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 9 of 10

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Dated May 3, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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

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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 Hearing date: February 6, 2020 Hearing time: 8:30 AM **Reply to Opposition to 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)

Respondents ask this court to rule that habeas cases are "criminal" and that as such, Rule 59(e) motions are not available in such cases. This argument fails to alert this Court to clear, contrary authority and should be rejected.

Further, the merits of the 59(e) motion warrant relief: the totality of the record shows the denial of the petition was erroneous based on material errors of law and fact. Accordingly, Evaristo Garcia respectfully requests relief.

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POINTS AND AUTHORITIES

I. The merits of the motion warrant an amended judgment granting Evaristo Garcia relief and a new trial due to the State's nondisclosure of explicitly-requested, exculpatory, material evidence.

The Nevada Supreme Court has noted Rule 59(e) permits a movant to request the original judgment be vacated rather than merely amended, and "cover[s] a broad range of motions, with the only real limitation on the type of motion permitted being that it must request a substantive alteration of the judgment, not merely correction of a clerical error, or relief of a type wholly collateral to the judgment."[1] Among the "basic grounds" for a Rule 59(e) motion are "correct[ing] manifest errors of law or fact," "newly discovered or previously unavailable evidence," the need "to prevent manifest injustice," or a "change in controlling law."[2] The Rule 59(e) motion is merited for several of these reasons.

Particularly, Evaristo filed this Rule 59(e) motion to correct manifest errors of law and fact in this Court's November 15, 2019 final order. Namely, the final order incorrectly concludes that trial counsel's strategy is somehow relevant to the inquiry of whether this suppressed evidence was exculpatory. However, the parties (apparently) agree that this is not relevant—instead, all that is relevant to the exculpatory inquiry is whether the evidence was favorable to the defense.[3]

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[1] *AA Primo Builders, LLC v. Washington*, 245 P.3d 1190, 1192–93 (Nev. 2010) (alterations omitted) (quoting 11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2810.1, at 119, 121 (2d ed. 1995)).

[2] *See id.* (citation omitted).

[3] *See* Opp. at 5 ("The attached affidavits from trial counsel stating that they would have made use of this information at trial are without legal relevance."). *But see* 11/15/19 Order at 2–3 ("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."). Thus, apparently both parties agree that this Court's legal conclusion was erroneous—trial counsel's strategy was legally irrelevant.

Next, this Court's final judgment rests on the manifest error of fact that defense counsel at trial "presented three alternative suspects who were never ruled out by an eye witness."[4] This, however, was manifest error, critical to the ultimate outcome of this habeas case: in fact, the primary alternative suspect (Giovanni Garcia) ***was*** ruled out by Betty Graves, an eyewitness, and the suppressed police reports demonstrate why Graves's ability to exclude Giovanni was seriously unreliable (given her previously undisclosed inconsistent description of the shooter). Had this Court been aware that one witness *was* excluded by Graves, and that this evidence would have allowed the defense to impeach Graves's reliability for excluding this witness, the outcome of this habeas case would have flipped: these facts show a reasonable possibility (and probability) of a different result at trial. There is a reasonable possibility that it would have been enough to raise reasonable doubt in the minds of the jury.

Next, this Court's final judgment rests of the manifest error of fact that trial counsel made a strategic decision to forgo pursuing the alternative suspect identified by the suppressed police reports.[5] In addition to this being legally irrelevant, it's a manifest error of fact: the record shows that trial counsel wasn't even aware of the existence of this alternative suspect, so they did not make a strategic decision to forgo this investigation. Further, their declarations, attached to the Rule 59(e) motion, now conclusively establish that had they known about this suspect, they would have pursued it further and utilized this information in Evaristo's defense.

If this Court requires further factual development of this case—for instance, to hear from trial counsel directly—Evaristo requests an evidentiary hearing.

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[4] *See* 11/15/19 Order at 2 lns. 22–23.

[5] *See id.* at 2–3.

II. Nevada Rule of Civil Procedure 59(e) is applicable in post-conviction habeas corpus cases.

Respondents' opposition misconstrues multiple procedural rules and makes several incorrect legal assertions to their advantage.

A. Post-conviction habeas corpus cases are neither civil nor criminal cases, and they apply the civil rules.

First, Respondents assert that habeas proceedings are "criminal."[6] This assertion contradicts the Nevada Supreme Court's repeated observation that these proceedings are neither civil nor criminal; rather, they fall into a unique category of their own. As the Nevada Supreme Court explained in *Mazzan v. State*, "habeas corpus is a proceeding which should be characterized as **neither civil nor criminal** for all purposes. It is a special statutory remedy which is essentially unique."[7] Although Respondents were apparently aware of *Mazzan*—they cited it on page 2 of their opposition—they nonetheless failed to alert this Court to *Mazzan*'s holding that habeas is actually neither civil nor criminal.

Insisting this is a "criminal" case, to which the civil rules do not apply, is an especially strange position to take where the Eighth Judicial District Court has applied a civil case number to this case. Whatever the abstract, academic merit that may support Respondents' belief that these are "criminal" proceedings (despite the Nevada Supreme Court's holding otherwise), at a minimum, Evaristo still should not be penalized for following the procedural rules that apply to the type of case that *this Court* has designated it to be. If for no other reason, Rule 59(e) applies.

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[6] Opp. at 2 (The Nevada Rules of Civil Procedure are not Applicable in Criminal Cases"); Opp. at 4 ("In addition to improperly citing to NRCP 59(e) when this is a criminal case . . . .").

[7] *Mazzan v. State*, 863 P.2d 1035, 1036 (Nev. 1993) (emphasis added) (quoting *Hill v. Warden*, 96 Nev. 38, 40, 604 P.2d 807, 808 (1980)). Indeed, in the federal system, habeas corpus cases are "technically civil in nature," though they are not "automatically subject to all the rules governing ordinary civil actions." *See Hill v. Warden, Nevada State Prison*, 604 P.2d 807, 808 (Nev. 1980) (quoting *Schlanger v. Seamans*, 401 U.S. 487, 490 n.4 (1970)).

B. Rule 59(e) applies to post-conviction habeas cases because it is a civil rule and it is consistent with habeas statutes.

Second, despite Respondents' implication to the contrary, whether these proceedings are classified as "criminal," "civil," or "other" is a red-herring issue that places form over function. This abstract question does not control the outcome of this motion. The question here is simply whether Rule 59(e) applies to habeas proceedings, which an on-point statute directly governs. That statute states explicitly that the civil rules *do* apply *unless* the civil rule is inconsistent with the habeas statutes.[8] Rule 59(e) is not inconsistent with any habeas rule.

Yet Respondents assert that "The Nevada Rules of Civil Procedure are not Applicable in Criminal Cases,"[9] that Evaristo "improperly cit[ed] to NRCP 59(e) when this is a criminal case,"[10] and "the Nevada Rules of Civil Procedure do[ ] not apply in habeas proceedings; such rules only apply to the extent they are not inconsistent with the statutes guiding habeas proceedings."[11] This framing suggests that application of the civil rules is the exception, rather than the rule. However, the opposite is true: the civil rules govern habeas proceedings *unless* they are inconsistent with the habeas statutes:

> 34.780 Applicability of Nevada Rules of Civil Procedure; discovery
>
> 1. The Nevada Rules of Civil Procedure, to the extent that they are not inconsistent with NRS 34.360 to 34.830, inclusive, apply to proceedings pursuant to NRS 34.720 to 34.830 [the post-conviction habeas corpus statutes].[12]

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[8] NRS 34.780(1) (emphasis added).

[9] Opp. at 2.

[10] Opp. at 4.

[11] Opp. at 2.

[12] NRS 34.780(1) (emphasis added).

That is, application of the civil rules is the rule, not the exception; if a specific civil rule is "inconsistent" with something within the habeas statutes, *that* is the exception. Further, the rules of criminal procedure do not apply at all. This makes sense because (a) the habeas statute itself says that it works this way, incorporating only the *civil* rules, not the criminal rules, and (b) the civil rules *should* apply because they cover a broader array of procedural considerations that may arise in a habeas case than the habeas statutes cover alone, and that would not apply to a criminal proceeding whatsoever. The habeas statutes cover only a few key concerns of habeas procedure, such as pleading standards unique to habeas and the unique rules governing when discovery is available in habeas. They are not written to cover every procedural question that might occur in a habeas case, which is why NRS 34.780 expressly incorporates the Rules of ***Civil*** Procedure into habeas cases.

Only where the Nevada Supreme Court has held a civil rule to be *inconsistent* with the habeas statutes does the rule *not* apply. Usually, the civil rules do apply. The Nevada Supreme Court has never held Rule 59(e) to be inconsistent with the habeas statutes. This is for good reason.

The starting presumption is that Rule 59(e) applies to post-conviction habeas cases because it is a civil rule, which NRS 34.780(1) expressly incorporates, and it is neither facially inconsistent nor directly contradictory to any of the habeas statutes found within NRS 34.360 to 34.830. There is nothing about a request for a court to correct a manifest error or law or fact in its final judgment inconsistent with the habeas statutes. Based on the plain language of NRS 34.780(1), then, this should be the end of the inquiry.[13] Perhaps, then, Respondents mean to argue that application of Rule 59(e) would be impliedly inconsistent with the habeas statutes. Not so.

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[13] "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the

In fact, Rule 59(e) is consistent with the habeas rules. It provides the district court an opportunity to correct manifest errors in its final judgment before the case proceeds. Allowing this opportunity facilitates judicial economy, because the district court may make a correction to its final judgment that may render an appeal moot, or may render a reversal and remand unnecessary. All told, just as in civil cases, Rule 59(e) motions promote judicial economy and thus, promote finality.

Respondents' contrary arguments that Rule 59(e) is inconsistent with the habeas statutes fail because (a) Respondents have misread NRS 34.750, and ignore the difference between "pleadings" and "motions"—they incorrectly assert NRS 34.750's prohibition of further "pleadings" means there can be literally no *motion* practice in habeas cases, which is not correct—and (b) allowing 59(e) motions in habeas cases does not run afoul of the policy favoring the finality of convictions.[14] Taking this one at a time, neither of Respondents' arguments holds water.

1. Rule 59(e) "motions" are not "pleadings" (at least when they do not assert new claims); thus, NRS 34.750 does not restrict a party's ability to file one.

Respondents argue that Rule 59(e) can't apply to habeas proceedings because "[p]ursuant 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."[15] This is incorrect for multiple reasons. First, this argument relies on a common—and wrong—conflation of the terms "pleading" and "motion." A "pleading" is a term of art with limited function: a "pleading" is simply the party's official documents initiating a

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sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The only exception Nevada recognizes to this plain-meaning rule is inapplicable here—where there is clear evidence that the legislature did not intend on a literal application of the plain language of the rule. *See A.J. v. Eighth Judicial Dist. Ct.*, 133 Nev. 202, 206–07, 394 P.3d 1209, 1213–14 (2017).

[14] *See* Opp. at 2–3.

[15] Opp. at 2–3.

new case and stating the allegations and claims that will control the case going forward, and the opposing party's response/answer to the initiating document. In a civil case, the "pleadings" are the complaint and the answer:

> **pleading** *n.* (16c) **1.** A formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses. • In federal civil procedure, the main pleadings are the plaintiff's complaint and the defendant's answer.[16]

In a criminal case, a "pleading" is the criminal complaint, information, or indictment.[17]

In a post-conviction habeas corpus case—according to the very statute that Respondents cited, NRS 34.750—the pleadings are the habeas corpus petition and the answer (sometimes called a "response") to the petition (and the petitioner's reply to the answer). The statute's prohibition of further pleadings simply means that the petitioner may not amend his original petition or file a supplemental petition to state new grounds for relief without leave of court. Here, Evaristo has not requested to add any new claim for relief; he's simply asking the Court to correct manifest errors with the final judgment on the claims he already raised in his pleadings.

A Rule 59(e) "motion"—the document Evaristo filed here—is not a pleading, it is a "motion," according to the language of Rule 59(e) itself:

> (e) **Motion to Alter or Amend a Judgment.** A motion to alter or amend a judgment must be filed no later than

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[16] Pleading, Black's Law Dictionary (11th ed. 2019); *see also* Pleadings, *How Courts Work: Steps in a Trial*, American Bar Association (Sep. 9, 2019) (available at https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleadings/) ("This first step begins what is known as the pleadings stage of the suit. Pleadings are certain formal documents filed with the court that state the parties' basic positions.").

[17] Accusatory Pleading, Black's Law Dictionary (11th ed. 2019) ("An indictment, information, or complaint by which the government begins a criminal prosecution").

28 days after service of written notice of entry of judgment.[18]

A "motion" is distinct from a "pleading"—"***Motions are not pleadings*** but are requests for the judge to make a legal ruling."[19] That is, a "motion" is "[a] written or oral application requesting a court to make a specified ruling or order," usually taking place "in the progress of litigation" which has already begun.[20] In other words, *pleadings* set out the claims and defenses in a case, thereby initiating the proceedings, while *motions* request the court to take specific action within that case that the pleadings initiated. For example, in a civil case, after the complaint is filed, a defendant may *move* to dismiss the case because the plaintiff's *pleading* (the complaint) failed to state a claim.[21]

Section III of the Nevada Rules of Civil Procedure—entitled "Pleadings and Motions"—makes it clear that these terms are *not* interchangeable in Nevada law. Like the rule Respondents cite in the habeas statutes, there is a civil rule that specifies the only "pleadings" that are allowed in a civil case, Rule 7(a). And subsection (b) of Rule 7 describes the different rules that govern "motions." The language and structure of Rule 7, then, clarify that "pleadings" and "motions" are two different, legally significant terms—they are not interchangeable.

By its own terms, a Rule 59(e) motion is *not* a pleading. Instead, it's a motion, which requests the court to alter its final judgment. The limitations NRS 34.750 sets out about when parties may file *pleadings* in a habeas case do not limit motion

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[18] Nev. R. Civ. P. 59(e).

[19] Motions, *How Courts Work: Steps in a Trial*, American Bar Association (Sep. 9, 2019) (available at https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/motions/).

[20] *See* Motion, Black's Law Dictionary (11th ed. 2019).

[21] *See* Nev. R. Civ. P. 12(b).

practice. Thus, they do not restrict a petitioner's ability to file a Rule 59(e) motion. That is, perhaps, unless that so-called "motion" is really a pleading in disguise.

An argument could be made—though Respondents do not make the argument here—that in certain cases, a party's Rule 59(e) motion might be better characterized as an attempt to file a new or supplemental *pleading* because the motion actually raises new claims for relief than those already pleaded in the petition. This arguably would not be an appropriate use of a Rule 59(e) motion. In such a case, per NRS 34.750, that party would likely need to first seek leave of the court to file this pleading-in-disguise. Indeed, such a situation is similar to that being considered by the United States Supreme Court currently, for federal proceedings, in *Bannister v. Davis*,[22] for which oral argument was held on December 4, 2019. But this issue is not present here.

Respondents do not allege that Evaristo is trying to raise any new claims here, and thus, that his motion should really be reconstrued as a pleading. To the contrary, Respondents claim, "Defendant simply re-argues facts and authorities already submitted in his Petition and alleges no new legal arguments."[23] Evaristo disputes this claim to the extent that Respondents are overlooking the arguments Evaristo raises that are appropriate for a Rule 59(e) motion—for example, that the final judgment made manifest errors of fact and law. In any event, Respondents' own characterization of Evaristo's Rule 59(e) motion shows, in fact, that he is *not* filing a document that should be construed as an unwarranted "pleading." It's a regular, post-judgment motion.

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[22] *See Bannister v. Davis*, No. 18-6943. The issue in *Bannister* is whether and under what circumstances a timely Rule 59(e) motion in federal habeas corpus practice should be recharacterized as a second or successive habeas petition.

[23] Opp. at 4.

What Evaristo's Rule 59(e) motion *does* do is argue that the Court's final judgment rests on manifest errors of fact and law. This is exactly what a Rule 59(e) motion is designed to address, to give the district court a chance to fix or at least address those errors before the case proceeds to appeal.[24] Until the Court made these manifest errors of fact and law, there was no occasion to raise the issues. Hence, the arguments raised with the Rule 59(e) motion address issues that did not exist before this Court's final judgment—the errors discussed in the motion were introduced by the court, argued by neither party. Therefore, Evaristo followed the appropriate remedy for these issues by filing a Rule 59(e) motion to alter or amend the judgment at his first possible opportunity to do so.

This is not inconsistent with the habeas statutes at all—making sure a final judgment does not rest of manifest error is consistent with the purpose of the post-conviction habeas corpus statute, which is, generally, to ensure a prisoner's judgment and continued incarceration does not violate state or federal law.

2. Merited Rule 59(e) motions advance the interest of finality by preventing piecemeal litigation.

The second argument Respondents advance is that Rule 59(e) motions, generally, run afoul of the policy favoring finality of convictions.[25] This is not true. Generally speaking, if a Rule 59(e) motion is merited, then it *serves* the interest of finality: it provides the district court the opportunity to correct a manifest error introduced by its final judgment in the first instance. The correction of such a material error may prevent the necessity of a reversal and remand to correct an error the district could have corrected on its own. Or, if the correction results in relief to the movant, it may render an appeal moot altogether.

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[24] *See* subsection C, *infra*.

[25] Opp. at 3.

Better, then, and more consistent with the policies animating the habeas rules, would be to allow the district court to correct its own manifest errors of fact and law in the first instance, before the Nevada Supreme Court needs to correct them on appeal, in an appeal that may have been wholly unnecessary. Rule 59(e) allows this important corrections process to occur, at least when the manifest error for which the motion seeks review is something introduced for the first time in the final judgment (as here). In this way, then, merited Rule 59(e) motions *advance* the policy in favor of finality because it prevents piecemeal litigation.

Indeed, the Rule 59(e) motion advances the interests of finality in this very case. Here, the Rule 59(e) motion points out new manifest errors introduced into this case by this Court's final, written order, which formed the foundation for the Court's final decision. Were this Court inclined to correct those errors, it should flip the outcome of these proceedings entirely and result in habeas relief for Evaristo in the form of a new trial.

Further, Evaristo presented to the Nevada Supreme Court the fact that this Rule 59(e) motion is still pending before this Court, and asked the Supreme Court to stay the briefing schedule on appeal so this Court can consider the Rule 59(e) motion first. The Supreme Court, ruling on the motion to stay, expressly ruled that this Court *does* have jurisdiction to consider this Rule 59(e) motion, and ordered the appeal stayed to allow this Court to consider the 59(e) motion first. This shows that, at least in this case, the Rule 59(e) motion before this Court will advance the interests of finality and is consistent with the habeas rules.

Were Rule 59(e) motions not cognizable in habeas corpus proceedings, it would stand to reason that the Nevada Supreme Court would not have granted the motion to stay the appeal, ruling instead that Rule 59(e) motions simply are not available in these proceedings. Instead, the Nevada Supreme Court ruled that Evaristo filed a "timely" motion to alter or amend the judgment in the district

court,[26] and that "[t]he district court presently has jurisdiction to consider and deny the pending motion to alter or amend," or, if it is inclined to grant the motion, the court "should enter and transmit to this court a written order certifying that it is inclined to grant the motion."[27] This order would make little sense if Rule 59(e) motions did not apply to habeas corpus cases. They do.

The Nevada Supreme Court considered an appeal from the denial of a Rule 59(e) motion in a post-conviction habeas corpus case in *Klein v. Warden*.[28] In that case, the Court held that Rule 59(e) motions do not toll the 30-day deadline to file a notice of appeal in a post-conviction habeas corpus case.[29] Thus, a petitioner filing a Rule 59(e) motion in a habeas case needs to file a notice of appeal within 30 days of the notice of entry of final order (which is what Evaristo did here, and then sought a stay of the appeal pending the outcome of the Rule 59(e) motion). That is, rather than take the opportunity to declare Rule 59(e) motions to be inconsistent with the habeas rules, the Supreme Court simply ruled that *tolling* for Rule 59(e) motions is inconsistent. This implies that there is nothing inconsistent with seeking Rule 59(e) relief in general, as long as the petitioner still files his notice of appeal on time and seeks a stay of the appeal from the Nevada Supreme Court, under circumstances warranting a stay (like here).

Finally, lest there be any remaining doubt that Rule 59(e) motions are consistent with post-conviction habeas corpus practice, this Court may look to federal caselaw. Nevada courts may look to federal caselaw to interpret Nevada

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[26] *Garcia v. Director*, Case No. 80255, Dkt. No. 20-02117, at *1 (Nev. Jan. 16, 2020) (Order Regarding Motion).

[27] *See id.*

[28] 118 Nev. 305, 43 P.3d 1029 (Nev. 2002).

[29] *See generally id.*

Rule of Civil Procedure 59(e), because it mirrors Federal Rule of Civil Procedure 59(e).[30]

In federal habeas practice, the United States Supreme Court has long recognized that Rule 59 motions are "thoroughly ***consistent*** with the spirit of the habeas corpus statutes," and is therefore "applicable in habeas corpus proceedings."[31] So too in Nevada: Rule 59 motions are consistent with the habeas rules. Therefore, there is no limitation on their application here.

C. A Rule 59(e) motion is the correct motion for relief here.

A Rule 59(e) motion is a broad post-judgment remedy, limited primarily by its short deadline to file after a final judgment.[32] The Nevada Supreme Court has noted Rule 59(e) permits a movant to request the original judgment be vacated rather than merely amended, and "cover[s] a broad range of motions, with the only real limitation on the type of motion permitted being that it must request a substantive alteration of the judgment, not merely correction of a clerical error, or relief of a type wholly collateral to the judgment."[33] Among the "basic grounds" for a Rule 59(e) motion are "correct[ing] manifest errors of law or fact," "newly discovered or previously unavailable evidence," the need "to prevent manifest injustice," or a "change in controlling law."[34]

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[30] *AA Primo Builders, LLC v. Washington*, 245 P.3d 1190, 1192–93 (Nev. 2010).

[31] *Browder v. Director, Dep't of Corrs. of Ill.*, 434 U.S. 257, 270–71 (1978) (emphasis added).

[32] *See* Nev. R. Civ. P. 59(e).

[33] *AA Primo Builders, LLC v. Washington*, 245 P.3d 1190, 1192–93 (Nev. 2010) (alterations omitted) (quoting 11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2810.1, at 119, 121 (2d ed. 1995)).

[34] *See id.* (citation omitted).

Evaristo's Rule 59(e) motion falls directly into these basic functions.[35] Thus, it is the appropriate vehicle for his post-judgment request for relief.

III. EDCR 2.24 is inapplicable to this motion.

Respondents maintain that Evaristo filed the wrong motion, and he should have filed a motion for reconsideration under local rule ECDR 2.24. In fact, Respondents imply he is somehow attempting to skirt the applicable rules by falsely characterizing his motion as a Rule 59(e) motion. Respondents then assert that under ECDR 2.24, Evaristo's motion is two days late.[36]

As a threshold matter, assuming *arguendo* that EDCR 2.24 did apply to this motion (it does not), Respondents argument fails on its face because, contrary to their assertion, the motion actually would have been timely per local rule. EDCR 2.24 grants parties **10 days** from the notice of entry of order to move for reconsideration. According to EDCR 1.14, "[w]hen the period of time prescribed or allowed is **less than 11 days**, intermediate Saturdays, Sundays, and non-judicial days must be **excluded** in the computation." Between the day of the final order (October 15, 2019) and the day Evaristo filed his Rule 59(e) motion, only 8 judicial (business) days elapsed.

Further, EDCR 2.24 requires the motion to be filed "within 10 days after service of written ***notice*** of the order or judgment," not within 10 days of the final order itself. This court apparently did not enter *notice* of the final order until November 18, 2019.[37] When Evaristo filed his Rule 59(e) motion on November 27, 2019, only 9 calendar days—and just 7 judicial/business days—had elapsed. Even if

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[35] *See* Section I, *supra.*

[36] *See* Opp. at 3.

[37] Evaristo still has not received a copy of this notice, to counsel's knowledge, but is aware that it was entered by looking at the court's electronic docket.

Respondents were correct, then, and EDCR 2.24 applies to this motion, the motion was nonetheless timely.

Moreover, even if the rule did apply, the rule's requirement that a party must first seek leave before requesting the same relief requested in an earlier motion is satisfied by the act of filing the motion for reconsideration itself. A party does not need to file a separate motion for leave to file a motion for reconsideration—the motion for reconsideration is exactly the document that EDCR 2.24 requires. Thus, even if EDCR 2.24 did apply here, Evaristo has therefore complied with it.

To be clear, however, EDCR 2.24 does not apply here. It doesn't have anything to do with the type of motion Evaristo filed. EDCR 2.24—by its own terms—does not apply to motions that can be addressed by Nevada Rule of Civil Procedure 59: "(b) A party seeking reconsideration of a ruling of the court, **other than** any order which may be addressed by motion pursuant to N.R.C.P. 50(b), 52(b), 59 or 60, must file a motion for such relief within 10 days . . . ." An order which Rule 59 may address is a final, appealable order, such as this Court's November 15, 2019 order denying Evaristo's petition. Thus, by its own terms, EDCR does not apply to post-final-order/judgment motions like this one. Thus, EDCR 2.24 doesn't apply to this motion at all.

Another reason EDCR 2.24 does not apply here is because it relates to motions for reconsideration of *prior motions*, not post-judgment motions challenging the final judgment itself. Thus, the limitation on reconsideration found in EDCR 2.24(a) does not apply here—EDCR 2.24 regards the situation in which a party files a *motion*, the court resolves that motion, and then a party wants to the court to reconsider its decision on that original motion. Evaristo is not seeking reconsideration of a prior motion; he's seeking review of the final judgment on the petition itself. The appropriate motion for this request is a Rule 59(e) motion, for all the reasons described at length above.

Finally, as the Nevada Supreme Court noted here, Evaristo's Rule 59(e) motion was timely filed, and this Court has jurisdiction to consider it. There is no procedural bar to this Court's consideration of the merits of Evaristo's Rule 59(e) motion. Evaristo respectfully requests this Court do so.

Conclusion

The request for relief Evaristo ultimately requests is that this Court vacate its final order dated November 15, 2019, pursuant to Rule 59(e), and grant habeas relief. Alternatively, he 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 Evaristo's favor, would entitle him to habeas relief.

The Nevada Supreme Court's order in this case details a specific procedure that must be followed to grant the request for relief here. Before this Court may grant this motion, it must "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, [the Nevada Supreme Court] will remand the matter to the district court so that jurisdiction to grant the motion will be properly vested in [this] court."[38]

The errors identified in Evaristo's Rule 59(e) motion warrant vacatur of the final judgment and the entry of a judgment granting habeas relief. The evidence the State withheld from Evaristo's counsel at the time of trial demonstrated that their star eyewitness gave an inconsistent description of the shooter directly after the shooting occurred, which substantially undermines her ability to identify or exclude suspects as the shooter. The jury never heard this. This alone would have been material evidence at trial. Further, the suppressed evidence reveals a previously

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[38] *Garcia v. Director*, Case No. 80255, Dkt. No. 20-02117, at *1–2 (Nev. Jan. 16, 2020) (Order Regarding Motion).

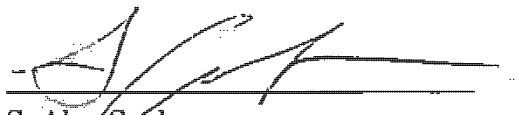
unknown alternative shooter who matched the description of the shooter and was discovered fleeing in the direction witnesses saw the shooter flee. This, too, would have been material evidence for the defense at trial. For either or both reasons, this far exceeds Nevada's reasonable-possibility standard and the federal reasonable-probability standard mandating a new trial, especially where the trial judge had commented that the evidence was not particularly strong in this case to begin with.

Evaristo requests this relief simply to receive the fair trial to which he was entitled. Evaristo maintains he is entitled to present this material evidence to a jury before they decide whether to label him a murderer and before he is given a life sentence.

Under these unique circumstances, Evaristo submits a new trial is warranted. Accordingly, he respectfully requests this Court certify to the Nevada Supreme Court that it is inclined to grant the Rule 59(e) motion.

Dated January 30, 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 January 30, 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
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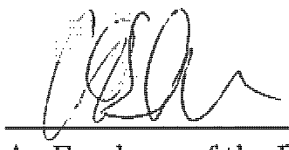

An Employee of the Federal Public Defender, District of Nevada

OPPS
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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 SUPPLEMENT TO 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 Supplement 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

ARGUMENT

The State wishes to modify its position contained in its Opposition filed on January 29, 2020. In sections I and II of that Opposition, the State alleged that Defendant's filing of a motion pursuant to Rule 59(e) of the Nevada Rules of Civil Procedure was procedurally improper, and that Defendant was attempting to circumvent the applicable procedural rules. However, upon further research and consideration, Nevada law appears unclear as to whether or not a motion pursuant to Nev. R. Civ. P. 59(e) may be filed in post-conviction proceedings. Thus, the State no longer contends that Defendant engaged in wrongdoing by filing the Motion, and hereby states that it no longer puts forth the arguments contained in sections I and II of its Opposition. However, the State stands by its arguments made in section III of that Opposition, and contends that the Motion to Alter or Amend a Judgment Pursuant to Nev. R. Civ. P. 59(e) fails on its merits.

DATED this 31st 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 31st 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

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

February 06, 2020 **08:30 AM** **MOTION TO ALTER OR AMEND**

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

COURT CLERK: Maldonado, Nancy

RECORDER: Delgado-Murphy, Melissa

REPORTER:

PARTIES PRESENT:

Charles W. Thoman	**Attorney for Defendant**
Stephen A Spelman	**Attorney for Plaintiff**

JOURNAL ENTRIES

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

06/05/20 1:00 PM EVIDENTIARY HEARING

Electronically Filed
3/17/2020 11:35 AM
Steven D. Grierson
CLERK OF THE COURT

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

THURSDAY, FEBRUARY 6, 2020

TRANSCRIPT OF PROCEEDINGS RE:
MOTION TO ALTER OR AMEND

APPEARANCES:
For the Petitioner(s): CHARLES W. THOMAN, ESQ.
Deputy District Attorney

For the Respondent(s): STEPHEN ALEX SPELMAN, ESQ.
JEREMY BARON, ESQ.
Assistant Federal Public Defenders

RECORDED BY: MELISSA MURPHY-DELGADO, COURT RECORDER

LAS VEGAS, NEVADA, THURSDAY, FEBRUARY 6, 2020

[Proceeding commenced at 8:46 a.m.]

THE COURT: Page 5, A-19-791171, Garcia versus Dzurenda.

MR. SPELMAN: Good morning, Your Honor. Alex Spelman with the Federal Public Defender. We have Jeremy Baron as well this morning.

THE COURT: Okay. Go ahead. This is your Motion to Alter or Amend the Judgment.

MR. SPELMAN: Yes, Your Honor.

Without belaboring what's in the filings before you, Motion to Alter or Amend the Judgment 59(e), basically, what we've brought forth to Your Honor is we just believe that there were factual and legal errors in the final judgment and that that's the function of the 59(e) motion.

And just, if I could, we focused last time on the -- in the last argument on the idea of this alternative suspect that was stopped --

THE COURT: Right.

MR. SPELMAN: -- right outside the school. I did want to highlight today just the other way that this evidence would have been -- would have given rise to reasonable doubt at the trial. And that's namely that Betty Graves -- the reports show two things about her ability to reliably identify the suspect. One is that she --

we now know she said a mustache, and then later on she never said anything about a mustache. And I think that, you know, a mustache is right in the middle of your face, I think that's a pretty big deal to change that.

Also, the reports say that she provided -- I think the exact quote is an updated -- we've received an updated description of the shooter. So I don't know how you go from directly after the shooting having a description and then updating it. To me, I think the defense would have been able to use that all day to impeach --

THE COURT: Well, counsel, don't you ever see when a person witnesses a crime, a violent crime, that they have a certain idea of what happens and then after they have a second to recall and basically refresh it, go back and calm down, that they didn't put in additional facts in regards to that eyewitness testimony?

MR. SPELMAN: Your Honor, I think the -- typically, the description that's given right after the event is considered the most reliable, because that's the one that's -- where it's most fresh in their memory. After that, you have the risk of misremembering, or the worst-case scenario is -- and we know that witnesses do have false memories that are created, as you start to think about things more after. So I think the defense would have been able to make this argument to the jury. The most -- we don't -- we know that this witness didn't quite know what the shooter looked like. That calls into question whether she got a good look.

And the reason why that's directly relevant to this case is

she -- I think that the best one -- or at least one of the best theories that the defense would have focused on at trial with this evidence was that Giovanni Garcia, the older cousin of our client, was the actual shooter. And the reason for that is he was the one who started this whole brawl. He's the one who had the beef with the other gang members. And then he's the one who witnesses said contemporaneously exclaim, Giovanni has a gun, Giovanni has a gun. And then witnesses told law enforcement right after the crime that Giovanni was the shooter. Of course, they recanted that later.

And the reason, I think, that what the defense would have done about the witness is changing their story afterward is these were people all in a gang. And we know that with the correlated shooting of Jonathan Harper, what the leader of the gang did, who was Giovanni's brother, his name is Salvador, what he did in that case, the State proved, was he marched his foot soldiers down to the police station under -- they said that they did it because they were afraid of him, to lie to the police about what happened in the Jonathan Harper shooting. I think the defense, with that information, would have been able to show -- that's probably what happened here.

People originally were telling what they really saw and then Salvador got to everybody, Hey, we're going to protect my brother here, Giovanni, go down and tell them it was the -- or my younger cousin, Evaristo, who's a 16-year-old special education student, who we can, basically, you know, pin this whole thing on.

I think that --

THE COURT: So, counsel, all that information was available to the defense at the time. You're not creating new arguments. All of that information was available to the defense team at that time.

MR. SPELMAN: I think --

THE COURT: The only argument you talk about is this one particular "misinformation" about one witness and a possible other suspect. All of this gang retaliation, all of this marching down, all of that was available at the time of the trial.

MR. SPELMAN: I think -- that's exactly right, Your Honor. And I think the reason --

THE COURT: That's more of an ineffective counsel argument than what you're making now.

MR. SPELMAN: Sure. And that does bring me to my final point. Having said all that, the -- what we know now from the school police reports shows -- and, sorry, the -- just before I say that, the reason the jury I think did not buy that Giovanni Garcia was the actual shooter was because Betty Graves was asked at trial, Was Giovanni the shooter? And she said no. And she, of course, is being relied upon as the sole eyewitness who actually said they saw his face. And so if I'm remembering the record correctly, but I believe that's how it was. And --

THE COURT: And she was open to cross-examination about her lack of understanding and what she did or didn't see and

where she was standing and the lighting and everything else.

MR. SPELMAN: Exactly. And I think that what this would have been -- absolutely much more powerful information to show, Look, in fact, you actually provided a different description of the shooter, right after it happened. And then you change your story. So did he have a mustached or not? Did he -- you know, and just be able to impeach the witness that way.

And all we're talking about is reasonable doubt. I'm not saying that with this evidence, trial counsel would have been able to affirmatively prove innocence, which they, of course, are not expected to do at the trial. Instead, this would have been enough just to create doubt in the mind of the jury, the reasonable doubt.

And the standard now in postconviction -- because what we're talking about is evidence that was explicitly requested and not handed over, is, is there a reasonable possibility, according to the Nevada Supreme Court, or under the federal standard, is there a reasonable probability --

THE COURT: Probability.

MR. SPELMAN: -- that reasonable doubt would have arisen at trial? So it's really now we're not even talking about reasonable doubt, which is a really low threshold, but a reasonable possibility of reasonable doubt. I think that's a very low threshold.

And just to put this into context, the point of all of this is not to ask Your Honor to declare my client innocent today. Of course not. It's that this evidence would have been important at

trial, would have certainly been relied upon by trial counsel, and that, I think, would -- that is what was necessary for my client to have a fair trial.

And if on a new trial, if this petition is granted and the State retries my client, then at that point, I think all of this would be fodder to talk about whether or not they do meet that reasonable doubt standard. But without this evidence, I don't think that they met that standard through a fair trial.

THE COURT: Okay. And one other request was an evidentiary hearing. What witnesses would be put in an evidentiary hearing and what type of evidence would you hope to gain through that hearing?

MR. SPELMAN: Your Honor, certainly we would call both trial counsel to discuss what they would have done with this evidence. I think that would be --

THE COURT: But didn't you tell me in this whole entire motion that trial strategy was my error and my ruling last time, that I was deciding whether defense counsel should have done or could have done, and you basically said that was in error?

MR. SPELMAN: Your Honor, and I volunteer that, because that was the analysis that Your Honor relied upon. I do maintain that trial counsel's strategy does not relate towards whether or not the evidence itself was exculpatory, which was a holding of Your Honor.

THE COURT: So what would you gain at an evidentiary

hearing calling those legal counsel in here and just say, If you had this evidence. Because then you're going to be asking them the exact error you said I committed, because you'd be asking them, If you had this evidence, would you have presented it? Isn't that what you just said was in error anyways?

MR. SPELMAN: I think it would actually be relevant towards the prejudice prong, towards the prong of whether or not if they talk about how they would have used it, it would illuminate the Court on -- I do think it would be redundant with what I just explained to the Court. That said, to the extent that Your Honor doesn't want to take my word for it and wants to hear what would trial counsel have really done with it, that could relate to whether or not they -- to hear it from them on whether or not they would meet that reasonable doubt.

And then the -- of course, the other relevant factor is just to establish the allegation we made in the petition, which is that this evidence was, in fact, suppressed.

THE COURT: Okay.

MR. SPELMAN: And that would certainly be relevant.

THE COURT: But you can understand my quandary about your request of an evidentiary hearing, because you're basically going to get out of these attorneys what would have been your strategy, which you have told this Court is a false theory in order to make a ruling is what their strategy would have been is irrelevant.

MR. SPELMAN: Right. Yes. And then, of course, the

witness that we would consider strongly calling would be Betty Graves herself to ask about this identification issues. And to get it on the record, see how strong that impeachment might have been, in fact, with that evidence.

And, of course, the officers who -- the school officers who never testified at the trial, we would like to speak with them as well.

THE COURT: State?

MR. THOMAN: And, Judge, Betty Graves, regardless, we -- trial counsel presented -- or presented argument that there were three alternative suspects. This argument has already been made at trial. They've already said, Hey, there's another shooter out there. One, two, three, now you've got a fourth.

Counsel has completely overlooked the prejudice prong of the fingerprint evidence at trial. Page 5 of our response --

THE COURT: Response.

MR. THOMAN: -- that we -- our initial response on January 29th of this year, fingerprint evidence and numerous other eyewitnesses. One witness trying to impeach one witness on a statement she made to Clark County police officer -- student police -- excuse me, school district police officers that -- in the report that they didn't receive. The impeachment of this one witness is not going to outweigh everything else that was presented at trial. And --

THE COURT: Counsel, how do you -- how do we know that? How do we know that Betty Graves was not the star witness

in the jury's opinion as to the identification?

MR. THOMAN: That's pure speculation.

THE COURT: Okay. But since we didn't have her crossed on that particular evidence, how do we know she wouldn't have crumbled on the stand and said, Yeah, you know what? I have no idea who the shooter was.

MR. THOMAN: And --

THE COURT: And that --

MR. THOMAN: And again --

THE COURT: -- crumbling in front of a jury has a huge impact upon all the State's witnesses.

MR. THOMAN: And again, Judge, I'm going to rely on the fingerprint evidence and the other eyewitnesses in this case.

THE COURT: All right. Counsel, that was the other -- I mean, it's just -- we've hashed this out before and whether or not 59(e) is procedurally correct, I'll let the Supreme Court make that decision some day. But the question is if, in fact, this one witness was discredited, what do you do with all the rest of the evidence that was utilized by this jury? I mean, you're basically saying that the jury made their decision based upon one person's eyewitness account of who the shooter was, and you're discounting everything else. You're basically saying the jury didn't even consider all of the evidence, which would be a violation of their oath.

MR. SPELMAN: I certainly think the jury -- well, I certainly

hope that they considered it all. We're just talking about was this enough to meet the reasonable doubt standard. Would this have entered into their deliberations had they this information, had Betty Graves crumbled on the stand the way Your Honor explains, perhaps had we discussed with the school police why they thought that alternative suspect, as well, was a good match. All of these reasons I think might have given rise to reasonable doubt.

And, certainly, the fingerprint evidence, they -- I just want to make a record of two points on the fingerprint evidence. One is the client never contested that he held the gun that day. And that -- because it was established and undisputed that he was hanging out with this group, his -- it's his family, it's his --

THE COURT: Right.

MR. SPELMAN: -- older cousins and they were passing the gun around and being dumb kids, you know, holding this gun. So he did touch the gun, that's not in dispute.

So what -- fingerprints on a gun is only relevant if you can prove when they were put there.

THE COURT: Well, that's the course --

MR. SPELMAN: And so that's the inference.

THE COURT: -- the jury didn't buy your client's story as to that we, you know, just happenstance, we all touched it a few days before when we were playing pseudo Russian roulette. I mean, what if the jury didn't buy that story? And basically said, you know what? That's a likely excuse. That's a way to basically firm up why

your hand and your fingerprints were on the gun that was used in a shooting.

MR. SPELMAN: Sure. I think that's possible. And again, it's about them weighing all the evidence together, and someone shot this kid, and then just decided who it was is what the jury's task was. Was it a client that -- was it my client? And if they have a reasonable doubt, well, it really might have been Giovanni, that is what people said right after the shooting, I think that that's reasonable doubt, that's -- the law requires an acquittal in that situation, even if there is evidence pointing to my client.

And so I think I would submit on that point, Your Honor.

THE COURT: Counsel, this is what we're going to do. Based upon the gravity of the offense and charge, I'm going to allow you to have your evidentiary hearing. Okay? I'm going to give you --

MR. SPELMAN: Thank you, Your Honor.

THE COURT: -- half a day in order to do your evidentiary hearing; how long is it going to take you to get these witnesses?

MR. SPELMAN: Probably four months to -- about four months, Your Honor, I would think.

THE COURT: Okay. Friday, June 5th. Let's start it in the afternoon, we'll give them just half the day.

THE COURT CLERK: Friday, June 5th at 1:00 p.m.

MR. SPELMAN: Thank you, Your Honor.

THE COURT: Thank you.

MR. SPELMAN: The other matter I -- just before I forget, is there was a Motion to Unseal the case. And we did bring a proposed – that's unopposed, and we just brought a order, if I may.

THE COURT: Approach.

MR. SPELMAN: Thank you, Your Honor.

THE COURT: She'll log it in and give it to you.

MR. SPELMAN: Thank you, Your Honor.

THE COURT: Thank you.

Anything else, counsels?

MR. SPELMAN: No, Your Honor.

THE COURT: Thank you.

[Proceeding concluded at 9:01 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

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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

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

This matter came before the Court on February 6, 2020 on petitioner's motion to alter or amend the judgment pursuant to Nev. R. Civ. P. 59(e). Present were counsel for petitioner and respondents. This court held oral argument at this time.

This Court has reviewed the Rule 59(e) motion, its attached declarations, considered respondents' filings, and considered the issues on the merits. This Court hereby certifies that it intends to rule on the Rule 59(e) motion as follows.

IT IS HEREBY ORDERED as follows: this Court certifies that it intends to **deny, in part, and grant, in part,** petitioner's motion to alter or amend the judgment pursuant to Nev. R. Civ. P. 59(e).

The Court denies petitioner's request for an amended judgment granting habeas relief at this time. Instead, the Court hereby certifies that it intends to vacate the November 15, 2019 final judgment and set this matter for an evidentiary hearing on June 26, 2020 at 9:00 AM, to hear evidence on the merits of petitioner's post-conviction claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

Upon remand from the Nevada Supreme Court, this Court will enter a written order effectuating the above.

The Clerk of Court is hereby instructed to transmit this order to the Nevada Supreme Court.

DATED this 27 day of February, 2020.

DISTRICT COURT JUDGE

RENE L. VALLADARES
Federal Public Defender

BY */s/ S. Alex Spelman*
S. ALEX SPELMAN
Assistant Federal Public Defender
Nevada Bar # 14278

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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

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

This matter came before the Court on February 6, 2020, on petitioner's motion to alter or amend the judgment pursuant to Nevada Rule of Civil Procedure 59(e). Present were counsel for petitioner and respondents. This court held oral argument at that time.

On March 2, 2020, this Court ordered that it intends to deny in part and grant in part petitioner's Rule 59(e) motion, to vacate the final judgment, and to set this matter for an evidentiary hearing following remand from the Nevada Supreme Court. On April 10, 2020, the Nevada Supreme Court ordered this case remanded.

This Court has reviewed the Rule 59(e) motion and its attached declarations, considered respondents' filings, and considered the issues on the merits.

IT IS HEREBY ORDERED that petitioner's motion to alter or amend the judgment pursuant to Nev. R. Civ. P. 59(e) is **denied, in part, and granted, in part,** as follows:

The Court denies petitioner's request for an amended judgment granting habeas relief at this time. Instead, this Court now orders that **the November 15, 2019, final judgment is hereby VACATED** and **this matter is SET FOR AN EVIDENTIARY HEARING on** ~~**June 26, 2020, at 9:00 AM**~~ May 7, 2020, at 1:00 PM, to hear evidence on the merits of petitioner's post-conviction claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

The Clerk of Court is hereby instructed to transmit this order to the Nevada Supreme Court.

DATED this 22nd day of April, 2020.

DISTRICT COURT JUDGE

RENE L. VALLADARES
Federal Public Defender

BY */s/ S. Alex Spelman*
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Assistant Federal Public Defender
Nevada Bar # 14278

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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 Hearing date: June 26, 2020 Hearing time: 9:00 AM **Motion for Discovery (NRS 34.780(2))**

POINTS AND AUTHORITIES

I. Introduction

This Court ordered an evidentiary hearing on Evaristo Garcia's claim that the State suppressed reports from the Clark County School District Police Department, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Evaristo seeks discovery in order to prove the elements of the *Brady* claim: that evidence was suppressed, that the evidence was favorable, and that the evidence was material.[1] Further, due to the State's non-disclosure of the school police reports before trial, despite the defense's specific request for such reports, Evaristo has good cause to believe discovery may uncover further *Brady* evidence currently in the State's file.

II. Relevant Background

The shooting in this case took place at a school. 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"). Before trial, the State provided the defense police reports from only the LVMPD, not from the CCSDPD.[2] And the State did not list any officers from the CCSDPD as witnesses and did not call them at trial.

After the Federal Public Defender ("FPD") was appointed to the case, the assigned investigator reviewed the LVMPD's computer aided dispatch ("CAD") log.[3] 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."[4] Following this lead, the investigator reviewed an LVMPD

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[1] *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Mazzan v. Warden, Ely State Prison*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000).

[2] *See* 3/14/19 Pet., Ex. 31 ¶ 5.

[3] *See* 3/14/19 Pet., Ex. 8 (highlights added to exhibit by FPD investigator).

[4] *Id.*, Ex. 31 ¶ 3.

Officer's Report, which lists seven CCSDPD personnel who were at the scene.[5] On November 26 2018,[6] the CCSDPD provided the FPD with several records pursuant to the FPD's request.[7]

First, CCSDPD provided Officer Arambula's report, which reveals that he was the "closest officer to the scene," who "responded and assisted in looking for the suspect" shooter.[8] 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."[9]

A second CCSDPD report provided to the FPD, authored by Officer Gaspardi, shows that school police decided to stop this alternative suspect, secure him, and explicitly considered him a "possible suspect."[10] The encounter ended only after a one-on-one identification with an eyewitness, Betty Graves, who law enforcement had trusted as a reliable source.[11] Though Ms. Graves "advised that [he] was not the shooter," the contents of this report reveal how close to the prevailing description of the shooter this Hispanic teenage male actually was.[12]

Additionally, this report reveals for the first time that even Ms. Graves's own description of the shooter was not consistent, as she here described him as having a mustache.[13] These records were not in trial counsel's casefile; both of Evaristo's trial attorneys declared they had not seen the reports.[14] The jury never learned the

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[5] *Id.* ¶ 4.
[6] *Id.* ¶ 6.
[7] *See id.*, Ex. 1.
[8] *Id.* at 11.
[9] *Id.*
[10] *Id.* at 10.
[11] *See id.*
[12] *See id.*
[13] *Id.*
[14] 11/27/19 Mtn. to Alter, Exs. 34, 35.

State's eyewitness provided inconsistent descriptions of the shooter and thus probably did not actually remember his appearance as well as they believed.

This Court ordered an evidentiary hearing on Evaristo's *Brady* claim.

III. Legal Standards

Once an evidentiary hearing has been ordered, a habeas corpus petitioner may invoke "any method of discovery available under the Nevada Rules of Civil Procedure" if he shows good cause to do so.[15] This Court's decision to order an evidentiary here provides good cause to permit Evaristo to discover the evidence probative to the factual issues that will be before the Court at the hearing.

There appear to be no reported Nevada cases defining "good cause" or what circumstances constitute "good cause." Therefore, this Court may find the federal definition instructive. Rule 6(a) of the Rules Governing Section 2254 Cases parallels the "good cause" provision of Nevada Revised Statute § 34.780(2). "Good cause" justifying discovery under Rule 6 exists when (1) the petitioner makes credible allegations of a constitutional violation, and (2) the requested discovery will enable the petitioner to investigate and prove his claims.[16] "Petitioner need not show that the additional discovery would definitely lead to relief. Rather, he need only show good cause that the evidence sought would lead to relevant evidence regarding his petition."[17] Moreover, even "potentially corroborating evidence constitutes good cause."[18]

The court has a duty to allow discovery in certain circumstances: "[W]here specific allegations before the court show reason to believe that the petitioner may,

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[15] Nev. Rev. Stat. § 34.780(2).

[16] *See Bracy v. Gramley*, 520 U.S. 899, 908–09 (1997).

[17] *Payne v. Bell*, 89 F. Supp. 2d 967, 970 (W.D. Tenn. 2000).

[18] *United States ex rel. Brisbon v. Gilmore*, No. 95 C 5033, 1997 WL 321862, at *3 (N.D. Ill. June 10, 1997).

if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry."[19] Notably, the United States Supreme Court has held that the denial of discovery was an abuse of discretion even when the petitioner's allegations were "quite speculative" and premised on facts that "might be equally likely" to support an inference opposite to that alleged by the petitioner.[20] And the Court has suggested that district courts should consider ordering discovery whenever the claim is not so "palpably incredible [or] patently frivolous . . . as to warrant summary dismissal."[21]

Once good cause is shown, discovery is available to the petitioner under the Nevada Rules of Civil Procedure.[22] Rule 26(b)(1) of the Nevada Rules of Civil Procedure defines the scope of discovery:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, considering the importance of the issues at stake in the action, . . . the parties' relative access to relevant information, . . . the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

The Rules of Civil Procedure provide multiple avenues to pursue such evidence. Under Rule 34, one party may request from another relevant documents, while under Rule 45, the Court can issue subpoenas requiring the production of

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[19] *Harris v. Nelson*, 394 U.S. 286, 300 (1969); *see also Bracy*, 520 U.S. at 909 ("Habeas Corpus Rule 6 is meant to be 'consistent' with *Harris*." (citing Advisory Comm. Notes on Habeas Rule 6)).

[20] *Bracy*, 520 U.S. at 905, 909–10.

[21] *Blackledge v. Allison*, 431 U.S. 63, 76, 82–83 (internal quotation marks and citation omitted).

[22] Nev. Rev. Stat. § 34.780(2).

documents or testimony. And under Rule 36, one party may serve on another requests for admission, asking the party to admit or deny pertinent facts. Finally, Rule 30 permits depositions. Evaristo has good cause to use these discovery tools to pursue evidence related to the State's suppression of material, favorable evidence, as outlined below.

Additionally, the State has a continuing duty under *Brady* and its progeny to produce material, favorable evidence even in the absence of a discovery request.[23]

IV. Discovery Requests

Evaristo seeks discovery to gather evidence in support of his claim that the State unconstitutionally suppressed the CCSDPD reports, which is the subject of the upcoming evidentiary hearing. Because the requested discovery will enable Evaristo to investigate and prove his credible allegation of a constitutional violation, he has shown good cause.[24]

A. Clark County District Attorney's Office

The Clark County District Attorney's Office prosecuted this case and withheld the *Brady* material. At the evidentiary hearing, Evaristo will have to prove that the State either willfully or inadvertently failed to disclose the school police reports to the defense.[25] Respondents have argued that the Clark County School District Police (CCSDPD) are not state actors, so the prosecution cannot be charged with constructive possession of the relevant reports.[26] Evaristo has argued that this assertion is legally incorrect and, regardless, does not resolve the issue of

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[23] *See Whitlock v. Brueggemann*, 682 F.3d 567, 587–88 (7th Cir. 2012) (rejecting argument that that *Brady* does not require State to disclose throughout judicial proceedings exculpatory evidence available at time of trial); *Douglas v. Workman*, 560 F.3d 1156 1173 (10th Cir. 2009).

[24] *See Bracy*, 520 U.S. at 908–09.

[25] *See, e.g.*, *Banks*, 540 U.S. at 691; *Mazzan*, 116 Nev. at 67, 993 P.2d at 37.

[26] 10/10/19 Resp. at 14

constructive possession.[27] But because Respondents have contested constructive possession of the reports, Evaristo also intends to exercise his right to prove actual possession as an alternative basis for relief. To do so, Evaristo will need to establish at the evidentiary hearing that the prosecution had the school police reports and failed to provide them to the defense. He therefore has good cause for discovery in order to prove this element of his *Brady* claim.

1. Requests for admission.

Evaristo seeks leave of the Court to serve requests for admission under Nevada Rule of Civil Procedure 36. "A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended."[28] The requests for admission could, therefore, conclusively establish facts underlying the issue of suppression of the school police reports, resulting in a shortened presentation at the upcoming evidentiary hearing. It may also render certain other discovery requests unnecessary. Evaristo specifically asks that the Clark County District Attorney's Office admit or deny the following:

(1) The Clark County District Attorney's Office was in possession, in whole or in part, of the CCSDPD reports submitted to this Court as Exhibit 1 to the instant post-conviction petition;

(2) The Clark County District Attorney's Office did not provide Mr. Garcia's defense counsel with the CCSDPD reports.

2. Requests for production.

Evaristo also seeks leave of the Court to serve a request for production, or, in the alternative, a subpoena duces tecum on the Clark County District Attorney's Office. Evaristo seeks a complete physical and—when available—digital copy of,

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[27] 10/17/19 Reply at 10–14.
[28] Nev. R. Civ. P. 36(b).

and an opportunity to physically inspect, their entire case file for Case No. C262966, including:

(1) any reports provided by the CCSDPD and the LVMPD;

(2) all communications—including but not limited to letters, e-mails, memoranda, and faxes—between the Clark County District Attorney's Office and the CCSDPD;

(3) all communications, in letter or e-mail form, between the Clark County District Attorney's Office and the LVMPD;

(3) discovery provided to the defense before trial;

(4) all communications, in letter or e-mail form, between the Clark County District Attorney's Office and counsel for Evaristo Garcia pertaining to discovery exchange or file review;

(5) records related to if, when, and how reports from the CCSDPD were provided to counsel for Evaristo Garcia at any time;

(6) all photographic lineups shown to witnesses;

(7) any documentation related to the Clark County District Attorney's Office's polices, practices, and procedures regarding gathering written reports from law enforcement agencies in effect during this prosecution and trial;

(8) any documentation related to the Clark County District Attorney's Office's polices, practices, and procedures regarding providing defense counsel with access to their file in effect during this prosecution and trial; and

(9) a copy of any backups that would contain versions of digital files for case number C262966 on any system (i.e. computer, server, or removable media) associated with the Clark County District Attorney's office.

Evaristo further requests a detailed privilege log for any item the Clark County District Attorney's Office asserts cannot be produced due to privilege and/or

attorney work product.[29] In order to show actual possession—if the Clark County District Attorney's Office denies it—Evaristo will need access to the entire prosecution file. He has good cause for this request.

Evaristo also seeks leave of the Court to serve a request for production or, in the alternative, a subpoena duces tecum, on the Clark County District Attorney's Office for a complete physical and—when available—digital copy of, and an opportunity to inspect, the entire prosecution file for Manuel Lopez in Case No. C262966-2, including any reports provided by the CCSDPD and the LVMPD; photographic lineups shown to witnesses; witness statements; audio recorded or videotaped witness interviews; and a copy of any backups that would contain versions of digital files for case number C262966-2 on any system (i.e. computer, server, or removable media) associated with the Clark County District Attorney's office. Evaristo further requests a detailed privilege log for any documentation the Clark County District Attorney's Office asserts cannot be produced due to privilege and/or work product.

Lopez pleaded guilty to conspiracy to commit a crime and voluntary manslaughter with use of a deadly weapon for the shooting of Gamboa.[30] This prosecution file is therefore closely related to the file for Evaristo. The file could reveal a great deal of relevant information. For example, if the file for Lopez contains the CCSDPD reports, this would also prove possession by the State.

Finally, Evaristo seeks leave of the Court to serve a request for production or, in the alternative, a subpoena duces tecum, on the Clark County District Attorney's Office for a complete physical and—when available—digital copy of, and the opportunity to inspect, the entire prosecution file for Giovanny Garcia in Case No. C226218, including any reports provided by the CCSDPD and the LVMPD;

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[29] *See* Nev. R. Civ. P. 26(b)(5); Nev. R. Civ. P. 45(d)(2).

[30] *See* Mtn. Ex. A.

photographic lineups shown to witnesses; witness statements; audio recorded or videotaped witness interviews; and a copy of any backups that would contain versions of digital files for case number C226218 on any system (i.e. computer, server, or removable media) associated with the Clark County District Attorney's office. Evaristo further requests a detailed privilege log for any documentation the Clark County District Attorney's Office asserts cannot be produced due to privilege and/or work product.

Giovanny pleaded guilty to conspiracy to commit murder for the shooting of Gamboa.[31] He is a primary alternative suspect for the actual shooting in Evaristo's case.[32] This prosecution file is therefore also closely related to the file for Evaristo and could reveal a great deal of relevant information, as with the file for Lopez. Evaristo has good cause for these requests.

B. Clark County School District Police Department

The school district police department—CCSDPD—was the first to respond to the scene in this case.[33] As explained above, the suppressed reports from the CCSDPD show that an alternate suspect who matched the description of the shooter was detained at the scene and that Betty Graves provided shifting, inconsistent descriptions of the shooter, which the jury never learned. Because the State's failure to disclose the CCSDPD reports is the basis of Evaristo's *Brady* claim, he has good cause for the following requests, as they will lead to the discovery of important and relevant evidence. The CCSDPD can provide information about its response to the scene and what occurred in the officers' interactions with Ms. Graves. These will be important details for this Court to hear at the upcoming hearing. This is information trial counsel could have gathered and

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[31] *See* Mtn. Ex. B.

[32] *See* 3/14/19 Pet. at 23–25.

[33] *See id.*, Ex. 1 at 9.

introduced at trial had they been informed of the full extent of CCSDPD's involvement in the case, which is relevant to the issue of the materiality of the suppressed evidence. Additionally, the discovery requests will reveal what information and materials the CCSDPD provided to the LVMPD, and what information and materials they provided to the Clark County District Attorney's Office. This information goes to the issue of actual possession and suppression, which is contested, as discussed above.

1. Subpoenas.

Evaristo seeks leave of the Court to serve a subpoena duces tecum on the CCSDPD for a copy of the entire case file for Evaristo Garcia in event number 0604-01080, including all reports (incident, officer's, investigation, supplemental, etc.); notes; video surveillance; witness statements; memoranda; records reflecting how and when information or records related to the incident were communicated to the LVMPD and the Clark County District Attorney's Office; and any documentation related to the CCSDPD's policies, practices, and procedures regarding sharing their investigative materials with the LVMPD and the Clark County District Attorney's Office during the investigation, prosecution, and trial in this case.

2. Depositions.

Evaristo seeks to depose the following officers, who responded to the scene in this case: 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. Officers Gaspardi and Arambula authored the suppressed reports at issue, and so will be priorities to depose. All of the listed officers, however, likely have information relevant to the current *Brady* claim and may be called to testify at the upcoming evidentiary hearing.

Third, in the event the CCSDPD does not have written policies on the subjects, Evaristo seeks to depose CCSDPD's Person Most Knowledgeable about the CCSDPD's policy on sharing information with the LVMPD and the Clark County District Attorney's Office.

C. Las Vegas Metropolitan Police Department

The LVMPD took over this case from the CCSDPD. Officers from LVMPD testified at trial, and LVMPD reports, not CCSDPD reports, were provided to the defense. Because Respondents are arguing that CCSDPD does not qualify as state actors, Evaristo plans to prove actual possession, as an alternative to constructive possession, in order to establish suppression. Because the State does not dispute that LVMPD is a state actor,[34] Evaristo could prove actual possession even if only LVMPD had the school police reports.

1. Subpoenas.

Evaristo seeks leave of the Court to serve a subpoena duces tecum on the LVMPD for a copy of the entire case file for Evaristo Garcia in event number 060206-2820, including all CCSDPD reports (incident, officer's, investigation, supplemental, etc.); notes; video surveillance; witness statements; records reflecting how and when information regarding the alleged crime was gathered from the CCSDPD; records reflecting how and when information or records related to the incident were communicated to the Clark County District Attorney's Office; documentation related to the LVMPD's policies, practices, and procedures regarding gathering information and investigative material from the Clark County Public School Police Department; and documentation related to the LVMPD's policies, practices, and procedures regarding sharing their investigative materials with the Clark County District Attorney's Office during the relevant time period.

[34] *See* 10/10/2019 State's Resp. at 14 ("The only law enforcement agency that collaborated on behalf of the State of Nevada in Petitioner's case was LVMPD.").

Next, the LVMPD also maintains field interview cards that are not necessarily associated with a particular event number but allow officers to document face-to-face contact in the field. The LVMPD's Gang Unit maintains such cards.

This case involved a shooting in a school parking lot arising out of a brawl between dozens of teenagers and young adults.[35] Two rival gangs were present in this fight—the Puros Locos and Brown Pride.[36] Evaristo's two older cousins, Giovanny and Salvador Garcia, were members of the Puros Locos; Salvador was its leader.[37] Evaristo was not a member.[38] Ultimately, the witnesses that accused Evaristo of being the shooter were members of the Puros Locos gang, the gang Evaristo's older cousins—Giovanny and Salvador—were in.[39] Witnesses initially identified Giovanny as the shooter.[40] And the gun used in the shooting belonged to Manual Lopez, another member of the Puros Locos gang.[41] As explained extensively in Evaristo's post-conviction petition, the evidence suggested that this was a gang shooting.[42]

Therefore, LVMPD field interview cards tracking gang activity will reveal who was a known member of the Puros Locos and Brown Pride gangs, who was a known leader in the gang, and what information was discussed by gang members leading up to and after the shooting. Such information is relevant first because part of the import of the suppressed school police reports is that it would have

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[35] *See* 3/14/19 Pet., Ex. 1 at 9.

[36] *See* 7/9/13 Tr. at 6, 24.

[37] *See* 7/10/13 Tr. at 12–13.

[38] *See* 7/9/13 Tr. at 26; 7/10/13 Tr. at 25.

[39] *See* 7/9/13 Tr. at 157, 184; 7/11/13 Tr. at 5, 21.

[40] *See* Ex. 5 at 1; Ex. 9 at 4; Ex. 10 at 8, 11; Ex. 11 at 6.

[41] *See* 7/9/13 Tr. at 157, 179.

[42] *See* 3/14/19 Pet at 10–13, 23–25.

undermined Betty Graves's exclusion of Giovanny Garcia as a suspect. Evaristo therefore now seeks the type of evidence trial counsel could have pursued. Had they known that Ms. Graves's exclusion of Giovanny could be challenged, Giovanny could have been more vigorously presented as an alternate suspect due to his gang involvement. Additionally, the suppressed reports reveal that Ms. Graves initially described the shooter as having a mustache. Salvador and Manuel had mustaches and were also part of the gang, and their gang involvement could have been established through the sought information. The following request therefore goes to the question of materiality.

Accordingly, Evaristo seeks leave of the Court to serve a subpoena duces tecum on the LVMPD for a copy of all field interview cards that the State has not already disclosed to Evaristo Garcia related to suspected gang activity for Giovanny Garcia, Salvador Garcia, Manuel Lopez, Jonathan Harper, Victor Gamboa, Evaristo Garcia, Edshel Calvillo, Melissa Gamboa, Melinda Lopez, Jesus Alonso, Stacey DeCarolis, Crystal Perez, Jena Marquez, Brian Marquez, and Bryan Calvillo, created and maintained from 1998 up to and including the date of the Evaristo Garcia's verdict. These are all known or suspected members of the Puros Locos and Brown Pride gangs or have close associations with gang members.

2. Depositions.

In the event the LVMPD does not have written policies on the subject, Evaristo seeks to depose the person in the LVMPD's Person Most Knowledgeable about the policy on sharing information with the Clark County District Attorney's Office and gathering investigative material from the Clark County School District Police during the relevant time period. He relatedly seeks to depose the Person Most Knowledgeable about how and when reports from LVMPD are shared with the Clark County District Attorney's Office, how the LVMPD gathers investigative material from the CCSDP, and who completed these tasks in this case. Once it is

learned who gathered information from CCSDP and provided information to the District Attorney, Evaristo will seek to depose this officer as well.

D. Clark County School District

As explained above, the shooting in this case took place at a school, Morris Sunset Academy. Evaristo's *Brady* claim centers on information about Betty Graves that would have undermined her description of the shooter and her claim that Giovanny Garcia was not the shooter. Therefore, information about the school is relevant to the materiality prong of Evaristo's claim. Specifically, the demographic makeup and size of the school is relevant to the analysis of Ms. Graves's ability to differentiate between students. Additionally, information about the lighting conditions of the school informs how well Ms. Graves could see the shooter.

Evaristo seeks leave of the Court to serve a subpoena duces tecum on the Clark County School District for student enrollment data for Morris Sunset Academy from as close to February 2006 as is available, including the total number of students, the breakdown of male and female students, the number of fulltime and part-time students, and the racial and/or ethnic makeup of the student body. He additionally seeks any documentation, such as photographs, work orders, blueprints, or schematics, showing the exterior lighting at Morris Sunset Academy and in its parking lot that reflect the conditions in February 2006.

E. Clark County School District Risk Management and Environmental Services Department

The Clark County School District Risk Management and Environmental Services Department is the department for the school district that will "review risks associated with the operation of the school district, recommend ways to minimize

losses, and handle any claims for damages."[43] The department is responsible for investigating insurance claims related to crimes that occur on school property. Because the shooting in this case occurred on school property, it is likely the department will have a file on the case, including reports from the CCSDPD. Because the *Brady* claim at issue concerns the suppression of such reports, Evaristo seeks to gather information from the Risk Management Department in order to ensure that he has received all information concerning the school district's investigation of the case.

Therefore, Evaristo seeks leave of the Court to serve a subpoena duces tecum on the Clark County School District Risk Management and Environmental Services Department for their entire file concerning any investigation into the shooting of Victor Gamboa, including any notes, reports, assessment of exposure for liability, resulting updated policies and procedures, and materials provided by the CCSDPD.

V. Conclusion

The requested discovery is tailored to evidence probative to the issues at the upcoming evidentiary hearing. Since this Court decided there is good cause to hold the hearing, it follows there is good cause for discovery of evidence relevant to the factual issues at this hearing. Evaristo requests this Court permit this discovery.

Dated May 1, 2020.

Respectfully submitted,
Rene L. Valladares
Federal Public Defender

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

[43] Clark County School District, Risk and Environmental Services Department, https://ccsd.net/departments/risk-management (last visited April 20, 2020).

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2020, 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: Steven Wolfson, Taleen Pandukht, Noreen DeMonte.

/s/ Jessica Pillsbury
An Employee of the
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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 Hearing date: June 26, 2020 Hearing time: 9:00 AM **Motion to disqualify Noreen DeMonte and Taleen Pandukht from representing Respondents at the upcoming evidentiary hearing** **(Nev. R. Prof. Cond. 3.7)**

"A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." Nev. R. Prof. Cond. 3.7; *see also* ABA R. Prof. Cond. 3.7. Counsel for Petitioner Garcia has been informed by Respondents that the original trial prosecutors in Evaristo Garcia's criminal case, Noreen DeMonte and Taleen Pandukht, will represent Respondents at the upcoming evidentiary hearing—a hearing solely about whether these same prosecutors violated their disclosure obligations at trial under *Brady v. Maryland*, 373 U.S. 83 (1963). They cannot do so.

POINTS AND AUTHORITIES

I. Introduction

One of the requirements of a *Brady* claim that Evaristo will have to prove is that the State suppressed evidence, meaning it either willfully or inadvertently failed to turn over evidence to the defense.[1] Because the focus of the suppression question is on what evidence the prosecution had, actually or constructively, and whether it disclosed that evidence to the defense, it is likely the trial prosecutors will be necessary, first-hand witnesses at the evidentiary hearing. If they also serve as advocates at the hearing, they will be in the position of arguing to the Court their own truthfulness as witnesses.

The Nevada Rules of Professional Conduct, the Nevada Supreme Court, and the American Bar Association counsel against such a situation. Evaristo respectfully requests this Court order that DeMonte and Pandukht not serve as the advocates for Respondents at the upcoming evidentiary hearing.

II. Factual background

The murder in this case took place at a school. 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). Before trial, the defense affirmatively requested discovery of all material to which Evaristo was entitled pursuant to *Brady* and *Giglio*,[2] requesting 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

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[1] *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Mazzan v. Warden, Ely State Prison*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000).

[2] *Giglio v. United States*, 405 U.S. 150 (1972).

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."[3] However, the State provided the defense police reports from only the LVMPD, not from the CCSDPD.[4] And the State did not list any officers from the CCSDPD as witnesses and did not 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.[5] DeMonte and Pandukht prosecuted Evaristo at trial. He was found guilty of second-degree murder with use of a deadly weapon.[6]

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 Federal Public Defender ("FPD") was appointed to his case. The FPD assigned an investigator. As part of her investigation, she reviewed the LVMPD's computer aided dispatch (CAD) log for this case.[7] 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."[8] Following this lead, the investigator reviewed an LVMPD Officer's Report, which lists seven CCSDPD personnel who were at the scene.[9]

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[3] 8/25/10 Mtn. for Discovery (emphasis added).

[4] *See* 3/14/19 Pet., Ex. 31 ¶¶ 3–5.

[5] 11/27/19 Mtn. to Alter, Exs. 34, 35.

[6] 7/15/13 Verdict.

[7] *See* 3/14/19 Pet., Ex. 8 (highlights added to exhibit by FPD investigator).

[8] *Id.*, Ex. 31 ¶ 3.

[9] *Id.* ¶ 4.

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."[10] On November 26 2018,[11] the CCSDPD responded with a letter and several records pursuant to the FPD's request.[12]

First, CCSDPD provided Officer Arambula's report, which reveals that he was the "closest officer to the scene," who "responded and assisted in looking for the suspect" shooter.[13] 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."[14]

A second CCSDPD report provided to the FPD, authored by an Officer Gaspardi, shows that school police decided to stop this alternative suspect, secure him, and explicitly considered him a "possible suspect."[15] The encounter ended only after a one-on-one identification with an eyewitness, Betty Graves, who law enforcement had trusted as a reliable source. [16] Though Ms. Graves "advised that it was not the shooter," the contents of this report reveals how close to the prevailing description of the shooter this Hispanic teenage male actually was. Finally, this

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[10] *Id.*, Ex. 1.
[11] *Id.*, Ex. 31 ¶ 6.
[12] *See id.*, Ex. 1.
[13] *Id.* at 12.
[14] *Id.*
[15] *Id.* at 11.
[16] *Id.*

report reveals for the first time that even Ms. Graves's own description of the shooter was not consistent, as she here described him as having a mustache.[17]

These records were not in trial counsel's casefile. Both of Evaristo's trial attorneys declared they had not seen the reports.[18]

This Court ordered an evidentiary hearing on Evaristo's resultant *Brady* claim.[19] Thereafter, Karen Mishler, who had been representing Respondents, informed undersigned counsel that the trial prosecutors, DeMonte and Pandukht, would take over representing Respondents at the evidentiary hearing. Respondents therefore intends for the very prosecutors responsible for the alleged violation to represent Respondents at the upcoming *Brady* hearing regarding their own alleged misconduct. Because they are likely to be necessary witnesses at this hearing—they, of course, have first-hand knowledge of their own conduct—Nevada law does not allow them to serve as counsel at this hearing. And for good reason.

III. Analysis

The Nevada Rules of Professional Conduct prevent an attorney from serving as an advocate in a proceeding in which she is likely to be a necessary witness.[20] The Nevada Supreme Court has explained that a goal of the rule, called the advocate-witness rule, is "to eliminate any confusion and prejudice that could result if an attorney appears before a jury as an advocate and as a witness."[21] As the Ninth Circuit has explained, the risk is that "the trier-of-fact is asked to segregate

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[17] *Id.*

[18] 11/27/19 Mtn. to Alter, Exs. 34, 35.

[19] *See* 2/6/20 Court Minutes.

[20] *See* Nev. R. Prof. Cond. 3.7.

[21] *DiMartino v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 119 Nev. 119, 122, 66 P.3d 945, 947 (2003).

the exhortations of the advocate from the testimonial accounts of the witness."[22]

An attorney is not prohibited from serving as both an advocate and a witness under three circumstances: (1) the attorney will testify about an "uncontested issue" only; (2) the attorney's testimony is about her legal services, such as a fee arrangement; and (3) if the attorney was disqualified, it "would work substantial hardship on the client."[23] The Nevada Supreme Court has also determined that the rule does not require that an attorney be excluded from acting as an advocate in pre-trial proceedings. But it adopted the American Bar Association Commission on Ethics and Professional Responsibility's limitation on this position: "the lawyer may not appear in any situation requiring the lawyer to argue his own veracity to a court or body, whether in a hearing on a preliminary motion, an appeal or other proceeding."[24]

Under these standards, disqualification of DeMonte and Pandukht as advocates at the upcoming evidentiary hearing is required. Unless Respondents concede the issue of suppression, their testimony will go to a contested issue. Their anticipated testimony goes not to an issue of representation, such as the amount of legal fees, but to whether the State violated Evaristo's constitutional rights. And because Evaristo is moving for their disqualification well in advance of the hearing, Respondents will not suffer a substantial hardship from reassigning the case. Indeed, the Respondents were previously represented by a different attorney. It was only after this Court scheduled the evidentiary hearing that DeMonte and Pandukht appeared. Finally, because an issue at the hearing will be whether the State knowingly suppressed material, exculpatory evidence, if DeMonte and

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[22] *United States v. Prantil*, 764 F.2d 548, 553 (9th Cir. 1985).

[23] Nev. R. Prof. Cond. 3.7; *see In re Estate of Bowlds*, 120 Nev. 990, 1000, 102 P.3d 593, 599 (2004) (discussing second circumstance).

[24] *DiMartino*, 119 Nev. at 122, 66 P.3d at 947.

Pandukht act as advocates at the hearing, they will have to argue their own veracity. This is precisely the type of situation the advocate-witness rule envisions and seeks to prevent.

A. DeMonte and Pandukht are "likely to be a necessary witness" at the upcoming evidentiary hearing.

At the evidentiary hearing, Evaristo will have to prove that the State either willfully or inadvertently failed to disclose the school police reports to the defense.[25] Respondents have argued that the Clark County School District Police are not state actors, so the prosecution cannot be charged with constructive possession of the relevant reports.[26] Evaristo has argued that this assertion is legally incorrect and, regardless, does not resolve the issue of constructive possession.[27] But because Respondents have contested constructive possession of the reports, Evaristo also intends to prove the alternative theory of possession: actual possession. To do so, Evaristo will need to establish at the evidentiary hearing that the prosecution had the school police reports and failed to provide them to the defense. Unless Respondents concede these points, DeMonte and Pandukht can testify (and be cross-examined) about their own actions.[28]

DeMonte and Pandukht are therefore likely to be necessary witnesses at the evidentiary hearing on the issue of suppression of the school police reports. As such, Nevada law precludes them from serving as attorneys for Respondents at this

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[25] *See, e.g.*, *Banks*, 540 U.S. at 691; *Mazzan*, 116 Nev. at 67, 993 P.2d at 37.

[26] 10/10/19 Resp. at 14

[27] 10/17/19 Reply at 10–13.

[28] *See Prantil*, 764 F.2d at 551–52 ("Both the quality and quantity of the alternate sources of evidence are proper subjects for comparison with that sought directly from the participating prosecutor."). Garcia has also separately requested discovery, including requests for admission on these points. If the Court grants Garcia's discovery request, DeMonte and Pandukht's responses to these requests for admission could render them no longer necessary witnesses.

evidentiary hearing unless an exception to the rule applies. None does.

B. No exception to the advocate-witness rule applies here unless Respondents admit suppression of the *Brady* material.

Because DeMonte and Pandukht are likely to be necessary witnesses, they are not allowed to act as advocates at the evidentiary hearing unless one of the exceptions included in Nevada Rule of Professional Conduct 3.7 applies. They do not. First, as explained in the preceding section, Respondents are contesting the issue of suppression. Thus, the prosecutors' testimony will go to a contested issue.[29]

Next, the testimony of DeMonte and Pandukht does not concern "the nature and value" of their legal services under the rule.[30] As the Nevada Supreme Court explained, "[t]his rule essentially allows an attorney to continue representing a client even if that attorney must testify regarding his or her fees."[31] Instead, DeMonte and Pandukht here will be asked to testify about whether they violated Evaristo's constitutional rights by failing to disclose *Brady* material.

Finally, the advocate-witness rule does not apply if disqualification of DeMonte and Pandukht from acting as advocates at the hearing would "work substantial hardship" on Respondents.[32] It would not. DeMonte and Pandukht were put back on the case once an evidentiary hearing was granted. They have not been involved in this case for years. Neither of them authored the filings in the instant post-conviction proceedings. Instead, Karen Mishler wrote Respondents' response to Evaristo's post-conviction petition and the opposition to Evaristo's Rule 59(e)

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[29] *See* Nev. R. Prof. Cond. 3.7(1).

[30] *See* Nev. R. Prof. Cond. 3.7(2).

[31] *In re Estate of Bowlds*, 120 Nev. at 1000, 102 P.3d at 599.

[32] *See* Nev. R. Prof. Cond. 3.7(3).

motion.[33] Therefore, Ms. Mishler is apprised of the relevant facts and legal issues and so could return to the case for the evidentiary hearing. Conversely, because the evidentiary hearing covers the isolated *Brady* issue spelled out in the recent filings before this court, and Evaristo is moving for disqualification well in advance of the hearing, there is sufficient time for a new prosecutor to get up to speed.[34]

No exception to the advocate-witness rule is applicable here. It therefore would be improper for DeMonte and Pandukht to serve as advocates at the evidentiary hearing. Nevada law requires they withdraw and substitute counsel to represent Respondents at this hearing.

C. The bar on advocate-witnesses applies to this hearing because if DeMonte and Pandukht served as both advocates and witnesses, they would have to argue their veracity to the Court.

The advocate-witness rule applies to this upcoming evidentiary hearing. As explained above, generally the rule does not require complete exclusion of an attorney, and the Nevada Supreme Court has made clear that an attorney who will be a witness can still participate in pre-trial proceedings. This is not true, however, when the proceeding will require "the lawyer to argue his own veracity to a court or body."[35] The evidentiary hearing in this case will be such a proceeding.

Assuming Respondents still contest suppression and therefore argue that the prosecutors either did not have the reports or did provide them to the defense, then the question of the prosecutors' veracity as witnesses will be before the Court. In that case, if DeMonte and Pandukht also served as advocates, "the trier-of-fact

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[33] 10/10/2019 Resp.; 1/29/20 Opp.

[34] *See Prantil*, 764 F.2d at 552 (noting request for disqualification "was made well in advance of trial, which "diminished, if not eliminated, any consequent inconvenience to the government's case").

[35] *DiMartino*, 119 Nev. at 122, 66 P.3d at 947.

[would be] asked to segregate the exhortations of the advocate from the testimonial accounts of the witness."[36]

Moreover, Evaristo intends to invoke the witness exclusionary rule at this hearing. But allowing DeMonte and Pandukht to serve as advocates at this hearing would permit them to circumvent the rule.[37] "The purpose of the rule of exclusion is to prevent the shaping of testimony by witnesses to match that given by other witnesses."[38] This purpose would be thwarted if witnesses are allowed not only to remain in the courtroom, but to question other witnesses and make arguments to the Court. Because this is the scenario the advocate-witness rule is designed to prevent, it applies to this post-conviction evidentiary hearing.

IV. Conclusion

Evaristo Garcia respectfully requests this Court enter an order precluding Noreen DeMonte and Taleen Pandukht from serving as counsel for Respondents during the upcoming evidentiary hearing because they are likely to be necessary witnesses at this hearing.

Dated May 1, 2020.

Respectfully submitted,
Rene L. Valladares
Federal Public Defender

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

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[36] *Prantil*, 764 F.2d at 553.

[37] *See* Nev. Rev. Stat. § 50.155.

[38] *United States v. Cozzetti*, 441 F.2d 344, 350 (9th Cir. 1971).

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2020, 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: Steven Wolfson, Taleen Pandukht, Noreen DeMonte.

/s/ Jessica Pillsbury
An Employee of the
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DISTRICT COURT
CLARK COUNTY, NEVADA

EVARISTO JONATHAN GARCIA,
#2685822,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-19-791171-W

DEPT NO: XXIX

STATE'S OPPOSITION TO PETITIONER'S MOTION FOR DISCOVERY (NRS 34.780(2))

DATE OF HEARING: JUNE 2, 2020
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through TALEEN R. PANDUKHT, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Petitioner's Motion for Discovery (NRS 34.780(2)).

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

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

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

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

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

On August 29, 2013, Petitioner was sentenced to the Nevada Department of Corrections to Life with the possibility of parole after a minimum of ten (10) years had been served plus an equal and consecutive term of Life with a possibility of parole after a minimum of ten (10) years has been served for 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.

On March 14, 2019, Petitioner 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, Petitioner filed a Motion for Reconsideration. On September 10, 2019, this Court issued an Order denying the Petition. On September 16, 2019, the State filed a Motion to Unseal Post-Conviction Petition for Writ of Habeas Corpus and Exhibits Related Thereto, and Motion for Clarification. On September 19, 2019, this Court issued an order vacating the previous Order denying the Petition. On October 10, 2019, the State filed its Response to the Petition. On October 17, 2019, Petitioner filed a Reply. On November 12, 2019, this Court denied the Petition. On November 15, 2019, this Court issued an Order denying the Petition. On December 11, 2019, Petitioner filed a Notice of Appeal.

On November 27, 2019, under seal, Petitioner filed a Motion to Alter or Amend a Judgment Pursuant to Nev. R. Civ. P. 59(e). On January 29, 2020, the State filed its Opposition to the motion. On January 30, 2020, Petitioner filed a Reply. On January 31, 2020, the State

filed a Supplement to its Opposition. On February 6, 2020, the Court advised it would allow an evidentiary hearing to be set. An order unsealing the case was also signed in open court. On March 2, 2020, an Order was filed denying Petitioner's request for an Amended Judgment granting habeas relief, but vacating its November 15, 2019 Order denying the Petition and granting an evidentiary hearing to be heard on June 26, 2020. On May 1, 2020, Petitioner filed the instant Motion for Discovery (NRS 34.780(2)). The State now responds as follows.

STATEMENT OF FACTS

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

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

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

Gamboa saw Victor outside of the school but did not see him fighting. During the fight, she observed a gray El Camino carrying two males and one female park at the school. One of the occupants got out of the car and proceeded to the fight. One of the males was wearing a

gray hooded sweatshirt. The fight broke up and everyone fled. Gamboa was running behind Victor when she saw the male in the gray hoodie with a gun in his right hand and watched as he shot her brother. Gamboa could not identify the shooter at trial, over seven (7) years later, but she had previously identified Petitioner as the shooter at the Preliminary Hearing on December 18, 2008.

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

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

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

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

Daniel Proietto, a Crime Scene Analyst with the Las Vegas Metropolitan Police Department ("LVMPD"), responded to the school to document the crime scene and collect evidence. On Washington, Proietto located four 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.

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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 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

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[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.

had to go to the school. Before leaving, Harper noticed that Lopez had his "nine" in his waistband and that he gave it to Petitioner. Harper, Lopez, Petitioner, and Lopez's girlfriend Stacy got into Lopez's El Camino.

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

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

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

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

Alice Maceo, a Latent Print Examiner and the Lab Manager of the Latent Prints Section of the LVMPD, examined the firearm. Maceo was able to lift three (3) latent prints from the upper grip below the slide (L1), the back strap (L2) and the grip (L3). The print from the grip (L3) was not of sufficient quality to make any identification. Maceo was able to exclude Giovanny Garcia and Manuel Lopez as to the remaining two 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.

ARGUMENT

I. LEGAL STANDARD FOR DISCOVERY IN HABEAS PROCEEDINGS

This discovery motion is made in the context of a successive, procedurally barred habeas petition. Petitioner does not have a constitutional right to discovery in a post-conviction habeas matter. DA's Office v. Osborne, 557 U.S. 52, 69-70, 129 S.Ct. 2308, 2320-21 (2009). Even in the federal system, "[a] habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 904, 117 S.Ct. 1793, 1796-97 (1997).

In Nevada, discovery is only available in post-conviction proceedings upon a judicial determination of good cause justifying it and after an evidentiary hearing has been set:

> NRS 34.780: Applicability of Nevada Rules of Civil Procedure; discovery
>
> 1. The Nevada Rules of Civil Procedure, to the extent that they are not inconsistent with NRS 34.360 to 34.830, inclusive, apply to proceedings pursuant to NRS 34.720 to 34.830, inclusive.
> 2. After the writ has been granted and a date set for the hearing, a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice for good cause shown grants leave to do so.
> 3. A request for discovery which is available under the Nevada Rules of Civil Procedure must be accompanied by a statement of the interrogatories or requests for admission and a list of any documents sought to be produced.

A writ is not "granted" for discovery purposes until a court determines that there is a need for an evidentiary hearing. NRS 34.770(3).

The Nevada Supreme Court has yet to address the meaning of good cause in the context of discovery in a post-conviction habeas proceeding. Under the federal rule, good cause exists to allow discovery only where specific allegations provide reason to believe that the Petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief. Rule 6 of the Federal Rules Governing § 2254 Cases; McDaniel v. U.S. District Court (Jones), 127 F. 3d 886, 888 (9th Cir. 1997). However, "courts should not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation." Calderon v. U.S. District Court (Nicolaus), 98 F. 3d 1102, 1106 (9th Cir. 1996), cert. denied, 520 U.S. 1233, 117 S. Ct. 1830 (1997); see also, Stanford v. Parker, 266 F. 3d 442, 460 (6th Cir. 2001); Murphy v. Johnson, 205 F.3d 809, 814 (5th Cir. 2000), cert. denied, 531 U.S. 957, 121 S. Ct. 380 (2000).

Furthermore, it is important to note that despite reference to the rules of civil procedure in NRS 34.780, the Nevada Supreme Court has repeatedly rejected attempts to graft those rules into Chapter 34. The Nevada Rules of Civil Procedure (NRCP) are only applicable in habeas proceedings "to the extent that they are not inconsistent with NRS 34.360 to 34.830[.]" NRS 34.780(1). Courts "'may look to general civil or criminal rules for guidance only when the statutes governing habeas proceedings have not addressed the issue presented.'" Beets v. State, 110 Nev. 339, 341, 871 P.2d 357, 358 (1994) (quoting, Mazzan v. State, 109 Nev. 1067, 1070, 863 P.2d 1035, 1036 (1993)). In Beets v. State, 110 Nev. 339, 871 P.2d 357 (1994), the Nevada Supreme Court stated: "[T]he provisions of NRS 34.780 expressly limit the extent to which civil rules govern post-conviction habeas proceedings. We cannot turn to the rules of civil procedure for guidance when NRS Chapter 34 has already addressed the matter at issue." Mazzan, 109 Nev. at 1073, 863 P.2d at 1038. Because NRS Chapter 34 addresses the issue of how the district court shall make its determination upon a post-conviction petition for a writ of habeas corpus, there is no need to turn to the rules of civil procedure." Beets v. State, 110 Nev. 339, 341, 871 P.2d 357, 358 (1994).

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Indeed, even where there would arguably be room enough for both to apply, the Nevada Supreme Court has strictly construed NRS 34.780(1) to preclude reliance on civil procedure law. In State v. Powell, 122 Nev. 751, 757-58, 138 P.3d 453, 457 (2006), the State argued that a complaint in a supplement to a habeas petition was untimely under NRCP 15(c) because it offered a new claim that was unrelated to any of the allegations in the initial pleading. The Court rejected this contention because NRS 34.750 addressed supplemental pleadings. Id. The Court reached this conclusion despite the fact that NRS 34.750 says nothing about whether a supplemental claim must relate back to a claim in a timely filed petition and only addresses a court's authority to allow supplemental pleadings. Similarly, in Means v. State, 120 Nev. 1001, 1009, 103 P.3d 25, 37 (2004), the Nevada Supreme Court rejected a habeas Petitioner's request for a default judgment against the State under NRCP 55 on the basis of NRS 34.800 and NRS 34.810 even though "[t]he statutory provisions governing post-conviction habeas proceedings are silent with respect to consequences in the event the State fails to abide by procedural rules."

Even federal courts have made clear that applicability of discovery procedures are not a matter of ordinary course for habeas petitioners. Bracy v. Gramley, 520 U.S. 899, 904, 117 S.Ct. 1793, 1796 (1997). Courts do not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation. Calderon at 1106. See Ward v. Whitley, 21 F.3d 1355, 1367 (5th Cir. – 1994) ("federal habeas court must allow discovery and an evidentiary hearing only where a factual dispute, if resolved in the petitioner's favor, would entitle him to relief.... Conclusory allegations are not enough to warrant discovery under Rule 6...; the Petitioner must set forth specific allegations of fact. Rule 6...does not authorize fishing expeditions."); United States ex rel. Nunes v. Nelson, 467 F.2d 1380, 1380 (9th Cir. – 1972) (state prisoner "is not entitled to discovery order to aid in the preparation of some future habeas corpus petition.").

In this procedurally time barred and successive Second Petition, an adequate showing of good cause is required and has not been met. There is no good cause to invoke the Nevada

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Rules of Civil Procedure to conduct civil discovery procedures because we have a remedy in the evidentiary hearing where Petitioner can subpoena witnesses.

II. GRANTING DISCOVERY IS NOT NECESSARY TO "FULLY DEVELOP" PETITIONER'S CLAIMS

Only where specific allegations before the Court show reason to believe that the Petitioner may, *if the facts are fully developed*, be able to demonstrate that he is entitled to relief, is the court under a duty to provide the necessary facilities and procedures for an adequate inquiry. McDaniel v. United States District Court For the District of Nevada, 127 F.3d 886, 888 (1997). Here, Petitioner has filed a time barred and successive Petition, has failed to raise any claims where he would be entitled to relief, and Petitioner is already in possession of all of the facts needed for those claims.

Petitioner was already able to obtain the Clark County School District Police Department ("CCSDPD") report(s) necessary to fully develop his claims. The discovery Petitioner seeks has already been done. Petitioner has the necessary facts at his disposal and no further discovery of facts is needed in order to fully develop his claims. Any further discovery under these circumstances would be for no other purpose than a general fishing expedition.

III. THE STATE DID NOT VIOLATE BRADY V. MARYLAND

Petitioner claims he has recently discovered a CCSDPD report(s) 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(s) could have been discovered through submitting a request to the Clark County School District ("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

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reasonably diligent efforts. In fact, Petitioner admitted as much in his Second 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, p. 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 report(s) 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 report(s) 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 given by Ms. Graves. The fact that another young Hispanic male was stopped in the area, and then definitively *excluded* as the shooter by an eyewitness, is neither exculpatory nor material. To undermine confidence in a trial's outcome, Petitioner would need to demonstrate this report linked Bonal to the crime, and indicated the Petitioner was not involved. Evans, 117 Nev at 626, 28 P.3d at 510. Petitioner has merely demonstrated that a report existed which definitively stated Bonal was not the shooter. 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).

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.

IV. PETITIONER'S DISCOVERY REQUESTS ARE OVERLY BROAD

Petitioner's requests are overly broad. Petitioner's demands for the complete physical and digital copy of and opportunity to physically inspect the CCDA files, including all communications and CCDA office policies is overbroad and should not be allowed by this Court. The State cannot respond to this request until such time as Petitioner identifies with specificity exactly what he is still seeking that has not already been provided in discovery or obtained by the defense through reasonable diligence. Nor can such a bare and naked demand establish good cause to allow discovery. Petitioner is engaging in an impermissible fishing expedition. Stanford, 266 F. 3d at 460; Murphy, 205 F.3d at 814; Calderon, 98 F. 3d at 1106.

These discovery requests are problematic in that they require discovery of the State's entire file and disclosure of potentially privileged information as well as the provision of discovery already in trial counsel's and Petitioner's possession. The Motion is essentially requiring disclosure of the State's entire file in addition to the specifically indicated items. This goes well beyond Petitioner's on the record representations as well as the Court's intent as expressed at the February 6, 2020 Court hearing when the Court granted the evidentiary hearing. Further, the demand for all communications clearly invades the province of privileged information. See, Floyd v. State, 118 Nev. 156, 167-68, 42 P.3d 249, 257 (2002) ("At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case"). Petitioner's discovery requests are worded as open ended as possible. Such overbreadth clearly violates the prohibition on duplicative and/or cumulative discovery. Nevada Rules of Civil Procedure (NRCP) Rule 26(b)(2)(C)(i).

In this case, the Court has already denied Petitioner's First Petition without permitting discovery. (Findings of Fact, Conclusions of Law and Order, filed October 25, 2016). This Court should not reconsider this determination for the reasons set forth in the State's Response to Second Petition for Writ of Habeas Corpus (Post-Conviction) as well as the instant Response. Nor do Petitioner's specific discovery demands establish good cause under NRS 34.780(2).

First, Petitioner demands that this Court order unbridled access to all files of the Clark County District Attorney's Office (CCDA). As to Petitioner's demand to have unrestricted access to the CCDA's files, he offers nothing to demonstrate that CCDA possesses any documents that would substantiate his claims. Instead, Petitioner offers nothing more than bare and naked speculation that the CCDA must have other unidentified undisclosed documents. Baseless conjecture does not meet the standard for ordering discovery.[2]

Second, Petitioner demands discovery of documents belonging to the CCSDPD. Petitioner has done nothing to demonstrate that these documents would add anything to his attempt to demonstrate that he is entitled to relief. Petitioner's investigator has already obtained the CCSDPD report(s) that form the basis of his Second Petition. This Court should not aid and abet Petitioner's attempt to abuse the discovery process in order to go on an impermissible fishing expedition. Calderon, 98 F. 3d at 1106 ("courts should not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation.").

Next, Petitioner demands discovery of documents belonging to the LVMPD. Petitioner offers nothing to establish that LVMPD is in possession of any documents that would substantiate his Brady claim. Petitioner erroneously assumes that since he has discovered information that he believes is relevant after many years of relentless searching, that the LVMPD must have had this information prior to trial. This is bare and naked speculation and this Court may not endorse a fishing expedition on such baseless allegations.

Finally, Petitioner demands discovery from the CCSD and their Risk Management and Environmental Services Department based on nothing more than bare and naked speculation that it could lead to additional information that might be helpful to the defense. Petitioner does not substantiate this bare and naked speculation and as such, this Court should decline to authorize his fishing expedition. Just because the murder in this case took place at a school does not give Petitioner the right to attempt to conduct unlimited discovery unrelated to the facts and circumstances of this criminal case. The school demographic makeup, size of the

[2] Petitioner attempts to buttress his unwarranted discovery demands by engaging in character assassination against Chief Deputy District Attorneys Noreen Demonte and Taleen Pandukht and the CCDA generally in his Motion to Disqualify Noreen Demonte and Taleen Pandukht from Representing Respondents at the Upcoming Evidentiary Hearing. This type of conduct should not be condoned by this Court.

school, and the assessment of exposure for civil liability resulting in updated policies and procedures are irrelevant to these post-conviction habeas proceedings. Petitioner has done nothing to demonstrate that these documents would add anything to his attempt to demonstrate that he is entitled to relief. This Court should not aid and abet Petitioner's attempt to abuse the discovery process in order to go on an impermissible fishing expedition. Calderon, 98 F. 3d at 1106 ("courts should not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation.").

V. REQUEST FOR ADMISSIONS

Chief Deputy District Attorneys Noreen Demonte and Taleen Pandukht have reviewed all documents related to this case in their possession. This consisted of digital documentation as well as all hardcopy documents. However, the vast majority of both consisted of copies of already provided discovery and pleadings filed with various courts or documents that have already been filed as exhibits to various pleadings over the years. The State should not be required to redisclose its entire file and to violate the work-product rule.

Contrary to Petitioner's allegations in a May 1, 2020 letter to the State, the State has no intentions of destroying any evidence in this case. The State already turned over all discovery in this case to trial counsel prior to trial, including all gang affiliation and field interview cards for all alleged gang members involved in this case. Trial counsel Dayvid Figler, Esq. even reviewed all of the boxes of discovery himself at the District Attorney's Office for an hour and a half on the Friday prior to the start of trial. Given the extreme lapse of time between the pretrial stage and the filing of this untimely, successive Petition, the trial attorneys for the State have no recollection of a specific discovery request for the CCSDPD report(s), but are confident that had such a request been made, the trial court would have certainly addressed such a request.

The State concedes that it did not turn over the report(s) authored by the CCSDPD, an outside agency, as the State was not in possession of said report(s) nor was it in any way aware of the potential existence of such report(s) since the CCSDPD was not the investigating body for this case and were not tasked with any investigative work by the LVMPD. Clark County,

Nevada has a unique characteristic of several agencies having concurrent law enforcement authority (LVMPD, North Las Vegas Police Department, Henderson Police Department, Mesquite Police Department, CCSDPD, Park Police, Taxicab Authority, Transportation Services Authority, Nevada State Gaming Control Board, Nevada Division of Investigations, City Marshalls, Animal Control, Attorney General Investigations, to name just a few). None of these agencies coordinate event numbers or report databases.

The State had no idea that the CCSDPD report(s) at issue existed in this case. There was no indication in any of the LVMPD police reports or witness statements that the CCSDPD prepared any reports or statements or interviewed any witnesses in this case. The State did not possess any such CCSDPD report(s) at any time or see any such report(s) in the LVMPD Homicide File. Had the State known of the existence of the CCSDPD report(s) at issue, the State would have provided them to the defense prior to trial.

The information known to and provided to the State was that the CCSDPD officers referenced by Petitioner were only present at the school for an unrelated incident. Further evidence of this fact was presented at trial when Danny Harris Eichelberger, the Principal of Morris Sunset East High School, testified why members of the CCSDPD were present. There was no indication to the State that the CCSDPD did anything substantive reference this case. The principal left the CCSDPD officers in his office to finish up with the student who committed a drug infraction when he went outside because of the fight:

> Q. And do you recall what you were doing physically on the school grounds at that point in time?
> A. At that time the release there was -- we had an episode occur with a student, like a drug infraction, so I had the police on campus, school district police were on campus assisting me with the search and, you know, just dealing with an issue, a drug-related issue with a student in my office.
> Q. Now, while you were dealing with that drug-related issue -- and that's not related to why we're here today; correct?
> A. Correct.
> Q. All right. Were you alerted to something else that might potentially be a problem?
> A. Yes. I have a campus security monitor named Betty Graves. She came -- she called me on the CB, walkie-talkies, very stressed, a lot of distress in her voice: Dan, need your help out front, please come out. And I left my office immediately, told the police officer if he could handle what's going on there, I was needed out front.

Reporter's Transcript of Proceedings, Jury Trial, Wednesday, July 10, 2013, pages 94-95.

VI. THE STATE OPPOSES ANY ATTEMPT TO OBTAIN THE STATE'S PRIVILEGED WORK PRODUCT

Additionally, Petitioner's request to breach the attorney-work product privilege is even less meritorious than his request for discovery. Petitioner must establish both a substantial need and an undue hardship in acquiring equivalent material through another means:

> [A] party may obtain discovery of documents and tangible things … prepared in anticipation of litigation … by or for another party or by or for that other party's representative … only upon a showing that the party seeking discovery has substantial need of the materials … and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

NRCP 26(b)(3); Accord, Wardleigh v. Second Judicial Dist. Court, 111 Nev. 345, 358, 891 P.2d 1180, 1188 (1995) ("The burden of showing undue hardship rests with the party seeking to discover the information"). Petitioner cannot make either of these showings because he has already demonstrated that he has acquired the material necessary to make his claim through the alleged CCSDPD report(s) Petitioner has already obtained.

Further, the demand for the complete physical and digital copy of and opportunity to physically inspect the CCDA files including all communications and CCDA office policies clearly invades the province of privileged information. See, Floyd v. State, 118 Nev. 156, 167-68, 42 P.3d 249, 257 (2002) ("At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case").

Should this Court authorize work-product discovery, the State requests that all documents potentially covered by the privilege be reviewed by this Court prior to any disclosure. Id. ("In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation"). Wynn Resorts, Ltd. v. Eighth Judicial District Court, 133 Nev. 369, 384, 399 P.3d 334, 348 (2017) (In determining whether documents merit work-product protection as having

been prepared in anticipation of litigation, a "because of" test applies, which requires inquiry, under a totality of the circumstances standard, into whether the documents were prepared or obtained because of the prospect of litigation).

VII. CIVIL DEPOSITIONS ARE INAPPROPRATE IN THE CONTEXT OF THIS CRIMINAL POST CONVICTION PROCEDURALLY BARRED HABEAS PROCEEDING

A typical civil litigant is entitled to depose witnesses as a matter of right. NRCP 26(a); NRCP 30(a)(1). However, "[a] habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." Bracy, 520 U.S. at 904, 117 S.Ct. at 1796-97. Accord, Osborne, 557 U.S. at 69-70, 129 S.Ct. at 2320-21. Instead, NRS 34.780(2) not only requires a showing of good cause to allow discover, but also demands that any particular method of discovery be justified by a demonstration of good cause. NRS 34.780(2). The Nevada Legislature has determined that a deposition could be appropriate where it appears that "a prospective witness is an older person or a vulnerable person or may be unable to attend or prevented from attending a trial or hearing, that the witness's testimony is material and that it is necessary to take the witness's deposition in order to prevent a failure of justice[.]" NRS 174.175(1). This statute is clearly not applicable to this case.

In this case, Petitioner fails to establish good cause for why a deposition is needed in addition to an evidentiary hearing. There is no good cause to depose anyone in the context of these habeas proceedings. Petitioner has not identified a single reason to justify a deposition in addition to the already scheduled evidentiary hearing. The evidentiary hearing is less than two (2) months away. Petitioner can subpoena whichever witnesses he chooses to testify at the evidentiary hearing. Therefore, there is absolutely no need or precedent in post-conviction habeas matters to conduct civil depositions.

VIII. LVMPD, CCSDPD AND CCSD WILL HAVE THE RIGHT TO OBJECT TO SUBPOENAS AND DEPOSITIONS

The State does not represent the LVMPD, CCSDPD or CCSD. As such, this opposition does not address any objections that the LVMPD, CCSDPD or CCSD may have to these

discovery requests and is limited only to addressing a lack of good cause under NRS 34.780(2). If this Court should find good cause, LVMPD, CCSDPD and CCSD should be provided notice and an opportunity to be heard as to any objections they may have to the discovery demands Petitioner attempts to impose upon them.

CONCLUSION

For the foregoing reasons, the State respectfully requests that Petitioner's Motion for Discovery (NRS 34.780(2)) be denied.

DATED this 11th day of May, 2020.

Respectfully submitted,

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

BY /s/ TALEEN R. PANDUJHT
TALEEN R. PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the foregoing, was made this 11th day of May, 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

TRP/lm/GU

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DISTRICT COURT
CLARK COUNTY, NEVADA

EVARISTO JONATHAN GARCIA,
#2685822,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-19-791171-W

DEPT NO: XXIX

STATE'S OPPOSITION TO PETITIONER'S MOTION TO DISQUALIFY NOREEN DEMONTE AND TALEEN PANDUKHT FROM REPRESENTING RESPONDENTS AT THE UPCOMING EVIDENTIARY HEARING

DATE OF HEARING: JUNE 2, 2020
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through TALEEN R. PANDUKHT, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Petitioner's Motion to Disqualify Noreen Demonte and Taleen Pandukht from Representing Respondents at the Upcoming Evidentiary Hearing.

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

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

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

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

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

On August 29, 2013, Petitioner was sentenced to the Nevada Department of Corrections to Life with the possibility of parole after a minimum of ten (10) years had been served plus an equal and consecutive term of Life with a possibility of parole after a minimum of ten (10) years has been served for 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.

On March 14, 2019, Petitioner 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, Petitioner filed a Motion for Reconsideration. On September 10, 2019, this Court issued an Order denying the Petition. On September 16, 2019, the State filed a Motion to Unseal Post-Conviction Petition for Writ of Habeas Corpus and Exhibits Related Thereto, and Motion for Clarification. On September 19, 2019, this Court issued an order vacating the previous Order denying the Petition. On October 10, 2019, the State filed its Response to the Petition. On October 17, 2019, Petitioner filed a Reply. On November 12, 2019, this Court denied the Petition. On November 15, 2019, this Court issued an Order denying the Petition. On December 11, 2019, Petitioner filed a Notice of Appeal.

On November 27, 2019, under seal, Petitioner filed a Motion to Alter or Amend a Judgment Pursuant to Nev. R. Civ. P. 59(e). On January 29, 2020, the State filed its Opposition to the motion. On January 30, 2020, Petitioner filed a Reply. On January 31, 2020, the State

filed a Supplement to its Opposition. On February 6, 2020, the Court advised it would allow an evidentiary hearing to be set. An order unsealing the case was also signed in open court. On March 2, 2020, an Order was filed denying Petitioner's request for an Amended Judgment granting habeas relief, but vacating its November 15, 2019 Order denying the Petition and granting an evidentiary hearing to be heard on June 26, 2020. On May 1, 2020, Petitioner filed the instant Motion to Disqualify Noreen Demonte and Taleen Pandukht from Representing Respondents at the Upcoming Evidentiary Hearing. The State now responds as follows.

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

Daniel Proietto, a Crime Scene Analyst with the Las Vegas Metropolitan Police Department (LVMPD), responded to the school to document the crime scene and collect evidence. On Washington, Proietto located four 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 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

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[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.

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

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

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

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

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

conversation, Petitioner's parents placed a call to Vera Cruz, Mexico. Petitioner was arrested on April 23, 2008 and was extradited to the United States on October 16, 2008.

Alice Maceo, a Latent Print Examiner and the Lab Manager of the Latent Prints Section of the LVMPD, examined the firearm. Maceo was able to lift three (3) latent prints from the upper grip below the slide (L1), the back strap (L2) and the grip (L3). The print from the grip (L3) was not of sufficient quality to make any identification. Maceo was able to exclude Giovanny Garcia and Manuel Lopez as to the remaining two 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.

ARGUMENT

Petitioner has failed to present any legal basis for this Court to grant his extraordinary request that this Court disqualify Chief Deputy District Attorneys Noreen Demonte and Taleen Pandukht from representing the State at the upcoming evidentiary hearing and all related hearings. There is a considerable case law that defeats Petitioner's motion. Therefore, this motion must be denied. "To prevail on a motion to disqualify opposing counsel, the moving party must first establish 'at least a reasonable possibility that some specifically identifiable impropriety did in fact occur,' and then must also establish that 'the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case.'" Brown v. Eighth Judicial Dist. Court, 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000) (quoting Cronin v. District Court, 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989)).

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I. PETITIONER HAS FAILED TO DEMONSTRATE THE EXISTENCE OF A CONFLICT OF INTEREST

When a party wishes to disqualify a prosecutor, such impropriety must take the form of a conflict of interest. See NRPC 1.7, 1.9, 1.11; United States v. Kahre, 737 F.3d 554, 574 (2013) ("proof of a conflict [of interest] must be clear and convincing to justify removal of a prosecutor from a case."). Petitioner has failed to demonstrate, or even address, the existence of a conflict of interest. Black's Law Dictionary defines "conflict of interest" as follows:

> 1) A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.
> 2) A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent.

Black's Law Dictionary (11th ed. 2019).

The Petitioner has failed to make a showing of a conflict of interest, by either definition. The second definition is clearly inapplicable here, as Petitioner's request for disqualification is not based upon competing interests between clients. There is also no indication that the first definition of a conflict of interest exists. The Petitioner has failed to make any showing of an incompatibility between Ms. Demonte's and Ms. Pandukht's public and private duties. Petitioner's mere allegation that the State committed a Brady violation does not create any sort of incompatibility between their duties as prosecutors and their private interests.

Petitioner cites to In Re Estate of Bowlds, 120 Nev. 990, 1000, 102 P.3d 593, 599 (2004). However, the footnote with the case and page number citation does not state what Petitioner claims in the body of his argument. Motion at page 6. Bowlds is a civil case about attorney fees where the primary beneficiary of an estate challenged the executor's accounting. The Nevada Supreme Court referred to SCR 178 (1)(b), stating: "This rule essentially allows an attorney to continue representing a client even if that attorney must testify regarding his or her fees, as such testimony generally does not implicate a conflict of interest." The Court further found there to be no conflict of interest in that case. In Re Estate of Bowlds, 120 Nev.

at 1000, 102 P.3d at 599. Clearly, this civil case has no applicability to the situation in our case as it related to an attorney testifying against his own client, and does not refer to criminal prosecutors or criminal post-conviction habeas proceedings.

Petitioner also cites to U.S. v. Prantil, 764 F.2d 548, 553 (9th Cir. 1985), which concerned a criminal defense attorney who was convicted of perjury, false statements and being an accessory after the fact. Defendant claimed to have been negotiating a fugitive's surrender with the prosecutor, who asserted personal knowledge of a testimonial rather than an argumentative character, exceeded the bounds of proper argument in his summation in front of the jury, and it was more probable than not that his improper remarks materially affected the verdict. U.S. v. Prantil, 764 F.2d at 548. The Prantil case is also distinguishable from the instant case in that it related to a jury trial where the prosecutor argued before a jury prior to conviction, not a post-conviction habeas evidentiary hearing seven (7) years after conviction.

Courts have recognized that an allegation of prosecutorial wrongdoing is insufficient to establish a conflict of interest. "There is no authority which would allow a defendant to disqualify a government attorney by merely alleging potential civil litigation. Similarly, threatening to file a grievance with a bar association against a United States Attorney does not constitute a conflict of interest requiring disqualification." United States v. Wencke, 604 F.2d 607, 611 (9th Cir. 1979). Further, "defendants must demonstrate prejudice from the prosecutor's potential conflict of interest." United States v. Kahre, 737 F.3d 554, 574 (9th Cir. 2013). Disqualification of a prosecutor "is not a mechanism to punish past prosecutorial misconduct. Instead, it is employed if necessary to ensure that *future* proceedings will be fair." People v. Dekraai, 5 Cal. App. 5th 1110, 1147, 210 Cal. Rptr. 3d 523, 553 (Ct. App. 2016).

A conflict of interest exists when an attorney is in a situation requiring the attorney to fulfill incompatible roles. See NRPC 1.7, 1.9. A desire to defend oneself against allegations of prosecutorial misconduct is in no way incompatible with one's duty as a prosecutor. "[T]hat a public prosecutor might feel unusually strongly about a particular prosecution or, inversely, might hesitate to commit to a prosecution for personal or political reasons does not inevitably

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indicate an actual conflict of interest." People v. Bryant, Smith & Wheeler, 60 Cal. 4th 335, 376, 334 P.3d 573, 617 (2014).

II. NEITHER NRPC RULE 3.7 NOR NRS 50.155 PROVIDE A BASIS FOR DISQUALIFICATION

In an attempt to circumvent the relevant legal requirements, Petitioner puts forth the novel claim that the Nevada Rules of Professional Conduct Rule 3.7 necessitates disqualification of Ms. Demonte and Ms. Pandukht. NRS 50.155 provides for the exclusion of witnesses from the proceedings, so that witnesses do not hear the testimony of other witnesses. This statute does not provide a legal basis for disqualification of an attorney. Unsurprisingly, as none exists, Petitioner has failed to cite a single case in which NRS 50.155 served as the basis for disqualifying any attorney. There is not a single case in which this statute has been held to authorize a district court to disqualify an attorney from representing a client, or a prosecutor from representing the State. Additionally, NRS 50.155 contains several exceptions, one of which states that it does not authorize the exclusion of "[a] person whose presence is shown by a party to be essential to the presentation of that party's cause." NRS 50.155(2)(c). Clearly, as the representative of the State, who prosecuted Petitioner at trial, Ms. Demonte's and Ms. Pandukht's presence at the upcoming evidentiary hearing will be essential to the presentation of the State's cause – specifically, that Petitioner has not established a Brady violation or good cause and prejudice that overcomes the procedural bars to his habeas petition. Accordingly, whether called as witnesses or not, they may not be excluded from the hearing under NRS 50.155.

Similarly, Petitioner's claim that Ms. Demonte and Ms. Pandukht must be disqualified pursuant to NRPC 3.7 is without merit. NRPC 3.7 prohibits a lawyer from acting "as advocate *at a trial* in which the lawyer is likely to be a necessary witness" unless certain exceptions apply. (emphasis added). "RPC 3.7 does not disqualify an attorney from the case entirely." Liapis v. Dist. Ct., 128 Nev. 414, 423, 282 P.3d 733, 739 (2012). NRPC 3.7 merely prohibits a necessary witness from being *trial* counsel. Id. See also DiMartino v. Eighth Judicial Dist. Ct., 119 Nev. 119, 121, 66 P.3d 945, 946 (2003). Accordingly, an attorney who may be a

necessary witness is permitted to act as counsel during the pretrial stage. 119 Nev. at 121-22, 66 P.3d at 946-47. The purpose of NRPC 3.7 is "to eliminate any confusion and prejudice that could result if an attorney *appears before a jury as an advocate and as a witness*." DiMartino, 119 Nev. at 122, 66 P.3d at 947 (emphasis added). See also 3.7 Lawyer as Witness, Ann. Mod. Rules Prof. Cond. § 3.7 ("[t]he prohibition against a lawyer serving as an advocate at trial and testifying as a witness in the same trial is aimed at eliminating confusion about the lawyer's role.").[2] Even if Ms. Demonte and Ms. Pandukht were called as witnesses at the evidentiary hearing, this Court, unlike a jury, will not be subject to confusion by Ms. Demonte and Ms. Pandukht appearing as both advocate and witness. NRPC 3.7 applies to trials, not post-conviction proceedings.

Additionally, when considering disqualification pursuant to NRPC 3.7, a court *must* balance the parties' interests, consider the hardship disqualification may have on the represented party, and make a finding as to whether or not the attorney is in fact a necessary witness. NRPC 3.7(a); DiMartino v. Dist. Ct., 119 Nev. 119, 122, 66 P.3d 945, 947 (2003). Here, Ms. Demonte and Ms. Pandukht are ***not*** necessary witnesses in this case. Petitioner's claim that he must call Ms. Demonte and Ms. Pandukht as witnesses because he accuses them of wrongdoing is highly suspect at best. Petitioner has not demonstrated that Ms. Demonte and Ms. Pandukht's testimony is necessary for him to present good cause and prejudice to overcome the procedural bars. Petitioner now possesses the Clark County School District Police Department ("CCSDPD") records that he claims; thus, Ms. DeMonte and Ms. Pandukht's testimony is not necessary as Petitioner's counsel was able to obtain these records on their own with the use of reasonable diligence.

As further detailed in the State's Opposition to Petitioner's Motion for Discovery, the State concedes that it did not turn over the alleged report(s) at issue authored by the CCSDPD, an outside agency, as the State was not in possession of said report(s) nor was it in any way aware of the potential existence of such report(s) since the CCSDPD was not the investigating body for this case and was not tasked with any investigative work by the LVMPD to the State's

[2]NRPC 3.7 is identical to ABA Model Rule of Professional Conduct 3.7.

knowledge. There is nothing further to be inquired of the State of any relevance to these post-conviction habeas proceedings. The prosecuting attorneys, like Petitioner's current counsel, are officers of the court whose veracity should not be questioned with bare and inflammatory allegations. Therefore, there is absolutely no need for Chief Deputy District Attorneys Noreen Demonte and Taleen Pandukht to testify at this evidentiary hearing, and their personal disqualification from handling this evidentiary hearing should be denied.

Petitioner's contention that Ms. Demonte and Ms. Pandukht are necessary witnesses is entirely fraudulent. Petitioner has no need to call Ms. Demonte and Ms. Pandukht as witnesses. Rather, Petitioner's goal is to impair the State's ability to prevail at the hearing, by disqualifying the prosecutors most knowledgeable about the case as they conducted the jury trial. Even this Court did not preside over the jury trial in this case. Such a deceptive tactic has been expressly condemned by the Nevada Supreme Court. "[W]e are loathe to allow a party to wholly disqualify opposing counsel under [NRPC 3.7] by simply listing that counsel as a witness two years into the litigation and asserting that disqualification doubts should be resolved in favor of disqualification. **The potential for abuse is obvious**. Interpreting [NRPC 3.7] to permit total disqualification *would invite the rule's misuse as a tactical ploy*." DiMartino, 119 Nev. at 122–23, 66 P.3d at 947 (emphasis added).[3] See also Zurich Ins. Co. v. Knotts, 52 S.W.3d 555, 560 (Ky. 2001) ("the showing of prejudice needed to disqualify opposing counsel must be more stringent than when the attorney is testifying on behalf of his own client, because adverse parties may attempt to call opposing lawyers as witnesses simply to disqualify them."). Furthermore, "parties should not be allowed to misuse motions for disqualification as instruments of harassment or delay." Brown v. Eighth Judicial Dist. Court, 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000).

Clearly, Petitioner is engaging in the precise tactical ploy expressly disapproved of in DiMartino, in a blatant attempt to have the most qualified prosecutors barred from handling his post-conviction proceedings. Ms. Demonte and Ms. Pandukht were the sole prosecutors at Petitioner's trial in 2013, and have remained on the case ever since. Karen Mishler is currently

[3]In DiMartino, the Nevada Supreme Court was interpreting Supreme Court Rule 178, which is identical to NRPC 3.7 and ABA Model Rule of Professional Conduct 3.7. 119 Nev. at 122, 66 P.3d at 947.

a member of the Criminal Appeals Division, who is assigned to this Department to handle its post-conviction oppositions and responses. Further, it is Clark County District Attorney Office policy for the trial attorneys to conduct the post-conviction evidentiary hearings, as these assigned prosecutors have done in all of their jury trials for twenty (20) years. Petitioner has notified this Court that he intends to call a number of witnesses at the evidentiary hearing, and Ms. Demonte and Ms. Pandukht are clearly the prosecutors most familiar with the facts, witnesses and evidence presented in this case and the best able to conduct cross-examination, having previously conducted the jury trial. Disqualification of Ms. Demonte and Ms. Pandukht, approximately one month prior to the hearing, would be a significant hardship to the State, and impair its ability to seek justice at the evidentiary hearing. Such deceptive tactics should not be allowed by this Court.

III. DISQUALIFICATION OF PARTICULAR PROSECUTORS IMPLICATES THE SEPARATION OF POWERS

Disqualification is a drastic measure that must be rarely used, as it implicates concerns regarding the separation of powers. Disqualification of an individual prosecutor by a district court is potentially an interference with the executive branch's mandatory role to enforce the law. See Nev. Const. art. III, § 1 ("[t]he powers of the Government of the State of Nevada shall be divided into three separate departments,--the Legislative,--the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others…").

"A district court does not have general supervisory powers over the co-equal executive branch of government." United States v. Dominguez-Villa, 954 F.2d 562, 565 (9th Cir. 1992). Thus, this Court does not have supervisory powers over the Clark County District Attorney's Office. For this reason, "the courts should not unnecessarily interfere with the performance of a prosecutor's duties." State v. Eighth Jud. Dist. Ct. (Zogheib), 130 Nev. 158, 164, 321 P.3d 882, 886 (2014) (citing State v. Camacho, 329 N.C. 589, 406 S.E.2d 868, 872 (1991)).

Further, the Nevada Supreme Court has never expressly ruled that a district court possesses the authority to disqualify an individual prosecutor. See, e.g., Wesley v. State, 112

Nev. 503, 510, 916 P.2d 793, 798 (1996) ("[t]his opinion does not reach the question of whether the district court has the authority to recuse a certain member of the district attorney's office from a case."). The sole Nevada case in which individual prosecutors were disqualified was Rippo v. State, in which two prosecutors participated in the execution of a search warrant, and were disqualified from prosecuting the case due to that participation, which resulted in one of the prosecutors testifying at trial. Rippo v. State, 113 Nev. 1239, 1247, 946 P.2d 1017, 1022 (1997).[4]

The deputies of the elected Clark County District Attorney have duties and responsibilities that are largely statutorily mandated. See NRS 252.110; NRS 252.070 ("[a]ll district attorneys may appoint deputies, who are authorized to transact all official business relating to those duties of the office set forth in NRS 252.080 and 252.090 to the same extent as their principals and perform such other duties as the district attorney may from time to time direct."). Accordingly, the Nevada courts must avoid interfering with Chief Deputy District Attorneys in their performance of these duties. As Chief Deputy District Attorneys, Ms. Demonte and Ms. Pandukht have been directed by an elected official to prosecute this case, and represent the State in the upcoming evidentiary hearing. The exercise of such powers is not just statutorily authorized, but mandated.

The State recognizes that in certain situations, a prosecutor may be disqualified from handling a matter pursuant to NRPC 1.7, 1.9, or 3.7. However, as discussed *supra*, none of these rules apply to the instant case. Petitioner has failed entirely to present this court with a valid, legal basis for imposing the drastic remedy of disqualification of the most qualified prosecutors from representing the State at an evidentiary hearing. Accordingly, this motion must be denied.

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[4]In Rippo, The Nevada Supreme Court also did not address whether or not the district court possesses the authority to disqualify individual prosecutors, as this issue was not raised on appeal. On appeal, the Court denied the Petitioner's claim that the district court should have disqualified the entire prosecutor's office. 113 Nev. at 1256, 946 P.2d at 1028.

CONCLUSION

For the foregoing reasons, the State respectfully requests that Petitioner's Motion to Disqualify Noreen Demonte and Taleen Pandukht from Representing Respondents at the Upcoming Evidentiary Hearing be denied.

DATED this 11th day of May, 2020.

Respectfully submitted,

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

BY /s/ TALEEN R. PANDUJHT
TALEEN R. PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the foregoing, was made this 11th day of May, 2020, by Electronic Filing to:

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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 Hearing date: June 26, 2020 Hearing time: 9:00 AM **Reply in Support of Motion for Discovery (NRS 34.780(2))**

POINTS AND AUTHORITIES

I. Introduction

This Court ordered an evidentiary hearing on Evaristo Garcia's claim that the State suppressed reports from the Clark County School District Police Department, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Evaristo sought discovery in order to prove the elements of the *Brady* claim: that evidence was suppressed, that the evidence was favorable, and that the evidence was material.[1] None of the Respondent's objections to Evaristo's request[2] are availing. Accordingly, Evaristo respectfully requests this Court grant his motion.

II. Discovery Requests

Evaristo seeks discovery to gather evidence in support of his claim that the State unconstitutionally suppressed the CCSDPD reports, which is the subject of the upcoming evidentiary hearing. Because the requested discovery will enable Evaristo to investigate and prove his credible allegation of a constitutional violation, he has shown good cause.[3]

Respondents assert broadly that discovery is not needed because Evaristo is already in possession of the CCSDPD reports that form the basis of his *Brady* claim.[4] They also repeatedly assert that his discovery requests are overbroad.[5] These arguments ignore not only the multiple prongs of a *Brady* claim that Evaristo has to prove, but the specific arguments that Evaristo made in his discovery motion

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[1] *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Mazzan v. Warden, Ely State Prison*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000).

[2] *See* 5/11/20 Opp. to Mtn. for Discovery.

[3] *See Bracy v. Gramley*, 520 U.S. 899, 908–09 (1997); *see generally* Mtn. for Discovery.

[4] Opp. at 11.

[5] See, e.g., id. at 16.

about the relevance of additional evidence. He relies on those arguments made in his motion, but responds to Respondents' particular objections below.

A. Clark County District Attorney's Office

1. Requests for admission.

Respondents do not object to Evaristo's request for admissions, but rather "concede[] that [the State] did not turn over the reports(s) authored by the CCSDPD, an outside agency, as the State was not in possession of said report(s)[.]"[6] These unsworn assertions do not conclusively establish the issue.[7] Because Respondents have unofficially answered the questions posed in Evaristo's proposed requests for admission, there is no reason they could not do so in response to a request for admission under oath. This would entail no additional burden.

2. Requests for production.

Respondents object to Evaraisto's request for the Clark County District Attorney's Office based on privilege.[8] But Evaristo specifically said he did *not* want privileged information and explicitly asserted his right for the Clark County District Attorney's Office to provide a detailed privilege log for any item it asserts cannot be produced due to privilege and/or attorney work product.[9]

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[6] *Id.* at 18.

[7] *Cf.* Nev. R. Civ. P. 36(b) ("A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended."). Additionally, Respondents assert that if any request for the CCSDPD reports had been made, "the trial court would have certainly addressed such a request." Opp. at 18. A request was made for reports from all law enforcement agencies, and the District Attorney's Office had a constitutional obligation to produce the CCSDPD reports at issue. *See* 8/25/10 Mtn. for Discovery. The fact that the prosecutors do not currently remember such a request does not mean it was not made. *See* Opp. at 18. And even absent a request, the State was still obligated to provide the defense with exculpatory information.

[8] Opp. at 16, 20–21.

[9] *See* Nev. R. Civ. P. 26(b)(5); Nev. R. Civ. P. 45(d)(2).

Second, Respondent's argument that Evaristo has not proved the Clark County District Attorney's Office is in possession of evidence that would support Evaristo's *Brady* claim fails.[10] Evaristo does not have to prove the DA's Office definitively has the evidence. He just needs good cause to believe they do.

"Good cause" justifying discovery exists when (1) the petitioner makes credible allegations of a constitutional violation, and (2) the requested discovery will enable the petitioner to investigate and prove his claims.[11] "Petitioner need not show that the additional discovery would definitely lead to relief. Rather, he need only show good cause that the evidence sought would lead to relevant evidence regarding his petition."[12] Moreover, even "potentially corroborating evidence constitutes good cause."[13] Evaristo met this standard.

Evaristo will have to prove that the State either willfully or inadvertently failed to disclose the school police reports to the defense.[14] Although Respondents now assert that the CCSDPD reports were not in the possession of the Clark County District Attorney's Office, Evaristo has the right to verify this assertion and seek to disprove it if the evidence does not support it. The only way to do so is to have access to the entirety of the case file. Without the entire file, Evaristo cannot confirm what is not there.

Additionally, the specific documents Evaristo delineated in his discovery motion would allow him to prove the *Brady* requirements. Reports provided by CCSDPD and the LVMPD, communications between the District Attorney's Office and those agencies, and documentation about the District Attorney's policies,

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[10] Opp. at 17.

[11] *See Bracy,* 520 U.S. at 908–09.

[12] *Payne v. Bell*, 89 F. Supp. 2d 967, 970 (W.D. Tenn. 2000).

[13] *United States ex rel. Brisbon v. Gilmore*, No. 95 C 5033, 1997 WL 321862, at *3 (N.D. Ill. June 10, 1997).

[14] *See, e.g.*, *Banks*, 540 U.S. at 691; *Mazzan*, 116 Nev. at 67, 993 P.2d at 37.

practices, and procedures regarding gathering information from those agencies go to whether the District Attorney's Office had or knew about the suppressed reports. Respondents have staked out a position in their opposition that they, two seasoned prosecutors on a homicide case, did not have and were not even *aware* of the police reports produced by the first officers to arrive at the scene of the crime (the reports at the center of this *Brady* claim). This unsworn assertion is certainly worthy of exploration.[15] The requests for discovery provided to the trial prosecutors are relevant to the possession question and the question of disclosure, too.

If the Court finds that Evaristo is not entitled to discovery of the *entire* prosecution file for his case, he also requested specific items in his discovery motion. Respondents make no arguments against these specific requests. Accordingly, at a minimum, the Court should grant that portion of Evaristo's request if it is not inclined to give him access to the entire prosecution file.

Respondents also do not argue in opposition to Evaristo's requests for copies and an opportunity to inspect the prosecution files for Manuel Lopez in Case No. C262966-2 and Giovanny Garcia in Case No. C226218. Accordingly, Evaristo's requests should be granted.[16]

Finally, Respondents make the irrelevant observation that this Court denied Evaristo's first petition without allowing discovery.[17] That petition did not include

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[15] Alternatively, Evaristo can demonstrate that the State violated *Brady* because regardless of their knowledge or actual possession of these reports, the State nonetheless had a legal obligation to find out about them and obtain them. This is the doctrine of constructive possession. But because Respondents raise a legal argument against application of constructive possession here, Evaristo has the right and desire to prove actual possession, too.

[16] *See O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 555, fn. 3, 429 P.3d 664, 669, fn3 (Ct. App. 2018) (a respondent concedes an issue when it fails to respond to it).

[17] Opp. at 16.

the current *Brady* claim. In any event, the Court has now ordered an evidentiary hearing, affording Evaristo the right to ask for discovery now.[18] Granting Evaristo's current discovery request would not be a reconsideration of the Court's prior ruling, as Respondents erroneously assert.[19]

B. Clark County School District Police Department

Evaristo requested leave of the Court to serve a subpoena duces tecum on the CCSDPD for a copy of the entire case file for Evaristo Garcia in event number 0604-01080. Respondents argue that Evaristo already has the reports, so he has no need for a copy of them.[20] This ignores the reasons for the discovery request. It is not so that Evaristo can procure a copy of the reports, but so that he can establish whether the LVMPD and the District Attorney's Office knew or possessed them. Evaristo is trying to establish where the chain of custody for these reports ended and why. Legally, after the CCSDPD created them, they should have been provided to the prosecution (either directly or through the LVMPD who took over the case), and then ultimately ended up in the hands of the defense. This did not happen and Evaristo has the right to establish when and how the chain of custody broke, in order to establish whether the prosecution failed to disclose police reports they *actually* possessed or simply failed to disclose reports they *constructively* possessed by operation of their legal obligation to obtain them. Because Respondents deny both actual and constructive possession of the reports, Evaristo has good cause to seek discovery of evidence relevant to both theories.

Additionally, the CCSDPD can provide information about its response to the scene and what occurred in the officers' interactions with Betty Graves. These will

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[18] *See* Nev. Rev. Stat. § 34.780(2).
[19] Opp. at 16.
[20] *Id.* at 17.

be important details for this Court to hear at the upcoming hearing. This is information trial counsel could have gathered and introduced at trial had they been informed of the full extent of CCSDPD's involvement in the case, which is relevant to the issue of the materiality of the suppressed evidence.[21]

Respondents also oppose Evaristo's request for depositions, calling them inappropriate and claiming Evaristo is not entitled to them as a matter of right.[22] He did not argue that he is. Instead, as Evaristo explained in his motion,[23] once an evidentiary hearing has been ordered, a habeas corpus petitioner may invoke "***any method of discovery available*** under the Nevada Rules of Civil Procedure" if he shows good cause to do so.[24] Rule 30 of the Rules of Civil Procedure in turn permits depositions.

To be abundantly clear, the *habeas corpus statute* specifically authorizes any form of discovery in these proceedings—Respondents' argument to the contrary is misplaced, no doubt premised on their false understanding that these are proceedings "criminal." This assertion contradicts the Nevada Supreme Court's repeated observation that these proceedings are neither civil nor criminal; rather, they fall into a unique category of their own. As the Nevada Supreme Court explained in *Mazzan v. State*, "habeas corpus is a proceeding which should be characterized as **neither civil nor criminal** for all purposes. It is a special statutory remedy which is essentially unique."[25] Habeas is actually neither civil nor

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[21] *See also* Mtn for Discovery at 2–4.

[22] Opp. at 21.

[23] Mtn for Discovery at 4.

[24] Nev. Rev. Stat. § 34.780(2) (emphasis added).

[25] *Mazzan v. State*, 863 P.2d 1035, 1036 (Nev. 1993) (emphasis added) (quoting *Hill v. Warden*, 96 Nev. 38, 40, 604 P.2d 807, 808 (1980)). Indeed, in the federal system, habeas corpus cases are "technically civil in nature," though they are not "automatically subject to all the rules governing ordinary civil actions." *See*

criminal. But regardless, this debate about the nature of these proceedings misses the only thing that really matters—Nev. Rev. Stat. § 34.780(2) explicitly authorizes "***any***" civil discovery mechanism in habeas proceedings upon good cause shown.

Respondents argue broadly Evaristo has not shown good cause for depositions because he can subpoena witnesses for the hearing.[26] This is not a basis to find a lack of good cause—it is just a practical preference the State apparently has for how these proceedings should proceed. But Respondents fail to recognize that permitting Evaristo to conduct depositions can, however, cut down on the number of witnesses Evaristo needs to call at the evidentiary hearing. Respondents instead propose the less efficient course of Evaristo calling all the CCSDPD officers who responded to the crime scene as well as the Person Most Knowledgeable about the CCSDPD's policy on sharing information with the LVMPD and the Clark County District Attorney's Office. Evaristo can certainly do that, but requests depositions in order to avoid calling such a large number of witnesses at the hearing itself, some of whom may not have relevant information. But he can only decide who he doesn't need to call after depositions in which he can discover who has the relevant information that the Court needs to hear for Evaristo's case in chief.

Respondents also cite a rule of criminal procedure concerning depositions and argue that it does not apply here.[27] That is true enough. But as the habeas statute itself states, these proceedings are governed by the rules of civil procedure, not the rules of criminal procedure, as noted above.[28] The habeas statute broadly permits *any* form of civil discovery upon a showing of good cause. Evaristo has shown good

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Hill v. Warden, Nevada State Prison, 604 P.2d 807, 808 (Nev. 1980) (quoting *Schlanger v. Seamans*, 401 U.S. 487, 490 n.4 (1970)).

[26] Opp. at 21.

[27] Id.

[28] Nev. Rev. Stat. § 34.780(2).

cause as this Court set this for an evidentiary hearing and his requests are designed to discover information material to the issues to be decided at hearing.

C. Las Vegas Metropolitan Police Department

The Respondents object to Evaristo's request for the entire LVMPD file because Evaristo "assumes that since he has discovered information that he believes is relevant after many years of relentless searching, that the LVMPD must have had this information prior to trial."[29] Evaristo does not so assume, but seeks to discover whether the LVMPD was in possession of the CCSDPD reports and, if so, whether LVMPD turned them over or told the District Attorney's Office about them. He cannot discover these facts without a subpoena. Because this information goes to the issue of suppression, Evaristo has shown good cause.

The Respondents do not object to Evaristo's request to subpoena LVMPD for a copy of all field interview cards that have not already been disclosed related to suspected gang activity for Giovanny Garcia, Salvador Garcia, Manuel Lopez, Jonathan Harper, Victor Gamboa, Evaristo Garcia, Edshel Calvillo, Melissa Gamboa, Melinda Lopez, Jesus Alonso, Stacey DeCarolis, Crystal Perez, Jena Marquez, Brian Marquez, and Bryan Calvillo, created and maintained from 1998 up to and including the date of the Evaristo Garcia's verdict. Instead, they assert the District Attorney's Office already turned over gang affiliation and field interview cards.[30] Even so, LVMPD may possess more. Given that Respondents argue that they were not in possession of reports concerning the investigation of this case, it is not safe to assume that they were in possession of *all* field interview cards related to the listed individuals.

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[29] Opp. at 17.
[30] *Id.* at 18.

As discussed above, Respondents generally assert that depositions are not appropriate in these proceedings.[31] Evaristo incorporates his response to that argument above.[32]

D. Clark County School District

The shooting in this case took place at a school, Morris Sunset Academy. As Evaristo explained in his motion, information about the school is relevant to the materiality prong of Evaristo's claim.[33] Specifically, the demographic makeup and size of the school is relevant to the analysis of Ms. Graves's ability to differentiate between students. Additionally, information about the lighting conditions of the school informs how well Ms. Graves could see the shooter. Respondents argue that Evaristo's request for leave to serve a subpoena duces tecum on the Clark County School District is irrelevant.[34] To the contrary, the requested information was specifically identified by Evaristo's retained eyewitness identification expert as relevant to the reliability of Ms. Graves's description of the shooter. Accordingly, Evaristo is entitled to this discovery.

E. Clark County School District Risk Management and Environmental Services Department

These respondents object to Evaristo's request to subpoena the Clark County School District Risk Management and Environmental Services Department for their entire file[35] related to Victor Gamboa's shooting as irrelevant.[36] Once again, the

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[31] Id.

[32] Respondents also object to Evaristo's request to obtain this information through depositions. But as Evaristo already explained, depositions are permitted in habeas corpus proceedings and are the only way he can decide how to limit the number of witnesses he will call at the hearing.

[33] Mtn. for Discovery at 10–11.

[34] *Id.* at 17-18.

[35] Mtn. for Discovery at 15–16.

[36] *Id.* at 17.

Respondents are wrong. As Evaristo explained in his motion, the Clark County School District Risk Management and Environmental Services Department is the department for the school district that will "review risks associated with the operation of the school district, recommend ways to minimize losses, and handle any claims for damages."[37] The department is responsible for investigating insurance claims related to crimes that occur on school property.[38] Because the shooting in this case occurred on school property, it is likely the department will have a file on the case, including reports from the CCSDPD. Because the *Brady* claim at issue concerns the suppression of such reports, Evaristo is entitled to information from the Risk Management Department in order to ensure that he has received all information concerning the school district's investigation of the case. This is a sufficient showing of good cause.[39]

III. Respondents' focus on the merits of the *Brady* claim is non-responsive to Evaristo's requests for discovery

Respondents focus a large part of their opposition on argument that Evaristo's claim fails on the merits.[40] But this Court has already granted an evidentiary hearing on this claim and so rejected the argument that the claim can

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[37] Clark County School District, Risk and Environmental Services Department, https://ccsd.net/departments/risk-management (last visited May 12, 2020).

[38] *See* Clark County School District, Risk and Environmental Services Department, https://ccsd.net/departments/risk-management (last visited April 20, 2020).

[39] *See Payne*, 89 F. Supp. 2d at 970 ("Petitioner need not show that the additional discovery would definitely lead to relief. Rather, he need only show good cause that the evidence sought would lead to relevant evidence regarding his petition."); *Brisbon*, 1997 WL 321862, at *3 ("[P]otentially corroborating evidence constitutes good cause.").

[40] *See* Opp. at 11–15, 18–19.

be summarily denied.[41] Evaristo therefore now has the opportunity to develop and prove his claim. The current briefing is not asking the Court to determine the ultimate merits of Evaristo's *Brady* claim. Respondents' focus on the merits is therefore misplaced; they can request either pre- or post-hearing briefing on the merits if they desire. The only question currently before the Court is whether Evaristo has shown good cause for his discovery requests.[42] As shown in his discovery motion and this reply, he has.

IV. Conclusion

The requested discovery is tailored to evidence probative to the issues at the upcoming evidentiary hearing. Since this Court decided there is good cause to hold the hearing, it follows there is good cause for discovery of evidence relevant to the factual issues at this hearing. None of Respondents' arguments against permitting discovery in this case are meritorious. Accordingly, Evaristo respectfully asks this Court to grant his motion.

Dated May 18, 2020.

Respectfully submitted,
Rene L. Valladares
Federal Public Defender

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

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[41] *See, e.g.*, *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) ("This court has long recognized a petitioner's right to a post-conviction evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief.").

[42] Respondents misleadingly argue that in order to show good cause, Evaristo "must demonstrate that the State affirmatively withheld information favorable to the defense." Opp. at 14. The case they rely on discusses good cause to overcome procedural bars, not for discovery. *See State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). In order to ultimately prevail, Evaristo has to prove the State withheld the information. He seeks discovery in order to do so.

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2020, 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: Taleen Pandukht, Noreen DeMonte.

/s/ Jessica Pillsbury
An Employee of the
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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

Reply to Opposition to Motion to disqualify Noreen DeMonte and Taleen Pandukht from representing Respondents at the upcoming evidentiary hearing

(Nev. R. Prof. Cond. 3.7)

POINTS AND AUTHORITIES

The opposition to Evaristo Garcia's motion to disqualify the trial prosecutors from representing Respondents at the upcoming evidentiary hearing misconstrues the legal basis for the request and thus, most of the argument is irrelevant. Evaristo is not moving to disqualify the prosecutors based on an alleged conflict of interest—Evaristo is moving to disqualify the prosecutors pursuant to Rule of Professional Conduct 3.7 because they are likely to be necessary witnesses regarding a contested issue, namely, whether these same prosecutors were in actual possession of the police reports they now admit they failed to provide to the defense.[1]

The entirety of Respondents' argument between pages 8–10 (and the top of page 11) is entirely misplaced and irrelevant to the motion before the Court. Because Evaristo is not raising a standalone conflict of interest claim—he is raising a violation of the advocate-witness rule—he opts not to address this section of the Respondents' opposition. This Court should ignore it, too.

It isn't until the bottom of page 11 of the opposition that the Respondents begin to address Evaristo's actual legal basis for his motion, citing his argument under Rule 3.7. They raise only a few superficial, meritless claims.

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[1] *See* 05-01-2020 Motion to Disqualify

I. These prosecutors are likely to be necessary witnesses about their own conduct, which remains a contested issue.

The advocate-witness rule generally prohibits attorneys "from taking the witness stand to testify in a case they are litigating."[2] The flipside of this same standard is that an attorney may not serve as an advocate when she is likely to be a necessary witness regarding a contested issue.[3]

The exceptions to the rule are very limited, as follows. If the subject of the testimony is (a) uncontested, (b) the issue is simply about an attorney's legal services, or (c) disqualification would "work a substantial hardship on the *client*," then a necessary witness may serve as an advocate.[4] This case does not involve a question of attorney services, such as a debate over the amount of attorney fees, and Evaristo will address the hardship question in a section below. Setting aside these two exceptions to the advocate-witnesses rule, there is only one other exception under Nevada law: the issue to be testified about is uncontested.[5] That exception does not apply here.

Whether an issue is contested is a straightforward, simple question. "The issue to be decided by the lower court was very simple: Did the testimony of the petitioner relate to an uncontested issue? If the answer is no, Rule 3.7 mandates disqualification."[6] Respondents attempt to muddy the waters, but the reality is that this is a simple *Brady* claim and one of the elements of any *Brady* claim is whether

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[2] *United States v. Edwards*, 154 F.3d 915, 921–22 (9th Cir. 1998); *United States v. Birdman*, 602 F.3d 547, 551 (3rd Cir. 1979).

[3] Nev. R. Prof. Cond. 3.7.

[4] *See id.*; *see also In re Estate of Bowlds*, 120 Nev. 990, 1000, 102 P.3d 593, 599 (2004) (emphasis added) (this case is simply an example of the second exception, discussing when an attorney can testify about his or her own fees in a legal case).

[5] *Id.*

[6] *State ex rel. Karr v. McCarty*, 417 S.E.2d 120 (W. Va. 1992).

the State suppressed the evidence in question. Further, suppression is a two-part question: (a) *possession* and (b) failure to disclose. Respondents conceded the failure-to-disclose prong.[7] They did not concede the possession prong, and in fact affirmatively denied it.[8] Thus, this material factual issue remains contested. For this reason alone, even if no other, Rule 3.7 mandates disqualification.

Moreover, Respondents took this issue to a new height when they placed on the record, in an unsworn assertion in their opposition to this motion and the motion requesting discovery, that they were *not* in possession and, in fact, were not even *aware*, of the school police reports at issue in this *Brady* claim.[9] But that is the exact contested issue of historical fact for which their testimony is likely to be necessary. They are first-hand witnesses to their own conduct. Their denial is certainly worthy of cross examination—they are claiming that as two experienced homicide prosecutors, they were not even aware of the reports written by the first police officers to arrive at the scene of the crime.[10] An unsworn assertion on such a material historical fact does not suffice. And Evaristo has every right to cross-examine them on this assertion and, if necessary, to discover and admit evidence and to call witnesses to rebut this factual position. As such, even if it was not clear before that this issue is contested, it is certainly clearly now.

Because Respondents continue to contest the issue of actual or constructive possession (and thus, the element of suppression), and in fact have affirmatively staked out a factual position on the issue that Evaristo contests,[11] then the "uncontested issue" exception to the advocate-witness rule does not apply here.

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[7] 05-11-2020 Opposition to Motion to Disqualify at 12 lns. 23–25.

[8] *Id.* at 12 lns. 25–26.

[9] *Id.*

[10] *See id.*

[11] *See id.*

These prosecutors' testimony is likely to be necessary on this contested issue for the reasons explained above. Thus, the age-old advocate-witness rule bars these prosecutors from representing respondents at this hearing.

II. Application of the advocate-witness rule will not work a substantial hardship on the *client*—the Respondents.

The advocate-witness rule does not apply if disqualification of DeMonte and Pandukht from acting as advocates at the hearing would "work *substantial* hardship" on the "client," that is, the Respondents themselves.[12] Respondents' counsel claim that it would present such a hardship because they are the best attorneys available to handle this hearing, implying no other prosecutors could do quite as good of a job on behalf of the Respondents.[13]

First, the hardship rule has to do with hardship on the *client*, not hardship on the attorneys who need to prepare for the hearing. Other prosecutors having to get up to speed on this case would not work any hardship on Respondents whatsoever because they are represented by numerous well-qualified prosecutors all capable of preparing for this hearing adequately. Any prosecutor is capable of getting up to speed on the facts of this case just as Karen Mishler did when she represented Respondents in their post-conviction briefing up until this point. And in any event, even if hardship on *counsel* were a relevant consideration for the advocate-witness rule, Evaristo—a non-capital petitioner with no inherent interest in delaying these proceedings—would not oppose a continuance for the purpose of allowing Respondents further time to allow new counsel to get up to speed on the case.

Second, Evaristo filed this motion promptly upon his first legal opportunity to do so, as soon as this Court vacated the prior final judgment after it regained

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[12] *See* Nev. R. Prof. Cond. 3.7(3) (emphasis added).

[13] *See* 05-11-2020 Opposition to Motion to Disqualify at 13–14.

jurisdiction.[14] Until that time, this Court did not have jurisdiction and Evaristo was barred from filing any motions. Evaristo filed this motion only 8 days later, giving Respondents as much time as possible to avoid any potential for "substantial" hardship on their client. Further, as just indicated, if this hardship question were the only sticking point for this request, Evaristo would have no opposition to a continuance to provide Respondents' replacement counsel more time to prepare.

Respondents' arguments fail. Respondents' counsels' testimony is likely to be necessary with regard to a contested issue, there will be no hardship on the client by replacing counsel with another qualified prosecutor in the same office, and this hearing has nothing to do with the nature of Respondents' counsels' legal services. There is therefore no applicable exception to the bar on advocate-witnesses. Rule 3.7 simply precludes DeMonte and Pandukht's representation of Respondents at this evidentiary hearing.

III. Rule 3.7 applies here.

Respondents further argue that Rule 3.7 simply doesn't apply here. Not so. The advocate-witness rule applies to this upcoming evidentiary hearing. As Evaristo explained in his motion, the fact the rule uses the word "trial" doesn't mean it applies literally only to trials—courts have expanded this rule to apply the prohibition of advocate-witnesses in *any* proceeding in which the attorney would have to address her own veracity before the adjudicative body: ". . . although the lawyer may not appear in ***any*** situation requiring the lawyer to argue his own veracity to a court or other body, whether in a hearing on a preliminary motion, an appeal ***or other proceeding***."[15]

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[14] *See* 04-23-2020 Order; 05-01-2020 Motion to Disqualify.

[15] *See DiMartino v. Eighth Judicial Dist. Court ex rel. County of Clark*, 119 Nev. 119, 122, 66 P.3d 945, 947 (2003) (emphasis added); *see also* 05-01-2020 Motion to Disqualify at 9.

The evidentiary hearing in this case will be such a proceeding. Respondents have already staked out a factual position on the issue of suppression. Evaristo contests that position. He has the right to receive their answer to the question of actual possession on the record and under oath because that would be cognizable evidence, unlike their bare, unsworn assertion within the points and authorities of their opposition. Further, Evaristo has the right to cross-examine them on their assertion and present any available evidence to the contrary at the hearing.

Thus, the question of actual possession will come down to the veracity of the prosecutors' assertions (and, by that time, testimony) that they did not have the school police reports and, in fact, were not even aware of them. Were these same prosecutors counsel for Respondents in this hearing, no doubt they would argue that the Court should trust their answers as "officers of the court" and attempt to use their professional positions and first-hand knowledge of the issues during the argument portion of the hearing itself. This is the exact situation the witness advocate rule is designed to prevent.

Further, allowing the prosecutors to serve as counsel would allow them to circumvent the exclusionary rule. This, too, is improper. This alone doesn't warrant their exclusion, as Respondents erroneously mischaracterize Evaristo's claim,[16] but rather is another reason to enforce Rule 3.7, demonstrating another practical reason for the rule and consequence of its non-enforcement.

The reality here is that the claim before the court places at issue whether these specific prosecutors, many years ago, had possession of the school police reports from the first officers to arrive at the scene of the homicide and nonetheless did not disclose them to the defense. This is one way for Evaristo to prove his *Brady* claim. Because DeMonte and Pandukht contest suppression, their memories and

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[16] *See* 05-11-2020 Opposition to Motion to Disqualify at 11.

the credibility of their assertions will be at issue at the hearing—something Evaristo has the right to explore at the evidentiary hearing. Their factual assertions are subject to challenge, if for no other reason than this happened several years ago, and if they represent the State at the evidentiary hearing, they will have to argue the strength and credibility of their own testimony.

Thankfully, Rule 3.7 prevents this blurring of the line between witnesses and advocates. Prosecutors who will not be asked to argue the credibility of their own memory to the court can provide an equal level of representation to Respondents without presenting the issues stated above.

Because the issue of these prosecutors' memories and credibility will be at issue in this hearing, Rule 3.7 applies here despite that it is not a literal "trial."

IV. Respondents' additional arguments

Respondents raised a few other arguments in the opposition that will be briefly addressed here. For one, they argue this Court does not have the power to disqualify the prosecutors because of the separation-of-powers doctrine.[17] This is clearly not so: the Nevada courts have the power to control which attorneys appear in their courtrooms if their appearance would violate court rules: "Inherent Powers of courts. Attorneys being court officers and essential aids in the administration of justice, the government of the legal profession is a judicial function." Supreme Court Rule 39. Indeed, as Respondents pointed out in their own opposition, a Nevada court has exercised this exact power in *Rippo v. State*.[18] While the disqualification

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[17] *See* 05-11-2020 Opposition to Motion to Disqualify at 14.

[18] 113 Nev. 1239, 1247 (1997).

issue did not make its way up to the appeal before the Supreme Court in *Rippo*, the district court's exercise of this power is still instructive here.[19]

Also, Respondents argue Evaristo's motion is a "tactical ploy" and is "entirely fraudulent."[20] This inflammatory language is plainly wrong and appears a meager attempt to misdirect this Court from what is really just one straightforward, limited legal issue: whether the advocate-witness rule disqualifies these prosecutors from serving as counsel at the upcoming hearing. As one Court posed the simplicity of the question: "Did the testimony of the petitioner relate to an uncontested issue? If the answer is no, Rule 3.7 mandates disqualification."[21] That is the same question here.

These disqualification claims certainly exist. The Rules of Professional Conduct clearly lay out the governing standard for such claims. Respondents' argument that *In re Estate of Bowlds*[22] does not apply here because it comes from a different type of case in a different procedural context[23] is immaterial because Evaristo cited that case simply as a counter example of a time when attorneys *can* testify as witnesses—such as when they are testifying about their own fees in that case. Indeed, Evaristo agrees that his case is very different than *Bowlds*—that was Evaristo's exact point. He cited *Bowlds* just to distinguish it from the present case. In *Bowlds*, the Court recognized that an attorney may testify in a situation that does not apply here: that is why Evaristo cited it. So when Respondents' opposition complains about Evaristo citing to this case, they missed the point entirely. The

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[19] *See also State ex rel. Karr v. McCarty*, 417 S.E.2d 120 (W. Va. 1992) (holding prosecutor was properly disqualified when testimony was necessary to establish chain of custody of taped telephone conversations, integrity of which was contested).

[20] *See id.* at 13 lns. 7–8, 24–26.

[21] *McCarty*, 417 S.E.2d 120.

[22] *See, e.g.*, 120 Nev. 990, 1000, 102 P.3d 593, 599 (2004).

[23] 05-11-2020 Opposition to Motion to Disqualify at 9–10.

point is simply that (a) sometimes attorneys *can* testify—*see, e.g.*, *In re Estate of Bowlds*—but (b) this case is not one of those times.

The real governing standard here is Rule of Professional Conduct 3.7, which is generally applicable across all legal practice—it is not limited to civil cases but instead generally governs the legal profession as a whole. Further, whether criminal or civil, whether before a judge or jury, courts have expanded this rule to apply to *any* hearing in which the lawyer would have to vouch for her own veracity and reliability as a witness.[24] As such, this Rule plainly applies to this hearing, is a recognized rule, and Evaristo has every right to insist that his upcoming hearing complies with it. Respondents' arguments to the contrary are wrong.

Finally, Respondents argue that the Clark County DA's office has been engaged in this practice for 20 years. This isn't evidence of anything and is legally irrelevant. For one, they didn't provide any actual evidence in support of this bare assertion. Second, prior practice in different cases is irrelevant. What *would* matter is if they could point to a single precedential opinion in which a higher court ruled that Rule 3.7 is not violated when a prosecutor serves as both advocate and witness in a *Brady* hearing implicating, as a central issue, the exact same prosecutor's knowledge, conduct, and testimony. They cannot provide such an opinion, of course, because such a practice *does* violate Rule 3.7. To the extent that any prior defense attorney, in a different case, might have failed to object under similar circumstances is not legally relevant or binding on the outcome of the straightforward question of law before the court here.

This prior-practice argument is just another distraction. The issue before this Court has nothing to do with what these prosecutors claim they have done in prior cases—instead, the question is simply whether these specific prosecutors are likely

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[24] *See DiMartino*, 119 Nev. at 122, 66 P.3d at 947.

to be necessary witnesses on a contested issue at *this* specific hearing. The answer here is "yes." Therefore, under Rule 3.7, they cannot also serve as Respondents' advocates at this hearing.

V. Conclusion

Evaristo Garcia respectfully requests this Court enter an order, pursuant to Rule 3.7, precluding Noreen DeMonte and Taleen Pandukht from serving as counsel for Respondents during the upcoming evidentiary hearing because they are likely to be necessary witnesses at this hearing.

Dated May 18, 2020.

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 18, 2020, 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: Taleen Pandukht, Noreen DeMonte.

/s/ Jessica Pillsbury
An Employee of the Federal Public Defender, District of Nevada

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

June 02, 2020 10:15 AM All Pending Motions

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

COURT CLERK: Tapia, Michaela

RECORDER: Delgado-Murphy, Melissa

REPORTER:

PARTIES PRESENT:

Amelia L. Bizzaro	**Attorney for Plaintiff**
Noreen C. Demonte	**Attorney for Defendant**
Stephen A Spelman	**Attorney for Plaintiff**
Taleen R Pandukht	**Attorney for Defendant**

JOURNAL ENTRIES

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

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

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

EVARISTO JONATHAN GARCIA, Petitioner, vs. JAMES DZURENDA, Respondents.	CASE#: A-19-791171-W DEPT. XXIX

BEFORE THE HONORABLE DAVID JONES, DISTRICT COURT JUDGE

TUESDAY, JUNE 02, 2020

RECORDER'S TRANSCRIPT OF PROCEEDINGS: PETITIONER'S MOTION FOR DISCOVERY [NRS 34.780(2)]; PETITIONER'S MOTION TO DISQUALIFY NOREEN DEMONTE AND TALEEN PANDUKHT FROM REPRESENTING RESPONDENTS AT THE UPCOMING EVIDENTIARY HEARING [NEV. R. PROF COND. 3.7]

APPEARANCES:

For the Petitioner: S. ALEX SPELMAN, ESQ.,

For the Respondent: NOREEN DEMONTE ESQ., TALEEN PANDUKHT, ESQ.

RECORDED BY: MELISSA DELGADO-MURPHY, COURT RECORDER

Case Number: A-19-791171-W

TUESDAY, JUNE 02, 2020 AT 11:07 A.M.

THE COURT: Okay. Is everybody here for this one?

MS. DEMONTE: Sorry. Noreen DeMonte and Taleen Pandukht for the State.

THE COURT: Okay. Let's deal with the motion -- go ahead counsel. I'm sorry.

MR. SPELMAN: Thanks okay, Your Honor. Alex Spelman appearing on behalf of Evaristo Garcia with the Federal Public Defender and appearing with me is my co-counsel, Amelia Bizzaro.

THE COURT: Okay. This is -- let's do the first one, the motion for discovery. Counsel, did you or did you not already receive the school district's entire file on this matter?

MR. SPELMAN: I do not have the entire file. What we have if I -- and forgive me if I'm misrepresenting the record, but from what I understand we received the school district police reports that we requested. Of course without having the entire file we can't verify what is and is not in there.

THE COURT: You received -- the question was did you receive the Clark County School District's Police Department file.

MR. SPELMAN: Your Honor, I believe the answer to that is yes.

THE COURT: Okay.

MR. SPELMAN: If their file only includes the police reports that we have in our possession now.

THE COURT: Well, is there any -- I mean, you're dealing with different entities. Is there any allegations that the school district has not complied with your request?

MR. SPELMAN: Not -- no, Your Honor.

THE COURT: Okay. So, because they're not here present I'm not going to be making allegations against them about them being present. So, the school district's giving you – has given you their police department's file on this matter as far as what they have; correct?

MR. SPELMAN: Your Honor, specifically, what we believe we don't have if is the school district is in possession of any video surveillance of the incident. For example, any additional reports that there might be. We have the officer's reports, specifically.

So, we're asking for -- if there are any other officer reports, of course we would want that included in the order, but like Your Honor just mentioned, we have no way to know whether or not they complied with that. There's no allegation that they didn't comply with our original request.

So, assuming for a moment that they have given us all the police reports, we still would want to know if there's any additional witness statements. And, in addition, for the school district police department's policy on how to -- how they normally would pass along a police report that they would write.

And, of course, Your Honor, if I may, the entire discovery motion really just breaks into two major points; one is that we're just trying to figure out what happened to these missing police reports. The

State has alleged in their -- in an unsworn statement in their opposition that they did not personally have possession of these reports. So, we just -- we do want to see where did the chain of custody end. And Officer Wright said -- and I presume that he doesn't just then put it in some file and never look at it again. In a homicide case he would pass it along to whoever the next, you know, responsible party is.

So, we want to figure out what that chain of custody was for the suppression prong. And then to the effect that, for example, video surveillance, any of these would be relevant to the questions that are now on the materiality prong of the *Brady* claim. For instance, where our major argument that we presented in the last hearing was that there is now serious reason to question whether Betty Graves, the school employee, made a reliable statement and that her testimony at trial that Giovanni Garcia was not the shooter, when she said that, is there serious reason to doubt that now. And so if we had more information our expert specifically asked us to find out what were the lighting conditions, what were, you know, other -- other information we can find out about the actual scene.

So, to the extent that they had further information on that, that's why we've asked specifically for the Clark County School District Police Department's file to the extent that there is anything else. If there's not anything else then, yes, we have everything.

THE COURT: Okay. So, but -- who you're asking that of? You've got this motion in front of me in regarding to asking the District Attorney's office for material being held by a separate entity, the Clark

County School District.

MR. SPELMAN: Yes, Your Honor. This would be a request for a subpoena duces tecum on a third party. And so that would be -- that is to if we accepted the State's argument that the Clark County School District Police Department is a separate entity than the Clark County DA's office. Certainly they're two different departments. They're both part of the county. And the argument that we've been making is they're all one party, at least at it relates to a *Brady* case and when we're asking ourselves who is the prosecution team responsible for the information that ends up at trial.

So, here, it could be characterized as a request on a third party if they accept the State's characterization of who they are. Alternatively, if they are -- if this Court would consider them part of the same party then it would just be a request for production from the opposing party.

THE COURT: Counsel, they're not the same party. The Clark County School District is a separate entity. It has its own separate legal staff, it has its own separate police department; it has its own separate everything. They're clearly not the same entity as the Clark County District Attorney's office. So, if we're making a request upon them should they not have been noticed in this so that they can appear to make a determination as to whether or not they have to comply with a Court order, they're not even basically aware that this is going on.

MR. SPELMAN: Your Honor, as I understand the case filing habeas corpus case, the first step is for us to go to the Court and

demonstrate that we even have good cause to --

THE COURT: Correct.

MR. SPELMAN: -- issue these subpoenas. Then if they receive the subpoena -- now at that point we would kind of treat this like a normal civil case -- that party would then receive the subpoena and have an issue with complying with it. They can move -- they can file a motion to a protective order or come to Court themselves to Your Honor to explain why they disagree with the propriety of the subpoena itself.

But here is the only question at this juncture is just whether we have good cause to even start the process.

THE COURT: I understand the request.

MR. SPELMAN: At that point, of course --

THE COURT: The request of the school district is not really what concerns me. More is the request to start doing basically request for production, request for admission, and depositions which is basically a civil matter.

The biggest issue, I can tell you this right now, looking at your request for admission, based upon the civil rules, they're improper. There's a case called *Demille.* You might want to look at it. *Demille* basically says you cannot in a request for admissions ask for the underlying basic things, i.e., in a civil case, in a car accident case, for example, in a request for admission you cannot ask the Defendant isn't it true you are responsible for the car accident. That's an improper admission, that's an improper request because it goes to the heart of the matter.

So, the question is and my biggest concern is we're asking this Court for extremely extraordinary relief -- and we'll talk about the timeliness of whether or not it's even valid -- but if we're going to start asking for civil discovery rules, we need to make sure that we know what the civil discovery rules are and what their limitations are.

So, what is the basis if in fact we do, for example, if I granted the subpoena duces tecum to the Clark County School District, what would be the basis then to be doing to RPAs and roggs and depositions on the DA?

MR. SPELMAN: Yes, Your Honor. Thank you.

The District Attorney, as you know, in addition to being a party, the two prosecutors involved in this case right now are also first hand witnesses to what they did or didn't do, specifically starting with a request for admission they -- the request -- to the extent Your Honor granted that any case law precludes an ultimate question, that of course would need to be denied. But to the extent that our request is limited, appropriately limited, to simple factual questions such as did you actually have these reports or not. I think that the State has already staked out a position in their briefing in this case, and my client is entitled to have them actually answer it under oath and subject that answer to cross-examination. For example, why, you know, how would you not, as we mentioned in our briefing, in a normal homicide case would that be your normal practice to not get the first police reports written by the first officers on the scene.

THE COURT: Okay.

MR. SPELMAN: Right. And so that's kind of the basis -- factually for why this is worthwhile not only to have under oath but for further examination. It all depends on their answer, of course. But the basis is at least to the extent that we can limit it factually to address Your Honor's concerns just to the simple facts, you know, what did you have, did you have this or not.

THE COURT: Okay.

MR. SPELMAN: I do maintain that that would be appropriate.

THE COURT: What would be the basis under *Brady* if in fact the defense counsel was aware that the school district was involved, that a school district employee was involved which was obvious since it happened on school grounds, and that Ms. Graves was all over the reports, why would that not have been a burden upon the defense at the time of getting this case ready to trial to do what you did now and request from the school district their police department report? Isn't that -- isn't that what *Brady* says that if it's something that you guys can easily obtain or it can be obtained under *Brady*. It's not the State's burden to basically provide it to the defense. How come the defense didn't request this stuff back during the discovery prior to trial?

MR. SPELMAN: Your Honor, I appreciate the question. This is something we discussed a little in the last hearing. And to reiterate, I -- what we will maintain throughout this case that there is a concurrent duty upon defense counsel to the extent that defense counsel did drop the ball if that's Your Honor's ultimate conclusion. Then that just translates into an ineffective assistance of counsel claim.

But at the moment, with the *Brady* claim before the Court, I don't believe that the duty of counsel and whether counsel -- I don't agree that counsel's obligation then relieves the State of its constitutional burden nonetheless to hand over anything that it knows is in its possession that is whether actually or constructively. The State still has a burden is my point.

The second point to that, Your Honor, is the defense counsel in this case actually did affirmatively request all police reports from any agency involved. This request was explicit on the record and the State responded to it with not all the reports requested. And so in this particular scenario to rule that defense counsel didn't do enough would be to effectively create a legal standard that defense counsel is required by law under the *Brady* case law to then distrust a prosecutor's response to their explicit request for reports.

And so in that case, Your Honor, I would submit that defense counsel actually acted with complete reasonableness. My office and our investigator happened to go above and beyond by suggesting, hey, you know, it might be worthwhile to make this request despite the fact that the State did not hand it over. I think in post-conviction we take a second look at things to really ask ourselves was something missed, was something omitted. Was there misconduct is one of the major parts of our investigation. So, I don't think that that is incumbent upon the trial defense counsel to distrust the trial prosecutor.

So, to that extent I do believe that trial counsel was reasonably diligent up until the point that our investigator, of course,

changed their – changed the investigation.

THE COURT: Then opinions apparently changed on the defense side.

MR. SPELMAN: Yes, with new counsel and with a new investigator who has a good instinct looking for things that might be missing.

THE COURT: Okay. State, let me hear from you.

MS. DEMONTE: Well, first, as we're talking about discovery, again, we don't represent the Clark County School District police. He mentioned video. Video was provided by the Clark County School District police to Detective Mogg and Hardy of the Las Vegas Metropolitan Police Department, and counsel well knows this because a report referencing that was sent to his investigator and included as an attachment to their -- as an exhibit. Those videos from the scene were provided in the initial discovery in this case way back when Mr. Garcia was finally brought back from the country of Mexico and the case was able to proceed. So, counsel has always had the videos.

THE COURT: Defense has always had.

MS. DEMONTE: Yes, sorry. Defendant has always had those videos. Whether or not he received it from Mr. Figler or Mr. Goodman or the Special Public Defender's office is entirely a different scenario not on the State. That was provided.

And, moreover, let's talk about what is essential to proving up their case because when we're talking about the discovery that's necessary, it has to be necessary to fully develop their claim. That is

what we're talking about is whether or not they can fully develop their claim, not bring in eye witness testimony to question a witness named Betty Graves who, by the way, never identified anyone as the shooter including Evaristo Garcia. Here's the picture she was provided of Evaristo Garcia. Her line down at the bottom at the onset of this case attended school -- sorry -- was hanging out with kids doing wrong things. Was in sight with the other students. Betty Graves, 2/19/10. She never made an identification of Evaristo Garcia or anyone.

So, I'm really quite perplexed as to why it is so important to their case. The only person that ever identified Evaristo Garcia at this trial was people who already knew him, Edshel Cavillo and Jonathan Harper. Those were the people that provided the identification not Betty Graves, not the other eye witnesses also on the grounds of that school. And Betty Graves wasn't the only person who testified that Giovanni wasn't the shooter. Edshel and --- Edshel Cavillo, Jonathan Harper, and I believe Crystal Lopez, even though that's the statement she initially provided to police. And you really cannot mistake Giovanni Garcia and Evaristo Garcia. You can't mistake the two. This is what Betty Graves wrote underneath Giovanni's photo. Went to school where I work, Morris Academy Sunset. Always a trouble maker. Betty Graves.

So, I'm not quite sure what it is they're actually looking for to fully develop their claim because their claim of a *Brady* violation for the State not turning over a report from a non-agency affiliated with this case. Yes, school police were on scene. Principal Danny Eichelberger said they were on scene. But he said was he left them in his office to go

deal with the fight outside. There was no indication from anything other than the CAD that the school district police were the first responding officers. That is not what is in Detective Hardy's officer's report. It just says they were on scene. State had no indication.

There is three -- two to three boxes that Mr. Figler reviewed of the State's case prior to this going to trial. Had we known this report existed, we would have gotten it. We're not ashamed of this report because it's not exculpatory. It doesn't explain away the charge. If anything, I'm not quite sure what it provides them because Betty Graves was then taken to where this person was put at gunpoint. That is not the guy. That's in the CAD. All it does is provide a description as to why he's not the guy because he had bushy hair and was lighter skin and thinner.

So, I'm a little – I'm perplexed as to why we're having an evidentiary hearing later this month, but as far as the discovery motion goes, there is no authority to grant this, none whatsoever. They had gotten what they needed from the Clark County School District and they got it within a month of asking for it.

THE COURT: Okay. Anything else? Counsel, rebuttal to that.

MR. SPELMAN: Yeah, Your Honor. I'd just like to point out if the State wanted to argue against a good cause for the evidentiary hearing they could have been present at the hearing where we actually had that argument. They weren't and now they're trying to re-argue a decision that Your Honor already made. So, they had another attorney

here who didn't make any of those arguments that they just made. I don't think that there's a motion for reconsideration for the Court on whether to have the evidentiary hearing. All the arguments counsel's making now has to do with the merits of the *Brady* claim itself. And Your Honor already decided that there was good cause enough, at least, to look into this further through an evidentiary hearing. We're just asking to get the information necessary to know who to call to the hearing and what information is relevant so Your Honor can actually make a decision at the hearing. And so -- and, again, --

THE COURT: Counsel, what you're doing is you're going on a fishing expedition. You want the entire DA file. Okay. You then want basically the DA's P and P, their policies and procedures, for what they do in certain cases. You then want the school district's policies and procedures. Tell me how that's not anything but a huge fishing expedition.

MR. SPELMAN: Yeah, it's directly relevant to the question of what happened to these reports. Right. Again, the State keeps making representations not on the stand that they didn't have these reports, and that's their position, and we are entitled to explore that. If they want to concede suppression then none of this is relevant. But if they are going to maintain the position that they didn't have the reports and therefore they're not responsible, then we're entitled under the statute to get this discovery and that way we can limit what the Court ends up seeing at the trial. We -- I don't care about little details here and there of what's in their file. I just care about this *Brady* claim and that's what we're trying

to -- I don't know why this is such a this extraordinary request just to look at the file and what's contained in there just to make sure that the defense had the opportunity -- had all the evidence that they were supposed to get related to the new evidence we discovered --

THE COURT: Because, counsel, that was not you request.

MR. SPELMAN: And that's --

THE COURT: Your request was not just let us see the file. Your request was basically let's see their entire file, let's see the school district's entire file which school district says they've given you. Let's also get all of their policies and procedures. Let's also start doing some depositions; let's also do some request for admissions; let's also start doing request for production. This is not just a simply we don't believe the DA and we want to be able to basically look through their file. That's not what the request was. The request basically is let's go back and basically re-litigate this entire case, and basically let's try to go after the DA and school district, police department saying that they intentionally hid information from some very, very competent defense counsel, some of the best in this state. And if those individuals themselves decided, yeah, as defense counsels we agree with the State, there must be absolutely nothing there because we didn't pursue it. I mean, that's really -- you're not asking for a very limited request. You're asking for one of the most open blanket requests I've ever seen in a criminal matter.

MR. SPELMAN: Your Honor, if that is your analysis of the scope of the request, certainly we would nonetheless request that

whatever limited items, specific items that Your Honor is comfortable granting, for example, the request for admission is relatively straight forward, we would nonetheless ask for that. And the reason is because I'm imagining how this evidentiary hearing is going to play out. Counsel is going to argue we don't have any evidence that, whoever, you know, that the State had these reports. They're going to say we didn't have any evidence of this, that and the other thing. And we're all asking is for the right to get that evidence or to look and see if it exists and that's the request.

THE COURT: Counsel, you have the school district report; correct? You just told me that you have what the school district had said unless you're now going to make an allegation that the school district is somehow working in concert with the DA to intentionally hide this. The school district, upon a request, gave you what they said is their police department file; correct?

MR. SPELMAN: Yes, and -- yes, Your Honor.

THE COURT: Okay. So, you have the file that the school district would have provided to Mr. Figler had he made the exact same request that you did today, how many years ago?

MS. DEMONTE: 2013 is when Mr. Figler --

THE COURT: Okay.

MS. DEMONTE: -- got them.

THE COURT: Seven years ago. Is there anything in that school district's file that you've reviewed I'm sure that would have given a basis for Mr. Figler to go forward with anything beyond just a review of

the file?

MR. SPELMAN: Yes. And if I could simply just explain how it happened in our exact office. When we were receive -- and just to clarify the record and I'll correct the record after if I'm mistaking these. I'm going from -- if I'm misspeaking because I'm going from memory. I believe that our request for the school district police wasn't for their entire file when we originally requested it before this discovery motion. We just asked for the police reports. And so that's why, again, like policies, if there was additional field interview cards, any additional witness statements. So, I don't know what's in their file so I can't represent --

THE COURT: All those would be, counsel, witness statement, policy cards, all those would be part of the police officer's report, it would be part of his file. What their P and P is back then in 2013, is that what you -- I mean, really the only thing that you're saying you did not get was what is the school district's policy and procedure in 2013 to hand over a file that I looked at that I can tell you there's really nothing in it that's going to somehow say is exculpatory under *Brady*.

MR. SELMAN: Yeah, the reports, again, this is the point of the hearing. I -- what -- I cannot answer Your Honor's question about whether it's the whole file no matter how -- like, there's no way I can do that. I don't work for the school district police department. If they -- if the State's position is that we have the whole file then that's the end of the matter. Right. If that's -- if they want to say that and they want to say there's nothing more. But, ironically, that was their position back at

the time of trial and now we're finding out more stuff.

So, the State is acting like it's crazy for us to assume there's more out there and we've already found more out there. And I don't know -- this is just our due diligence in looking through and understanding what happened to these records, why were they not provided to the defense attorney when they asked for them, and how are they relevant beyond just the words on the page. And so, for example, we've been working with our expert and she has been asking us to look for certain things that would be relevant to understanding Betty Graves' statement.

Betty Graves, at the trial, said Giovanni Garcia was not the shooter. However, right after the shooting multiple eye witnesses said he was. So, the relevance of Betty Graves saying he was not the shooter, which the State though was relevant enough to explicitly ask her at trial, is still relevant now. If that is not true and he might actually be the shooter, that's the whole point of this *Brady* claim.

And so finding out what happened to the records and why they're relevant, our position is that this discovery motion is in good faith, that we have good cause for it, and it's going to be very hard to prove the suppression prong of the hearing unless Your Honor, at a minimum, requires the State to answer certain questions or gives us a little bit of discovery just so we can establish the chain of custody for these reports that were not handed over to the defense.

Alternatively of course, Your Honor, is aware of our constructive possession argument if we don't get any of the discovery,

we would still maintain that we then establish an alternative argument. But as far as the State's rejection of the actual possession prong of our claim, Your Honor, I do -- I do submit -- I feel like I might be going around and around on this argument. I just want to make it very clear that's our position. We just want to prove suppression and materiality.

THE COURT: State, anything else? Go ahead, counsel.

MS. PANDUKHT: We -- Taleen Pandukht for the State. Noreen had this case earlier than I did.

THE COURT: Right.

MS. PANDUKHT: I came on in 2013 to the gang unit and assisted her in trying the case. But I just wanted to really emphasize the fact that there is no precedent in the state of Nevada for this kind of fishing expedition as Your Honor called it. There is no Nevada Supreme Court case that addresses --

THE COURT: Counsel, unfortunately, that's the truth in 90% of the law in Nevada. There is no law.

MS. PANDUKHT: And so -- and that's true. But we are -- what they're doing is relying on the federal law.

THE COURT: Mm-hmm.

MS. PANDUKHT: They're relying on a federal rule and even in that rule they don't say that they're entitled to this discovery as a matter of right. And they have to prove their cause.

So, I just wanted to emphasize that they haven't shown good cause because they requested the CCSD records and they got those records within a month. It's basically one report, one incident report --

THE COURT: Right.

MS. PANDUKHT: -- that the State has already said they didn't know about. So -- and then I also wanted to correct the record because I reviewed -- we weren't able to be at the hearing last time when you set the evidentiary hearing. I wanted to reiterate that at that hearing, I want to make it clear that in the discovery motion there was only one discovery motion that was filed by the Special Public Defender in this case and the Special Public Defender made a general request for discovery. On page six of the Special Public Defender motion it says copies of all police reports, medical reports in the actual or constructive possession of the District Attorney's office, the Las Vegas Metropolitan Police Department, Nevada Department of Corrections, the Clark County Sheriff's office, and any other law enforcement agency. It is not explicit as he says, it is not a specific request, and therefore the standard isn't a reasonable possibility, it is a reasonable probability --

THE COURT: Probability.

MS. PANDUKHT: -- that it would have been a different result. So, I just wanted to emphasize all of that.

And then also with regard to his argument now about how this would have been relevant to try and prevent Giovanni Garcia as an alternate suspect. At the trial, defense counsel absolutely presented four alternate suspects. Their main one was Giovanni Garcia, but also Sal Garcia who shot Jonathan Harper in the head and also Manual Lopez who gave the gun to Evaristo Garcia as well as the State's

witness. And I want to make it clear Betty Graves was not the State's star witness.

The State's star witness, frankly, was Edshel Cavillo. He was the witness that nobody could get to come to Court, and we were finally able to arrest him on a material witness warrant. And I firmly believe that that was the State's star witness, and he looks very much like Evaristo Garcia. And so then we had a fourth alternate suspect at trial and that is when, you know, they said, oh, he looks alike so it's him.

So, the defense counsel presented all of that to the jury and I just wanted to clarify those things. Thank you for letting me speak.

THE COURT: That's my understanding is this is where my -- that's why I said the fishing expedition. And I appreciate the fact that there is no state law on it, but unfortunately when there is no state law on it we look to adjoined jurisdictions and the federal court for guidance, and that's why I even talked about the evidentiary hearing was, basically, the DA said, look, we gave them everything we had. And I said, well, let's find out. The biggest issue what I'm finding out here is the defense is saying, look, we could have presented alternative possible Defendants which they did.

So, I don't understand what would have been gained out of this discovery what was not already presented to the jury. The jury was given -- and I went back because this case was so old -- I went back and pulled some of the trial transcripts, and because -- at first it was kind of a -- I thought the way the defense was going was inadequate counsel. And when I looked at the names of the defense counsel, I had to look at

it and go, okay, that's going to be a big hurdle. And I looked over it and saw that that's exactly what the defense did in the entire trial was basically to give the jury alternative possible shooters and the support therein.

So, what difference is going to come out of this, quote, unquote, that you believe is so exculpatory discovery that would have been presented for the alternative Defendants in the first trial? I still haven't seen what's different in this matter that wasn't presented by counsel in the entire trial. Their entire defense theory was it was somebody else. How is that any different, counselor?

MR. SPELMAN: Your Honor, thank you for the question. Again, this is classic impeachment evidence. This is their -- they presented an alternative suspect, they didn't have the evidence to back it up, now we do. Giovanni Garcia was excluded --

THE COURT: Wait, counsel. Who would they impeach? Ms. Graves?

MR. SPELMAN: Exactly, Your Honor. They would impeach Ms. Graves who was the only person who could say I saw the shooter -- the only one who could say I saw the shooter's face and it was him -- I'm sorry -- and it was not Giovanni Garcia.

MS. DEMONTE: And I thought she never identified him.

THE COURT: Whoa, yeah, counsel, you're going to have to tell me somewhere. Tell me, because I'm sure you're very familiar with the transcript, tell me in the transcript of trial where Ms. Graves, under oath, said, yes, the Defendant there sitting at that table was the shooter?

MR. SPELMAN: No, I'm sorry, Your Honor. I misspoke. I apologize for that. That is not what I meant to say and just to clarify the record. On the very last page of Ms. Graves' direct examination -- I am sorry I don't have the page number on my -- on hand -- she -- the State asked was Giovanni Garcia the shooter -- this is paraphrasing -- and she said no. Had defense counsel -- if defense counsel had this report and then the follow-up on that report that we are now doing, because they would have been able to show the relevance of the report, in cross-examination the primary point, these very good defense attorneys would have made is, well, you say he wasn't the shooter. But let's talk about whether or not you actually got a good look at the shooter so you know whether or not you were correct when you said Giovanni was not the shooter. Let's talk about the fact that when you -- now we know, which they didn't know then, is that when you spoke to law enforcement you gave multiple descriptions of the shooter that are not consistent as we laid out in our pleadings. That is something defense counsel did not know about that would have been relevant for the jury to understand that, okay, there's an alternative suspect. One witness said it wasn't him. Now we know -- actually, she might not have gotten a good look at the shooter, and the standard here is very low. Whether it's reasonable probability or reasonable possibility we don't have to prove absolutely that the jury would have acquitted just enough to give rise to a new trial. That's going to be the argument that we make at the evidentiary hearing. So, what we would request before the Court now --

THE COURT: So, let me see if I understand your argument,

counsel. This star witness said I cannot identify the shooter and therefore if the defense had her previous statements they could then cross-examine her and say you're really, really sure, right. You can't identify him. What would have been different in her testimony? She basically said at trial I cannot identify the shooter.

MR. SPELMAN: No, I don't believe that is in the transcript, Your Honor. She was not asked -- when we checked this multiple times, I had my team read it, there is nowhere in the transcript where Betty Graves said I can't identify the shooter. She was never asked. She was asked is Giovanni Garcia the shooter and she confidently said no. That is the exact point of her testimony that I believe is the reason our client was convicted because the primary alternative suspect was explicitly excluded in the transcript.

THE COURT: It wasn't the fact that all the other witnesses including gang members who basically laid out who it was, who gave him the gun, the conversations they had in regards to the disposal of the gun, that had nothing to do with the jury's consideration. They just ignored all that.

MR. SPELMAN: The jury's required to consider all evidence, Your Honor. This is the totality of the evidence determination.

As the State has pointed out, there is another case when Jonathan, one of the witness's here, Jonathan Harper, was shot in the head and in the course of those proceedings the witness admitted that members of the gang instructed -- I believe it was Salvador Garcia -- instructed the members of that gang to go lie to the police. There is

evidence here, although the point of our *Brady* claim is not to re-litigate all these other facts, there is evidence that we submit under the totality of evidence had Betty Graves' exclusion of Giovanni Garcia been impeached and taking that into consideration of all the other evidence on the record, the jury would not have been able to overcome reasonable doubt about whether it was Evaristo Garcia or our client. And that is the relevance of this information.

Now, the State is arguing that we can't prove that, we can't prove the relevance of that, we can't prove a lot of these prongs, and that's part of why we're asking for discovery. They want to both say we don't have evidence and that we also don't get to look for it.

And so, Your Honor, we're here believing that we do have enough record -- enough evidence to meet the [indiscernible] *Brady* claim but also that my client is entitled to substantiate the elements further to the extent that Your Honor is on the fence about whether he will prevail at the evidentiary hearing.

THE COURT: Well, it's not that I'm on the fence, counsel, because I don't make that decision until after the evidentiary hearing. I'm the type of judge that I actually want to hear the facts and the evidence before I even think about a case especially when you're talking about an evidentiary hearing.

But what my concern is I have what you have labeled as a very narrow discovery request which I can tell you is not a narrow request. You're basically asking for everything under the sun in regards to policies and procedures and request for admissions. You want to

take depositions of DAs. I'm -- you know, just as easily we could take the deposition of the defense counsel and ask them why didn't they pursue it when they knew it was on school grounds, and they had the video that somehow you guys are saying the defense didn't have and they did. The record clearly shows they had the video from the very beginning.

So, what is it in the discovery, the limited discovery, if in fact I ever ordered it that would give you any indication other than basically what I think what you're saying is the school district clearly in our opinion, even though they were not the responding officers; even though they basically -- the second Metro stepped on the school grounds they no longer had jurisdiction, the school district police back off. The principal saying they're in my office. I went out. I'm the one who tried to break it up. The shooting occurred. Metro was on scene. What is it about all of these requests that is going to give any type of exculpatory evidence other than what you said Ms. Graves, at the very beginning, said, you know what. I cannot identify -- she said this individual is not the shooter. I cannot identify the shooter. Basically, that's what she said I can't identify the shooter. That came out in the trial.

MR. SPELMAN: Your Honor, I think at trial in fact is just the opposite, that Ms. Graves, her testimony was presented as if she was who saw the shooter. She could identity the shooter. She was never asked, strangely enough, whether our client was the shooter because the State knows that before trial she excluded him even though now he's the one who is convicted. But the -- she was explicitly asked, okay,

based on the fact that you were standing there on the corner, you got a look at the shooter, saw his face. Was Giovanni the guy? No. Never asked a follow-up question of, well, what about the guy sitting at the defense table right in front of you for whatever reason. But --

THE COURT: Well, counsel, don't you think -- don't you think a learned counsel like Mr. Figler would have if he thought that was the, as you're claiming now, the all-encompassing most important question of the entire trial, don't you think they would have asked that based on the totality of their understanding of the case, that if this witness gets on the stand and basically says I can't identify that guy, that you're telling me that these attorneys missed what you consider the most pivotal -- and I guess what you're saying is the most basic question of the entire defense -- why didn't the defense counsel say, Ms. Graves, the gentleman sitting right here next to me, was he the shooter? Are you saying that that was the important question they never asked?

MR. SPELMAN: Your Honor, I couldn't imagine any defense attorney asking that question. That -- you have no idea what the witness is going to say. In worst case scenario, the witness now decides as in a very suggestive environment with your client sitting at the defense table to ask then, hey, by the way was my client the killer. I couldn't -- I don't think I've ever met a defense attorney who would ask that question because that -- the risk of that, giving new evidence to the jury that -- as of right now, there's just nothing in the 11:44:29 [indiscernible] that our client was the shooter from -- it was just her exclusion [indiscernible] to provide the witness the opportunity --

THE COURT: But, counsel, you on the record -- counsel, you said on the record that Ms. Graves was the pivotal witness, the witness that you believe and your staff believes was the pivotal witness that convicted your client. So, you're telling me that if this witness was the witness, the pivotal one, the one that was going to convince the jury that your client was in fact the shooter, you're saying that not a single defense attorney in this state would ask Ms. Graves follow-up questions in regards to her ability to identify or to at least set out the basic physical characterizations of the shooter if she was the witness that was putting your client behind bars for life?

MR. SPELMAN: Your Honor, based on what the defense knew at trial unlike what we know now, the defense attorney [indiscernible] the description of the shooter that was generally consistent with our client. Now we have on the record based on the newly discovered *Brady* evidence that there is an inconsistent if not multiple inconsistent descriptions of the shooter from Betty Graves. Had defense counsel had that information, they certainly would have gone down the line of inquiry, Your Honor, I'm suggesting. I do not believe they would have asked directly did our client kill that guy because if she said yes you might just be walking your client into a conviction that otherwise could have been avoided. I don't believe that any -- I don't think I -- maybe I over spoke about any defense attorney. I don't know what other defense attorneys would do, but these defense attorneys in this case have filed affidavits or I'm sorry declarations, both of them. They both said that the reason they didn't go down this road is only

because they did not receive this information from the State. So, if we were to put them on stand in this evidentiary hearing to discovery more about this, Your Honor, that I believe this testimony would be consistent with what they've already said about why they didn't go down this line.

THE COURT: So, basically what you're saying that they would have had was the school district -- the records that the school district provided to you?

MR. SPELMAN: In addition, Your Honor, as our office has done, they would have asked an eye witness expert to evaluate the importance of an inconsistent description right at the scene to look at the conditions of a shooting. We've already notified the State that we do have an expert to talk about that stuff at this hearing. And that would have provided context for the newly discovered *Brady* reports, and through that would have proved the materiality of why her inconsistent descriptions are so important in this case, Your Honor.

THE COURT: Okay. Quickly, State.

MS. DEMONTE: Thank you. I just want to correct another misrepresentation of the record.

Counsel has just told you that the inconsistent description that they see in the school district police report that they just obtained was not available to them. I'm reading from the CAD that was provided in the initial discovery. C24. Suspect is LMA, dark complected, medium build, short dark hair, mustache, gray pullover. So, that description was there the whole time. That's all I have.

THE COURT: This is why -- this is why I'm having the most

difficulty, counsel, is everything that you're saying was so vital that the defense counsel did not have they had. They had Ms. Graves initial statement as to what -- how she described this individual. They had Ms. Graves on the stand. Wouldn't it have been easy just to ask her, okay, this is what the initial report said you -- how you described the shooter. Is that correct? Well, yeah, I think so, dah, dah, dah, dah. Ma'am, doesn't that describe every young Hispanic male who has facial hair in the state of Nevada? I mean, you could go about on cross-examination and have a hay day in which I've seen Mr. Figler do for hours and basically discredit this, quote, unquote, star witness.

I don't -- I'm having a hard time -- when you keep claiming is this ultimate great *Brady* information, what is this great Brady information that you think would have changed this case? I mean, give me a scenario. What is it about the school district report that would have been this all enlightening information that they did not have?

MR. SPELMAN: Your Honor, I just want to clarify first that I've been accused multiple times of misrepresenting the record and I don't know if they're implying misconduct. Of course, if I've made any misrepresentations, which I don't believe I don't have, I've been working on this case for years, but if I have it's entirely my own fault. That said --

THE COURT: I'm not -- personal attacks are far beyond me. I don't even bother to listen to those. But it's whether or not --

MR. SPELMAN: Thank you, Your Honor.

THE COURT: -- a statement is incorrect is what I'm looking at, and that I'm not even interested in. What I'm interested in is when

you're talking about this type of discovery in a very old criminal case that have gone up, I believe, at least twice on appeal. What is it because I've read through that school district report and I've read through Graves' basically statement that's included in the CAD report. I don't -- I'm still having a hard time understanding what you have described as basically the all-knowing, all perfect had this come out at trial my client would have walked.

What piece of evidence is it that in front of this jury that they did not have the opportunity to get other than some kind of work product that the DA created that would have made a difference to this jury?

Ms. Graves was at, at best, a wishy-washy witness. I mean, reading through her testimony it's kind of a -- basically this is a, hey, this was a very chaotic situation. This is what I described as the person. Hey, this is how I looked at it, but I can't identify this individual or that individual as the shooter. I still haven't seen what it is that you're telling this Court, aah ha, here it is, Your Honor. Had the DA turned this over to defense counsel they would have presented that piece of evidence that would have discredited everything else that was presented by the DA in this case. What is it in the school report that is so enlightening to you that I have yet to see?

MR. SPELMAN: Your Honor, I -- thank you again for the question. I -- my understanding is now I am going off memory because I was trying to access the CAD report and I don't -- I'm not able to pull it up simply at this moment.

My understanding of the difference was that alternative

description to the extent that it is in the CAD report and, again, I can't represent that, is that it wasn't attributed to Betty Graves specifically. We didn't know which officer spoke to her. And what defense counsel would have done was then go speak to the officers like we would like to and also would have approached a expert to say, look, now we know that in fact this statement was attributed to Betty Graves. She now in fact has provided inconsistent descriptions which we didn't realize before, and given that -- given the additional factors here, now we have additional -- now we have actual some legs to go on during impeachment of her testimony about Giovanni Garcia specifically.

And I would like to mention, of course, we haven't discussed it at all in this hearing, yeah, but of course, this is all certainly the other part of this *Brady* evidence is certainly also important which is that the State conveniently did not provide reports that talked about an alternative suspect as well, and whether that would have been overkill and the fact that there's four alternative suspects already and now this would be a fifth, I think is a factual question that the jury would have had to consider well maybe for some reason they rejected all the other four. Now we have this fifth. Maybe there's some reason. Law enforcement thought he matched the description. The only one who said he wasn't the guy was Betty Graves and now we know that there's a reason to doubt Betty Graves' reliability. Defense counsel didn't even know about the existence of this Jose Banal [phonetic] individual. And for that reason, in addition to these other things, it would have been further impeachment of Betty Graves or they would have been able to also ask

her about the Jose Banal and put officers on the stand who actually talked to Betty Graves to get further details. That's part of the discovery request is we want to find out, you know, talk to us about your actual interaction with Betty Graves, when she provided this alternative description, that sort of thing.

And so the final point I'd like to make, Your Honor, it's -- it is really hard at this juncture. It sounds like what we're engaged in right now is what is the ultimate that we were hoping would happen after the evidence is presented as far as, okay, now Your Honor has heard from the eye witness expert as to why this report really does matter. Your Honor has heard other factors like I just described but from the witnesses themselves can assess the credibility of different witnesses, et cetera, et cetera.

I think it's hard to -- for me to argue at this point before we've had the presentation of evidence. No one's been under oath, the State hasn't answered under oath whether they actually had these reports or not. All of these things, I think, go towards both the suppression and materiality prongs that Your Honor has already determined we have good cause enough at least to have a hearing on. And so for that reason I think that getting into the merits of the claims is certainly something that -- I'll answer any question Your Honor asks me, of course, but --

THE COURT: It's not that, counsel. The issue is, is -- and I take this very seriously if you can imagine. I mean, I have probably spent upwards of 50 hours on this file, more than I have on almost any

other case that's in front of me that's not in active trial, going through a very detailed analysis as to what happened at the time of trial, and all the defenses that you're talking about that are being argued that we would -- we would have as a defense presented were presented ad nauseum that this is not the guy, and Ladies and Gentlemen of the jury, here are alternative individuals, that the exact same argument you're making now. Basically what you're saying is they would have not said, okay, if you don't believe us on number one or number two or number three or number four, let's go for five. That's if what you're saying is if we threw enough suspects at the jury, sooner or later they would say, aah ha, maybe it is somebody else, maybe not those four but maybe this fifth.

That's the problem I'm having is you're -- I could understand this argument clearly if at the time of trial alternative suspects that are not very, very similar in facial characteristics, body size, being all Latino. If all those individuals were not brought forth in front of the jury, I could understand this argument that Ladies and Gentlemen of the jury, they got the wrong guy. But that was the entire defense on this case is Ladies and Gentlemen, they've got the wrong guy, oh, by the way, look, here are the other four possible suspects. Let's make it five, let's make it ten. It's going to make all the different in the world.

Okay. I'm going to take this one -- I'm going to ponder this thing over the weekend because this is too important not to. We got inmates coming in I know on another matter. So, let's -- let's deal with the petitioner's motion to disqualify the attorneys at the DA's office.

MR. SPELMAN: Yes, Your Honor. Just quite straight forward. Of course, I just want to address up front we're not -- this isn't some tactic. I appreciate everyone is working under unusual scenario -- conditions right now with the pandemic and everything. I completely understand that and the State's concern that was filed just as a tactic. I just wanted to dispel that right away.

The only point of this motion is when I -- you know, you can look at me and see I'm a younger attorney. I looked at this. I thought it was unusual in my experience that two prosecutors would -- that are relevant to the actual suppression issue of a *Brady* claim could both be attorneys. I just remembered it from personal responsibility class because you could -- you're not supposed to be a witness and an attorney.

So, I emailed it out of my office. People came back to me saying, yeah, that sounds strange. Here's the rule, 3.7. I read it; I filed the motion. I think it makes sense in particular. I'm not just trying to cause trouble. I am -- simply think that it creates primary two problems; one, is what the Nevada Supreme -- brought out if the State would have to take the stand and then get up and go back behind counsel table and be like, Your Honor, you just heard my testimony. Listen to how, you know, credible I am, and that's inappropriate. The Nevada Supreme Court has said no matter what kind of hearing it is, whether it's a trial, pre-trial, anything, whether it's an adjudicated proceeding, no attorney should be arguing in their own voracity. That's just a fact. But that's one thing because I, of course --

THE COURT: Well, counsel, wouldn't the other DA be doing that? I mean, since you're attacking the DA in this matter on the stand there would be, I would imagine, if I in fact excluded these two DAs another DA. But aren't these the two DAs --

MR. SPELMAN: Yeah, but not personally –

THE COURT: Aren't these the two DAs that have the best knowledge in regards to how this case was orchestrated?

MR. SPELMAN: Yes.

THE COURT: So, why would I limit the DA the ability to defend their position and take away their best two attorneys with the most knowledge. If you put Ms. DeMonte on the stand, I would imagine she's going to be represented, at least on cross, by the other DA. I don't imagine she's going to play a Laurel and Hardy scenario and jump back and forth between table and witness stand. How would that be any different if I had Mr. Wolfson there?

MR. SPELMAN: Yes, Your Honor. Okay. So, first of all, practically here, the -- I can't argue with and I won't and it's not my position that they're not the best attorneys to work on this case.

My position is my client is entitled to a fair hearing. They would not only be able to cross-examine each other as Your Honor just mentioned; they're both behind counsel table and they're working on the case, and whoever takes the argument at the end, they were both the attorneys on this trial, both of them. They've been making representations here every hearing we've appeared where they've appeared. They've been making personal representations about their

experience in this case. None of this has been under oath. It's all inappropriate. They're directly related to the elements of the claim -- the constitutional claim before the Court. They are witnesses in this case to their own conduct which is central to the *Brady* claim. And so to that it would be inappropriate for them to be arguing about their own conduct in a constitutional claim such as this.

Secondly, Your Honor, as we've mentioned, one of the practical concerns we have although it's not part of the legal rule, is that it also presents a disadvantage because that would allow them to sit through all of the testimony and hear what the other witnesses are saying before they can give their side of the story. And so it's neither here or there.

The point is that they've made a representation that is worthy of cross-examination which is they didn't have these reports. Again, Your Honor, this is -- this goes back to the discovery motion, not that I'm reopening that debate, but that if they in a request for admission would submit that, you know, for whatever reason we'll concede the issue of suppression, then this is all neither here or there. If it no longer matters at the hearing because they want to stipulate to that element whether or not they have these reports or whether or not the Clark County School District Police Department is part of their prosecution team for purposes of *Brady* since they investigated the case, at least for five minutes, it doesn't matter. If they want just stipulate to that one element, then they're not witnesses anymore because their conduct is no longer at issue. All they have to worry about at the hearing is the materiality

prong of a *Brady* claim. But as long as they're going to try to say my client is not entitled to win this claim because we did this, this and this or we didn't know about that, that's all -- that's all stuff that needs to be under oath so we can cross-examine, and under Rule 3.7 my client is entitled to have any witnesses participating in the case likely to be necessary witnesses to the actual language of the rule not also be the attorneys in the case. Beyond that --

THE COURT: Well, actually, counsel, the language of 3.7 is at trial. So, if we want to be precise --

MR. SPELMAN: Yes, Your Honor. And the Nevada Supreme Court, yes, and the Nevada Supreme Court has expanded the applicability of that rule to be any sort of hearing where the voracity of the witness and witness-counsel is at issue. That's the case we cited. That's in both of our briefing. So, it's not limited to trial and it hasn't been treated that way even though, yes, definitely the plain language does say trial.

THE COURT: Okay.

MR. SPELMAN: It's just a judicial expansion of the rule.

THE COURT: State.

MS. DEMONTE: Yeah, I'm going to direct this Court's attention to the *DeMartino* case. Again, the language has always been at trial. The Nevada Supreme Court case that addressed it was *Rippo* and that, once again, precluded the prosecutor from being there because the prosecutor became a witness at trial.

THE COURT: Trial.

MS. DEMONTE: So, with that, I'll submit it.

THE COURT: Okay. The motion to exclude -- disqualify Ms. DeMonte and Ms. Pandukht is denied. I'll take the other one under advisement. I'll have an answer to you by Monday. Anything else, counsels?

MS. DEMONTE: No, Your Honor.

MR. SPELMAN: No -- I am sorry. I apologize, Your Honor. Just a logical question about the hearing itself. Is there anyway to know whether this is going to be by video or in person by June 26th? Do we have any information yet?

THE COURT: I'd love to be able to tell you that, counsel, but I'm getting -- we get information almost on an hourly basis from the chief judge in regards to that matter. I'm going to work desperately to -- it's up to the judge right now as to whether or not that I believe it's material to have them in person. I can tell you this. Blue Jeans, as you can note, because of the -- unfortunately we over talk on each other, is not the best way in which to present it.

But right now if counsel or witnesses -- because it's really up to the witnesses -- if witnesses believe for their own personal health they do not want to be present but can be present via Blue Jeans or some other means, I am not going to require a witness to appear in front of even though I can limit the amount of people. If the witnesses say I don't care, I'm not going to be there. I will appear telephonically or appear in a person, I don't have a necessity myself. As long as I can see the witness when they're testifying, I, just like any other jury during

an evidentiary hearing or jury trial, believe it's absolutely necessary that I I see the visual, that I see their faces, that I see their reflection, I see how they're answering questions. I am going to require that I have them visually available, but I am not going to require their physical presence because I'm not going to order someone who may have some extreme health conditions to be in the presence of other individuals and therefore make them uncomfortable because that would go towards their testimony. If I am an uncomfortable witness at the very beginning because I am concerned about my health and my life, clearly that's going to impact my credibility because I'm going to be scared to death to even be there.

So, I'm going to leave that up to the attorneys as to whether or not they want to have the witnesses and contact with the witnesses in person. As long as I can see them visually and I can have them present, that way I am fine with it. I am not going to order anyone to be here physically in this type of a matter. Okay.

MS. PANDUKHT: Your Honor, if I could ask you about the transport order.

MR. SPELMAN: I do want just want to state it on the record our position would be at least that we can appear in person with our client so in case he has any questions during the hearing.

THE COURT: The only other question is going to be that. This is going to be the other issue is whether or not the Department of Corrections will transport a prisoner during this time period. I know as of right now they are not transporting prisoners not because of Covid but

because of other actions that are taking place during some riots right now that they are not transporting prisoners. But that clearly may or may not change in June. If the request is that he be present, I will sign an Order for Transport. Okay.

MS. PANDUKHT: We did one.

MS. DEMONTE: Yeah.

THE COURT: Okay.

MS. PANDUKHT: We did an Order for Transport, and we've been in communication with the jail. The jail asked me if you wanted to have the Defendant in person or by video. I said in person because I thought we were doing an evidentiary hearing. But whatever you tell me I'll tell the jail.

THE COURT: If defense counsel believes it's in the best interest of their client to have him physically present and I signed an order, then let's go forward with having him physically present. If someone happens between now and that June date that the jail or the prison decides it's not in the best interests of either the Defendant for his own personal safety or the officers and they refuse transport, then we'll have to deal with it when we get notice of it.

But it's my understanding right now they're not transporting prisoners whatsoever out of the NDOC to Las Vegas because of not Covid but because of other reasons. So, if that changes, counsel, and you need to get a hold of defense counsel immediately --

MS. PANDUKHT: I'll inquire.

THE COURT: -- and let them know you've been alerted by

the NDOC that they're not going to transport the Defendant.

MS. PANDUKHT: I'll inquire, Your Honor, and let you know if there's anything different. But we have them coming now.

THE COURT: They have them coming now, counsel, which I anticipate you wanted. Okay. Anything else?

MS. DEMONTE: No, Thank you, Your Honor.

MR. SPELMAN: No, Your Honor. Thank you very much for your time.

THE COURT: Thank you.

[Proceedings concluded at 12:05 p.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.

Patricia Slattery

PATRICIA SLATTERY
Court Transcriber

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6/9/2020 4:40 PM
Steven D. Grierson
CLERK OF THE COURT

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 MOTION FOR DISCOVERY

DAVID M. JONES
DISTRICT COURT JUDGE
DEPARTMENT XXIX

Petitioner Evaristo Garcia ("Petitioner") filed a motion for discovery on May 1, 2020. Following an opposition and a reply filed by the State and Petitioner, respectively, this Court held a hearing on the motion on June 2, 2020. After considering the papers and pleadings on file and counsels' oral arguments, the Court hereby DENIES the motion.

DISCUSSION

Once the district court sets an evidentiary hearing, NRS 34.780(2) permits the district court to allow for post-conviction discovery to occur. The party requesting discovery must show good cause for the requested discovery. NRS § 34.780(2). The Nevada Supreme Court has not provided the meaning of "good cause" as it relates to discovery in a post-conviction proceeding. Thus, this Court will look to the federal courts' definition of "good cause." Under Rule 6 Governing Section 2254, which is consistent with NRS 34.780, good cause exists where specific allegations provide reason to believe that, if the facts are fully developed, Petitioner may establish he is entitled to relief.

See Harris v. Nelson, 394 U.S. 286, 300 (1969). That rule does not permit a Petitioner to use discovery as a fishing expedition to investigate mere speculation. *Calderon v. U.S.D.C (Nicolaus)*, 98 F.3d 1102, 1106 (9th Cir. 1996).

Here, this Court set an evidentiary hearing on the writ of habeas corpus for June 26, 2020, and Petitioner moved for discovery. In his motion, Petitioner lists several entities—the Clark County District Attorney's Office (CCDA), the Clark County School District Police Department (CCSDPD), Las Vegas Metropolitan Police Department (LVMPD), and the Clark County School District—that he wishes to serve requests for admissions, requests for production, or subpoenas, and conduct depositions. Petitioner, however, fails to provide good cause for each of these requests.

The motion lists discoverable material that the Petitioner already has in his possession or his trial counsel had in his possession. For example, Petitioner requests leave to serve CCSDPD a request to produce video surveillance. CCSDPD provided video surveillance from the incident to LVMPD, who then provided it to the State. The State provided the video to Petitioner's trial counsel. Moreover, Petitioner failed to establish that discovery would provide information to fully develop Petitioner's *Brady* claim. The issue for the evidentiary hearing is whether the State possessed the CCSDPD report that allegedly contained exculpatory information thus constituting a *Brady* violation. Lastly, Petitioner's discovery request is a fishing expedition to investigate speculative claims, and this Court will not permit discovery to occur when it would allow Petitioner to search for potential, speculative claims.

Accordingly, this Court finds that Petitioner has not demonstrated good cause to permit post-conviction discovery to occur prior to the evidentiary hearing.

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IT IS HEREBY ORDERED the motion for discovery is DENIED

Dated June 9, 2020

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
Taleen Pandukht — Attorneys for Respondent

Susan M. Linn
Judicial Executive Assistant
Department XXIX

DECLARATION OF KATHY PEZDEK, PH.D.
IN THE MATTER OF *EVARISTO GARCIA v. DZURENDA*, NO. A-19-791171-W,
FEDERAL PUBLIC DEFENDER, DISTRICT OF NV

I, Kathy Pezdek, Ph.D., declare as follows:

1. I am Professor of Psychology at Claremont Graduate University, Claremont, California, where I have been on the faculty since 1981. My qualifications are detailed in the attached Vita. In brief, I received a B.S. in Psychology from the University of Virginia, Fredericksburg, in 1971; an M.A. in Psychology from the University of Massachusetts, Amherst, in 1972; and a Ph.D. in Psychology from the same institution in 1975. My specialty is cognitive science – that is, the study of perception, attention, and memory. My professional research has focused on human memory and factors that affect the accuracy of memory. I have conducted research and experiments relating to eyewitness memory, the suggestibility of memory, visual memory, autobiographical memory, and memory and comprehension. More specifically relevant to eyewitness memory, my research has directly examined memory processes that affect the accuracy of eyewitness identification and recall of event details. I teach graduate courses and conduct research on this topic as a Professor at Claremont Graduate University.

2. I am a Fellow of both the Association for Psychological Science (APS) and the Psychonomic Society, and my research has been funded by a number of federal grants. I recently received a three-year grant from the National Science Foundation's Program in Law and Social Sciences to study, "Cognitive Consequences of Viewing Body-Worn Camera Video Footage." Prior to that, I had a three-year grant from the National Institute of Justice, and another from the National Science Foundation's program in Law and Social Sciences. In addition, I serve as a scientific reviewer for the National Science Foundation and the National Institutes of Health. I serve on the Governing Board of the Society for

Applied Research in Memory and Cognition, an international group of researchers who address applied memory topics.

3. My research has been widely published, as indicated in the attached Vita. I have conducted numerous eyewitness memory experiments and have authored and co-authored numerous scholarly articles in peer-reviewed journals, as well as chapters in books and textbooks. I also regularly present my research at national and international professional conferences.

4. I also have served as an editor and reviewer of other scholarly works. From 1995 to 2000, I was Editor of the journal *Applied Cognitive Psychology*, and I am currently on the Editorial Board for several journals. In addition, I am an editorial reviewer for fourteen professional journals in my field, and have served as a textbook consultant and reviewer for four publishers.

5. This professional background in the area of cognitive science, with a specialty in eyewitness memory, has qualified me to testify as an expert witness on eyewitness memory in more than 300 cases, in federal and superior state courts, primarily in California but also in Arizona. Although there are thousands of experimental psychologists around the world, and hundreds who specialize in memory, relatively few have specialized in eyewitness memory. My professional background is directly relevant to the work that I do as an Expert Witness on Eyewitness Memory.

6. Counsel for Mr. Evaristo Garcia, Ms. Emma L. Smith, Assistant Federal Public Defender in the Las Vegas office of the Federal Public Defender, has asked me to (a) review materials related to the charges against Mr. Garcia, (b) describe the factors that affect the accuracy of eyewitness memory in general and those that specifically apply to Ms. Betty Graves's memory for the critical event in this case, (c) determine if any information in the

recently discovered incident report from the day of the critical event (or very soon thereafter) reveals any previously unknown critical information about Ms. Graves's memory for the shooter, (d) explain if there was other information relevant to the assessment of Ms. Graves's eyewitness account that could have been gathered at the time of the incident, and (e) determine whether Ms. Graves's current memory for this incident is reliable.

7. To perform these tasks, I have reviewed case materials related to the ability of the eyewitness in this case, Ms. Betty Graves, to (a) observe and remember the events at the time of the shooting and (b) identify the shooter. The materials provided to me by Ms. Emma Smith included:

- Las Vegas Metropolitan Police Officer's Report
- Handwritten voluntary statement of Betty Graves
- Voluntary statement of Betty Graves
- Handwritten and typewritten voluntary statements of Terell Burkley
- LV Metropolitan Police – CAD log
- Declaration of warrant/summons (Evaristo Garcia)
- Declaration of warrant/summons (Yobani Borradas, aka Giovanny Borradas, aka Giovanny Garcia)
- Declaration of warrant/summons (Manuel Anthony Lopez)
- Trial testimony of Danny Eichelberger
- Trial testimony of Betty Graves
- Records from Clark County School District Police Department received 11/26/2018

- Photos of 5 suspects reportedly shown to Ms. Graves in a sequential lineup
- State's trial exhibits 50 – 51, photo of Giovanni Garcia
- State trial exhibit 58, photo of Manuel Lopez
- State's trial exhibit 111, Garcia booking photo
- State's trial exhibits 1 – 2, aerial maps
- State's trial exhibit 3, crime scene diagram
- Google maps of school
- Declaration of Betty Graves
- Evaristo Garcia Clark County School District Enrollment History
- Roadmap of records and chart of statements generated by Federal Public Defender

RESEARCH ON EYEWITNESS MEMORY

8. A common impression that people have regarding how memory works is wrong. Memory does not work like a camera or video recorder. People do not sit and passively take in information, recording it the way a video camera would. Rather, we take in information in bits and pieces, from different sources, at different times, interpret the information, and integrate these pieces to form a unified impression. And, in fact, much of what is retained in memory for an event is actually information about the event – true or false – that was ascertained after the event, that is, post-event information. When eyewitnesses talk to each other ("witness cross-talk") and are interviewed multiple times, this provides a salient form of post-event information that is likely to suggestively influence their memory. The "memory as camera" model implies that when describing an event, an

eyewitness simply "plays back" their film of the event and "reads off of the film" the details of the event. This commonly held "memory as camera model" of memory is an incorrect myth and far too simple.

9. ***Another myth that people frequently hold is the belief that memory gets better with the passage of time once the eyewitness has had time to ruminate about the event. In fact, an abundance of scientific research has shown just the opposite; the accuracy of memory clearly declines with the passage of time.*** Earlier descriptions are more likely to be correct, which is one of the reasons why Ms. Graves's memory documented in the incident report from the day of the incident (or soon thereafter) is so critical.

10. Eyewitness memory relies on brain systems for visual perception and memory, and these systems are affected by specific eyewitness factors. As a framework for conceptualizing eyewitness memory, cognitive psychologists consider three phases to this process: (a) the perception or encoding phase, (b) the storage phase, and (c) the identification or test phase.

11. The **perception or encoding phase** occurs at the time that a witness is actually watching an event, taking into their memory information about the event. The basic issue in the perception phase is the question of how clearly each eyewitness actually saw what happened to begin with. In the present case, there are multiple factors likely to have contributed to the accuracy of encoding the perpetrator in the encoding phase.

12. The second stage of memory is the **storage phase**. This is the long-term retention of information after encoding. At this stage, memory is affected primarily by the passage of time since the original observation, as well as by possible sources of post-event suggestion. Post-event suggestion occurs when relevant information ascertained after an event becomes incorporated into an eyewitness's memory thereby contaminating their

original memory. This post-event information is likely to alter the original memory for the event, permanently contaminating it.

13. The third stage of memory is the **identification or test phase**. Accurate or inaccurate recall or recognition occur at the time that an eyewitness's memory is tested. This includes when the eyewitness is asked to describe her memory for an event or is presented faces and asked if she can identify anyone. Many factors come into play that affect the accuracy in the identification or test phase. The major factors that may lead to inaccurate identification at the identification phase are (a) whether best practices were followed by law enforcement in assessing the eyewitness identification accuracy and (b) the extent to which the identification procedure may have been contaminated by suggestive sources. In a recent review of eyewitness identification research, the National Academy of Sciences summarized the best practices for the law enforcement community regarding how to assess eyewitness identifications.[1] When these best practices are followed, eyewitness evidence is more likely to be valid than when these best practices are not followed. Reducing witness cross-talk also reduces memory contamination.

14. The above discussion offers a general framework for the cognitive processes related to eyewitness memory and identification. The accuracy of the memory for any event depends on the conditions of perception, storage, and identification. Also, it is important to consider that these three stages are related to each other. In other words, if an event is not

[1] *Identifying the Culprit: Assessing Eyewitness Identification* (2014). National Research Council of the National Academies. The National Academies Press, Washington, D.C. Available free online: http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification.

well perceived, it will not be stored in memory accurately and will not be accurately recalled (i.e., "garbage in, garbage out").

MEMORY FACTORS RELEVANT TO *GARCIA v. DZURENDA*

15. On the basis of the research described herein and on my review of the materials listed above, I have identified eleven factors in this case that affect the reliability of Ms. Graves's description of the shooter, the reliability of her exclusions of alternative suspects, and the reliability of her description of the events that transpired at the time of the shooting.

16. In the discussion below, I set forth the research findings relevant to Ms. Betty Graves's memory for the events that transpired on the evening of the shooting and her ability to describe and identify the shooter accurately. ***It is important to recognize that the assessment put forth herein relates both to Ms. Graves's ability to accurately describe the shooter and her ability to reject Mr. Giovanny Garcia[2] as the shooter. Because her memory of the shooter and the events that evening were weak and contaminated, neither of these identifications is reliable.***

17. As described in greater detail below, I have identified eleven factors relevant to Ms. Graves's eyewitness memory and testimony. These factors are known to negatively impact the accuracy of both memory of the event and memory of the perpetrator. As discussed further below, for five of the factors, although they were certainly present in this case, additional information, which was not gathered during the initial investigation, would have clarified the full extent to which they impaired the accuracy of Ms. Graves's memory. ***It is also important to note that the role of these eleven factors was well known in the***

[2] The record shows various spellings and names for Giovanny Garcia. His name has appeared as "Giovanni" and "Yovani Borradas." This report refers to this individual as "Giovanny Garcia" or just "Giovanny."

scientific literature both at the time of the shooting in 2006 and at the time of Mr. Garcia's trial in 2013.

18. The most relevant eyewitness factors in this case are the following:

A. Exposure Duration

B. Distraction

C. Distance and Lighting

D. Weapon Focus (right hand in pocket)

E. Cross-Race Identification

F. Disguise (hood)

G. Familiarity of the Perpetrator

H. Stress

I. Time Delay

J. Memory as a Reconstructive Process

K. Post-Event Contamination (Witness Cross-Talk)

A brief review of the research literature on these eleven memory factors follows with a discussion of how each specific factor applies to the accuracy of the eyewitness memory of Ms. Graves. The research discussed below is empirical scientific research published in peer-reviewed journals, the gold standard of scientific research. In addition, where available, the results of relevant meta-analyses are also included. A meta-analysis is a statistical synthesis of results reported across all of the studies conducted on a specific topic. Typically, meta-analyses involve effect-size analyses expressed in *d* units (i.e., the difference in means between conditions divided by the standard deviation). This measure conveys the size of the effect of any variable measured across multiple studies. Meta-

analyses allow researchers to draw conclusions that are likely to be more generalizable than those drawn from any single study.

A. Exposure Duration

19. Exposure duration, that is, the time spent observing a perpetrator's face during a crime, is significantly correlated with eyewitness identification accuracy. To identify a person accurately, one must observe the person's general characteristics as well as the specific features of the person's face, such as face shape, cheek bones, jaw, eyes, nose, mouth, and hair line and the relationship among these features. Faces viewed for seconds, even with multiple brief glances, are less likely to be correctly recognized than faces viewed for longer durations, and longer durations without interruption.[3] Studies dating back to the early 1970s have demonstrated that longer exposure times produce higher rates of accurate identifications and lower rates of misidentifications.[4] Further, when initial identifications are from a photograph or a photographic line-up, it is most important to consider what had been the exposure duration *to the face of the perpetrator*.

20. In Mr. Garcia's case, based on Ms. Grave's description of the incident, she would have had only a brief opportunity to look at this suspect's face. In her description on the day of the incident, Ms. Graves said that within a short period of time (1) she was standing out in front of the school waiting for the bell to ring, (2) she saw about 20 people (not students)

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[3] Shapiro, P.N. & Steve Penrod, S. (1986). Meta-Analysis of Facial Identification Studies, *Psychological Bulletin 100*, 139; Memon, A., Hope, L., & Bull, R. (2003). Exposure duration: Effects on eyewitness accuracy and confidence. *British Journal of Psychology. 94*, 339-54.

[4] Laughery, K.R., J.E. Alexander, and A.B. Lane (1971). Recognition of human faces: effects of target exposure time, target position, pose position, and type of photograph, *Journal of Applied Psychology, 55*, 477; Bornstein, B. H., Deffenbacher, K. A., Penrod, S. D., & McGorty, E. K. (2012). Effects of exposure time and cognitive operations on facial identification accuracy: A meta-analysis of two variables associated with initial memory strength. *Psychology, Crime & Law*, *18*(5), 473-490.

in the parking lot, (3) Terell Burkley, the other campus monitor, asked them to leave but they did not, (4) the bell rang and students exited, (5) a fight started, (6) Ms. Graves called the principal, (7) the principal came out and tried to disperse the students, (8) she saw a youth with his right hand in his pocket swinging his left hand, then (9) the shooting occurred. It does not appear that she was ever asked how much time she had to look at the suspect's face, but given the circumstances, and everything else that was going on as explained above and in the next section, she was not likely looking at this man's face for more than a few seconds.

B. Distraction

21. When an event occurs unexpectedly and very quickly, to the extent that an eyewitness is looking elsewhere and not at the target event, they are perceiving limited information about the target event. It is important to recognize that because of the way the visual system works, an observer cannot simultaneously have more than one focal point at a time. An observer can switch attention from one focal point to another, but at any time, only one focal point can be seen in specific detail; events in the observer's peripheral vision cannot be in focus and seen in detail. The research suggests that memory errors are more likely under these circumstances. The effect of distraction has been well-documented for a range of cognitive performance tasks,[5] including, in a classic study by Treisman (1964), attentional processing.[6] In a relevant study that more specifically pertained to eyewitness perception and memory, Clifford and Hollins (1981) demonstrated that when eyewitnesses

[5] Craik, F. I. M. (2014). Effects of distraction on memory and cognition: A commentary. *Frontiers in Psychology*, *5*, 841. http://doi.org/10.3389/fpsyg.2014.00841

[6] Treisman A. M. (1964). Verbal cues, language, and meaning in selective attention. *American Journal of Psychology*. *77*, 206–219.

observe an event, as the number of perpetrators observed increased, the accuracy of memory for the event decreased.[7]

22. In Mr. Garcia's case, Ms. Graves was working as a campus monitor and was watching as school let out; students were leaving the building and going out into the parking lot. In her statement to the Las Vegas Metropolitan Police Department, she said that she "saw about 20 young men and women standing in the parking lot." During this time, she was also interacting with Terell Burkley, the other campus monitor, and calling the principal, Danny Eichelberger, on her two-way radio. In his trial testimony (page 96), the principal, Mr. Eichelberger said, "As I walked out, in my vision, my line of vision, the whole area, this whole parking lot area was just total mayhem in a sense of, like, multiple people fighting. And I really couldn't get a handle on what's going on. Just most, most people I've seen fighting in one area in my lifetime." It is unlikely that Ms. Graves observed this event clearly or saw the shooter clearly, thus rendering her memory unreliable.

C. Distance and Lighting

23. Much research suggests that people perceive faces less accurately and with less certainty when the lighting is less than optimal.[8] Poor lighting especially obscures encoding of the type of physical details necessary for differentiating among similar looking people, although more global information (gender, race, size, clothing, etc.) would not as likely be affected by this factor.

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7 Clifford, B.R. & Hollins, C.R. (1981). Effects of the type of incident and the number of perpetrators on eyewitness memory. *Journal of Applied Psychology, 66*, 364-370.

8 Loftus, G.R., (1985). Picture perception: Effects of luminance on available information and information-extraction rate. *Journal of Experimental Psychology: General.* 114(3): 342-56.

24. In Mr. Garcia's case, Ms. Graves said that initially, this suspect was standing just 1½ feet in front of her. However, this is an unusually close distance, so likely she has estimated this distance incorrectly. This suspect then ran away from the school across the parking lot and was much farther away from her at the time of the shooting. In terms of lighting, this incident occurred at 8:40 in the evening in February, which is well after sunset. It is not clear what lighting was available to illuminate the shooter's face at any time during this incident, and it does not appear that anyone asked about this.

D. Weapon Focus (Right Hand in Pocket)

25. Weapon focus is a particularly strong source of distraction. Research suggests that when a weapon is present during a crime, witnesses tend to focus their attention on the weapon and not on the face of the person holding the weapon. This results in (a) increased stress and (b) even less time available to focus on the face of the suspect holding the weapon. In one important study on this topic by Loftus, Loftus, and Messo (1987),[9] participants viewed a slide sequence presenting an interaction between two individuals with the individuals passing either a check or a gun between them. First, an eye movement recording device indicated that participants spent more time looking at the gun than the check. But more important, in a subsequent photographic lineup, participants were more accurate recognizing the individuals in the check than the gun condition. A meta-analysis of 19 published studies on weapon focus corroborated these findings.[10] In a subsequent meta-

[9] Loftus, E. F., Loftus, G.E., Messo, J., (1987). Some facts about "weapon focus." *Law and Human Behavior*, Vol 11(1), 55-62.

[10] Steblay, N. M. (1992). A meta-analytic review of the weapon focus effect. Law and Human Behavior, Vol 16 (4), 413-424.

analysis it was reported that a larger effect of a weapon was observed in threatening than nonthreatening situations, and at shorter rather than longer exposure durations.[11]

26. In Mr. Garcia's case, Ms. Graves did not ever see the gun, but saw that the suspect she focused on had his right hand in the front pocket of his hoodie. She was focused on his pocket. We know that she assumed that this suspect had a gun in his right hand because she testified at the trial (page 124) that she told the other school monitor, Terell Burkley, "the young man has a gun." Therefore, Ms. Graves's focus was not on this suspect's face, but on his hand.

E. Cross-Race Identification

27. A significant number of scientifically valid research studies have reported that individuals are more accurate identifying faces of their own race than faces of another race, a phenomenon known as the cross-race effect (CRE) or own-race bias.[12] In a meta-analysis by Meissner and Brigham,[13] the CRE was verified as a robust construct (effect size, d = .30); individuals were 1.4 times more likely to identify correctly a previously seen face if it was a same-race face than a cross-race face, and false alarm rates for new faces were 1.56 times greater for cross-race than same-race faces. Further, in terms of real-world data, the Innocence Project has reported that of the 75% of wrongful conviction cases involving eyewitness memory, in at least 40% of these misidentifications the victim and perpetrator

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[11] Fawcett, J.M., Russell, E.J., Peace, K.A., & Christie, J. (2013). Of guns and geese: A meta-analytic review of the 'weapon-focus' literature. *Psychology, Crime, & Law, 19* (1). 35-66.

[12] Malpass, R. S. & Kravitz, J. (1969). Recognition for faces of own and other race. *Journal of Personality and Social Psychology, 13*, 330-334.

[13] Meissner, C. A. & Brigham, J. (2001). Thirty years of investigating the own-race bias in memory for faces: A meta-analytic review. *Psychology, Public Policy, and Law, 7*(1), 3-35.

were of different races.[14] The cross-race effect applies as well to individuals who live in mixed-race neighborhoods and have daily experience with other race people.

28. In Mr. Garcia's case, the suspect was *Hispanic*; Ms. Graves is *African-American*. This was a cross-race case, the type most prone to misidentification error.

F. Disguise (Hood)

29. Misidentifications are more likely when the individual observed has some portion of his head covered when he is observed, especially if the covering is to the top portion of the head, such as a hood or hat. In an experimental test of the effect of a wearing a cap on identification, Cutler, Penrod and Martens (1987)[15] had participants view a videotape of a robbery in a liquor store. In the video, the perpetrator either wore a cap, or not. Later participants' memory for the perpetrator was tested. In the no cap condition, 45% of the participants identified the correct individual. In the cap condition, only 27% of the participants identified the correct individual. This finding suggests that the information in the top of a person's face – forehead, hairline, hair – is especially important for recognizing the person. When this portion of a person's face is covered, for example by a cap, misidentifications are more likely.

30. In Mr. Garcia's case, Ms. Graves first said that this suspect was wearing a grey hoodie but that his hood was not up. However, at the trial she testified (page 126) that, "like the hoody hood was on his head." If the hood had been pulled up on his head, this would have impaired any witness's ability to see his whole face and head.

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[14] http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php

[15] Cutler, B.L., Penrod, S.D., & Martens, T.K. (1987) Improving the reliability of eyewitness identifications: Putting context into context. *Journal of Applied Psychology, 72*, 629-637.

G. Familiarity of the Perpetrator

31. Familiar people are more likely to be correctly identified than strangers. Correct identification basically requires (a) forming an accurate memory for a face at the time that the face is observed and then (b) recognizing that face later. Whereas both of these two steps need to occur to identify a stranger, the first step in this process has already occurred for a familiar person.

32. In Mr. Garcia's case, Ms. Graves said that she had never seen this suspect before; he was not familiar to her. Curiously though, when Ms. Graves viewed Mr. Garcia's photo in the photo sequence shown to her some time prior to the trial, she did not recognize him as the shooter but wrote, "attend Sunset. Was hanging with kids doing wrong things…" Mr. Garcia did not attend Morris Sunset Academy. She therefore mistook him for someone else. Similarly, when Ms. Graves viewed Giovanny's photograph, she said that she knew him as a student at the school and that he was not the shooter. The precise type of memory error that led Ms. Graves to erroneously recognize Mr. Garcia as a student in the school would also undermine the credibility of her rejection of Mr. Giovanny as the shooter.

H. Stress

33. Numerous recent studies have reported that memory is impaired by high levels of stress. In one typical line of research on this topic, Morgan and his colleagues assessed eyewitness identification accuracy in 519 active-duty military personnel enrolled in military survival school training. The participants observed an interrogator for 40-minutes under high and low stress conditions and then were tested 24-hours later. Consistent across all

measures, recognition was *less accurate* in the high than the low stress condition.[16] Consistent with this finding, a meta-analysis of the effect of high stress on eyewitness memory also reported that heightened stress impairs memory.[17]

34. In Mr. Garcia's case, clearly Ms. Graves and the other witnesses were under a high level of stress when they observed "mayhem" surrounding a shooting in the school parking lot and suspected that one of the participants had a gun in his pocket.

J. Time Delay

35. One of the oldest findings in psychology is the fact that memory declines with the passage of time. In 1885, psychologist Hermann Ebbinghaus tested his memory on lists of items he presented to himself. He initially learned each list to the point that he was able to recall the list, in order, two times without error. He subsequently tested his retention by recalling these lists at various time delays: 20 minutes; 1 hour; 9 hours; and up to 31 days. He discovered that his memory faded over the first 24 hours and that reliability of recall declined to the 31st day. This finding is referred to as "Ebbinghaus' Forgetting Curve." In a number of studies, it has been reported that after a significant time delay, (a) the probability of correctly identifying a perpetrator decreases, and (b) the probability of incorrectly identifying someone who was not the perpetrator increases.[18]

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[16] Morgan, C. A. III, et al. (2004). Accuracy of eyewitness memory for persons encountered during exposure to highly intense stress. *International Journal of Law and Psychiatry. 27*, 265-279.

[17] Deffenbacher, K.A., Bornstein, B.H., Penrod, S.D., & McGorty, E.K. (2004). A meta-analytic review of the effects of high stress on eyewitness memory. *Law & Human Behavior. 28* (6), 687-706.

[18] Chance, J.E. & Goldstein, A.G. (1987). Retention interval and face recognition: Response latency measures, *Bulletin of the Psychonomic Society 25*, 415 (1987); J. Dysart and R. C. L. Lindsay, "The Effects of Delay on Eyewitness Identification Accuracy: Should We Be Concerned?" in *The Handbook of Eyewitness Psychology: Volume II: Memory for*

36. Further, in a meta-analysis of published face recognition and eyewitness identification studies, it was reported – consistent with Ebbinghaus's findings – that as the time delay between observing a person and identifying the person increased, the probability of a correct identification decreased and the probability of a misidentification increased, and further, the rate of forgetting was greatest soon after the initial observation.[19]

37. In Mr. Garcia's case, Ms. Graves's earlier descriptions of the shooter closer in time to the event are more likely to be correct. This is why Ms. Graves's description in the Clark County School District Police Department incident report from the day of the incident is so critical. There she described the shooter as a dark skin Hispanic male with short hair. She further said that the suspect had a moustache and was of medium build and approximately 5' 7".

38. And, relevant to the facts of this case, research studies have concluded that eyewitness memory for a face that was not carefully perceived initially declines more quickly over time than memory for a face that was initially perceived in greater detail. This memory principle is called Jost's Law.[20] This is certainly relevant to Mr. Garcia's case given that Ms. Graves and the other witnesses each observed the suspect only very briefly with a great deal of distraction. This original weak memory is precisely the type that decays more quickly from memory. ***This is a major reason why Ms. Graves's early descriptions of the***

People, ed. R. C. L. Lindsay, D. F. Ross, J. D. Read, and M. P. Toglia. (Mahwah: Lawrence Erlbaum and Associates, 2006), 361–373.

[19] Deffenbacher, K.A., Bornstein, B.H., McGorty, & E.K. Penrod, S.D. (2004). Forgetting the once-seen face: Estimating the strength of an eyewitness's memory representation. *Journal of Experimental Psychology: Applied. 14* (2), 139-150.

[20] Youtz, A. C. (1941). An experimental evaluation of Jost's laws. *Psychological Monographs, 53*(1, Whole No. 238).

shooting and the shooter are important; they are more likely to be accurate than her later descriptions.

K. Memory as a Reconstructive Process

39. In keeping with the notion that memory does not work like a camera, with an original event preserved in memory in a form that is an analogue record of the event, memory for events is typically constructed and then reconstructed over time. In the reconstruction process, people try to make sense of an event by applying hindsight and remembering the sequence of events that probably occurred, even if this is not what was observed. This explains why recalled details of an original event, close in time to the event, are often different from details of the reconstructed event recalled later. In ruminating about an event afterward, people try to make sense of what happened and then remember the event as if it occurred this way, even if it did not. ***This is another reason why Ms. Betty Graves's early descriptions of the shooting and the shooter are important—because the scientific literature demonstrates that earlier descriptions are more likely to be accurate than later descriptions.*** A comparison of Ms. Graves's descriptions is laid out below.

40. In a relevant study, I researched memory for the events of September 11, 2001.[21] People across the country, even people from lower Manhattan who lived through the events first hand in real time, experienced the events as a disjointed sequence of terrifying and incomprehensible incidents. It took some time for people to realize that the events of September 11 constituted a coordinated terrorists' attack. When people experience an unexpected event that unfolds as a disjointed and chaotic sequence, they cognitively seek to make sense of the event – to integrate the details into a story – and then construct their

[21] Pezdek, K. (2003). Event memory and autobiographical memory for the events of September 11, 2001. *Applied Cognitive Psychology, 17,* 1033-1045.

memory around this cohesive story. Memory is thus constructed, and reconstructed, and not simply recorded. This constructive process can also serve to distort an eyewitness's original memory for an event.

41. In this process, memories are reconstructed from information actually observed, as well as information inferred from other sources. This includes conversations with other witnesses and self-rumination motivated by the need to make sense of the event.[22] In addition, people use schemas to comprehend events and consequently remember along with the event experienced, the embellishments and inferences that they derived from the schema. Although this constructive characteristic of memory aids in our comprehension, it is often the basis for memory flaws and distortions.[23]

42. In Mr. Garcia's case, there are several examples suggesting that Ms. Graves's memory was reconstructed over time. First, in her initial statements close in time to the incident, Ms. Graves never said that she singled out the suspect, focused on him, or even saw him standing up close to her before the fight broke out. However, she testified at the trial in 2013 (page 123) that, "the guy that was standing in front of me, it was so strange because he wouldn't move." She then added, "he was the strangest looking young man because he was standing right in front me and he had on a gray hoody, and all the time he's standing there, he had his right hand in his pocket. And he was just standing there, and he wouldn't move." In reconstructing memory for an event, a witness frequently makes the suspect more prominent and memorable than he actually was, and confabulates details to

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[22] Pezdek, K. (2008). Post-Event information. In B. L. Cutler (Ed.) *Encyclopedia of psychology and law* (pp. 607-609), Thousand Oaks, CA: SAGE Publications.

[23] Holst, V. F., & Pezdek, K. (1992). Scripts for typical crimes and their effects on memory for eyewitness testimony. *Applied Cognitive Psychology, 6*(7), 573-587. doi:10.1002/acp.2350060702

bolster this memory. Another example of this would be Ms. Graves's statement at the trial (p. 125), "But the whole time I got my eye on this one boy, I don't know why, I guess by the grace of God, I'm watching this one young man, and I see him run north across the parking lot." Because Ms. Graves did not present this characterization of the event where she focused on a suspicious youth initially, but only seven years after the event, it likely reflects her reconstruction of the event and not her original perceptions.

L. Post-Event Contamination (Witness Cross-Talk)

43. Also consistent with the notion that memory is a reconstructive process and does not work like a camera, relevant information perceived subsequent to an event can contaminate the original memory for the incident. In several studies it has been reported that event memory and person memory can be influenced by post-event information.[24] Witness cross-talk is a common form of post-event contamination. Eyewitnesses, hearing the descriptions of other eyewitnesses, are likely to incorporate into their own memory, information – true or false information – that was part of the other person's perception but not their own. This is by definition, contamination of eyewitness evidence. Through witness cross-talk, missing pieces in otherwise vague memories can be filled in.

44. In Mr. Garcia's case, knowing the extent to which Ms. Graves talked with other eyewitnesses to the shooting, both initially and at any time prior to the 2013 trial, would have made clear the extent to which her account was contaminated by others' descriptions. Unfortunately, it does not appear that anyone asked her about her discussions with other witnesses and documented her response. However, in light of the fact that she continued to work at the school after the shooting, and she worked with Terell Burkley, who served as

[24] Pezdek, K. & Blandón-Gitlin, I. (2005). When is an intervening lineup most likely to affect eyewitness identification accuracy? *Legal and Criminological Psychology*, *10*(2), 247-263.

campus monitor with her, and Mr. Eichelberger, the principal, it would have been normal behavior for her to have had frequent conversations about the shooting with both men, and perhaps with other witnesses as well.

45. Further, the relevant scientific research indicates that post-event contamination is an unconscious process, and suggested details are as permanent in memory as details actually observed. Finally, people are more likely to be suggestively influenced when they did not see the initial event very carefully to begin with, and they become more suggestible with the passage of time from the initial event. Both of these conditions were operative in Mr. Garcia's case. ***This is why the recently discovered report is so critically important; it documents her original perceptions and memories before they were contaminated.***

INFORMATION IN THE NEWLY DISCOVERED REPORT IS RELEVANT TO UNDERSTANDING MS. GRAVES'S MEMORY

46. **What in the recently discovered incident report from the Clark County School District Police Department raises concerns about the reliability of Ms. Graves's memory for the appearance of the shooter and the event that ended in the shooting of the victim**? Strong memories tend to be consistently recalled over time; weak memories tend to be more inconsistently recalled over time. Several of the details in the incident report are inconsistent with details that Ms. Graves used to describe the suspect later and at the trial, suggesting that her memory was weak.

- Ms. Graves described the suspect as having a (medium build" in the incident report but described him as "heavy set" at the trial (page 126).
- Ms. Graves described the suspect as having a moustache in the incident report but not thereafter.

- Ms. Graves described the suspect as a "dark skin Hispanic male" in the incident report but did not mention dark skin thereafter.
- Ms. Graves described the suspect at trial (page 123) saying, "he was the strangest looking young man" but did not say this at any time prior.

Memory inconsistencies by an eyewitness reflect that the eyewitness's initial perception and memory were likely to have been weak, hazy and unclear. The inconsistencies noted in this case are important because they suggest exactly this, that Ms. Graves's initial memory was weak and thus more likely to have been susceptible to decay over time and contamination by post-event information. The information in the recently discovered documents was therefore important for accurately assessing Ms. Graves's testimony.

47. The above factors are also relevant to assessing the credibility of Ms. Graves's rejection of Giovanny Garcia as the shooter. If she never saw the shooter clearly to begin with, her ability to match her perception of the shooter with any other suspect – whether to confirm a match or, in the case of Giovanny Garcia, to disconfirm a match – would be dubious.

OTHER IMPORTANT INFORMATION RELEVANT TO MS. GRAVES'S EYEWITNESS ACCOUNT COULD HAVE BEEN GATHERED AT THE TIME OF THE INCIDENT

48. As explained above, eleven factors that impact Ms. Graves's memory are present in this case. For some of the factors, information that would elucidate the extent to which those factors impacted her account was not gathered close in time to the shooting, when it would have been appropriate to do so. This information could have been obtained on the day of the shooting, or shortly thereafter, had the investigating officers more

thoroughly questioned Ms. Graves and other witnesses. They did not. The factors for which more information would have been available are:

- **Exposure Duration** – Regarding the youth who Ms. Graves assumed was the shooter, how long could she observe him and how much of this time was direct face-to-face contact? Again, once he turned and ran away from her, did she ever lose eye contact with him?
- **Lighting** – What was the available lighting that would have illuminated the suspect's face during the time that Ms. Graves may have had face-to-face contact with him? After all, this incident did occur in the evening at about 8:40 pm in February, which is well after sunset.
- **Disguise** – At the trial, Ms. Graves testified that the suspect had the hood of his sweatshirt up over his head. We do not know how much of his head and face were covered by the hood. Was the hood forward on his head covering some of the top and sides of his face or was it on the back of his head? Ms. Graves was never asked this.
- **Familiarity** – Ms. Graves said that she knew Giovanny Garcia from the school and that he was not the shooter. How familiar was she with Giovanny? How well did she know Giovanny? What was the nature of their prior contact at the school and over what period of time?
- **Witness-Cross Talk** – In this case, Ms. Graves's memory could have been based not only on her own perceptions, but on conversations with other eyewitnesses. Although we can assume that she likely did so, there is no information in the case record about whether and how frequently Ms. Graves talked about this incident with her colleagues at the school,

Terell Burkley and Danny Eichelberger, or any other eyewitnesses to the shooting.

MS. GRAVES'S CURRENT MEMORY OF THE EVENTS IS NOT RELIABLE

49. Repeating what was said above, there are two reasons why missing information can no longer be determined simply by asking Ms. Graves. First, the accuracy of memory decays with the passage of time. Once information fades from memory, it is gone and cannot be reinstated, especially now, 14-years after the shooting. Research on this point is reviewed in Chapter 5 of the attached 2014 report of the National Research Council of the National Academies.[25] Second, memory becomes contaminated over time by post-event information. Specifically, witness-cross talk and rumination introduce into an eyewitness's memory information that they only learned after the event, and this contaminating post-event information is as permanent in memory as details actually observed. Once contaminated, the bell cannot be unrung.

SUMMARY AND CONCLUSIONS

50. This declaration offers scientific evidence concerning the fallibility of eyewitness evidence in general and in the case of *Garcia v, Dzurenda* in particular. Mr. Garcia's case is replete with factors that would have distorted Ms. Graves's perception of what transpired during the shooting and reduced the likelihood of an accurate description of the shooter and the event itself. Based on the eleven memory factors reviewed above, it appears that Ms. Graves observed both the person she believed was the shooter and the

[25] *Identifying the Culprit: Assessing Eyewitness Identification* (2014). National Research Council of the National Academies. The National Academies Press, Washington, D.C. Available free online: http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification.

event under dubious circumstances known to be unfavorable to producing an accurate memory.

51. However, it is not even clear that the shooter was the same person who initially stood in front of Ms. Graves outside of the school. We do not know from the record in this case for how long Ms. Graves lost eye contact with suspect between the time that he stood in front of her near the school until when the shooting occurred. Ms. Graves did not see the shooting itself, so she lost eye contact with this suspect after she first saw him. However, it is not known for how long she lost eye contact. Therefore, she may simply be assuming that this was the shooter, an assumption that could be true or false. There is no information in the case materials documenting that Ms. Graves was ever asked if she ever lost eye contact with this suspect. In fact, at the trial (page 127), Ms. Graves was asked, "Okay. And who, based on what you saw and heard, do you think was shooting?" She answered: "The same young man, because I seen him run up Washington and, I mean, he wouldn't have been running if he, you know." She was clearly speculating about who the shooter was because she did not see the shooter firing the gun.

52. It is important to note that several research studies have indicated that the role of the identified factors in affecting eyewitness identification accuracy is not usually known by individuals serving on a jury without the assistance of an expert witness. For example, in several research studies, mock jurors were presented a video of an armed robbery trial in which the eyewitness evidence was strong or weak. The testimony of an expert on eyewitness identification was included or not included. It was reported that following eyewitness expert testimony, juror's verdicts and ratings of the eyewitness's accuracy were significantly higher under conditions typically associated with higher identification accuracy. This suggests that the eyewitness expert testimony increased *eyewitness*

sensitivity to (not simply eyewitness skepticism of) factors that affect the accuracy of eyewitness memory and identification.[26]

53. In the absence of eyewitness expert testimony, the primary vehicle available to educate the jury about the reliability of eyewitness evidence is jury instructions such as so-called *Telfaire* instructions, named for a federal case addressing them.[27] Nonetheless, several studies have concluded that jurors often misunderstand jury instructions by judges.[28] Greene (1988) reported that unlike eyewitness expert testimony, *Telfaire* instructions increased jurors' skepticism but not their sensitivity to the accuracy of eyewitness evidence.[29]

54. In sum, it is my professional opinion that the eleven above-specified factors cast significant doubt on the reliability of Ms. Graves's memory for the events in this case. These factors impact the perception or encoding phase, the storage phase, and the identification or test phase of Ms. Graves's memory. She observed who she believed to be the shooter only briefly, amid a chaotic, evening scene where dozens of youths were fighting each other. Instead of focusing on the face of who she believed was the suspect, she was distracted by

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[26] Cutler, B. L., Dexter, H. R., & Penrod, S. D. (1990). Nonadversarial methods for sensitizing jurors to eyewitness evidence. *Journal of Applied Social Psychology, 20*, 1197 – 1207; Cutler, B. L., Dexter, H. R., & Penrod, S. D. (1989). Expert testimony and jury decision making: An empirical analysis. *Behavioral Sciences and the Law, 7*, 215-225.

[27] In *United States v. Telfaire*, 469 F.2d 552, 557-60 (D.C. Cir. 1972), a circuit court created a model identification instruction to deal with shortcomings in the identification process that highlights four key factors, including: (1) whether the "witness had the capacity and an adequate opportunity to observe the offender"; (2) whether "the identification made by the witness subsequent to the offense was the product of his own recollection"; (3) whether the witness made an inconsistent identification; and (4) the credibility of the witness.

[28] Glassman, I. P., Deckelbaum, J., & Cutler, B. L. (1989) Improving juror understanding for intervening causation instructions. *Forensic Reports, 2*, 173-189.

[29] Greene, E. (1988). Judge's instructions on eyewitness testimony: Evaluation and revision. *Journal of Applied Social Psychology, 18*, 151-276.

her assumption that he had a gun in his pocket. Additionally, he was a different race than Ms. Graves, potentially had his head covered by a hood, and her degree of familiarity with the suspect is unknown. Moreover, Ms. Graves's description changed over time and her trial testimony was seven years after the incident, diminishing its reliability. Ms. Graves's ability to accurately identify or exclude a suspect, whether shortly after the shooting or years later, was significantly diminished by these factors.

55. This is made clear by the recently discovered incident report, which was not known to the jury and describes her earliest known description of the shooter. In my professional opinion, the information in this report would have been significant to understanding the unreliability of her eyewitness testimony because several of the details in the incident report are inconsistent with details that Ms. Graves used to describe the suspect later and at the trial. These inconsistences confirm that her memory of the shooter was weak from the beginning. Therefore, my conclusion in this case is that the new evidence presented confirms that Ms. Graves's description of the shooter, and her ruling out Giovanny Garcia as the shooter, are both unreliable. Yet without the suppressed report, the jury was not aware of this critical information that informed my conclusions herein.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of California on June 9, 2020.

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EDUCATION

- Ph.D., Psychology, University of Massachusetts, Amherst, 1975
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- B.S., Psychology, University of Virginia, Fredericksburg, 1971

PROFESSIONAL ASSOCIATIONS

- Association for Psychological Science, Elected APS Fellow, 1999;
  APS Fellows Committee, 2014 – 2017
- The Psychonomic Society, Elected Fellow
  Society of Women in Cognitive Science, 2016 Outstanding Mentor Award
- American Psychology - Law Society, APA Division 41
- Society for Applied Research in Memory and Cognition;
  President, 2000-2006
  Elected Governing Board Member, 1994-present
  Publications Committee Chair, 2009 - 2013

EDITORIAL EXPERIENCE

- North American Editor of *Applied Cognitive Psychology* (1995-2000)
- Member of the Editorial Board for:
  - *Journal of Applied Psychology* (2002 – 2009)
  - *Journal of Applied Research in Memory & Cognition* (2011 – 2015, 2017 - 2019)
  - *Legal and Criminological Psychology* (2005 - present)
  - *Journal of Trauma & Dissociation* (2014 - present)
  - *Applied Cognitive Psychology* (1993 - 2011)
  - *Child Development* (1984-1985), (1987-1991)

GENERAL RESEARCH INTERESTS

Eyewitness Memory
Suggestibility of Memory
Visual Memory
Autobiographical Memory
Memory and Comprehension

GENERAL TEACHING INTERESTS

Statistics
Memory
Psychology & Law
Applied Cognitive Psychology
Research Design and Methodology

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Factors Related to the Accuracy of Eyewitness Memory
In the Matter of Evaristo Garcia v. Dzurenda

1. Exposure Duration

2. Distraction

3. Distance and Lighting

4. Weapon Focus (right hand in pocket)

5. Cross-Race Identification

6. Disguise (hood)

7. Familiarity of the Perpetrator

8. Stress

9. Time Delay

10. Memory as a Reconstructive Process

11. Post-Event Contamination (Witness Cross-Talk)

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

September 21, 2020 08:00 AM Evidentiary Hearing

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

COURT CLERK: Tapia, Michaela

RECORDER: Michaux, Angelica

REPORTER:

PARTIES PRESENT:

Amelia L. Bizzaro	**Attorney for Plaintiff**
Emma Lauren Smith	**Attorney for Plaintiff**
Evaristo Jonathan Garcia	**Plaintiff**
Noreen C. Demonte	**Attorney for Defendant**
Taleen R Pandukht	**Attorney for Defendant**

JOURNAL ENTRIES

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