insufficient evidence to prove Evaristo committed second-degree murder, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

III. The trial court violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by admitting an unduly suggestive, prior in-court identification at trial.

IV. The trial court violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by denying Evaristo's request to have a state's witness examined by a psychiatrist and by allowing this incompetent witness to testify.

V. The State violated Evaristo's right to due process by utilizing a material witness warrant to prejudice the jury, in violation of the Fourteenth Amendment to the United States Constitution.

VI. The State violated Due Process by proceeding to trial with a prejudicial gang enhancement, knowing it lacked evidentiary support, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

(4) Did you receive an evidentiary hearing on your petition, application or motion? N/A (still pending)

(5) Result: Pending.

(6) Date of result: Pending

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: N/A

(c) As to any third petition, application or motion, give the same information: N/A

(1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion? N/A

(5) Result: N/A

(6) Date of result: N/A

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? Yes If so, identify:

a. Which of the grounds is the same: Ground I

b. The proceedings in which these grounds were raised: Federal habeas corpus petition proceedings (Case No. 16-cv-03095 in the United States District Court for the District of Nevada).

c. Briefly explain why you are again raising these grounds. In the course of preparing Mr. Garcia's federal post-conviction petition for a writ of habeas corpus, counsel's investigator obtained newly discovered evidence constituting a *Brady/Giglio/Napue* claim alleging the State suppressed favorable and material evidence. Such allegations can represent "good cause" and prejudice to overcome the procedural bars contained in Chapter 34. *See State v. Huebler*, __ Nev. __, 275 P.3d 91, 95–96 (2012); *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003); *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). Mr. Garcia also has good cause for raising Ground One in a successive petition because the factual basis for the claim was not previously available. More specifically, he discovered new evidence in support of the claim within the past year.

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court,

state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.). N/A

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? Yes If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

Evaristo Garcia's counsel, the Federal Public Defender, newly discovered the factual basis for this *Brady/Napue/Giglio* claim on November 26, 2018 and January 9, 2019. This evidence, primarily a Clark County School District Police Report, should have been disclosed by the prosecution before trial. Trial counsel explicitly requested all police reports from the prosecution and nonetheless, the prosecution did not disclose this report. The State's violation of *Brady v. Maryland, Napue*, and *Giglio* here establishes cause and prejudice to overcome the procedural bars to this petition. *See State v. Huebler*, 128 Nev. 192 (2012); *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003); *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). Mr. Garcia also has good cause for raising Ground One more than a year after judgment and direct appeal because the factual basis for the claim was not previously available.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes x No _____

If yes, state what court and the case number: *Garcia v. Nevada Department of Corrections, et al.*, No. 2:17-cv-03095-JCM-CWH (D. Nev.) (United States District Court for the District of Nevada).

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

John Momot

Ross Goodman

Dayvid Figler

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack: Yes _____ No __x_____

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

I. The prosecution violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by suppressing material and exculpatory evidence from the defense at the time of trial.

A. Legal standard

The prosecution must affirmatively provide to the defense, without request, all favorable and impeachment evidence in its actual or constructive possession; failure to do so violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[1] This duty encompasses "evidence favorable to an accused . . . material to either guilt or punishment."[2] "Brady and its progeny require the state to disclose all material evidence that could exculpate the defendant,

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667, 675 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263 (1999).

[2] *Brady*, 373 U.S. at 87.

including evidence that could be used to impeach one of the prosecution's witnesses or undermine the prosecution's case."[3]

The burden to disclose exculpatory or impeachment material is a broad obligation falling upon the prosecutor because the "special role played by the American prosecutor in the search for truth in criminal trials"—the interest of the State, and the prosecutor, "is not that it shall win a case, but that justice shall be done."[4] While it is advisable for the defense to request production of such information, the prosecutor's duty to disclose *Brady* material does not depend on the defense requesting it.[5]

The state must affirmatively disclose favorable material even if it is only in its constructive possession, as was the case in the United States Supreme Court case of *Kyles v. Whitley*.[6] A prosecutor "may not be excused from disclosing what it does not know but could have learned."[7] This is because "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case."[8]

B. Analysis

The prosecution violated *Brady v. Maryland* by failing to disclose, before trial, a material and exculpatory Clark County School District Police report.

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[3] *Milke v. Ryan*, 711 F.3d 998, 1003 (9th Cir. 2013); *see Giglio v. United States*, 405 U.S. 150, 154 (1972).

[4] *Strickler*, 527 U.S. at 281 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

[5] *Bagley*, 473 U.S. at 680–82.

[6] *See Kyles*, 514 U.S. at 421, 437, 441–42 ("[W]e hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention").

[7] *Amado v. Gonzalez*, 758 F.3d 1119, 1134–35 (9th Cir. 2014) (citing *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997) (en banc)).

[8] *Kyles*, 514 U.S. at 437.

The testimony at trial established the following. This case involved a shooting in a school parking lot arising out of a brawl between dozens of teenagers and young adults. Testimony established that two rival gangs were present in this fight—the Puros Locos and Brown Pride. Evaristo's two older cousins, Giovanni and Salvador Garcia, were members of the Puros Locos; Salvador was its leader. Other relevant members of the Puros Locos were Manuel Lopez, who owned the gun used in this shooting, Jonathan Harper, and Edshel Calvillo. Evaristo was not a member.

Rumors for days leading up to the shooting indicated that Giovanni Garcia was going to be in a fight with members of the Brown Pride gang. When the day arrived, after school ended, Giovanni called his fellow Puros Locos members by phone to come support him. Who actually arrived to support him remained subject to debate.

During the fight, school officials came outside to break it up. People began to scatter and run away. At this time, a young Hispanic male pulled out a black gun and fired into the back of Victor Gamboa as he tried to run away, killing him.

The school at which the shooting occurred was a night school, so when the school day ended it was already dark outside. The prevailing description of the shooter was only that he was a young Hispanic male wearing a gray or light gray hoodie sweatshirt with dark shorts. He had short black hair. Witnesses were inconsistent about whether his hood was up or down during these events and thus, whether and to what extent they actually got a good look at him.

Witnesses stated to law enforcement that the shooter fled on foot west on Washington towards Parkhurst Street. The following image depicts the scene, which the FPD investigator in this case created on Google Maps and marked for

ease of reference, which simply depicts more of the same area as the State's crime-scene diagram and image at trial.[9]

Later, law enforcement discovered a pistol, purported to be the murder weapon, stashed in a toilet tank in the area of 865 Parkhurst Street.[10] As far as the defense knew at trial, law enforcement did not apprehend anyone at the scene.

No disinterested witness identified Evaristo as the shooter. Rather, at first, other witnesses said they saw or heard Giovanni was the shooter. Most witnesses said they did not know who the shooter was, or did not get a good look at his face.

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[9] *See* Exhibits 22, 23, 30. Evaristo requests the court take judicial notice of the map of this area, on the page to follow.

[10] *See* 7/10/13 Tr. at 241–47; 7/9/13 Tr. at 58, 109–10.

The witnesses to accuse Evaristo were members of the Puros Locos gang, the gang Evaristo's older cousins—Giovanni and Salvador—were in.

Evaristo was arrested years later in Mexico and extradited to the United States. He pleaded not guilty and went to trial.

1. The primary defense at trial was about identity, and the State's identity evidence was weak.

This trial centered on whether the State had identified the correct person as the shooter. To that end, the State's evidence was weak, at best. In the words of the trial judge, this was "obviously not the strongest case that we see in the criminal justice system."[11]

There was no reliable identification of the shooter in this case. This shooting arose out of a brawl between dozens of teenagers in a school parking lot. Many of the kids or young adults involved claimed membership in local Hispanic gangs, and therefore, given the likelihood the shooter was a member of one of these gangs, many witnesses had an interest in misleading the police about their knowledge of the events. Some even admitted they provided misinformation to the law enforcement. Finding reliable witnesses was nearly impossible. In the end, the few witnesses that could be considered independently credible were unable to identify the shooter. And the few witnesses who claimed Evaristo was the shooter each had serious credibility or reliability concerns, or even failed to identify him at trial.

In contrast, several eyewitnesses provided statements before trial affirmatively pointing to Evaristo's cousin, Giovanni Garcia, as the shooter. The State's case against Evaristo was truly thin.

The only forensic evidence the State relied upon for identity also failed to prove the identity of the shooter. Law enforcement discovered a pistol near the

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[11] 8/1/13 Tr. at 15.

crime scene that the State alleged to be the murder weapon. This pistol belonged to co-defendant Manuel Lopez, a member of the "Puros Locos" gang.[12] Evaristo's older cousins—Giovanni and Salvador Garcia—belonged to this gang, and Salvador was its leader.[13] Testimony and witness statements established that although Evaristo was not a member of Puros Locos, he would hang out with them from time to time. When they would hang out, they would pass around Manuel's pistol. That is, it was known that Evaristo, and others, have held that pistol before.

Manuel's relationship to the pistol, in contrast, was much more intimate. The records shows he either provided the pistol to the shooter, or he was the shooter himself. After the shooting, he tried to retrieve it from the place the shooter stashed it.[14] But by the time he arrived to retrieve it, the police had already discovered and impounded it.

Law enforcement tested this pistol for fingerprints. Although the record shows that Manuel and likely others have held this pistol, the fingerprints on the weapon were either insufficient for identification or, in the case of one fingerprint and one palm print, belonged to Evaristo. Thus, the fingerprint forensics in this case established only that which no one was disputing—at some point in time, Evaristo has held that pistol. Who held and actually fired the pistol on the night of the shooting, however, remained unproven.

Indeed, as the evidence of identification was in such contention here, the course of this six-day trial focused almost entirely on the issue of identification. The parties extensively questioned witnesses about the credibility of their purported identifications and descriptions of the shooter. And to that end, though differences between the witnesses emerged, the prevailing, common ground was that the

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[12] *See* 7/9/13 Tr. at 179.

[13] 7/10/13 Tr. at 13.

[14] *See* 7/11/13 Tr. at 38.

shooter was wearing gray hoodie, had dark shorts on, and was a Hispanic teenage male with short hair.

Counsel used this information to compare it to potential suspects known to be at the scene of the crime. The prosecution used this information to identify Evaristo as the shooter through a witness who alleged he matched the description on that night. In contrast, the defense was unable to affirmatively prove Evaristo was wearing something else or that anyone else matched that description at the scene.

How helpful to the defense it would have been, therefore, had they reliable, affirmative proof that a person other than Evaristo matched that description and was at the scene that very night. Moreover, how helpful to the defense it would have been had they reliable evidence that law enforcement themselves actually discovered and apprehended such a person, at gunpoint, as he fled the crime scene just past the location the shooter stashed the weapon.

Also, how helpful it would have been to discover that one of the most important witnesses—Betty Graves, the school safety monitor—who saw the shooter's face, actually provided law enforcement with an additional identifying detail of the shooter inconsistent with her trial testimony, which matched alternative suspects at the scene.

Unfortunately, the prosecution never provided the defense with such evidence. But it did exist. And it was in law enforcement's possession.

2. The State did not provide critical discovery, which the FPD's investigator later discovered in 2018.

The murder in this case took place at a school. Therefore, because of the location and gravity of the offense, two police departments were involved: first the Clark County School District Police Department (CCSDPD), then the Las Vegas Metropolitan Police Department (LVMPD). Thus, the defense's discovery request, as well as the prosecution's constitutional obligations, encompassed providing the

defense with the police reports from both. Indeed here, the defense affirmatively requested discovery of all material to which Evaristo is entitled pursuant to *Brady*[15] and *Giglio*,[16] and, specifically: "[c]opies of statements given by any State witness on any case, specifically including any reports of said information provided prepared by any law enforcement agent," and "[c]opies of all police reports, medical reports in the actual or constructive possession of the District Attorney's Office, the [LVMPD], Nevada Department of Corrections, the Clark County Sheriff's Office, and *any other* law enforcement agency."[17]

However, the State provided the defense police reports from only the LVMPD, not from the CCSDPD.[18] And the State did not list any officers from the CCSDPD as witnesses nor call them at trial.

Relying on the State's affirmation that all relevant law enforcement materials had been turned over to the defense, the defense proceeded to trial with only reports and testimony from officers of the LVMPD. The jury found Evaristo guilty despite the weak evidence of identification in this case.

After trial and direct appeal, Evaristo proceeded with his post-conviction litigation *pro se*. Thus, he was unable to conduct any meaningful investigation until the United States Courts appointed him post-conviction counsel, through the Federal Public Defender (FPD).

The FPD assigned an investigator to this case. As part of her investigation, she reviewed the LVMPD's computer aided dispatch (CAD) log for this case.[19]

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[15] 373 U.S. 83 (1963).

[16] 405 U.S. 150 (1972).

[17] 8/25/10 Mtn. for Discovery (emphasis added).

[18] *See* Exhibit 31 ¶ 3–5.

[19] *See* Exhibit 8 (highlights added to exhibit by FPD investigator).

Surprisingly, unmentioned at Evaristo's trial or in any other LVMPD report, the investigator discovered this log "indicates that school police took down a suspect at gunpoint in a neighborhood near the crime scene, specifically in the area of 852 Shrubbery."[20] Following this lead, the investigator reviewed an LVMPD Officer's Report which lists seven CCSDPD personnel who were at the scene.[21]

On October 25, 2018, the FPD investigator wrote a letter to the records unit of the CCSDPD, providing the names of the officers involved and requesting copies of its "file(s) pertaining to [this case], to include reports (incident, officer's, investigation, supplemental, etc.), notes, video surveillance, statements, memoranda, and any other related documents or materials."[22] On November 26 2018,[23] the CCSDPD responded with a letter and several records pursuant to the FPD's request.[24] The records provided were not in trial counsel's casefile.

The contents of these reports were remarkable in a number of ways. First, CCSDPD Officer Arambula's report reveals this officer was the "closest officer to the scene," who "responded and assisted in looking for the suspect" shooter.[25] In the course of that search, Officer Arambula "observed a Hispanic Juvenile" that he described as "***matching the description*** given by dispatch," nearby the scene of the school shooting, "at 852 block of Shrubbery."[26] Officer Arambula's report did not provide much more information.

This alone was material and exculpatory. Until now, the defense did not know that law enforcement had considered this juvenile to "match[ ] the

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[20] Exhibit 31 ¶ 3.

[21] Exhibit 31 ¶ 4.

[22] Exhibit 1.

[23] Exhibit 31 ¶ 6.

[24] *See* Exhibit 1.

[25] *Id.* at 12.

[26] *Id.* (emphasis added).

description" of the shooter. Further, the location at which school police stopped this suspect was in a highly probative location—it was in the direction witnesses saw the shooter flee, and was in the direction witnesses saw the shooter run, and was just past the location the shooter stashed the purported murder weapon. This alone would have been critical, exculpatory evidence for the defense.

A second CCSDPD report provided to the FPD, authored by an Officer Gaspardi,[27] provided further material, exculpatory information. Officer Gaspardi's report shows that school police decided to stop this alternative suspect, secure him, and explicitly considered him a "possible suspect."[28] This stop was not the result of a momentary, passing belief in the likelihood of this suspect's culpability. Rather, law enforcement stood next to this individual, keeping him detained, for 14 minutes believing he was a possible suspect:

> Officer J. Harris #305 assisted Arambula to secure the suspect while I returned to the victim to speak with any witness who could positively identify the suspect. . . . I met with Bettye Graves, a CCSD employee who is a campus monitor at Morris HS. Graves advised that [she] witnessed the fight as well as the shooting and stated that she could identify the suspect . . . . I took Graves to Officer Arambula's location to where a one on one was conducted, but Graves advised that it was not the shooter. [This suspect] was stopped at approx. 2106 and released at approx. 2120. . . .[29]

Thus, the encounter ended only after a one-on-one identification with an eyewitness, who law enforcement had trusted was a reliable source. Yet though Betty Graves "advised that it was not the shooter," the contents of this report

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[27] *Id.* at 9–11.

[28] Exhibit 1 at 11.

[29] *Id.*

revealed how close to the prevailing description of the shooter this Hispanic teenage male actually was:

> The suspect that was stopped was of thin build with longer, bushy hair and light skin. He was wearing a ***gray hoodie*** and ***ran*** from a neighbor's yard. He was identified as Jose Bonal, D.O.B. . . . [1990], student ID . . . . Bonal is a Desert Pines [High School] student.[30]

For several reasons, Betty Graves was quite possibly wrong about her description of the shooter, her decision that Jose was not the right person, or both. The record establishes that the scene was quite dark at the time of the brawl and shooting, so the dark might have obscured Ms. Graves's perception of the shooter. Further, witnesses disagreed about whether the shooter was covering his head with a hoodie and, thus, covering his hair while at the scene.

Finally, this report revealed for the first time that even Ms. Graves's own description of the shooter was not consistent:

> Graves . . . ***was able to give an updated description of*** [the shooter]. . . . [She] advised that the suspect 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. 5-7".[31]

Remarkably, this is the only place in the record that indicates the shooter had a mustache. Before the FPD obtained this report, nowhere in the record had someone alleged the shooter had a mustache. Even Ms. Graves herself never repeated the allegation.

This information would have been critical to the defense: either her mustache allegation is correct and the other witnesses were mistaken (leading law enforcement to look for suspects matching the wrong description), or Ms. Graves's

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[30] *Id.* (emphasis added).

[31] *Id.* (emphasis added).

varying description of the shooter (and confidence in negatively identifying Jose) renders her testimony unreliable. Either way, if the defense had this information in hand, they could have presented this information to the jury as material, exculpatory, and valid fodder for impeachment.

a. This report contained a specifically named, closely-matching alternative suspect for the defense to present to the jury.

The prevailing common description of the shooter was that he was a Hispanic male in his mid to late teens, of medium build, with short dark hair, wearing a gray hoodie with dark shorts (or pants). These reports, which described Jose as a "Hispanic Juvenile ***matching the description***" of the shooter,[32] establishes that he was of the correct ethnicity, was 16 years old, and was wearing a gray hoodie, all as the shooter was. Indeed, this report makes him the only alternative suspect at the scene of the shooting confirmed to be wearing a gray hoodie that night.

Although the report discounts Jose's appearance as having a "thin build" with "light skin" and "longer, bushy hair," these criteria are quite subjective. Therefore, the FPD requested a close-in-time image and description information from the Department of Motor Vehicles of Jose (which, if the State had provided this report before trial, the defense at trial could have done, too).[33]

The DMV responded with an image captured on July 3, 2006—only a few months after the shooting—and with other identifying information from Jose's Nevada identification card that expired back in February 2010.[34] Notably, it shows

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[32] Exhibit 1 at 12.

[33] Exhibit 31 at 7.

[34] Exhibit 16.

that Jose was 5'8"—in the height range witnesses estimated of the shooter[35]—and that he was 145 pounds. According to the Center for Disease Control, this weight is in the 65th percentile for teenage boys of his age in July 2006 and his height.[36] In other words, Officer Gaspardi's subjective perception that Jose was "of thin build" was not correct—this DMV record shows he was of medium build, as witnesses reported of the shooter.[37]

Also, the DMV image of Jose from July 2006, shown in Exhibit 16, shows he likely has either a light or medium shade of skin. As for Betty Graves's "updated" description of the shooter as having "dark" skin, this is highly subjective and quite possibly a mistake due to the dark lighting conditions in which she observed the shooter, who was wearing a hoodie over his head at the time.

As for the hair, the DMV image shows Jose had relatively short hair only a few months after this shooting. It's not a buzz cut, but it is a length that one might expect if the person had very short hair only a few months prior, at the time of the shooting. Or if the hair depicted in this photograph is an accurate depiction of how Jose always wore his hair at the time, then it is understandable why one witness might call it short and another describe it as "longer, bushy hair"—this hair is somewhere between those descriptions.

Beyond closely matching the description of the shooter, the record shows Jose was apprehended along the route witnesses and the forensic evidence show the

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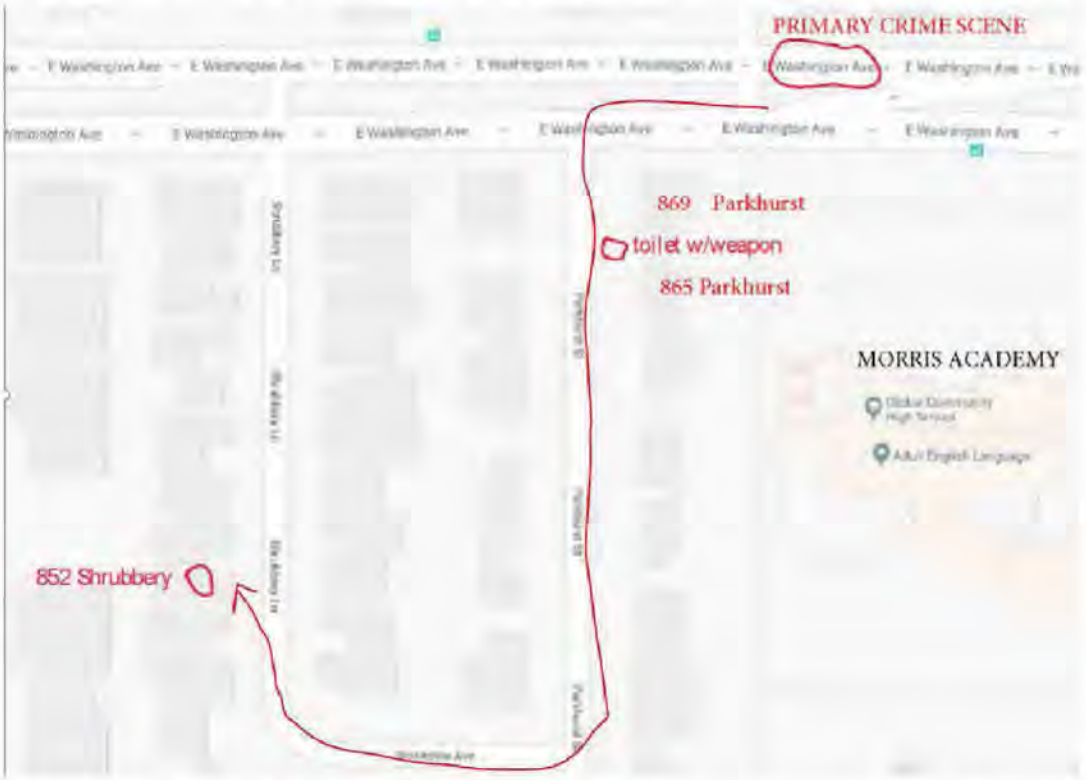
[35] *See, e.g.*, 7/10/13 Tr. at 108 ("I would say not shorter than five-eight, five-nine, not taller than six-one.").

[36] *See* Center for Disease Control, *BMI Percentile Calculator for Child and Teen: Results*, https://www.cdc.gov/healthyweight/bmi/result.html?&method=english&gender=m&age_y=16&age_m=5&hft=5&hin=8&twp=145 (accessed February 5, 2019)]

[37] In any event, even if Jose were best described as of lighter build, this would be consistent with the testimony of the school principal, who also saw the shooter. *See* 7/10/13 Tr. at 108 (". . . athletic build, I would say skinnier.").

shooter fled. Witnesses reported the shooter running west on Washington, towards Parkhurst.[38] He then turned left (south) on Parkhurst[39] and deposited the pistol in front of a house. Jose was found just around the corner from that location. If the defense had the benefit of these school police reports, then they could have argued Jose was the shooter, who fled along this simple route ending at 852 Shrubbery:[40]



Finally, the fact Jose was running from the crime scene, and law enforcement stopped him at gunpoint and detained him, is additional evidence suggesting culpability, which Evaristo's defense counsel could have used to suggest Jose as an alternative suspect and raise reasonable doubt.

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[38] *See, e.g.*, 7/10/13 Tr. at 115

[39] *Id.* at 116.

[40] Below is a screenshot of Exhibit 30, created by the FPD investigator, over which counsel drew a red line to indicate the direction trial counsel could have argued Jose ran. This is submitted as argument and for demonstrative purposes.

This would have been material, exculpatory information.

b. This report could have been used to impeach Betty Graves's testimony and allow defense counsel further evidence to suggest alternative suspects.

This is the first and only time in the record that a witness reports that the suspect had a mustache. This contradicts Ms. Graves's own later statements to law enforcement and her trial testimony, in which she never mentions a mustache, as well as the description of the shooter by other eyewitnesses. The defense could have used this school police report to impeach Betty Graves's testimony.

At trial, the State relied heavily on the accuracy of Ms. Graves's description and memory of the shooter's appearance. For instance, she testified that Giovanni Garcia—Evaristo's older cousin, and member of the Puros Locos who started the after school brawl—was not the shooter. Thus, the State relied on this testimony to exclude him as a possible alternative suspect.

And from this new, previously-undisclosed school police report, we now know that law enforcement also relied on Ms. Graves's opinion as a witness to reject the possibility that Jose—the person stopped on Shrubbery—was the real shooter.[41]

But this previously-undisclosed school police report calls Betty Graves's ability to identify or exclude people as the shooter into doubt. Unknown to the defense at trial, this police report shows she originally gave a description of the shooter inconsistent with her own later statements and testimony, and inconsistent with the description of the shooter given by other witnesses. Indeed, nowhere else in the record does a witness allege the shooter had a mustache. This calls Ms. Graves's ability to reliably identify the shooter into doubt.

[41] Exhibit 1.

For this reason, if the defense had this school police report in hand at the time of trial, it could have used this information to impeach Ms. Graves's ability to reliably identify—and to exclude people—as the shooter. The immediate impact of such impeachment would have been to give the defense more latitude to suggest one of Ms. Graves's rejected alternatives, such as Jose or Giovanni, was the real shooter.

Indeed, as explained above, Jose otherwise closely matched the description of the shooter, was wearing the same clothes as the shooter, and was found in the area witnesses saw the shooter run and near where the gun was stashed.

Alternatively, impeaching Ms. Graves's ability to reliably exclude Giovanni as the shooter would have allowed the defense to present a stronger theory to the jury that it was really him. Without her statement, there was ample support in the record that it was. It was he who started the after school brawl in the parking lot and who had a grudge with the members of the rival gang involved. Further, before trial, several witnesses provided statements to law enforcement stating explicitly he was, in fact, the shooter. For instance, Crystal Perez wrote in a handwritten, voluntary statement: "I see Yovanni [running] with a gun. . . . [H]e was pointing the gun at Melissa and Victor. Victor ran [and] Yovanny was behind him[.] [T]hat's when he shouts Victor and he's down."[42] In this writing, and in the context, it is clear that "Yovanni" is Giovanni.[43] And "Victor" is the victim in this case.

Next, Crystal verbally told law enforcement, ". . . and I see Giovanni in the corner with a gun and I hear him shoot. . . . he was shooting at Victor."[44] Law

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[42] Exhibit 9 (highlights added).

[43] *See* Exhibit 25 at 3 ("GIOVANNY GARCIA, aka Yobani Borradas").

[44] Exhibit 10 at 8.

enforcement clarified with her, "Q. All right. And you're sure that you, that you saw Giovanni shoot him?" She replied, "Yes. I'm positive."[45]

Crystal later changed her story at trial,[46] but the record corroborated her statements about Giovanni. For instance, a witness at the scene said he overheard someone exclaim that Giovanni has a gun: "Someone yells out . . . Giovanni has a gun."[47] Another witness claimed, "he (Giovany) just ended up shooting my friend's brother (Victor Gamboa). . . . I heard like 5 shots," (though this particular witness did not provide a foundation for her ability to identify the shooter).[48]

Further, but for Ms. Graves's exclusion of Giovanni as the shooter, the defense would have had a stronger case that he was the right guy because his motive and relationship to the other persons involved in this case. Giovanni was in the same gang, Puros Locos, as Manuel Lopez—Manuel Lopez was the person who owned and supplied the pistol used in this murder.[49] Also, Giovanni's brother was Salvador Garcia, the leader of the Puros Locos.[50] Testimony at this trial established that Salvador has directed members of the Puros Locos to outright lie to law enforcement on other occasions. And the two witnesses accusing Evaristo, Jonathan Harper and Edshel Calvillo, were members of the Puros Locos—unlike Evaristo. Both Harper and Edshel admitted they were afraid of testifying in a way that would upset Salvador.[51] And Edshel explicitly admitted that Salvador has directed him to lie to law enforcement before.[52] Therefore, it would not have been a stretch for the

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[45] *Id.* at 11.

[46] *See* 7/10/13 Tr. at 183. *But see id.* at 184.

[47] Exhibit 11 at 7.

[48] Exhibit 5.

[49] *See* 7/9/13 Tr. at 179.

[50] 7/10/13 Tr. at 13.

[51] *See* 7/13/13 Tr. at 57–58; 7/11/13 Tr. at 53. *See also* Exhibit 15 at 11.

[52] *See* 7/10/13 Tr. at 23.

defense to argue this case is no different: members of the Puros Locos were accusing Evaristo of this shooting because Salvador, their leader, directed them to, to protect Salvador's brother, Giovanni.

Thus, the ability to impeach Betty Graves's testimony—that Giovanni was not the shooter—would have been material to Evaristo's defense.

In fact, these police reports would have been material and exculpatory even without impeaching Ms. Graves. Counsel could have used these reports to remind Ms. Graves, and inform the jury, that she originally reported the shooter as having a mustache. The defense could have relied on this fact to argue that the shooter did, in fact, have a mustache, as did Salvador and Manuel. The record would have supported an alternative-shooter defense for these individuals, too.

Armed with the information that the shooter had a mustache, the defense could have created reasonable doubt about Evaristo's guilt by presenting Salvador Garcia as a possible alternative suspect. In addition to the fact that he had a mustache,[53] he otherwise matched the description of the shooter. He was a young Hispanic male. He had short hair, according to the discovery photograph (at least the part that one might see if he were wearing a hoodie).[54] And he would have had similar motive to his brother Giovanni to use lethal force in this brawl, as both the leader of the Puros Locos and to defend his brother.

Further, he has proven to be a hot-tempered gang member willing to use violent force to impose his will, shooting Jonathan Harper in the head only a few weeks after the shooting in this case. And the record establishes that he directed the members of his gang to lie to law enforcement about the Harper shooting to protect him from criminal liability.[55] Had the defense the undisclosed information

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[53] Exhibit 18 at 5.

[54] *Id.*

[55] *See* 7/10/13 Tr. at 23.

that the shooter had a mustache, as did Salvador, it could have presented a plausible defense to the jury that Salvador was an alternative possibility as the shooter, who directed the members of his gang to falsely accuse his younger cousin, Evaristo, who was not a member of the gang, to protect himself.

Finally, had the defense the undisclosed information that a witness described the shooter as having a mustache, they could have put on a defense that Manuel Lopez—who had a mustache[56]—was an alternative possibility as the shooter. He, too, was a young Hispanic male and a confirmed member of the Puros Locos. He thus would have had similar motivations to Giovanni and/or Salvador for this shooting. And critically for him, there were certain factors uniquely implicating Manuel as the shooter. First, testimony established that he was the owner of the pistol used in this shooting. Second, strangely, Manuel had previously worked as a contractor in the house where (or near where) the shooter decided to stash the gun[57]—thus, he would have been familiar in advance with the availability of this location. Further testimony established that Manuel returned to the crime scene after the shooting to try to retrieve the pistol from the stash location (but the police had already recovered it).[58]

And finally, in the middle of Manuel's interview with law enforcement, his mother called him to tell him "remember your alibi." Everyone in the room overheard the call, and the transcriber recorded it as follows:

> A. So go head. Hold on. I'm still here.
> [Voice on cell phone: Oh yeah?]
> A. Yeah.
> [Voice on cell phone: Right, ___ you're alibi, that you're picking up, um Stacey. You know?]
> A. I know.

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[56] Exhibit 17.

[57] *See* 7/11/13 Tr. at 161.

[58] *See id.* at 37.

. . .
KH. Who that? Your Mom?
A. Yeah. That's her work.
KH. Does she know you were over there?
A. Um, yeah, she know I was picking up Giovanny.
KH. Okay.
A. But-
KH. She said, she said that
A. I went to pick up Stacey too.
KH. Uh, she said "remember your alibi".
A. Yeah.
KH. It wasn't just...
A. Yeah.
KH. ... you were there.
A. Yeah, I was there.
KH. So-
A. She was like, she, she says it like, like, remember you, you don't have nothing to do with it 'cause you. It's like really not-
KH. You were there. Bullshit. . . .
Q. What's this alibi?
. . .
KH. She's, she's ____ make sure the police think you're somewhere else, though.
A. Yeah, 'cause she don't want me to get in trouble ____ you know, but, uh...
KH. [laughs] Yeah. Okay, yeah, I got ya. All right . . . .[59]

Thus, Manuel was a good candidate for the defense to present to the jury as an alternative suspect, had they known that he matched Betty Graves's undisclosed description of the shooter as having a mustache. Therefore, this would have been material and exculpatory information.

C. Conclusion

With these undisclosed school police reports, the defense would have been in a much better position to present an alternative-shooter theory to the jury and to impeach Betty Graves, among other uses. This information would have been

[59] Exhibit 12 at 35–39.

material and exculpatory in addition to being valuable impeachment material, for the reasons described above. The State thus failed to comply with its constitutional obligation to provide these reports to the defense before trial.

This violated the Due Process Clause of the Fourteenth Amendment. Evaristo is entitled to habeas relief.

DATED this March 14, 2019.

Respectfully submitted,
Rene L. Valladares
Federal Public Defender

S. Alex Spelman
Assistant Federal Public Defender

VERIFICATION

Under penalty of perjury, the undersigned declares that he is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of her own knowledge except as to those matters stated on information and belief and as to such matters she believes them to be true. Petitioner personally authorized undersigned counsel to commence this action.

DATED this March 14, 2019.

S. Alex Spelman
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

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

That on March 14, 2019, she served a true and accurate copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS by placing it in the United States mail, first-class postage paid, addressed to:

Steven B. Wolfson
Clark County District Attorney
200 Lewis Ave. #3
Las Vegas, N V 89101

Heather D. Procter
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Evaristo Jonathan Garcia
No. 1108072
Saguaro Correctional Center
1252 E. Arica Road
Eloy, AZ 85131

An Employee of the Federal Public Defender, District of Nevada

EXHS
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*S. Alex Spelman
Assistant Federal Public Defender
Nevada State Bar No. 14278
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
alex_spelman@fd.org

Attorney for Petitioner Evaristo Garcia

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Evaristo Jonathan Garcia,

Petitioner,

v.

James Dzurenda, Director of Nevada Department of Corrections;

Aaron Ford, Attorney General of the State of Nevada;

Todd Thomas, Warden of Saguaro Correctional Center.

Respondents.

Case No. A-19-791171-W

Dept. No. 29

Index Of Exhibits In Support Of Petition For Writ Of Habeas (Post-Conviction)

(FILED UNDER SEAL)

Petitioner, Evaristo Jonathan Garcia, hereby submits the following Index of Exhibits in support of the Petition for Writ of Habeas Corpus (Post-Conviction).

No.	DATE	DOCUMENT	COURT	CASE #
1.	2/06/2006	Records from Clark County School District Police Department Received 11/26/2018 **FILED UNDER SEAL**		
2.	2/06/2006	Voluntary Statement of Melissa Gamboa **FILED UNDER SEAL**		
3.	2/06/2006	Voluntary Statement of Betty Graves **FILED UNDER SEAL**		
4.	2/06/2006	Voluntary Statement of Yessica Lorena Rosales **FILED UNDER SEAL**		
5.	2/06/2006	Handwritten Voluntary Statement of Yessica Rosales **FILED UNDER SEAL**		
6.	2/06/2006	Handwritten Voluntary Statement of Betty Graves **FILED UNDER SEAL**		
7.	2/06/2006	Voluntary Statement of Betty Graves **FILED UNDER SEAL**		
8.	2/07/2006	CAD Log **FILED UNDER SEAL**		
9.	2/07/2006	Handwritten Voluntary Statement of Crystal Perez **FILED UNDER SEAL**		
10.	2/07/2006	Voluntary Statement of Crystal Perez **FILED UNDER SEAL**		
11.	2/08/2006	Voluntary Statement of Gilbert Garcia **FILED UNDER SEAL**		

No.	DATE	DOCUMENT	COURT	CASE #
12.	2/09/2006	Voluntary Statement of Manuel Anthony Lopez **FILED UNDER SEAL**		
13.	2/18/2006	Incident Report **FILED UNDER SEAL**		
14.	4/01/2006	Incident Report **FILED UNDER SEAL**		
15.	4/01/2006	Voluntary Statement of Jonathan Harper **FILED UNDER SEAL**		
16.	7/03/2006	Nevada Department of Motor Vehicles Photo of Jose Bonal (2006) – Obtained 01/09/2019 **FILED UNDER SEAL**		
17.	10/19/2006	Mug Shot of Manuel Anthony Lopez **FILED UNDER SEAL**		
18.	4/22/2009	Photos of Subjects Used in Line-Up for Harper Case **FILED UNDER SEAL**		
19.	8/25/2010	Motion for Discovery **FILED UNDER SEAL**	Eighth Judicial District Court	10C262966-1
20.	9/27/2012	Motion for Evidentiary Hearing to Determine Competency of State's Primary Witness and Order Compelling Productions of Medical Records and Psychological Examination and Testing to Determine Extent of Memory Loss **FILED UNDER SEAL**	Eighth Judicial District Court	C262966
21.	7/09/2013	State Trial Ex. 58 – Photo of Manuel Lopez **FILED UNDER SEAL**	Eighth Judicial District Court	C262966

No.	DATE	DOCUMENT	COURT	CASE #
22.	7/09/2013	State's Trial Ex. 1, 2 – Aerial Maps **FILED UNDER SEAL**	Eighth Judicial District Court	C262966
23.	7/09/2013	State Trial Ex. 3 – Crime Scene Diagram **FILED UNDER SEAL**	Eighth Judicial District Court	C262966
24.	7/11/2013	State Trial Ex. 111 – Evaristo Garcia Booking Photo **FILED UNDER SEAL**	Eighth Judicial District Court	C262966
25.	7/12/2013	Fourth Amended Indictment **FILED UNDER SEAL**	Eighth Judicial District Court	10C262966-1
26.	7/15/2013	Instructions to the Jury **FILED UNDER SEAL**	Eighth Judicial District Court	C262966
27.	9/11/2013	Judgment of Conviction **FILED UNDER SEAL**	Eighth Judicial District Court	C262966-1
28.	10/6/2016	Letter to Clerk **FILED UNDER SEAL**	Eighth Judicial District Court	10C262966-1
29.	10/26/2016	Notice of Entry of Findings of Fact, Conclusions of Law and Order **FILED UNDER SEAL**	Eighth Judicial District Court	10C262966-1
30.	9/20/2018	Google Maps **FILED UNDER SEAL**		
31.	2/05/2019	Declaration of Tammy R. Smith **FILED UNDER SEAL**		

Dated this 14th day of March, 2019.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

S. ALEX SPELMAN
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

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

That on March 14, 2019, she served a true and accurate copy of the foregoing INDEX OF EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS (POST-CONVICTION) by placing it in the United States mail, first-class postage paid, addressed to:

Steven B. Wolfson
Clark County District Attorney
200 Lewis Ave. #3
Las Vegas, N V 89101

Heather D. Procter
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Evaristo Jonathan Garcia
No. 1108072
Saguaro Correctional Center
1252 E. Arica Road
Eloy, AZ 85131

An Employee of the
Federal Public Defender

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Deputy District Attorney
Nevada Bar #013730
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

EVARISTO JONATHAN GARCIA, #2685822

Petitioner.

CASE NO: A-19-791171-W

DEPT NO: XXIX

STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

DATE OF HEARING: NOVEMBER 12, 2019
TIME OF HEARING: 8:30AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through KAREN MISHLER, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Petition for Writ of Habeas Corpus (Post Conviction).

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On March 19, 2010, EVARISTO JONATHAN GARCIA (hereinafter "Petitioner") was charged by way of Indictment with: Count 1 – CONSPIRACY TO COMMIT MURDER WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Category B Felony – NRS 200.010, 200.030, 199.480, 193.168, 193.169); and Count 2 – MURDER WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Category A Felony – NRS 193.168, 193.169, 200.010, 200.030, 200.450, 193.165).

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

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

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

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

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

On October 11, 2013, Petitioner filed a Notice of Appeal. On October 23, 2015, the Nevada Supreme Court entered an order affirming Petitioner's conviction and remittitur issued.

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

On October 13, 2016, Petitioner filed a Notice of Appeal. On June 20, 2017, the Nevada Supreme Court issued an order affirming the Court's denial of Petitioner's first Petition and remittitur issued.

Petitioner filed a second Petition for Writ of Habeas Corpus in Federal Court. That petition is still pending. Petition p. 4-5.

On March 14, 2019, Petitioner filed the instant Petition for Writ of Habeas Corpus. The State responds as follows:

STATEMENT OF THE FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

Puppet, and twelve calls to Melinda Lopez, the girlfriend of Salvador Garcia, another member of Puros Locos.

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

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

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

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

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

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

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

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

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ARGUMENT

I. PETITIONER'S CLAIMS ARE PROCEDURALLY BARRED.

a. Petitioner's Petition is Time-Barred.

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

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

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

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

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

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

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

In the instant case, the Judgment of Conviction was filed on September 11, 2013, and Petitioner filed a direct appeal on October 11, 2013. The Petitioner's conviction was affirmed, and remittitur issued on October 23, 2015. Thus, the one-year time bar began to run from the date remittitur issued. The instant Petition was not filed until March 14, 2019. This is over three (3) years after remittitur issued and in excess of the one-year time frame. Absent a showing of good cause for this delay and undue prejudice, Petitioner's claim must be dismissed because of its tardy filing.

b. Petitioner's Petition is Successive.

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

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

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

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950.

The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Petitioner filed his first Petition for Writ of Habeas Corpus on June 10, 2016. On October 25, 2016, the Court denied this Petition on the merits and issued a detailed Findings of Fact, Conclusions of Law and Order. The Petitioner appealed. On June 20, 2017, the Nevada Supreme Court affirmed the district court's denial of the Petitioner's Petition and remittitur issued. As this Petition is successive, pursuant to NRS 34.810(2), it cannot be decided on the merits absent a showing of good cause and prejudice. NRS 34.810(3).

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

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

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1230 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Petitioner claims he has recently discovered a Clark County School District Police Department ("CCSDPD") report that should have been disclosed under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) and that provides good cause to overcome the procedural bars. Due Process does not require simply the disclosure of "exculpatory" evidence. Evidence must also be disclosed if it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation or to impeach the credibility of the State's witnesses. See Kyles v. Whitley, 514 U.S. 419, 442, 445-51, 1115 S. Ct. 1555, 1555 n. 13 (1995). Evidence cannot be regarded as "suppressed" by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence. United States v. White, 970 F.2d 328, 337 (7th Cir. 1992). "While the [United States] Supreme Court in Brady held that the [g]overnment may not properly conceal exculpatory evidence from a defendant, it does not place any burden upon the [g]overnment to conduct a defendant's investigation or assist in the presentation of the defense's case." United States v. Marinero, 904 F.2d 251, 261 (5th Cir. 1990); *accord* United States v. Pandozzi, 878 F.2d 1526, 1529 (1st Cir. 1989); United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989). "Regardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no Brady claim." United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980).

The Nevada Supreme Court has followed the federal line of cases in holding that Brady does not require the State to disclose evidence which was available to the defendant from other sources, including diligent investigation by the defense. Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). In Steese, the undisclosed information stemmed from collect calls that the defendant made. This Court held that the defendant certainly had knowledge of the calls that he made and through diligent investigation the defendant's counsel could have obtained the phone records independently. Id. Based on that finding, this Court found that

there was no Brady violation when the State did not provide the phone records to the defense. Id.

Petitioner could have obtained the impeachment evidence in question through his own diligent discovery. "Brady does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense." Steese, 114 Nev. at 495, 960 Nev. at 331. Even if the prosecution or one of the agencies acting on its behalf had the impeachment evidence, there was no duty to disclose it because Petitioner could have discovered this information on his own. The CCSDPD report could have been discovered through submitting a request to CCSD, as it apparently eventually was. Further, Petitioner could have discovered this information by contacting CCSD as an earlier date. The State did not in any way prevent or hinder Petitioner from making such contact, thus Petitioner could have discovered such information through reasonably diligent efforts. In fact, Petitioner admitted as much in the instant Petition, which states:

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

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

Moreover, the CCSDPD reports are not Brady material. In Evans v. State, 117 Nev. 609, 625-27, 28 P.3d 498, 510-11 (2001), overruled on other grounds by Lisle v. State, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015), the defendant, on appeal, argued that the State had the obligation to continue investigating alternate suspects of the crime, and speculated the State had evidence one of the victims had been an informant previously, which would have demonstrated others had motive to kill her. Id. at 626, 28 P.3d at 510-11. The Court found that the defendant had not demonstrated that such an investigation would have led to exculpatory information. Id. at 626, 28 P.3d at 510. To undermine confidence in a trial's outcome, a defendant would have to allege the nondisclosure of specific information that not only linked alternate suspects to the crime, but also indicate the defendant was not involved. Id. at 626, 28 P.3d at 510. Further, the Court found that the victim's mere acting as an informant, without at least some evidence that she had received actual threats against her, would not implicate the State's affirmative duty to disclose potentially exculpatory information to the defense because such information must be material. Id. at 627, 28 P.3d at 511.

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

While it is the State's position the CCSDPD reports are not exculpatory or material, should this Court determine otherwise, Petitioner failed to demonstrate that the State affirmatively withheld the information. In order to qualify as good cause, Petitioner must demonstrate that the State affirmatively withheld information favorable to the defense. State v. Bennett, 119 Nev. 589, 600, 81 P.3d 1, 8 (2003). The defense bears the burden of proving that the State withheld information, and it must prove specific facts that show as much. Id. A mere showing that evidence favorable to the defense exists is not a constitutional violation under Brady. See Strickler v. Greene, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 1948 (1999) ("there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."). Rather, a Brady violation only exists if each of three separate components exist for a given claim—first, that the evidence at issue is favorable to the defense; second, that the *evidence was actually suppressed* by the State; and third, that the *prejudice from such suppression* meets the Kyles standard of there being a reasonable probability of a different result, had the evidence reached the jury. Id.; Kyles, 514 U.S. at 434–35, 115 S. Ct. at 1566.

Petitioner sets forth no facts or evidence to demonstrate that the evidence in question was exclusively in the State's control at the time of trial. To constitute a Brady/Giglio violation, the evidence at issue must have been in the State's exclusive control. See Thomas v. United States, 343 F.2d 49, 54 (9th Cir. 1954). There is no evidence that CCSDPD is a state actor for Brady purposes and, for that reason, Petitioner has failed to show evidence was "withheld" by the State. The only law enforcement agency that collaborated on behalf of the State of Nevada in Petitioner's case was LVMPD. Therefore, this agency was the sole agency, outside of the Clark County District Attorney's Office (CCDA), that the prosecutor had a duty from which to procure any information favorable to Petitioner. See Kyles, 514 U.S. at 437–38, 115 S. Ct. at 1567–68 (explaining that the prosecutor has a duty to learn of information favorable to the accused secured by *others acting on the State's behalf in the case*) (emphasis added). Yet, Petitioner has neither asserted nor set forth facts to show that the CCDA or the LVMPD possessed the impeachment evidence that Petitioner discusses in his Petition.

Petitioner's failure to show such exclusive possession is critical because if the State did not suppress, conceal, or exclusively control the CCSDPD reports, then no impediment external to the defense existed sufficient to constitute good cause. Petitioner fails to address this point on appeal; as such, his claim should be denied.

Here, Petitioner has not alleged – let alone proved – that the State had any Brady/Giglio information and failed to disclose it. In fact, Petitioner has not even pled generally that the State affirmatively withheld information. Petitioner also has not asserted—nor does the alleged impeachment evidence evince—facial indicia that the State necessarily, or even should have had, knowledge of the evidence's existence. Despite the Strickler-Bennett requirement of proving affirmative State "suppression" for there to be a constitutional violation, Petitioner nonetheless argues that the State unconstitutionally violated his rights because the State did not take steps to affirmatively investigate CCSDPD's involvement in a case investigated by LVMPD. He claims that he had a right to rely upon the State to disclose all CCSDPD reports that were in existence, anywhere, even if the State did not possess or know about it. Yet, such a claim directly contradicts the rule set forth in Evans, which rejected a similar argument by a defendant. 117 Nev. at 627, 28 P.3d at 511.

In Evans, the Court held, "[The Petitioner] seems to assume that the State has a duty to compile information or pursue an investigative lead simply because it would conceivably develop evidence helpful to the defense, but he offers no authority for this proposition, and we reject it." Id. Similarly, Petitioner has not offered any authority for this proposition either. Further, Petitioner's proposed rule would contravene the rule set forth by the U.S. Supreme Court in United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397 (1976) explaining that Brady violations *only occur* when information was known—actually or constructively—by the prosecution. The new rule Petitioner seemingly requests would impute to the State any and all knowledge that Petitioner's post-conviction counsel discovers ad infinitum, regardless of the State's actual or constructive knowledge of such evidence's existence at the time of the original trial. Fashioning such a broad rule would be unreasonable. See Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998); Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424,

435 (2001). To require the State in future cases to search out, gather, and package every shred of possible impeachment evidence, nationwide, would essentially lead to the anomalous result that the prosecution has to develop the defense for a defendant. It would also impose an "unreasonable and likely cost-prohibitive burden upon the State". As such, Petitioner has not demonstrated good cause to overcome the fact that his successive Petition was filed over two (2) years late, and his Petition must be denied.

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

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

3383 (1985). A reasonable probability is shown when the nondisclosure undermines confidence in the outcome of the trial. Kyles at 434, 115 S.Ct. 1565. Petitioner is unable to demonstrate prejudice and, thus, his claim fails.

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

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

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

Petitioner's approximate age wearing a gray hooded sweatshirt shoot the victim during the fight at the school. Jonathan Harper testified that he rode in the car with Petitioner to the fight, that Manuel Lopez handed his gun to Petitioner before getting into the car, that Petitioner was wearing a gray hooded sweatshirt that night, that he saw Petitioner shoot the victim in the back as the victim attempted to run away and that he saw Petitioner run into the neighborhood where the gun was found. Edshell Calvillo testified that Petitioner told him that Petitioner shot a boy and that he hid the gun in a toilet. A police officer testified that he found the gun in the tank of a toilet left on the curb as garbage one block from the school. Latent fingerprint analysts identified two prints on the gun that were matched to Petitioner. Cartridge casings from the scene of the shooting matched the gun to the victim's shooting. There was more than enough evidence for a jury to determine Petitioner committed the crimes beyond a reasonable doubt and, thus, any prejudice to Petitioner would be outweighed by the overwhelming evidence of his guilt and would therefore be harmless.

Therefore, Petitioner's meritless claims are procedurally barred, and his Petition should be denied.

CONCLUSION

For the foregoing reasons, Petitioner's Petition must be denied.

DATED this 10th day of October, 2019.

Respectfully submitted,

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

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

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the foregoing, was made this 10th day of October, 2019, by Electronic Filing to:

RENE VALLADARES, Federal Public Defender
E-mail Address: alex_spelman@fd.org

/s/ Janet Hayes
Secretary for the District Attorney's Office

KM/sso/jlh /GANG

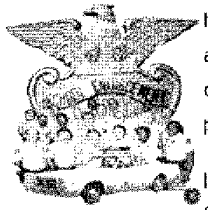
CCSD Police Department

With the fifth-largest school district in the nation, the Clark County School District (CCSD) covers 7,910 square miles and includes the metropolitan Las Vegas area, all outlying communities, and rural areas. The School District has more than 309,000 students located at 352 schools. Because of its size, it would have been difficult for the CCSD to employ a traditional school resource officer, as seen in other parts of the country. Instead, the District created its own police department, with the mission to provide a safe, secure, and nurturing learning environment, which is conducive to education. Officers from the Clark County School District Police Department (CCSDPD) are sworn police officers for the State of Nevada and have the authority to make arrests and issue traffic citations. The CCSDPD is composed of a workforce of 41 civilian and 161 sworn officers. The command staff is structured to consist of 16 sergeants, four lieutenants, two captains, and a chief of police. The CCSDPD is divided into eight police Area Commands with two police officers assigned to every high school and patrol officers assigned to patrol each command area, primed to respond to the needs of all District elementary, middle, and high schools. In addition, CCSDPD police officers patrol 24/7 covering all property and buildings belonging to the School District. The CCSDPD also has a Detective Bureau, a Training Bureau, and a Communications Bureau consisting of a Fingerprint Unit, a Records Unit, and a Dispatch Center composed of 24 civilian employees.

HISTORY OF THE CCSD POLICE DEPARTMENT

The Clark County School District Police was developed in the late 1960's as a branch of the Maintenance Department of the Clark County School District and has evolved into a fully empowered law enforcement agency comprised of dedicated police officers and support staff.

What would eventually become the Clark County School District Police Department began in 1967 when the need for someone to watch overnight activities at school sites became necessary. The nucleus of the present Department was comprised of security officers who monitored school property and activities from five in the evening until one in the morning. There is some speculation that prior to 1967 the School District had a tie to the Clark County Sheriff's Office, though the only evidence of that is a Sheriff's patch with a rocker that states: 'School Enforcement'.



In January of 1971, the Nevada State Legislature designated the Clark County School District security officers as peace officers; this gave them the authority of police officers. By 1976, the Department was comprised of one sergeant and four patrol officers. Eventually, the Department implemented the first officer training program, and in 1988, added 18 new officers.

In October 1989, the Nevada State Legislature authorized the District to operate a fully state-certified police force and the addition of a Director of School Police. All School District police officers are now required to receive Nevada Peace Officers' Standards & Training (POST) certification. The size of the Department grew from 22 officers to 68 officers, some of which were stationed at all metropolitan-area high schools and some junior high schools, while others were assigned to patrol duties.

Since 1989, all police applicants go through extensive pre-employment testing and background investigations. Prior to the creation of the SNLEA, officers attended the Nevada POST Academy in Carson City. Now all officers attend the Southern Nevada Law Enforcement Academy in Las Vegas for twenty weeks.

In 1999, the Clark County School District Police was again impacted by the legislature. The position of Supervisor of School Police was changed to Chief of School Police. The Chief reports directly to the Superintendent of Schools.

In 2000, Elliot Phelps was named as Chief of School Police. The Department roster listed one hundred twenty four sworn officers on the force.

In 2005, Hector R. Garcia was named as Chief of School Police. Chief Garcia then began a campaign to return the School Police to its roots of service, education and protection. The initiative was codenamed "The Roadmap to Excellence".

In February 2008, Clark County School District made an unprecedented decision to promote one of its own, Captain Filiberto Arroyo, to the rank of Chief of Police. Almost immediately Chief Arroyo began echoing a new mantra, "Back to Basics"; his goal, to deliver School Police back to its true mission of ensuring a safe, secure, and nurturing learning environment for the students and staff of Clark County. Chief Arroyo has firmly stated that "As a School Police Department we must continue to work hand-in-hand with school administration to become one. We must also continue to forge bonds with local police agencies to ensure the wellbeing and safety of our students at all times." This philosophy is founded strongly on advocating the ideology that the presence of a CCSDPD officer promotes a sense of overwhelming confidence in our students, so that their environment is safe and conducive for learning.

Department Timeline

1960

Clark County's population of 116,000 people, of which 29,044 were students, was served by 42 schools.

1962

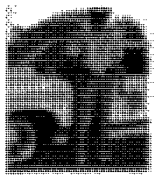
Four security guards were assigned to protect School District properties and provide safety services for school-related activities.

Late 1960's

A School District 'Security Department' was formed under the umbrella of the District 'Maintenance Department'.

1970

With the county's population having more than doubled to 262,000 people in ten years, including a student population of 73,846 in 81 schools, Mr. William Scherkenback created and implemented the Division of Police Services.



CHIEF SCHERKENBACH

1971

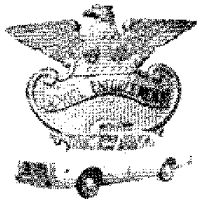
The passing of new state legislation reclassified those employees of the new Divison of Police Services as peace officers.

1972-75

With gang activity on the rise in the schools, the Division of Police Services expanded to employee one sergeant and four patrol officers.

1976

Mr. Ernest Diggs was appointed as Supervisor of School Police.



1980

The population in Clark County continued to explode (now at 444,000 people), and to provide for 88,567 students, the School District expanded to 113 schools.

Mid-late 1980's

With a continued rise in gang activity and the strong growth and development of the Valley, the School District increased School Police staffing to 22 officers.

1988

Mr. Jack Lazarotto was appointed Director of School Police.

1989

The passing of new state legislation authorized the creation of the Clark County School District Police Department (CCSDPD). The existing District peace officers were now eligible to become state-certified police officers.

1990

Clark County's 122,058 students (out of a population now consisting of 708,000 people) were served by 147 schools.

1991

The homicide of a student at Eldorado High School prompted the hiring of additional officers.

1992

Mr. Dan Reyes was named Supervisor of School Police. He commanded 63 officers.

1998

In six years, CCSDPD had nearly doubled in size -- from 63 to 107 officers.

1999

With School Police now employing 110 officers, the Nevada Legislature reclassified the position of Supervisor of School Police to the sworn position of Chief of Police. The Chief of Police now fell under the direction of the Superintendent of Schools.

2000

Clark County's population had exploded to 1,300,000 people, and Elliott Phelps was named Chief of Police for CCSDPD. Chief Phelps commanded 124 officers and was responsible for 250 schools and the safety of 231,028 students.

2001

A federal grant awarded 31 additional officers to the Department, which then became the 7th largest police department in the state of Nevada.

2001/2002

Now that CCSDPD employed 129 police officers, the School District's ratio of students-to-officers was 2,247:1.

2005

Hector R. Garcia was named Chief of Police. He commanded 147 officers.

2006

CCSDPD received its International Organization for Standardization (I.S.O.) 9001:2000, Management Process Systems (M.P.S.) certification. It was the first time a school-based law enforcement agency had managed to accomplish the feat. At the same time, the Clark County School District became the 5th largest school district in the United States. The District's 326 schools served 302,763 students from a population of 1,710,551 people.

2007

After many years on the campus of Las Vegas Academy in downtown Las Vegas, School Police Services moved into its new home in nearby Henderson. Shortly thereafter, the new School Police Services headquarters building was inaugurated, providing an even greater police presence in the District. With the departure of Chief Garcia, Captains Filiberto Arroyo and James Ketsaa were named acting Co-Chiefs of Police, and the Department became authorized for a total of 170 police officer positions.

2008

Following a nationwide search for a new Chief of Police, Superintendent Walt Ruffles appointed Captain Filiberto Arroyo to the position of Chief of Police for CCSDPD It was the first time a member of the Department had been bestowed the honor. Chief Arroyo commanded 146 police officers and 60 civilian employees.

CCSDPD and the Las Vegas Metropolitan Police Department partnered with local, state and federal law enforcement agencies to establish and operate the Southern Nevada Counter-Terrorism Center (SNCTC). This collaboration allows for horizontal

information sharing, a critical component of the all-crimes and all-hazards Fusion Center, which responds to multi-jurisdictional incidents within southern Nevada. CCSDPD permanently assigned a liaison officer to the Center, which operates 24 hours per day, seven days per week. The liaison officer shares information, products, and resources and participates in the coordination of potential or actual incidents.

2009

CCSDPD established the Special Operations Support Unit which encompasses the Accreditation/Policy Management detail, the Intelligence & Analysis detail, the TALON program, and the Evidence/Property Room. The Unit is supervised by a sergeant who is also CCSDPD's Emergency Preparedness Liaison to the School District and other local agencies. The Administrative Support Unit, which encompasses CCSDPD's Security Specialists, the Computer Forensic Information & Technology detail, and all clerical staff, to include a quartermaster, was also established and falls under the supervision of the Administrative Assistant to the Chief of Police. The Training and Detective Bureaus were enhanced along with the Bureau of Professional Standards, which was expanded to better assist the needs of the School District's Employee Management Relations, Human Resources and Transportation Departments.

2010

Clark County's population was estimated at 2,106,347 people, of which 309,476 are students attending 356 schools. Those schools, as well as the staff and students who attend them, are served by 168 police officers.

CCSDPD continually strives to be the best school-based police department in the nation. The Department's accomplishments were showcased on February 22-24, 2010, when the Department received its International Organization for Standardization (I.S.O.) 9001 Standards of Quality Management Re-Certification. The Department was also awarded the 7th Annual IACP-IXP 'Excellence in Technology' award for having been identified as the best in the 'Innovation in the Information Technology' category for a medium-size U.S. law enforcement agency by the International Association of Chiefs of Police. CCSDPD was among a very distinguished group of winners.

Frequently Asked Questions

Question: Are you real police officers?

Answer: Yes, the CCSD School Police officers are required to complete a Peace Officer Standards & Training (P.O.S.T.) academy to become certified police officers.

Question: Can CCSD police officers make arrests and write traffic citations?

Answer: Yes, as a sworn police officer for the State of Nevada we have the authority to make arrests and issue traffic citations.

Question: Can CCSD police officers make arrests off School District property?

Answer: Yes, our primary jurisdiction is School District property, but as first responders we have a responsibility to respond to imminent incidents and take the appropriate action. These incidents will be turned over to the local police agency of primary jurisdiction.

Question: If a crime occurs in my neighborhood involving School District students, whom should I notify?

Answer: Your local police agency will take the initial report and investigate the crime. However, information involving students should be forwarded to School Police and the site administrator. This information is crucial for the safety of our students and staff.

RPLY
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*S. Alex Spelman
Assistant Federal Public Defender
Nevada State Bar No. 14273
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
alex_spelman@fd.org

*Attorney 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

Date of Hearing: November 12, 2019

Time of Hearing: 8:30AM

Reply to State's Response to Petitioner's Petition for Writ of Habeas Corpus

(FILED UNDER SEAL PER 9/19/2019 ORDER, PAGE 3)

POINTS AND AUTHORITIES

A. Introduction

At the time of Evaristo Garcia's trial, the State had police reports from school police officers that identified an alternative shooter suspect who those officers claimed matched the description of the shooter, who they found fleeing the crime scene in the direction witnesses saw the shooter run, and who was wearing a gray hoodie, as witnesses said the shooter was wearing. These reports also showed that the State's star witness provided an inconsistent description of the shooter right after the shooting occurred. The defense requested these reports, but the State never provided them, so neither the defense nor the jury learned this information. There is both a reasonable possibility and reasonable probability that this information would have made at least one juror reasonably doubt whether Evaristo was the actual shooter.

Garcia is entitled to a new trial, where he can share this with the jury.

B. Because Garcia is presenting a *Brady/Giglio* claim, he can overcome the procedural bars.

When a defendant, years after his trial, discovers material and exculpatory evidence that the State suppressed from his trial, this provides good cause under Nevada law to overcome any procedural bars that may have prevented the defendant from bringing a new habeas corpus petition before this Court. Under Nevada law, if this Court agrees that Evaristo has satisfied the standards required for a new trial under *Brady* and *Giglio*, as described in Evaristo's habeas corpus petition and below, then Evaristo has also satisfied the good cause standard to overcome the purported procedural bars to his habeas corpus petition.[1] Evaristo

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[1] *See State v. Huebler*, 128 Nev. 192, 198, 275 P.3d 91, 95–96 (2012) (holding that the standard to prove a *Brady* claim parallels the standard to prove good cause to overcome the procedural bars to a post-conviction habeas corpus petition). *See*

filed this petition promptly after discovering the new evidence, and the new evidence gives rise to a *Brady/Giglio* claim. Therefore, if this Court agrees with the merits of his *Brady/Giglio* claim, then he has also satisfied the good cause standard to overcome any procedural bars.[2]

C. The standard of relief here requires a new trial if there is a *reasonable possibility* that this suppressed material could have changed the outcome at trial.

Evaristo does not have to prove he's innocent here. His burden is only to convince this Court that there is a reasonable *possibility*—that is, the easiest-to-satisfy standard of relief in the law—that the trial would have turned out differently.[3] In other words, if this Court concludes that this material, under the totality of evidence, reasonably *could* have caused at least *one* juror to reasonably *doubt* Evaristo's guilt, then a new trial is required now so Evaristo can present this evidence to a jury, to obtain a fair verdict based on all the material evidence.

The reason this standard is so low here is because the evidence at issue was in the State's possession or control at the time of trial and Evaristo specifically requested it from the State, who failed to turn it over.[4] "In Nevada, after a specific request for evidence, a *Brady* violation is material if there is a reasonable *possibility* that the omitted evidence would have affected the outcome."[5]

Here, specifically, on August 25, 2010, Evaristo's counsel requested from the State—on the record by motion—"***Copies of all police reports,*** *medical reports in*

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also State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003); *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

[2] *See Huebler*, 128 Nev. at 198, 275 P.3d at 95–96.

[3] *See Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25 (2000). *See also Jimenez v. State*, 112 Nev. 610, 618–19, 918 P.2d 687, 692 (1996); *Roberts v. State*, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994).

[4] *See Mazzan*, 116 Nev. at 66.

[5] *Id.* (emphasis in original).

the actual ***or constructive possession*** *of the District Attorney's Office*, the Las Vegas Metropolitan Police Department, the Nevada Department of Corrections, the Clark County Sheriff's Office, ***and any other law enforcement agency.***"[6] These Clark County School District Police Department reports regarding this very case certainly fall within that request. Therefore, according to the Nevada Supreme Court, this rare situation calls for a lowered standard of proof, entitling the petitioner to a new trial as long as there is a reasonably ***possibility*** that the outcome of the trial would have been different had the jury been able to consider the requested-but-not-disclosed evidence.

Indeed, even under the federal *Brady/Giglio* standard, Evaristo is entitled to a new trial due to the State's non-disclosure. Under the Fourteenth Amendment to the United States Constitution, Evaristo is entitled to a new trial if newly discovered evidence that was in the State's possession at the time of trial, but was not disclosed, posed a reasonable *likelihood* of a different outcome at trial.[7] As explained in Evaristo's petition, and below, Evaristo meets this standard, too.

Either way, both state and federal law require a new trial because the State failed to hand over these police reports, which contained evidence that posed a reasonable possibility and probability of at least one juror reasonably doubting Evaristo's guilt.

D. The omitted evidence meets the low standard of relief here because it was exculpatory, could be used to impeach one or more State witnesses, and was material.

Here, exculpatory information is material if there is a reasonable *possibility* that the omitted evidence would have affected the outcome of the trial.[8] Garcia

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[6] 2010-08-25 (Case No. 10C262966-1) Motion for Discovery at 6 (emphasis added).

[7] *See Brady*, 373 U.S. 83; *Giglio*, 405 U.S. 150.

[8] *Id.* (emphasis in original).

meets this standard because the omitted evidence was favorable, could have been used to impeach one or more of the State's witnesses, and there is a reasonable *possibility*—at least—that the omission of this evidence affected the outcome.

Evaristo requested all police reports from the State[9] but did not get them all. The reports the State did not turn over talked about an alternative shooter suspect the police stopped at the scene of the crime that, by law enforcement's own words, "matched" the description of the shooter. In fact, the report actually identifies this alternative suspect by name and explains that he was found fleeing from the scene of the crime along the path that witnesses saw the shooter flee. If the defense had this information, they would have had a field day with it at trial.

For one, this information alone posed a reasonable *possibility* of at least one juror reasonably doubting Evaristo was the shooter, given the information about an alternative suspect the jury never heard about. In fact, it posed a reasonable likelihood of such, meeting the state and federal standards of relief for this alone.

Yet the omitted police reports at issue here contained much more favorable and material information than the fact of a second shooter. Beyond that information, this is also the only place anywhere in the State's record of this case that the State's star witness, school employee Betty Graves, provided an alternative description of the shooter that was not consistent with her own other descriptions or the description that other people provided—this is the one place that anyone referred to the shooter as having a mustache. This is important for at least four reasons. First, it creates reason to doubt the reliability of Graves's description of the shooter, because if her description of the shooter has changed (which the jury did not learn), then maybe she wasn't so sure, after all, what the shooter looked like.

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[9] 2010-08-25 (Case No. 10C262966-1) Motion for Discovery at 6.

This leads into the second point. If Graves's description of the shooter was not reliable, after all, then maybe the jury should not trust her negative identification of the alternative suspect that school police stopped (Jose Banal) and asked Graves to identify. Indeed, Graves was the sole witness law enforcement relied upon to decide that Jose was *not* the shooter, even though he matched the description of the shooter, was running in the direction witnesses saw the shooter flee, and was wearing a gray hoodie, just like every witness said the shooter was wearing. But if Graves didn't really get a good look at the shooter like the jury believed she did—though these reports suggest she didn't—then maybe her assurance that Jose Banal was not the shooter was not reliable after all. Thus, had the jury learned there was an alternative suspect named Jose, and that when Graves said Jose was not the shooter, she might have been mistaken (due to her inconsistent descriptions of the shooter), this would have been favorable evidence to the defense that posed, at least, a reasonable *possibility* of causing at least one juror to reasonably doubt whether Evaristo was the actual shooter.

Third, this omitted evidence would have presented reason for the jury to question Graves's exclusion of Giovanni Garcia as the shooter. Graves excluded him as the shooter, but these omitted police reports call her reliability about the identity of the shooter in question because, the reports show, she provided inconsistent statements regarding the shooter's appearance. This suggests she didn't get as good a look on the shooter as the jury was led to believe—the jury never heard that she had provided inconsistent descriptions of the shooter. If Graves actually didn't see the shooter as well as the jury was led to believe, then actually, there is good reason to doubt whether she was correct in declaring that Giovanni was not the shooter. This is especially so because other evidence suggests that Giovanni was, in fact, the shooter. Namely, he was the person that witnesses originally said shot the victim. For instance, a witness at the scene said he overheard someone exclaim that

Giovanni has a gun, "Someone yells out . . . Giovanni has a gun."[10] Another witness claimed, "he (Giovany) just ended up shooting my friend's brother (Victor Gamboa). . . . I heard like 5 shots," though this witness did not provide a foundation for her ability to identify the shooter.[11] Given this, calling Graves's reliability into question with this omitted report, therefore, would have been important to a defense that Giovanni was the real shooter.

Further, but for Graves's exclusion of Giovanni as the shooter, the defense would have had a stronger case that he was the perpetrator because his motive and relationship to the other persons involved in this case. Giovanni was in the same gang, Puros Locos, as Manuel Lopez, the person who owned and supplied the pistol used in this murder.[12] Also, Giovanni's brother was Salvador Garcia, the leader of the Puros Locos.[13] Testimony at trial established that Salvador has directed members of the Puros Locos to outright lie to law enforcement on other occasions. And the two witnesses accusing Evaristo, Jonathan Harper and Edshel Calvillo, were members of the Puros Locos—unlike Evaristo. Both Harper and Edshel admitted they were afraid of testifying in a way that would upset Salvador.[14] And Edshel explicitly admitted that Salvador has directed him to lie to law enforcement before.[15] Therefore, it would not have been a stretch for the defense to argue that this case was no different: members of the Puros Locos were accusing Evaristo of this shooting because Salvador, their leader, directed them to, in order to protect Salvador's brother, Giovanni.

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[10] Exhibit 11 at 7.

[11] Exhibit 5.

[12] *See* 7/9/13 Tr. at 179.

[13] 7/10/13 Tr. at 13.

[14] *See* 7/13/13 Tr. at 57–58; 7/11/13 Tr. at 53. *See also* Exhibit 15 at 11.

[15] *See* 7/10/13 Tr. at 23.

Thus, the ability to impeach Graves's testimony—that Giovanni was not the shooter—would have been favorable and material to Evaristo's defense.

Finally, Graves's description of the shooter as having a mustache—which neither the jury nor defense ever knew about because the State did not share this information—would have provided further evidence that any number of people who were present at the shooting, who had a mustache, was the real shooter. Namely, this includes Manuel Lopez, the known owner of the murder weapon.[16] Had the defense known the undisclosed information, that a witness described the shooter as having a mustache, they could have put on a defense that Manuel Lopez—who had a mustache[17]—was an alternative possibility as the shooter.

Lopez was a young Hispanic male and a confirmed member of the Puros Locos gang involved in the brawl that led to this shooting. He thus had motive for this shooting. And there were certain factors uniquely implicating Lopez as the shooter that apply to no other individual involved in this case. First, testimony established that he was the owner of the pistol used in this shooting. Second, Lopez had previously worked as a contractor in the house where (or near where) the shooter stashed the gun[18]—thus, he would have been familiar in advance with the availability of this location to stash the gun, which could explain why he ran there with the gun after shooting. Further testimony established that Lopez returned to the crime scene after the shooting to try to retrieve the pistol from the stash location (but the police had already recovered it).[19] And finally, remarkably, in the

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[16] *See* 7/9/13 Tr. at 179.

[17] Exhibit 17.

[18] *See* 7/11/13 Tr. at 161.

[19] *See id.* at 37.

middle of Lopez's interview with law enforcement, his mother called him to tell him "remember your alibi," which everyone in the room overheard.[20]

Thus, Lopez would have been a good candidate for the defense to present to the jury as an alternative suspect, had they known that he matched Graves's undisclosed description of the shooter as having a mustache. This would have been favorable and material information for the defense to utilize at trial.

In a nutshell, if the defense knew that law enforcement stopped an alternative suspect matching the description of the shooter, who was found where witnesses saw the shooter flee, and who was wearing what witnesses said the shooter was wearing, this would have posed, at least, a reasonable possibility and likelihood that one juror would have reasonably doubted Evaristo was the actual shooter. Further, had the jury learned that the State's key, neutral eyewitness, Betty Graves, had actually given inconsistent descriptions of the shooter, this information would have given the jury reason to doubt Evaristo was the actual shooter for a multitude of reasons, described above. This evidence was therefore prejudicial under the State's "reasonable possibility" standard and the federal "reasonable likelihood" standard, warranting a new trial so the jury can hear all of this undisclosed evidence now.

However, the State argues that whether or not Evaristo meets materiality standard, it doesn't matter here because the evidence against him at trial was overwhelming.[21] This is both legally and factually incorrect. If he proves materiality/prejudice (here, he just needs to show that there is a reasonable *possibility* one juror would reasonably doubt guilt after hearing this omitted

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[20] Exhibit 12 at 35–39.

[21] *See* 2019-10-10 State's Response at 17–18.

evidence), then he is entitled to a new trial as a matter of law.[22] Also, the evidence here was not, in fact, overwhelming. To the contrary, in the words of now-Justice Abby Silver, who presided over the trial in this case, this was "obviously not the strongest case that we see in the criminal justice system."[23] As such, given how shaky the evidence of identity was in this case in the first place, and how probative this undisclosed evidence would have been to a jury trying to determine the identity issue, there is at least a reasonable possibility that this evidence would have caused at least one juror to reasonably doubt Evaristo was the actual shooter. Thus, Evaristo has proven that this evidence was favorable and material.

E. The State "withheld" or "suppressed" these reports because they had, at least, constructive possession of them and didn't hand them over to the defense.

The ***Clark County*** District Attorney's office, who represented the State at Evaristo's trial, now argues on behalf of respondents that the State didn't suppress these police reports from Garcia even though they were produced by and were in the possession of their own ***Clark County*** School District Police Department. In fact, they claim that "[t]here is no evidence that [the Clark County School Police Department] is a state actor and, for that reason, [Evaristo] has failed to show evidence was 'withheld' by the State."[24] Moreover, they claim, without any citation, that "[t]he only law enforcement agency that collaborated on behalf of the State of Nevada in Petitioner's case was LVMPD."[25] This is wrong on many levels.

First, they are factually wrong—these police officers are agents of the State. The Clark County School District Police Department officers are duly sworn police

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[22] *See Kyles v. Whitley*, 514 U.S. 419, 434–35 (1995).

[23] 8/1/13 Tr. at 15.

[24] 10/10/2019 State's Response at 14.

[25] *Id.*

officers for the State of Nevada, as a quick glance at their own website shows, which says so explicitly: "Officers from the Clark County School District Police Department (CCSDPD) are sworn police ***officers for the State of Nevada*** and have the authority to make arrests and issue traffic citations."[26] Indeed, this fact is codified in the Nevada Revised Statutes. "A person employed or appointed to serve as a school police officer . . . has the powers of a peace officer."[27]

Further, regardless of their legal status generally, it is clear these officers actually participated in the investigation in this case. This Court need look no further than CCSDPD reports themselves—the *Brady/Giglio* evidence at issue here—to see this. These school police officers were the first at the crime scene, assisted with the investigation, and documented reports of the shooting and investigation. Even if the Clark County District Attorney chose not to request a copy of these reports from their own Clark County School District Police Department,[28] that doesn't change the fact that these officers were actually involved in the early response and investigation in this case.

Respondents' argument rises and falls on the incorrect proposition that the Clark County District Attorney was not under a legal obligation to obtain or at least be aware of the information in the Clark County School District Police Department's police reports. Yet the United States Supreme Court has held otherwise: "[T]he individual prosecutor has a duty to ***learn*** any favorable evidence

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[26] Exhibit 32 (emphasis added). *See also* Exhibit 33 (same).

[27] Nev. Rev. Stat. § 289.190.

[28] It seems very unlikely, by common sense, that the DA would not have a copy of all the police reports generated in a homicide case by the first officers to respond to the scene of the crime, especially because they spoke to witnesses. But regardless, the law does not require Evaristo to prove the prosecutors *actually* possessed these reports because the prosecutors had an affirmative legal obligation to obtain them, putting them in constructive possession of the school police reports.

known to others acting on the government's behalf in the case."[29] This obligation means the prosecutor needs to affirmatively learn what the officers who investigated the case learned about it, in order to be able to disclose any information that would be favorable to the defense: "[W]e hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention."[30] The Ninth Circuit stated this point more succinctly, holding that **a prosecutor "may not be excused from disclosing what it does not know but could have learned."**[31]

All of the above means that a prosecutor violates *Brady* and *Giglio* by failing to disclose favorable evidence, even if not in the prosecutor's actual possession, that was nonetheless in the prosecutor's "constructive" possession. And as the Nevada Supreme Court has held, what counts as being in the State's "constructive possession" is, actually, a fairly broad rule—for the Clark County District Attorney, the broad rule encompasses evidence in the possession of police departments beyond just the Las Vegas Metropolitan Police Department. In fact, this standard covers evidence in the possession of *any* police department that helped with the investigation of the crime—*e.g.*, this even extended to a department that was *out of state*. In *State v. Bennet*, the Nevada Supreme Court concluded as follows: "We conclude that it is appropriate to charge the State with constructive knowledge of the evidence because the Utah police ***assisted in the investigation of this crime*** and initially supplied the information received from Chidester to the LVMPD."[32] This rule certainly includes the Clark County School District Police Department.

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[29] *Kyles*, 514 U.S. at 437 (emphasis added).

[30] *Id.* at 441–42.

[31] *Amada v. Gonzalez*, 758 F.3d 1119, 1134–35 (9th Cir. 2014) (emphasis added) (citing *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997) (en banc)).

[32] 119 Nev. 589, 603, 81 P.3d 1, 10–11 (2003) (emphasis added).

Here, the *Clark County* School District Police Department assisted in the investigation of this crime because they were the first on the scene, stopped a possible suspect, spoke to witnesses, and even generated reports about the crime. Not only do those facts alone satisfy the constructive possession standard of *Bennet*, but this is also a case of *actual* possession or control because this is a *Clark County* police department, which is literally part of the same state and county government as the *Clark County* District Attorney's office who prosecuted the case here, and moreover, these officers are deputized peace officers for the State of Nevada.[33] Thus, the State possessed this omitted evidence. Therefore, as long as the omitted evidence contained favorable and material information to the defense—as argued above—then the State was under an affirmatively obligation to disclose.

Respondents are also incorrect that Evaristo cannot satisfy the *Brady* standard if the evidence was not in the State's "exclusive" possession. Courts, including the Nevada Supreme Court, have held otherwise. For instance, in *Bennet*, the Nevada Supreme Court found that the State unlawfully suppressed evidence that was in the possession of a Utah police department. In that case, the State was not in the exclusive possession of the records at issue because the Utah department possessed them, too. Still, the Nevada Supreme Court held the State unlawfully failed to disclose the evidence. Thus, even when a law enforcement agency possesses the omitted evidence, not the State "exclusively," they are still within the ambit of the State's *Brady* obligations.

And in any event, the Clark County School District Police Department are literally part of the same state and county government as the prosecuting agency here. Therefore, the State was not only in constructive possession of the school police department reports—because the officers participated in the early

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[33] Nev. Rev. Stat. § 289.190. *See also* Exhibits 32, 33.

investigation in this case—but the State was also in *actual* possession of their own county's police reports, generated by their own county agency by state-deputized peace officers. The State actually and constructively possessed these reports.

Therefore, because at least some of the information contained in these reports constituted *Brady/Giglio* material (for the reasons argued in Evaristo's petition and above), the State had an *affirmative* obligation to provide it to the defense. That is especially so here because Evaristo expressly requested all the police reports.

F. When a defendant requests the specific material from the State that was in the State's possession, and the State declines to turn it over, he has done everything reasonably expected to acquire the material under *Brady* and *Giglio*.

Finally, the State argues that—even if Evaristo requested this evidence, the evidence was favorable and material, the State had it in their possession, and the State failed to turn it over to Evaristo—the State is off the hook for failing to hand it over because he should have somehow independently obtained copies on his own from the police department by "diligent investigation." In a pre-trial setting, it is hard to grasp what further obligation Evaristo's counsel had in order to try to obtain these police reports beyond exactly what he did: explicitly asking for them from the Clark County District Attorney.

Specifically, Evaristo's trial counsel requested from the Clark County DA "***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, the Nevada Department of Corrections, the Clark County Sheriff's Office, ***and any other law enforcement agency.***"[34] This, of course, would include the Clark County DA turning over all Clark County police reports about this very

[34] 2010-08-25 (Case No. 10C262966-1) Motion for Discovery at 6.

homicide, regardless of which state or county agency generated them. So when the Clark County DA, in response to Evaristo's request for all such police reports, provided Evaristo with police reports from only the LVMPD, the State was representing that there were no further police reports in this matter from any state or county police departments.[35] In other words, the defense would have every reason to believe, relying on the State's disclosure, that there were no more Clark County police reports it needed to go seek out.

To the extent that respondents are arguing that Evaristo—a *pro se* prisoner who was a special education student and had none of the investigation resources available to the Federal Public Defender—should have somehow conducting this *Brady* investigation himself and discovered this suppressed evidence, their argument is misguided. The only reason the Federal Public Defender found this suppressed information is because it employed an investigator for this case who followed a hunch that, she suspected, the Clark County District Attorney did not actually disclose all the police reports trial counsel requested.

Evaristo submits that he was entitled to rely on the Clark County District Attorney's office's disclosures just as trial counsel did, and should not be penalized for not having the resources and instincts of a professional post-conviction federal investigator, which he does now. As soon as he obtained these resources and discovered this evidence, he promptly presented this *Brady* claim to this Court.

The fact that once he was appointed federal counsel, his federal counsel and investigator elected to second guess and distrust the State's pretrial discovery disclosures, and as a result found these additional, undisclosed police reports, does not mean that the law expects trial counsel to do so, too, and does not mean that the law expects a *pro se* prisoner to do so, after trial counsel already *explicitly* and on

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[35] *See United States v. Bagley*, 473 U.S. 667, 682 (1985).

the record requested these exact police reports from the State. They were entitled to rely on the State's disclosures in response to their explicit request. This explicit request was more than diligent, and thus, Evaristo was reasonably diligent by relying on the State's disclosures. Requiring anything more of the defense would undermine *Brady* and allow the State to shirt its constitutional obligations.

Evaristo submits he and his trial counsel did everything the law, and common sense, requires and expects a reasonably diligent trial attorney and *pro se* prisoner to do to obtain these police reports, and each were reasonably diligent. Trial counsel explicitly asked the prosecution for all the reports, and the prosecution turned over only some. Evaristo had no way to know that this was an inadequate disclosure until his federal investigator followed a lead and discovered the suppressed reports. Then he brought this claim before this Court right away. This is reasonable diligence.

These undisclosed reports contained material and exculpatory information. Respondents argue that a new trial is not warranted here because Evaristo should have done something more than specifically ask for these reports from the State before trial, despite the State's failure to comply with its constitutional obligation to comply with Evaristo's pre-trial request.[36] They are is wrong. Evaristo is entitled to a new trial in which the jury is entitled to hear all of the material evidence—inculpatory and exculpatory alike—without the State's suppression of this evidence.

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[36] Evaristo did everything the law expects of him to obtain these reports because they were in the possession of a law enforcement agency who assisted in the early investigation of this offense. He was under no obligation to independently approach this law enforcement agency to ask for the reports. *See, e.g., State v. Bennet*, 119 Nev. 589, 603, 81 P.3d 1, 10–11 (2003).

CONCLUSION

The State of Nevada failed to disclose police reports that contained material and exculpatory information, which the defense specifically requested at the time of trial. Evaristo is entitled to habeas relief. This relief does not mean that Evaristo will be walked out of prison tomorrow—he's only asking for the opportunity to present this information to a jury so the jury has all the facts and can make a fair determination of whether the State has met their constitutional burden to prove his guilt beyond a reasonable doubt. To ensure the integrity of our criminal justice system, Evaristo is entitled to such relief.

Accordingly, he respectfully requests this Court grant his habeas corpus petition and order his conditional release subject to the State retrying him within a short, reasonable period of time.

Dated October 17, 2019.

Respectfully submitted,
Rene L. Valladares
Federal Public Defender

S. Alex Spelman
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

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

That on October 17, 2019, he served a true and accurate copy of the foregoing by placing it in the United States mail, first-class postage paid, addressed to:

Karen Mishler
Deputy District Attorney
Clark County District Attorney
200 Lewis Ave.
Las Vegas, N V 89101

Heather D. Procter
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Evaristo Jonathan Garcia
No. 1108072
Saguaro Correctional Center
1252 E. Arica Road
Eloy, AZ 85131

An Employee of the Federal Public Defender, District of Nevada

EXHS
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*S. Alex Spelman
Assistant Federal Public Defender
Nevada State Bar No. 14278
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
alex_spelman@fd.org

Attorney for Petitioner Evaristo 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

Index Of Exhibits In Support Of Reply to State's Response to Petitioner's Petition For Writ Of Habeas (Post-Conviction)

(FILED UNDER SEAL PER 9/19/2019 ORDER, PAGE 3)

Petitioner, Evaristo Jonathan Garcia, hereby submits the following Index of Exhibits, and wit the attached exhibits, in support of the Reply to State's Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction). This index and the attached exhibits are filed under seal pursuant to the order of this court filed on 9/19/2019, page 3.

No.	DATE	DOCUMENT	COURT	CASE #
1.	10/16/2019	Article Re: CCSD Police Department **FILED UNDER SEAL**		
2.	10/16/2019	Article Re: Frequently Asked Questions Regarding CCSD Police Department **FILED UNDER SEAL**		

Dated this 17th day of October, 2019.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

S. ALEX SPELMAN
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

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

That on October 17, 2019, she served a true and accurate copy of the foregoing INDEX OF EXHIBITS IN SUPPORT OF REPLY TO STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS (POST-CONVICTION) by placing it in the United States mail, first-class postage paid, addressed to:

Karen Mishler
Deputy District Attorney
Clark County District Attorney
200 Lewis Ave.
Las Vegas, N V 89101

Heather D. Procter
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Evaristo Jonathan Garcia
No. 1108072
Saguaro Correctional Center
1252 E. Arica Road
Eloy, AZ 85131

An Employee of the
Federal Public Defender

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 **08:30 AM** **HEARING: HABEAS CORPUS PETITION**

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

COURT CLERK: Maldonado, Nancy

RECORDER: Reiger, Gail

REPORTER:

PARTIES PRESENT:

Noreen C. Demonte	**Attorney for Defendant**
Stephen A Spelman	**Attorney for Plaintiff**

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.

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

EVARISTO GARCIA,
Petitioner(s),
vs.
JAMES DZURENDA,
Respondent(s).

Case No. A-19-791171-W
DEPT. XXIX

BEFORE THE HONORABLE DAVID M. JONES,
DISTRICT COURT JUDGE

TUESDAY, NOVEMBER 12, 2019

TRANSCRIPT OF PROCEEDINGS RE:
HABEAS CORPUS PETITION

APPEARANCES:
For the Petitioner(s): NOREEN C. DeMONTE, ESQ.
Chief Deputy District Attorney

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

RECORDED BY: GAIL REIGER, COURT RECORDER

LAS VEGAS, NEVADA, TUESDAY, NOVEMBER 12, 2019

[Proceeding commenced at 8:49 a.m.]

THE COURT: Page 3, A-19-791171, Garcia versus Dzurenda, et al.

MR. SPELMAN: Good morning, Your Honor. Alex Spelman on behalf of Evaristo Garcia. This is on a proper -- on a postconviction petition for writ of habeas corpus.

MS. DeMONTE: Noreen DeMonte for the State.

THE COURT: Go ahead, counsel. I've read through all the materials.

MR. SPELMAN: Yes, Your Honor. This matter is now fully briefed and we will be asking this morning for -- to set an evidentiary hearing in this matter, if Your Honor does not think that the postconviction petition is warranted on the filings that we already have before the Court.

THE COURT: What do you think the evidentiary hearing is going to bring to light?

MR. SPELMAN: If there's any factual questions that Your Honor has, I believe that it would be warranted to call several witnesses. We could call prior counsel to assure the Court that prior counsel is unaware of these police reports that constitute the basis of the *Brady* claim. We can call the school official who -- her name was Bettye Graves.

THE COURT: Graves.

MR. SPELMAN: We can call her and find out more details about the inconsistent descriptions of the shooter that wasn't revealed until our office received the police reports that weren't disclosed.

THE COURT: Facial hair, basically, is what you're talking about, counsel.

MR. SPELMAN: Yeah, Your Honor, that we would be able to shore up all the allegations that we have in the petition, because it is our position, of course, that the allegations on their own are -- do warrant relief. So --

THE COURT: Let's deal with the timeliness, counsel. You're saying, basically, that it wasn't discovered until not too long ago that this actual report existed. Okay. But you look at the call log, it says right there the Clark County School District police department was involved. So how did the previous counsel not basically see that and say, you know, I understand they made a request to the other side, but say, well, there's a police department that you guys are claiming is a governmental actor; why didn't the previous counsel go after those records if they thought they were pertinent?

MR. SPELMAN: That's a good question, Your Honor. And my answer is this: There can be concurrent duties both -- there are concurrent duties both on the State and on trial counsel. Trial counsel has a obligation to provide effective assistance to counsel.

So to the extent that our client cannot prevail on the *Brady*

claim, there may be an ineffective assistance of counsel claim based on trial counsel's failure to do exactly what Your Honor just said.

However, the claim before this Court is the *Brady* claim.

THE COURT: Right.

MR. SPELMAN: And the *Brady* claim focuses solely on what was the State's responsibility? Notwithstanding any responsibility that trial counsel may have had, does not absolve the State -- by federal law, it does not absolve the State of the obligation to still turn over any material in its possession that could be material in exculpatory or useful for impeachment to guilt or punishment for the defendant. And that's exactly what these reports contained.

So while there was indication in the record that led our investigator to go find these reports and, arguably, trial counsel could have done the same thing, and trial counsel may have had an obligation to do so, as well, the State had an affirmative obligation, without trial counsel's request, to do exactly that, and just as simply hand them over.

THE COURT: Didn't it --

MR. SPELMAN: And, in fact, trial counsel did --

THE COURT: Those that are in their possession. Okay. Where is it that shows that the DA ever had the school district's information in its possession?

MR. SPELMAN: Thank you for that question, Your Honor.

That -- we -- that would be something worthy of an evidentiary hearing, but we don't need to actually prove that, because the Nevada Supreme Court has held that constructive possession is enough to make the State responsible to go out and find out what law enforcement has and what they know. So even if the prosecutor was fully genuine about these are the reports that we've been given, and here you go, the responsibility of the prosecutor, actually, they are responsible for the agents acting on their behalf.

And the Clark County School police department is -- they are state actors, they do, by law --

THE COURT: You sure about that, counsel?

MR. SPELMAN: Yes, Your Honor. They are. That --

THE COURT: There's not a conflict going on in regards to that, whether or not they're quasi governmental agency or is not. That's still up in the air by Nevada Supreme Court.

MR. SPELMAN: Your Honor, I would stand by the Nevada -- the NRS that states what their -- what I wrote in my briefing, Your Honor.

THE COURT: Uh-huh.

MR. SPELMAN: And -- but also, in addition to that, even if this were an out-of-state agency, as the Nevada Supreme Court has found, and I don't remember the case name off the top of my head, but it is in my reply, it doesn't actually matter that they're part of the same governmental body or a different governmental body or,

really, exactly what they are. If they assisted in any way whatsoever in the investigation of this case, the Nevada Supreme Court has held that that makes the State responsible to obtain whatever they have.

And so even though it -- we're not saying necessarily that the prosecutor is somehow immoral or something for not, you know, grilling the police, they are, nonetheless, as a legal matter, responsible for whatever those police officers had and didn't turn over. So if those police officers are the ones who didn't hand over the reports or if the prosecution actually did have those reports and thought they didn't have to hand them over or whatever, either way, under law, they are responsible nonetheless, under their *Brady* obligations, to provide them to the defense.

THE COURT: Is that good cause for the delay in regards to this that the fact that the State didn't go out and get school district reports, that they didn't rely upon at trial, and since they didn't do that, is that good -- is that a good basis for the delay?

MR. SPELMAN: Yes, Your Honor. Because the Nevada Supreme Court has held that establishing a *Brady* claim is coextensive, it's establishing the good cause requirement for a postconviction petition. So whether it's late and successive, as long as from the date that we discovered the previously undisclosed reports, if those -- the contents of those reports and the circumstances do establish a *Brady* claim, then the Nevada Supreme Court has held that also will substantiate good cause to

overcome the postconviction petition. The -- I'm sorry, the time bar's in successiveness.

And so for that matter, Your Honor, again, if any of these factual issues are outstanding in Your Honor's mind, I would ask that we set this for an evidentiary hearing.

THE COURT: So, basically, if -- let's say they got the school district report, they would have basically -- for the facial hair, I know you make an exciting thing about that, but it's, basically, facial hair on a young Hispanic male. Okay. But the important things is that it would give them alternative suspects.

At trial, the defense presented alternative suspects. In fact, three separate alternative suspects in this case. So how is that any different? What would have been gleaned off of this other than the school district pulled over some individual, detained him for 14 minutes, got an ID witness who came in and said, No, that's not the individual. A specific eyewitness. I know you guys want to kind of like skate over her basically coming to the scene and doing a walk-by and saying, No, that's not him, you've got the wrong guy. And so the school district releases the other gentleman.

So what would you have presented at trial in regards to this other suspect that wasn't presented at the time of trial? Three alternative suspects were presented at trial and the jury didn't buy it.

MR. SPELMAN: Right. The jury did not buy the other three suspects and this would have been an additional suspect. But

it would have been a different type of alternative suspect.

THE COURT: A suspect who was specifically stated by an eyewitness that you do not have the right person. The other three alleged suspects didn't have that affirmative statement that says, Nope, they're not it.

MR. SPELMAN: Right.

THE COURT: So you could have brought this individual in and they would have -- Ms. Graves would have said, Nope, not it. So what impact would you have on the jury?

MR. SPELMAN: Sure, Your Honor. I have several things to say about that.

First, the standard of review in this case is only that it might have made a difference. The Nevada Supreme Court said --

THE COURT: Probability of it.

MR. SPELMAN: The probability standard is the federal standard, and we believe we meet that also. But the Nevada Supreme Court has held that if there's a specific request for this information and here all school -- or not school, all police reports were requested by any law enforcement agency involved in this case, in a situation like that, where it wasn't disclosed, it lowers the standard of proof on a postconviction petition that we just have to show that it might have made a difference. It is a reasonable possibility. And --

THE COURT: Right. That's what I said. How is this a reasonable possibility --

MR. SPELMAN: There's a reasonable --

THE COURT: -- when three alternatives --

MR. SPELMAN: Yes.

THE COURT: -- who didn't have a specific eyewitness who said, No, that's not the right person, where is the reasonable possibility that this person -- who a specific eyewitness said, No, wrong person -- is going to make an impact?

MR. SPELMAN: Right. And going to that, this -- the trial judge, Abby Silver, who sat on this --

THE COURT: Justice Silver now, yes.

MR. SPELMAN: Justice Silver, who sat on this case, remarked to herself that this is not the strongest case we've seen, that the evidence in this case already, the starting point is that the evidence was weak. This was the borderline case from the beginning.

The next point is, is that given that starting point, this alternative suspect, specifically, is the only one I've ever seen in this record now that actually was ever described as matching the description of the shooter. And I understand the issue with Bettye Graves and I'll move to that to the next point.

But the first thing is the defense would have been able to put on that, look, there was another individual who was wearing a gray hoodie, that was a young Hispanic male running from the crime scene in the direction that people saw the shooter going, actually past the location where the gun was deposited. And so

those facts alone are compelling to me.

The next point is, is that --

THE COURT: Counsel, there were hundreds of young men running from this scene.

MR. SPELMAN: Yes, Your Honor. And not a single alternative suspect has been mentioned as wearing a gray hoodie other than this individual. The other alternative suspects that were presented at trial, witnesses all identified them wearing something different. So this one, first --

THE COURT: And never have you seen a shooter take off a hoodie and throw it away so they don't get caught.

MR. SPELMAN: Your Honor, and I think that's a point that the State could make at trial, on a retrial. But the point is, is that it's just a question of whether a juror might have developed reasonable doubt as a result of this presentation of the alternative suspect.

And then finally, the point I think that, of course, the State is hanging their hat on is that Bettye Graves came up and said this individual is not the guy. But this report also shows now that she has provided inconsistent descriptions of the shooter, and that would have provided fodder for the defense to impeach her credibility. Not her credibility as if she's a truthful person, but her reliability as, did she really get a good look at the shooter or not? And that would have given them the ammunition to use enough to develop this theory that this was, in fact -- there is reasonable doubt as whether or not it was actually this other guy, and maybe Bettye

Graves really doesn't know what she's talking about.

And that's what these reports show. And that's why we think at a -- we meet this very low burden of proof for a retrial in this case, Your Honor.

THE COURT: Counsel?

MS. DeMONTE: Your Honor, thank you.

This was actually my case from start to finish. I actually handled this case beginning with the related case where a witness, Jonathan Harper, was shot in the head by Evaristo's cousin, Salvador --

THE COURT: Right.

MS. DeMONTE: -- on through the international extradition, where I got all the witness statements and had him extradited from Mexico, all the way through the trial.

It's not just that it was Dave Figler and Ross Goodman. This defendant first had Bill Terry, then had John Momot, then had the special public defender, then settled on Ross Goodman. Not one of those four previous counsels did anything with regard to that CAD report or an alternate suspect who was, basically, right there at the scene, 86'd as a suspect once Bettye Graves took one look at him. Nope, not him. It was in the CAD the entire time.

This is his second postconviction, it's successive. It is time-barred. There is no good cause at this point. Because for it to be a *Brady* violation, it has to first be exculpatory. And it's not exculpatory. They stopped somebody because he was Hispanic,

wearing a gray hoodie, and the eyewitness said, No, that's not the guy. That is absolutely not exculpatory evidence.

And if it even could be argued that way, I would think that Bill Terry, John Momot, or Ross Goodman, or the special public defender's office, which I believe was Scott Bindrup at the time, none of these are slackers. These are very stellar attorneys. They kept me on my toes the entire eight years I had this case.

So they absolutely could have gone down this road, but chose not to.

THE COURT: Maybe because it wasn't exculpatory.

MS. DeMONTE: Because it is not exculpatory.

So with that, the State would ask that this successive time-barred petition be denied.

THE COURT: Counsel, rebuttal.

MR. SPELMAN: Just final points, Your Honor.

I think that it's a big stretch to assume that trial counsel made a strategic choice about what -- whether or not --

THE COURT: You think so, counsel?

MR. SPELMAN: -- to go down this road.

THE COURT: They look at this and they go, basically, an eyewitness at the scene, couldn't ask for a better chance of IDing someone. Close in time, close proximity, nothing in -- that changed her viewpoint. You have three learned counsel who said, This woman said that's not the person. So why would we go down that road and basically embarrass ourselves in front of a jury by pulling

this woman in here again and saying, Did you see this individual? Yes. Did you ID this individual at the scene? Yes. Was he the individual suspect? No.

MR. SPELMAN: Right. Your Honor, trial counsel didn't have this information. That's the whole point of this claim. So we can't assume --

THE COURT: It was available, counsel. That was the problem. It was available. I know you wanted the entire report and I agree that that may be an issue. But the availability and the understanding of that was out there. You're assuming that these three learned attorneys didn't bother to look into it and say, Yeah, there's nowhere to go on this. This was an alternative suspect.

If they thought that was claim, counsel, they wouldn't have gone after the three alternates they did present at jury. They clearly wanted that to be their avenue, that you got the wrong man. This is the whole entire case. They supplied to a jury three alternate suspects.

Don't you think if that was their formulated theory, they're going after alternative suspects, if they thought they had any basis for this other individual that was denied by Ms. Graves as a suspect, they would have carried that out? Instead, they took the three that were not "dismissed" by Ms. Graves as being a possible suspect. They clearly went that route. That was their entire argument in this case. I pulled up some of the transcripts.

That's how they fought this entire case, you've got the

wrong man. Here are three alternative suspects, the reasonable doubt thing, these three suspects are the ones that did it. One of these three or all three of them may have been involved.

That's clearly where the counsel went on this matter, that's how they were fighting this matter. They decided that was the route they were going to do. If they thought they had a better alternative, I would imagine that when you have three suspects who don't have an eyewitness who denies that those three might be the person, that's a heck of a lot better argument to a jury than one individual who, specifically, by an eyewitness, was told right there at the scene, No, he's not it.

What do you think the jury would believe more? Three people who have no dispute, there's nobody that's going to say they are not the suspect versus one who has a very specific eyewitness who saw the entire fight, who saw the shooting, who went within minutes of the shooting with police officers to this individual and said, No, that's not it. Who do you think the jury would think has more credibility as far as a possible alternative suspect? The three that no one can say wasn't the party, or the one that a different eyewitness says, That's not him? Okay.

Based upon that, there's no exculpatory evidence here. There's no basis for a good-faith delay in regards to timing. The Court is going to deny it based upon the timing and the fact that there's no good-faith basis for the delay.

Counsel for the State, go ahead and prepare the order.

MS. DeMONTE: Thank you.

THE COURT: Thank you.

MR. SPELMAN: Your Honor, I apologize. I do want to state an objection to the State preparing the order in this case. I think if it could be prepared by chambers, the Nevada Constitution has an explicit separation of powers clause. The State, they are acting on behalf of the executive branch of government, and I believe that's a judicial function.

THE COURT: Counsel, if you want, I will prepare the order.

MR. SPELMAN: Thank you, Your Honor.

THE COURT: Thank you.

[Proceeding concluded at 9:05 a.m.]

///

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

Shawna Ortega, CET*562

ORDR

DISTRICT COURT

CLARK COUNTY, NEVADA

EVARISTO GARCIA

Petitioner,

v.

JAMES DZURENDA, et al.,

Respondents.

CASE NO: A-19-791171-W

DEPT. NO.: XXIX

ORDER ON PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DAVID M. JONES
DISTRICT COURT JUDGE
DEPARTMENT XXIX

Petitioner Evaristo Garcia ("Petitioner") filed a Post-Conviction Petition for Writ of Habeas Corpus ("Petition") on March 14, 2019. Following a response and a reply filed by the State and Petitioner, respectively, this Court held a hearing for the Petition on November 12, 2019. After considering the papers and pleadings on file and counsels' oral arguments, the Court hereby DENIES the Petition.

DISCUSSION

I. Petitioner's Petition for Writ of Habeas Corpus is time barred and no good cause for delay exists.

Pursuant to NRS 34.726(1), a petition that challenges the validity of a judgement must be filed within one year of the judgment of conviction being entered. Here, the judgment of conviction was filed on September 11, 2013, and Petitioner filed his direct appeal on October 11, 2013. The conviction was affirmed and remittur issued on October 23, 2015. The Petition at issue here was

filed on March 14, 2019, which is over three years after the remittur issued. Thus, this Petition was filed well past the one year deadline and Petitioner failed to establish good cause for that delay. Petitioner argued that he recently discovered the CCSDPD reports after a diligent investigation. However, the log, provided to trial counsel, indicates that CCSDPD was involved in the investigation, so previous counsel was likely aware of the existence of the CCSDPS reports. Accordingly, this Court finds that the Petition is time barred and there is no good cause for the delay.

II. Even if the Petition was timely filed, the evidence at issue in the Petition is not exculpatory evidence.

The State is required to disclose all material evidence that may exculpate the defendant. *See United States v. Bagley*, 473 U.S. 667, 675 (1985); *Brady v. Maryland*, 373 U.S. 83 (1963). Exculpatory evidence includes evidence that is favorable to the defendant and material to his guilt or punishment. *Brady*, 373 U.S. at 87. Evidence that provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigations or to impeach the credibility of the State's witnesses must be disclosed. *Kyles v. Whitley*, 514 U.S. 419, 442, 445–51 (1995)

Here, Petitioner argued that the State violated *Brady* by failing to turn over or to request records from Clark County School District Police Department (CCSPD) regarding the case. Those reports contained a description from an eye witness, Betty Graves, which was different than a description previously provided by that witness. Petitioner argued that if those reports would have been turned over by the State or requested by the State, Petitioner would have provided another alternative suspect at trial, which may have established reasonable doubt. Petitioner also argued that the reports could have been used to impeach the credibility and reliability of Ms. Graves's identification of the shooter. At trial, Petitioner's trial counsel presented three alternative suspects who were never ruled out by an eye witness. The alternative suspect that would have been presented based on the CCSDPD reports was conclusively ruled out by Ms. Graves, stating that he was not the shooter. Additionally, the difference in the descriptions that Ms. Graves provides was that she mentioned facial hair in the CCSDPD reports but did not mention it later on in her description.

This Court gives great deference to strategic decisions of trial counsel. Petitioner's trial

DAVID M. JONES
DISTRICT COURT JUDGE
DEPARTMENT XXIX

counsel presented alternative suspects, and likely chose not to pursue the suspect that Ms. Graves conclusively stated was not the shooter. As a result, the Court finds that the CCSDPD reports do not provide exculpatory evidence.

IT IS HEREBY ORDERED the Petition is DENIED

Dated November 13, 2019

HONORABLE DAVID M. JONES
DISTRICT COURT JUDGE
DEPARTMENT XXIX

DAVID M. JONES
DISTRICT COURT JUDGE
DEPARTMENT XXIX

DAVID M. JONES
DISTRICT COURT JUDGE
DEPARTMENT XXIX

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Order was electronically filed and served to all registered parties in the Eighth Judicial District Court Electronic Filing Program and/or placed in the attorney's folder maintained by the Clerk of the Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States mail to the proper parties as follows:

S. Alex Spelman — Attorney for Petitioner

Noreen DeMonte
Karen Mishler — Attorneys for Respondent

Susan M. Linn
Judicial Executive Assistant
Department XXIX

DECLARATION OF DAYVID FIGLER

I, Dayvid Figler, hereby declare as follows:

1. I am a Nevada attorney who represented Evaristo Garcia in his 2013 homicide trial in the Eighth Judicial District Court, along with co-counsel Ross Goodman.

2. I spoke with attorney S. Alex Spelman, Assistant Federal Public Defender, who indicated he represents Garcia for his post-conviction proceedings in the U.S. District Court for the District of Nevada, *see Garcia v. Nevada Department of Corrections, et al.*, Case No. 2:17-cv-03095-JCM-CWH, and in the Eighth Judicial District Court, *see Garcia v. Dzurenda, et al.*, Case No. A-19-791171-W.

3. I first spoke to Spelman via phone and email on or about January or February of 2019. At that time, Spelman indicated to me that the FPD investigator assigned to this case discovered police reports from the Clark County School District Police Department (CCDSPD) that were not contained in the file his office received from trial counsel.

4. Spelman sent a copy of those CCSDPD reports to me via email on February 5, 2019. The same day, I reviewed those reports. I do not recall seeing these reports prior to Spelman showing them to me.

5. On 8/25/2010, Garcia's prior defense counsel in this case filed a motion for discovery, in which they requested "[c]opies 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."

6. When the Clark County District Attorney provided the defense with police reports from only the Las Vegas Metropolitan Police Department and no other agencies, Goodman and I relied on this disclosure as a representation that no further police reports existed. Had we known more police reports *did* exist—especially reports containing information from school police officers who were first on the scene of the crime—we would have wanted to obtain and review them before trial. There would have been no strategic advantage to proceed to trial without at least reviewing any such reports first.

7. I also reviewed the LVMPD CAD log pertaining to event #060206-2820. The CAD log indicates that school police took down a suspect at gunpoint in a neighborhood near the crime scene, specifically in the area of 852 Shruberry. The log further indicates a "one on one" was conducted with "NEG" results. The defense did not make a strategic decision to avoid further investigation of this incident—to the contrary, if the defense knew that there were additional, undisclosed police reports written by school police officers that would have shed further light on this event, we would have wanted to review those before trial.

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11-18-19

8. I reviewed the Honorable David Jones's written order dated November 15, 2019, denying Evaristo's petition. After reviewing this written order, it appears it is predicated on an incorrect assumption of fact. Namely, the November 15 order incorrectly states that trial counsel "likely chose not to pursue the suspect that Ms. Graves conclusively stated was not the shooter." This is not so.

9. At trial, had the State provided the CCSDPD reports to us beforehand, Goodman and I would have utilized them in Garcia's defense. Namely, these reports discuss in detail the circumstances surrounding school police stopping an alternative suspect near the crime scene. This suspect was discovered along the path that witnesses saw the shooter flee, and these reports explain that the suspect was wearing clothes witnesses saw the shooter wearing and matched the description of the shooter. There would have been no strategic advantage to the defense to deprive the jury of this information, which I believe may have given rise to reasonable doubt.

10. Although school employee Betty Graves indicated to law enforcement that this alternative suspect was not the shooter, this fact would not have stopped Goodman and I from presenting the facts in these reports at trial in Garcia's defense. Whether Graves's negative identification of this suspect was accurate would have been a question of fact for the jury, and we would have taken steps to impeach the reliability of her negative identification to promote reasonable doubt about Garcia's guilt.

11. Beyond discussing details about the alternative-suspect stop, the CCSDPD reports also show Graves provided inconsistent descriptions of the shooter, including one otherwise-undisclosed description of the shooter as having a mustache. Had the defense been aware of this, we would have used it to impeach the reliability of Graves's negative identifications to promote reasonable doubt.

12. Impeaching Graves's reliability for identification would have been critical to our defense at trial. Graves testified at trial that one of Garcia's relatives was not the shooter, who was one of the alternative suspects in this case. Thus, her reliability for identification was important to exclude this alternative suspect. Graves also stated to law enforcement that the alternative suspect stopped by school police, mentioned in the CCSDPD reports, was not the shooter. Had the jury been given reason to doubt Graves's reliability for making either of these negative identifications, that would have been critical to Garcia's defense and promoted reasonable doubt. I would have wanted to present this impeachment evidence to the jury in Garcia's defense.

13. Further, if the defense had the CCSDPD reports, we would have launched an investigation into the alternative suspect. We would have scoured police records to see whether this suspect's name was mentioned in connection with any of the

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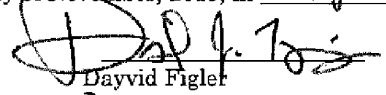
other known players in this case. We would have also considered requesting a continuance to seek a re-evaluation of the forensic evidence to see whether any were linked to this suspect. We would not have ignored this information—the only reason we did not conduct this investigation is because the State did not disclose the CCSDPD reports to us before trial.

14. All told, Goodman and I would have wanted these reports before trial but we did not know they existed. We did not make a strategic decision to forgo this investigation and the defense we could have presented based on these reports. Instead, we relied to our detriment on the State's police report disclosures, assuming the State had complied with the defense's request for all police reports. Had the State disclosed these CCSDPD reports before trial, we would have conducted further investigation and in any event, we would have utilized these reports in Garcia's defense at trial in the ways described above.

I declare under penalty of perjury that the foregoing information is true and correct.

Executed on this 18th day ~~of November~~, 2019, in Las Vegas, Nevada



Dayvid Figler
Bar # 4264

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MAMJ
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*S. Alex Spelman
Assistant Federal Public Defender
Nevada State Bar No. 14278
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
alex_spelman@fd.org

*Attorney for Petitioner Evaristo J. Garcia

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

FUS

Evaristo Jonathan Garcia,

Petitioner,

v.

James Dzurenda, *et al.*,

Respondents.

Case No. A-19-791171-W

Dept. No. 29

Motion to Alter or Amend a Judgment pursuant to Nev. R. Civ. P. 59(e)

(FILED UNDER SEAL
PER 9/19/2019 ORDER, PAGE 3)

On November 15, 2019, this Court entered a written order denying Evaristo Garcia's petition for writ of habeas corpus. Evaristo presented a *Brady* claim to this Court, arguing that undisclosed school police reports were material and exculpatory or useful for impeachment, entitling Evaristo to a new trial. The court's analysis, rejecting Evaristo's *Brady* claim, concludes that this evidence would not have been exculpatory based on two incorrect premises of fact. This motion seeks to correct the record on these facts and asks for reconsideration of the petition's denial.

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POINTS AND AUTHORITIES

Nevada Rule of Civil Procedure 59(e) provides that a party may file a motion to alter or amend a judgment within 28 days after service of written notice of entry of judgment. This motion is being filed well before that time, and is therefore timely. Evaristo Garcia asks this Court to vacate its November 15 order pursuant to Rule 59(e) and enter a new order granting him relief, or setting this matter for an evidentiary hearing, because the Court's decision to deny the petition was based on two incorrect premises of fact.

First, the Court stated that defense counsel at trial "presented three alternative suspects who were never ruled out by an eye witness."[1] In actuality, at least one of these suspects were ruled out by an eye-witness—Betty Graves. Graves was the school employee (a campus monitor) who claimed she saw the shooter before the shooting. She provided descriptions of the shooter to law enforcement. Contrary to this Court's assertion in its order, Graves actually did exclude one of the alternative suspects in her testimony at trial. Namely, she testified that Giovanni Garcia—Evaristo's cousin and the gang member that instigated the brawl in which the shooting occurred—was not the shooter:

> Q. Okay. Do you remember someone who went to school by the name of Giovanny?
>
> A. Yes, ma'am.
>
> Q. Was Giovanny the shooter?
>
> A. No, ma'am.[2]

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[1] *See* Order at 2 lns. 22–23.

[2] *See* 7-10-2013 Trial Transcript, at 131.

Yet under the totality of evidence now before this Court, Giovanni remains a likely suspect for this shooting. Just after the shooting, multiple witnesses provided statements to law enforcement that Giovanni was the true shooter—Evaristo's reply brief goes into this theory in detail, so this motion will not belabor the theory again here.[3] However, the fact that Graves excluded Giovanni as the shooter at trial is critical to this *Brady* claim had trial counsel been aware that Graves provided inconsistent descriptions of the shooter to law enforcement—which the undisclosed school police reports revealed—they would have been able to utilize this information to impeach her exclusion of Giovanni and thus to promote reasonable doubt by the theory that Graves was wrong, and the shooter really was Giovanni. As long as there is a reasonable possibility of this result, a new trial is mandated.

Second, this Court's order incorrectly posits that trial counsel made a strategic decision to forgo investigating the *Brady* claim Evaristo now presents: "This Court gives great deference to strategic decisions of trial counsel. Petitioner's trial counsel presented alternative suspects, and likely chose not to pursue the suspect that Ms. Graves conclusively stated was not the shooter. As a result, the Court finds that the CCSDPD reports do not provide exculpatory evidence."[4]

As a threshold matter, the assumption of fact about trial counsel's strategy is legally irrelevant to the determination of whether evidence can be characterized as exculpatory or useful for impeachment for the purposes of a claim under *Brady v. Maryland*[5] or *Giglio v. United States*.[6] Instead, the analysis involves looking at the evidence itself and determining whether it pertains to the material questions of fact at trial, or could be used to impeach a State's witness.

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[3] *See* 10-17-2019 Reply at 6–8.

[4] *See* Order at 2–3.

[5] 373 U.S. 83 (1963).

[6] 405 U.S. 150 (1972).

Also, regardless of its legal relevance, this Court's assumption is factually incorrect. Undersigned counsel contacted both of Garcia's attorneys at trial, Ross Goodman and Dayvid Figler, shared with them the evidence at issue here, and asked for their opinions. They now provide declarations, which Evaristo includes with this motion.[7] In a nutshell, they deny the Court's assumption about their trial strategy, and indicate to the contrary that they if they knew these police reports existed, they would have utilized them in Evaristo's defense. They did not make a strategic choice to forgo the defenses these reports created (namely, they could have proposed an alternative suspect and impeached the state's key eye witness)—to the contrary, they did not know these defenses were available because they did not know the reports existed. Further, they did not know these reports existed because in a discovery motion filed on August 25, 2010, the defense had already requested all police reports from the State.[8] The State provided police reports from only the Las Vegas Metropolitan Police Department and no other agencies. Therefore, trial counsel was entitled to believe, as they did, that the State fully complied with the discovery request and provided all the police reports available in this case.[9] The defense did not make a strategic choice, as this Court's order implies, to forgo requesting these reports. They in fact *did* request them and just did not get them from the State. Further, Figler and Goodman explain in their declarations that they would have used these reports at trial in Evaristo's defense in numerous ways.[10]

As this Court's decision to deny relief depended on the two incorrect premises of fact described above, Garcia now corrects the record on these matters and

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[7] *See* Declaration of Dayvid Figler (Ex. 34); Declaration of Ross Goodman (Ex. 35). Each are being filed contemporaneously as exhibits 34 and 35 to this motion.

[8] *See* Ex. 34 ¶ 5.

[9] *See* Ex. 34 ¶ 6, 14.

[10] *See generally* Exs. 34, 35.

respectfully requests this Court reconsider its decision to deny him relief. Because the allegations in Garcia's petition, if true, warrant relief, Garcia is entitled to an evidentiary hearing on this claim. And even without an evidentiary hearing, the evidence on record already entitles Garcia to habeas relief and a new trial.

Garcia respectfully submits that he is entitled to a trial in which the jury hears all of the material evidence, without State suppression. That is all he asks from this Court. At a new trial, the jury will weigh whether this previously undisclosed evidence gives rise to reasonable doubt about the identity of the shooter and Garcia's culpability. But at this juncture, Garcia meets Nevada's very low threshold of relief for a *Brady* claim involving explicitly-requested-but-undisclosed evidence—that is, had the State disclosed this evidence, there is at least a reasonable *possibility* the jury would have developed reasonable doubt at trial.[11]

CONCLUSION

Petitioner Evaristo Garcia respectfully requests this Court vacate its final order dated November 15, 2019, pursuant to Rule 59(e), and grant habeas relief.

Alternatively, Garcia respectfully requests this Court vacate the November 15 order and set an evidentiary hearing in this matter to resolve any outstanding factual issues that, if resolved in Garcia's favor, would entitle him to habeas relief.

Dated November 27, 2019.

Respectfully submitted,
Rene L. Valladares
Federal Public Defender

S. Alex Spelman
Assistant Federal Public Defender

[11] *See Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25 (2000).

CERTIFICATE OF SERVICE

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

That on November 27, 2019, he served a true and accurate copy of the foregoing by placing it in the United States mail, first-class postage paid, addressed to:

Karen Mishler
Noreen DeMonte
Deputy District Attorney
Clark County District Attorney
200 Lewis Ave.
Las Vegas, N V 89101

Heather D. Procter
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Evaristo Jonathan Garcia
No. 1108072
Saguaro Correctional Center
1252 E. Arica Road
Eloy, AZ 85131

An Employee of the Federal Public Defender, District of Nevada

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EXHS
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*S. Alex Spelman
Assistant Federal Public Defender
Nevada State Bar No. 14278
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
alex_spelman@fd.org

Attorney for Petitioner Evaristo Garcia

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

FUS

Evaristo Jonathan Garcia,

Petitioner,

v.

James Dzurenda, *et al.*,

Respondents.

Case No. A-19-791171-W

Dept. No. 29

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

(FILED UNDER SEAL PER 9/19/2019 ORDER, PAGE 3)

Petitioner, Evaristo Jonathan Garcia, hereby submits the following Index of Exhibits, and wit the attached exhibits, in support of the Motion to Alter or Amend a Judgment and Garcia's petition for writ of habeas corpus.

This index and the attached exhibits are filed under seal pursuant to the order of this court filed on 9/19/2019, page 3.

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No.	DATE	DOCUMENT	COURT	CASE #
34.	11/18/2019	Declaration of Dayvid Figler		
35.	11/27/2019	Declaration of Ross Goodman		

Dated this 27th day of November 2019.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

S. ALEX SPELMAN
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

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

That on November 27, 2019, he served a true and accurate copy of the foregoing **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** by placing it in the United States mail, first-class postage paid, addressed to:

Karen Mishler
Noreen DeMonte
Deputy District Attorney
Clark County District Attorney
200 Lewis Ave.
Las Vegas, N V 89101

Heather D. Procter
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Evaristo Jonathan Garcia
No. 1108072
Saguaro Correctional Center
1252 E. Arica Road
Eloy, AZ 85131

An Employee of the
Federal Public Defender

DECLARATION OF ROSS GOODMAN

I, Ross Goodman, hereby declares as follows:

1. I am a Nevada attorney who represented Evaristo Garcia in his 2013 homicide trial in the Eighth Judicial District Court, along with co-counsel Dayvid Figler.

2. I spoke with attorney S. Alex Spelman, Assistant Federal Public Defender, who indicated he represents Garcia for his post-conviction proceedings in the U.S. District Court for the District of Nevada, *see Garcia v. Nevada Department of Corrections, et al.*, Case No. 2:17-cv-03095-JCM-CWH, and in the Eighth Judicial District Court, *see Garcia v. Dzurenda, et al.*, Case No. A-19-791171-W.

3. I spoke to Mr. Spelman *via* phone and email in November, 2019 who indicated to me that the FPD investigator discovered police reports from the Clark County School District Police Department (CCDSPD) that were not contained in the file his office received from trial counsel.

4. Mr. Spelman sent a copy of those CCSDPD reports to me via email on November 14, 2019. I have reviewed those reports. I do not recall seeing these reports prior to Mr. Spelman showing them to me.

5. I reviewed the LVMPD CAD log pertaining to event #060206-2820. The CAD log indicates that school police took down a suspect at gunpoint in a neighborhood near the crime scene, specifically in the area of 852 Shruberry. The log further indicates a "one on one" was conducted with "NEG" results.

6. The defense did not make a strategic decision to avoid further investigation of the incident described in the CAD log. To the contrary, if the defense knew that there were additional, undisclosed police reports written by school police officers that would have shed further light on this event, I would have at least wanted an opportunity to review those reports before trial.

7. At trial, had the State provided the CCSDPD reports to us beforehand, I would have utilized them in Garcia's defense. The reports discuss a possible alternative suspect and give grounds to impeach the testimony of Betty Graves, the State's eyewitness. There would have been no strategic advantage to the defense to deprive the jury of this information, which I believe may have given rise to reasonable doubt.

8. I did not make a strategic decision to forgo this investigation or to forgo any defense trial counsel could have presented based on these undisclosed reports. Instead, we assumed the State had complied with the defense's request for all police reports. We relied to our detriment on the State's disclosure as a representation that no further police reports existed regarding this case.

9. Had the State disclosed the CCSDPD reports before trial, we would have conducted further investigation on the information contained in them. Further, we would have strategized ways to utilize the information in these reports in Garcia's defense.

I declare under penalty of perjury that the foregoing information is true and correct.

Executed on this 26th day of November, 2019, in Las Vegas, Nevada.

Ross Goodman

NOAS
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*S. Alex Spelman
Assistant Federal Public Defender
Nevada State Bar No. 14278
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
alex_spelman@fd.org

Attorney for Petitioner Evaristo 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

Notice of Appeal

Notice is hereby given that the petitioner Evaristo Garcia appeals to the Nevada Supreme Court from the Order Denying Petition for Writ of Habeas Corpus (Post-Conviction) entered in this action on November 15, 2019.

Dated this 11th day of December, 2019.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

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

CERTIFICATE OF SERVICE

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

That on December 11, 2019, he served a true and accurate copy of the foregoing **Notice of Appeal** by placing it in the United States mail, first-class postage paid, addressed to:

Karen Mishler
Noreen DeMonte
Deputy District Attorney
Clark County District Attorney
200 Lewis Ave.
Las Vegas, N V 89101

Heather D. Procter
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Evaristo Jonathan Garcia
No. 1108072
Saguaro Correctional Center
1252 E. Arica Road
Eloy, AZ 85131

/s/ Adam Dunn
An Employee of the
Federal Public Defender

ASTA
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*S. Alex Spelman
Assistant Federal Public Defender
Nevada State Bar No. 14278
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
alex_spelman@fd.org

Attorney for Petitioner Evaristo 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

CASE APPEAL STATEMENT

1. Name of petitioner filing this case appeal statement:

Evaristo Jonathan Garcia

2. Identify the judge issuing the order appealed from:

Hon. David Jones, District Court Judge, Dept. XXIX, Eighth Judicial District, Clark County, Nevada.

3. Identify each appellant and the name and address of counsel for each appellant:

Evaristo Jonathan Garcia represented by S. Alex Spelman, Assistant Federal Public Defender, Federal Public Defender, District of Nevada, 411 E. Bonneville Ave., Suite 250, Las Vegas, NV 89101.

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent:

Warden James Dzurenda represented by Karen Mishler, Deputy District Attorney, Clark County District Attorney's Office, 200 Lewis Avenue, Las Vegas, Nevada, 89155-2212.

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42:

N/A.

6. Whether petitioner/appellant was represented by appointed or retained counsel in the district court:

Garcia was represented in the district court by counsel previously appointed to represent him in a related federal matter.

7. Whether petitioner/appellant is represented by appointed or retained counsel on appeal:

Garcia is represented on appeal by counsel previously appointed to represent him in a related federal matter.

8. Whether petitioner/appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

Garcia was previously granted permission to proceed *in forma pauperis*.

9. Date proceedings commenced in the district court (e.g., date complaint, indictment, information or petition was filed):

Garcia filed a Petition for Writ of Habeas Corpus (Post-Conviction) on March 14, 2019.

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

This is an appeal of the order denying Garcia's post-conviction petition.

11. Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court or Court of Appeals and, if so, the caption and docket number of the prior proceeding:

This case has been subject to the following appeals to this Court:

Garcia v. State, Docket 64221;

Garcia v. State, Docket 71525;

Garcia v. State, Docket 71525-COA

12. Indicate whether this appeal involves child custody or visitation:

This appeal does not involve child custody or visitation.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

N/A, this is a criminal, post-conviction case.

Dated this 11th day of December, 2019.

Respectfully submitted,
Rene l. Valladares
Federal Public Defender

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

CERTIFICATE OF SERVICE

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

That on December 11, 2019, he served a true and accurate copy of the foregoing **Case Appeal Statement** by placing it in the United States mail, first-class postage paid, addressed to:

Karen Mishler
Noreen DeMonte
Deputy District Attorney
Clark County District Attorney
200 Lewis Ave.
Las Vegas, N V 89101

Heather D. Procter
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Evaristo Jonathan Garcia
No. 1108072
Saguaro Correctional Center
1252 E. Arica Road
Eloy, AZ 85131

/s/ Adam Dunn
An Employee of the
Federal Public Defender

NOTC
RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
*S. Alex Spelman
Assistant Federal Public Defender
Nevada State Bar No. 14278
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-6419 (Fax)
Alex_Spelman@fd.org

*Attorney 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 **Notice of order from Nevada Supreme Court and request for submission of outstanding Nev. R. Civ. P. 59(e) motion**

Petitioner Evaristo Jonathan Garcia filed in the Nevada Supreme Court a Motion to Stay the Briefing Schedule for his appeal from this Court's denial of his post-conviction habeas petition. Ex. 1. The Nevada Supreme Court stayed his appeal pending this Court's resolution of the still-outstanding motion under Nevada Rule of Civil Procedure 59(e), filed on November 27, 2019. Ex. 2.

Mr. Garcia seeks this Court's resolution of his outstanding Rule 59(e) motion.

On November 15, 2019, this Court entered a written, final order denying Mr. Garcia's petition for writ of habeas corpus. In the order, this Court ruled that the evidence Mr. Garcia presented in support of his *Brady v. Maryland*[1] claim was not exculpatory. In support of that conclusion, the Court reasoned, (a) "At trial, Petitioner's trial counsel presented three alternative suspects who were never ruled out by an eye witness," and (b) trial counsel "likely chose not to pursue the suspect that Ms. Graves conclusively stated was not the shooter."

Thereafter, Mr. Garcia filed a Nev. R. Civ. P. 59(e) motion to alter or amend the judgment. In the motion, he explained that both of the factual bases for this Court's final order, and denial of the petition, were erroneous: (a) an eye witness's testimony excluded one of the primary alternative suspects, but the new *Brady* evidence shows that there is strong reason to doubt that witness's ability to accurately identify the shooter, and (b) trial counsel, in fact, did *not* intentionally forgo investigating the alternative suspect identified in the *Brady* evidence because trial counsel was unaware of the existence of that suspect, due to the State's failure to disclose this information. Both of Mr. Garcia's trial attorneys provided declarations in support of the Rule 59(e) motion. Both of these factual corrections should flip the outcome of this case: given these facts, the suppressed evidence is exculpatory and meets Nevada's low legal threshold to require a new trial, due to the State's failure to disclose the explicitly-requested police reports at issue here.

This Court has not resolved the outstanding Rule 59(e) motion yet, likely because Mr. Garcia filed a notice of appeal promptly after filing the motion. The reason Mr. Garcia' filed the notice of appeal so quickly was because, according to the Nevada Supreme Court case of *Klein v. Warden*, a Rule 59(e) motion does *not* toll the deadline to file a notice of appeal in post-conviction habeas corpus cases, unlike

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[1] 373 U.S. 83 (1963).

all other civil proceedings. *See* 118 Nev. 305, 309–11, 43 P.3d 1029, 1032–33 (2002). Therefore, Mr. Garcia needed to promptly file his notice of appeal and request the appeal be stayed pending this Court's resolution of the Rule 59(e) motion.

As such, Mr. Garcia moved the Nevada Supreme Court to stay the appeal pending this Court's resolution of the Rule 59(e) motion. Ex. 1. The Nevada Supreme Court has granted the motion. Ex. 2. The Nevada Supreme Court stayed the briefing schedule for Mr. Garcia's appeal and provided the following instructions to this Court:

During the pendency of Mr. Garcia's appeal, this Court does not have jurisdiction to outright grant his Rule 59(e) motion. Ex. 2. at 1 (citing *Layton v. State*, 89 Nev. 252, 254, 510 P.2d 864, 865 (1973); *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978)). Instead, if this Court is inclined to grant the motion, it must follow the following procedure: "before [this Court] may grant [Mr. Garcia's] motion, it should enter and transmit to [the Nevada Supreme Court] a written order certifying that it is inclined to grant the motion. Upon receipt of such an order, this court will remand the matter to the district court so that jurisdiction to grant the motion will be properly vested in that court." Ex. 2 at 1–2.

Mr. Garcia respectfully requests this Court do exactly that and enter and transmit to the Nevada Supreme Court a written order certifying that it is inclined to grant Mr. Garcia's outstanding Rule 59(e) motion.

Otherwise, if this Court is inclined to deny Mr. Garcia's outstanding Rule 59(e) motion, this Court has jurisdiction to do so now in a written order. *See* Ex. 2 at 1 ("the district court may deny the motion without a remand from this court"). However, for the reasons explained in detail in Mr. Garcia's 59(e) motion and the accompanying exhibits, denial of the 59(e) motion would be erroneous.

Mr. Garcia's proceedings on appeal are stayed until this Court choses one of the above options—either certifying to the Nevada Supreme Court that this Court is inclined to grant the 59(e) motion, or entering a written order denying the motion.

Mr. Garcia filed the 59(e) motion nearly two months ago—thus, Respondents' opportunity to file a written opposition to the motion has long-since passed. Nonetheless, due to the unusual procedure in this case, Mr. Garcia would not object to this Court providing Respondents' a reasonable opportunity to oppose, should Respondents choose to do so.

In conclusion, Mr. Garcia respectfully requests this Court enter a written order certifying to the Nevada Supreme Court that it is inclined to grant Mr. Garcia's outstanding Rule 59(e) motion.

Dated January 21, 2020.

Respectfully submitted,
Rene L. Valladares
Federal Public Defender

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

CERTIFICATE OF SERVICE

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

That on January 21, 2020, he served a true and accurate copy of the foregoing by placing it in the United States mail, first-class postage paid, addressed to:

Karen Mishler
Noreen DeMonte
Deputy District Attorney
Clark County District Attorney
200 Lewis Ave.
Las Vegas, N V 89101

Heather D. Procter
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Evaristo Jonathan Garcia
No. 1108072
Saguaro Correctional Center
1252 E. Arica Road
Eloy, AZ 85131

/s/ Adam Dunn
An Employee of the
Federal Public Defender

MOT
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*S. Alex Spelman
Assistant Federal Public Defender
Nevada State Bar No. 14278
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
alex_spelman@fd.org

*Attorney 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 C262966-1 **HEARING NOT REQUESTED** Dept. No. 29 Date of hearing: Time of Hearing:

UNOPPOSED MOTION TO UNSEAL COURT FILE AND COURT RECORDS

This Court ordered the records and file in this case sealed. *See* 9-19-2019 Order at 3. Mr. Garcia now moves to unseal this case. Respondents do not oppose.

NOTICE OF MOTION[1]

Please be advised that the Petitioner's "unopposed motion to unseal court file and court records" in the above-entitled matter is set for hearing as follows:

Date: The _____ day of _____, 2020.

Time: _____

Location: RJC Courtroom 15A
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

Note: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of Court

By: _____
Deputy Clerk of the Court

[1] This case is already set for a hearing on February 6, 2020 on another motion. Petitioner requests this unopposed motion be heard during the same hearing.

POINTS AND AUTHORITIES

Mr. Garcia moved previously to seal the records and file in this case to protect the identity of the children involved in this case. *See* 3-14-2019 Motion to Seal. While the rules do not require redaction of the names of minors, there is a reasonable policy argument in favor of doing so nonetheless, as Mr. Garcia explained in his motion to seal. *See id.* Further, because Mr. Garcia is also litigating his case in the federal courts, and the federal courts *do* require redaction of the names of children, and the federal court here ordered Mr. Garcia's federal case sealed, Mr. Garcia moved for the same ruling in this Court for consistency purposes. This Court granted the motion and sealed this case. *See* 9-19-2019 Order at 3.

However, as this litigation progresses to the appellate stage, and Mr. Garcia's new counsel[2] has re-evaluated the need for sealing this case at the state-court level, Mr. Garcia's counsel has determined that continuing the sealed-nature of this case in perpetuity is neither in Mr. Garcia's interest nor is in the public's interest for access to information about court proceedings. Namely, Mr. Garcia was 16 at the time of the offense, and is now 30. The children involved in the offense, therefore, are all adults now. Further, the prior proceedings under Mr. Garcia's criminal case number, including his trial, were neither conducted nor filed under seal—thus, the courts have already publicized the names of these now-adult individuals.

Further, there will be practical hurdles to keeping this case under seal if it proceeds to briefing on appeal. Mr. Garcia would be required to file the all the records under seal, for instance. And if the Nevada Supreme Court were interested in publishing an opinion in this case, it would have to grapple with whether to unseal the case in order to discuss the names of the individuals involved, and to allow the public to review the filings in that court.

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[2] The Federal Public Defender has assigned a new co-counsel to assist with Mr. Garcia's case after previous co-counsel left the office.

The local federal rules appear to require redaction of the names of minor children, even if they are adults now, and even if their names were already publicized in state-court proceedings—Nevada's state-court rules do not require such redaction. The circumstances now counsel against keeping this case under seal. Given the above, Mr. Garcia's counsel discussed unsealing this case with counsel for respondents, Deputy District Attorney John Niman. Respondents, through counsel, indicated they do not oppose this motion to unseal the case.

In conclusion, Mr. Garcia requests this Court grant this motion and order the records in this case, both under its civil and criminal case numbers (A-19-791171-W and C262966-1), be permanently unsealed.

Dated January 27, 2020.

Respectfully submitted,
Rene L. Valladares
Federal Public Defender

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

CERTIFICATE OF SERVICE

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

That on January 27, 2020, he served a true and accurate copy of the foregoing by placing it in the United States mail, first-class postage paid, addressed to:

Steven B. Wolfson
Clark County District Attorney
200 Lewis Ave. #3
Las Vegas, N V 89101

Heather D. Procter
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Evaristo Jonathan Garcia
No. 1108072
Saguaro Correctional Center
1252 E. Arica Road
Eloy, AZ 85131

/s/ Adam Dunn
An Employee of the Federal Public Defender, District of Nevada

OPPS
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Deputy District Attorney
Nevada Bar #013730
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

EVARISTO GARCIA,
#2685822

Defendant.

CASE NO: A-19-791171-W

DEPT NO: 29

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

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

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

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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

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

ARGUMENT

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

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

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

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

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

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

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

Further, EDCR 7.12 bars multiple applications for relief:

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

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

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

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

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

III. DEFENDANT'S MOTION FAILS ON THE MERITS

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

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

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

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

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

CONCLUSION

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

DATED this 29th day of January, 2020.

Respectfully submitted,

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

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

CERTIFICATE OF ELECTRONIC FILING

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

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

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

KM/lm/GU