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 10 of 10

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Dated May 3, 2021.

Respectfully submitted,

Rene L. Valladares
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/s/ Emma L. Smith
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CERTIFICATE OF SERVICE

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

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

/s/ Jessica Pillsbury
An Employee of the
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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

EVARISTO GARCIA, Plaintiff(s), vs. JAMES DZURENDA, Defendant(s).	Case No. A-19-791171-W DEPT. XXIX

BEFORE THE HONORABLE DAVID M. JONES,
DISTRICT COURT JUDGE

MONDAY, SEPTEMBER 21, 2020

TRANSCRIPT OF PROCEEDINGS RE:
EVIDENTIARY HEARING

(Via BlueJeans)

(Appearances on page 2.)

RECORDED BY: ANGELICA MICHAUX, COURT RECORDER

APPEARANCES:

For the Plaintiff(s):	AMELIA L. BIZZARO, ESQ. Assistant Federal Public Defender EMMA LAUREN SMITH, ESQ. Federal Public Defender (Appearing via BlueJeans)
For the Defendant(s):	TALEEN R. PANDUKHT, ESQ. Chief Deputy District Attorney NOREEN C. DeMONTE, ESQ. Chief Deputy District Attorney

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LAS VEGAS, NEVADA, MONDAY, SEPTEMBER 21, 2020

[Proceeding commenced at 8:26 a.m.]

THE COURT: Case Number A-19-791171, Garcia versus State of Nevada. Counsel, your presence for the record.

MS. BIZZARO: Good morning, Your Honor. Attorney Amelia Bizzaro appearing in the courtroom on behalf of Mr. Garcia, who's joining us remotely, as well as Attorney Emma Smith, who's joining us remotely, as well.

THE COURT: Thank you, counsel.

MS. DEMONTE: Noreen Demonte and Taleen Pandukht for the State.

THE COURT: Okay. Counsel, this is the time set for the evidentiary hearing. Does either side wish to do a brief opening?

MS. DEMONTE: We'll waive, Your Honor.

MS. BIZZARO: No, Your Honor.

THE COURT: Okay. Counsel, call your first witness.

MS. BIZZARO: I'm sorry, Judge. I misunderstood. I have two housekeeping things --

THE COURT: Okay.

MS. BIZZARO: -- for Your Honor. First, Exhibit 1 in everybody's binder is now the copy of the exhibit that the State provided. It was just better copies of the same thing. And so we're -- we swapped it out for everybody.

THE COURT: Right. We did it this morning.

MS. BIZZARO: The second thing I wanted to ask is permission to use my cell phone to communicate with the team, who's remotely during the hearing.

THE COURT: Absolutely.

MS. BIZZARO: Okay. That's it, Your Honor.

And then we can call Mr. Morales.

Do you prefer if I stand or sit?

THE COURT: Counsel, this is going to be a long hearing, so we're all going to sit.

MS. BIZZARO: Okay. Thank you.

We call Mr. Morales.

THE COURT: Mr. Morales, can you hear us?

MR. MORALES: Yes, sir, I can hear you, Your Honor.

THE COURT: If you'd please rise and raise your right hand, please. And my court clerk is going to swear you in.

ROBERTO MORALES,

[having been called as a witness and first duly sworn, testified via BlueJeans as follows:]

THE COURT CLERK: Please state and spell your first and last name.

THE WITNESS: Roberto Morales, R-O-B-E-R-T-O, M-O-R-A-L-E-S.

THE COURT: You may be seated, sir.

THE WITNESS: Thank you, sir.

THE COURT: Counsel, your witness.

MS. BIZZARO: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. BIZZARO:

Q Good morning, Mr. Morales. You can hear me?

A Yes, I can. Good morning.

Q How are you currently employed?

A Security supervisor.

Q Did you previously work at the Clark County School District Police Department?

A Yes, I did.

Q How long were you employed there?

A 28 years.

Q How did you -- did you -- how did you retire? What rank were you at your retirement?

A Lieutenant.

Q And how did you start?

A Officer.

Q Can you tell us a little bit about how the Clark County School District Police Department is structured?

A Current structure at my departure was a chief, five captains, and I believe four lieutenants, and approximately 20 sergeants, and -- for a total of around 160 to 180 officers.

Q Does the police department operate 24/7?

A Yes, they do.

Q What kind of authority do officers have?

A Well, the officers are a Category 1 officer, so we have full range of NRS statute and application of the law.

Q Does that mean you can arrest people?

A Yes, ma'am.

Q Do you investigate crime?

A Yes, ma'am.

Q Are there other bureaus that exist inside the Clark County School District Police Department?

A Yes, ma'am.

Q What are those bureaus?

A You have your detective bureau, you have your K-9 bureau, you'd have motors, you have what was called at one time a fit unit, which would assist other areas of patrol with extra vigilance of initiative action taken in certain areas.

Q What kind of training did you undergo?

A Well, I was an academy trained officer. I attended the academy in Carson City. Then I was -- and then I had progressive training throughout the years. My last training was command school, I attended through Northwestern University.

Q Through the authority -- does the authority that the officers have to make arrests, is that limited by anything?

A I don't remember -- recall the exact year, but there was a year, I'm going to guess 2000 or so, where NRS stated that Category A felonies were to be -- the local jurisdiction was to be contacted and advised of the incident. At that point, they would

either take them over or ask us to continue the [indiscernible; technical issue].

Q So you could -- if it was a Category 1 felony, you had to call the local jurisdiction; that's right?

A Category A?

Q Category A, I'm sorry. And I would like to take you back to February 2006. During that time, once Clark County School District Police Department officer arrested someone, what would happen next?

A If we arrested him, we would just do the same process, you know, book them into county or the appropriate detention facility, and move forward with the paperwork and process everything through your chain of command and your procedures and orders.

Q Could you refer someone for charges?

A Absolutely.

Q In February 2006, did the Clark County School District Police Department work with the Clark County District Attorney's Office?

A Yes, they did.

Q And part of the duties of the officers there include writing reports?

[Audio interruption; announcement over PA system.]

Q I'm sorry, Mr. Morales, did you hear my question?

A Yes. They write reports.

Q Okay. I would like to turn your attention, please, to Exhibit Number 2 in your binder. Do you have that in front of you, sir?

A I do.

Q At the bottom corner of each page, there's a Bates stamp, a page number. And I want you to turn to page 8, please.

THE COURT: And just for the record, counsel, Bates stamped FPD-0008?

MS. BIZZARO: Yes, Your Honor.

THE COURT: Thank you.

BY MS. BIZZARO:

Q Are you there, Mr. Morales?

[Audio interruption; remote speaker.]

THE COURT: Whoever has your phone on that's not part of the conversation, please mute it.

MS. BIZZARO: Judge, I guess that's reminding me, the person that just joined appears to be our expert. And I think it would be appropriate to --

THE COURT: Exclude.

MS. BIZZARO: Yeah, have an exclusion --

THE COURT: Is that who that is, Kathy --

MS. BIZZARO: Pezdek, yes.

MS. DEMONTE: Yes. Are we able to exclude on our end?

THE COURT: Can we mute somebody out so they can't hear us?

THE COURT CLERK: I did, Your Honor. Oh, to not hear

us?

THE COURT: Right.

MS. DEMONTE: Yes.

MS. BIZZARO: We can ask her to leave the room and then let her know when it's time for her to join again.

MS. DEMONTE: That's probably best.

MS. BIZZARO: Okay.

THE COURT: Okay. Go ahead, counsel. See if she's present.

MS. BIZZARO: Let me just make sure.

MS. DEMONTE: Yeah, because she muted herself now. Or they did it.

THE COURT CLERK: I did it.

MS. BIZZARO: I'm sorry. One moment, please.

MS. DEMONTE: And just for the record, Mr. Figler is not on yet, so we don't have an issue with his.

[Pause in proceedings.]

THE COURT: Kathy, are you present? Can you hear us?

THE WITNESS: Hello?

THE COURT: Yeah, thank you, Mr. Morales. Actually, we have another witness who had popped on for a second, we wanted to make sure they were off.

MS. DEMONTE: Oh, she logged off.

THE COURT: She logged off now?

MS. DEMONTE: Yeah, she popped off.

THE COURT: Okay. Continue, counsel.

MS. BIZZARO: Thank you, Your Honor.

BY MS. BIZZARO:

Q Mr. Morales, turning your attention to FPD0008 in your binder, which is part of Exhibit 2, do you have that in front of you, sir?

A Yes, I do.

Q Can you identify that document, please?

A Looks like a Clark County School District incident crime report.

Q And about a third of the way down from the top of the page, under Supervisor Approving Report, can you identify that signature?

A That's my signature.

Q What does it mean to approve a report?

A It means to approve it either for continuing investigation or to be filed and sent towards -- forward towards records department.

Q Turning your attention to FPD0011 in that same Exhibit Number 2, can you identify the supervisor approving and date signature there?

A That is mine.

Q And this Post-it Note, is that yours as well, sir?

A Yes.

Q What does that note mean, ICK?

A ICR.

Q What does that stand for?

A Incident Crime Report. It says, Please attach to incident crime report.

Q Okay.

A Because this is an officer's report.

Q And your responsibilities as sergeant that lent to that signature, what was the -- what were those responsibilities?

A To attach and make sure that all pertaining documents for -- with that event number or DR number all made it to the same file.

Q And once the report was created and approved, what happened to it?

A It would move forward to the records bureau.

Q And what was the Clark County School District Police Department's policy in 2006 about providing reports to other investigating agencies like the Clark County District Attorney's Office?

A Without having the policy in front of me, I could only answer to what I remember.

Q That would be great.

A We share our reports with other local agencies and/or the district attorney's office upon request.

Q How is that request made?

A Sometimes we get a phone call, sometimes we get e-mail,

sometimes we get a thousand miler, sometimes they would show up in person.

Q And you would just send them whatever they asked for?

A Once they showed us, you know, that they're officially investigating the case, yes, we would share our documents with them.

MS. BIZZARO: I have no further questions, Your Honor.

THE COURT: Cross.

MS. DEMONTE: Thank you.

CROSS-EXAMINATION

BY MS. DEMONTE:

Q Hello, Mr. Morales.

A Hello.

Q Now, just a couple of things. Counsel had asked you that, back in February of 2006, if your agency had worked with the DA's office. That would be on cases that you originated and subpoenaed and the DAs were then prosecuting, correct?

A Yes, cases that they needed our documentations on.

Q Okay. But what I'm talking about is, generally speaking, those were cases that were worked up by your agency?

A [Indiscernible.]

Q All right. Let me talk to you specifically. Were you working directly with the Clark County District Attorney's Office in February 2006 on this particular event?

A I wasn't. I don't recall if there was an investigator from

our agency that was the liaison or the link to the DA's office or not.

Q Okay.

A I just processed the report.

Q Would it surprise you if there was not?

A It would surprise me, because it was a beating, a murder.

Q Okay. But sitting here right now, as you shrug your shoulders, you have no knowledge or no recollection of any direct liaison or direct contact between your agency and the Clark County District Attorney's Office regarding this event, correct?

A I don't.

Q All right. And your event number is 0602-0180; is that correct?

A That looks correct.

Q Okay. Now, your event numbers are different from Las Vegas Metropolitan Police Department event numbers; is that correct?

A Yes, they are.

Q And your records department, as an entirely separate records department from that of the Las Vegas Metropolitan Police Department, correct?

A Yeah, it is. Yes, it is.

Q Okay. And when these officers' reports, typically, were generated and then approved by you, they were sent to your records department, correct?

A Correct.

Q Okay. And they were only shared with other agencies if those other agencies would affirmatively request those; is that correct?

A That is correct.

Q Okay. Now, do you have any direct knowledge that in 2006 a affirmative request was made by the district attorney's office or the Las Vegas Metropolitan Police Department for the exact officer's report that you testified about today?

A No, I don't have any direct knowledge.

MS. DEMONTE: Court's indulgence.

THE COURT: Why not.

MS. DEMONTE: Okay.

BY MS. DEMONTE:

Q And just so the record's clear, you did not generate these reports, you were just the supervising approving officer, correct?

A Yes, ma'am.

MS. DEMONTE: No further questions.

THE COURT: Redirect.

MS. BIZZARO: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MS. BIZZARO:

Q Mr. Morales, would your -- the Clark County School District Police Department provide whatever records Metro or the district attorney's office ask for?

A Yes, we would.

Q And I just want to turn your attention to Exhibit Number 11, page FPD-0062.

MS. DEMONTE: 0062?

THE COURT: 62 starts on 064 on the 11.

MS. BIZZARO: Oh, I'm sorry, Your Honor. Exhibit Number 10.

THE COURT: Okay.

BY MS. BIZZARO:

Q Did you hear that --

A Page 0062?

Q Mr. Morales, Exhibit Number 10, FPD0062.

A Yes. Yes, I do. I'm on that page.

Q About three-quarters of the way down around my Number 20, is that your name there?

MS. DEMONTE: And, Your Honor, I'm going to object as to the personal knowledge as to this witness as to what was -- what documents were filed. For the record, this is a rather lengthy notice of witnesses generated by the State and filed in this case. And State would like to lodge a continuing objection to the fact that the entire binder of exhibits had been provided to every single witness by the federal public defender, just so the record's clear on that.

THE COURT: Okay. So what's the objection? That they got the records now and they're reviewing them? Or the fact that he, as a witness, can notice that his name was typed on a piece of paper? That doesn't mean he got it.

MS. DEMONTE: I'll just stipulate --

THE COURT: It just means it's --

MS. DEMONTE: -- to the fact that that's there.

THE COURT: Okay. Counsel?

MS. BIZZARO: I have no further questions, Your Honor, with that stipulation. And if Your Honor wishes me to respond to the objection, I can.

THE COURT: Well, basically, you've got a document here that has his name typed on it.

MS. BIZZARO: Right.

THE COURT: He can testify that there's a document in front of him that has his name typed on it. It doesn't confirm whether he received it or not.

MS. BIZZARO: Agreed.

THE COURT: Okay. Anything else?

MS. BIZZARO: No, Your Honor.

THE COURT: Any follow-up to that?

MS. DEMONTE: No, Your Honor.

THE COURT: Thank you, Mr. Morales. You may be excused.

THE WITNESS: Thank you.

MS. BIZZARO: Mr. Evaristo, do you have any questions that I need to discuss with you?

THE DEFENDANT: No.

MS. BIZZARO: Thank you.

THE COURT: Okay. Counsel, who's your next witness?

MS. BIZZARO: Attorney Smith is going to be calling Dr. Kathy Pezdek to the stand.

THE COURT: Okay.

MS. SMITH: Thank you, Your Honor. I will just make sure she logs back on right now.

THE COURT: Okay.

[Pause in proceedings.]

THE COURT: Counsel, I believe your witness is present.

MS. SMITH: Good morning, Dr. Pezdek, can you hear me?

MS. PEZDEK: Yes. Good morning. Can you hear me as well?

MS. SMITH: Yes, I can.

THE COURT: Yes, Doctor, if you'd please rise and raise your right hand.

KATHY PEZDEK,

[having been called as a witness and first duly sworn, testified via BlueJeans as follows:]

THE COURT CLERK: Please be seated. And please state and spell your first and last name.

THE WITNESS: Yes. My name is Dr. Kathy, K-A-T-H-Y, Pezdek, P-E-Z-D-E-K.

THE COURT: Good morning, Doctor.

THE WITNESS: Good morning. And may I ask again, you can hear me fine? Is -- the volume is fine?

THE COURT: Yes, your volume's fine.

Counsel, your witness.

MS. SMITH: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. SMITH:

Q Dr. Pezdek, where are you currently employed?

A I am a professor at Claremont Graduate University, which is in Los Angeles County.

Q And how long have you been employed there?

A For a long time. I was hired in 1981 and I've been a professor there since then.

Q Could you briefly tell us about your educational background?

A Yes. I have a Ph.D. in cognitive science from University of Massachusetts at Amherst. I have a master's degree from that same institution. And I have a bachelor's degree from the University of Virginia.

Q And can you briefly explain to us what cognitive science is?

A Yes. Cognitive science is an area of experimental psychology that involves studying how people do -- how people process information from the world. So how perception works, how attention works, how memory works, how comprehension works. It's that general field. It's -- specifically, my research is on eyewitness memory and the cognitive science involved with

eyewitness memory and identification.

Q And you have published your work on eyewitness memory?

A Yes, I have. I have a publish-or-perish-type faculty position. And I regularly publish research on this topic.

Q And what professional recognition have you received for your research in this area?

A Well, within my field, just publishing papers. It is some professional recognition for the work that I do. When I talk about published work, I publish in what I call peer-reviewed journals. Peer-reviewed journals are professional journals in my field. Basically, I publish in research journals that on average have about an 85 percent rejection rate. So to answer your question, you know, that some recognition for the work that I do is that the work is published.

I also bring in research grants in my area. Right now I have a grant from the National Science Foundation's program in law and social sciences. So I bring in that grant. I've had other grants from the National Institute of Justice and from the National Science Foundation as well.

So I'm plugged into a network of people both in the United States and around the world who are doing research on an eyewitness memory and identification. I'm doing that research, I'm going to conferences where I talk about that research. I've given invited talks on that research, publishing and bringing in research

grants. So that's what I do professionally.

Q And has any of that teaching that you've done involved programs for law enforcement?

A Yes. I am periodically asked to give continuing education workshops and I do that -- I used to do that before the pandemic on a regular basis. I'm giving -- I give workshops to attorneys and also to investigators, to police departments, I've given talks to FBI agencies, groups of investigators. But, yes, I do continuing education workshops. Those are pro bono just to kind of get the research findings out there.

Q And you described yourself as a research or experimental psychologist. What differentiates you from other types of psychologists, like a clinical psychologist?

A Yes, the field of psychology is -- the -- of the people who have a Ph.D. in psychology, the field is divided in half. Half the people with a Ph.D. in psychology are clinical psychologists, they are therapists, and they're the people that we know as, like, the Bob Newharts of psychology. They are doing therapy. I have no training or experience in that half of the field. That is not what I've done or have ever done.

I come from the other half of the field of psychology. I'm a researcher and I said I do research, I publish research, and in particular, I do research on eyewitness memory. But I'm a researcher, I'm not a clinical psychologist.

Q And because of your established expertise in the area of

memory, have you testified before as an expert witness on eyewitness identification?

A Yes, I have.

Q Do you recall in approximately how many cases?

A I don't have an exact count of how many times I've testified. I testified for the first time, believe it or not, it was back in the late 1970s. And I've testified in excess of 300 different trials since then, all on cases that involve eyewitness memory and identification.

Q And have those been predominantly criminal trials?

A They're predominantly criminal trials, yes.

Q And have you ever testified for the prosecution?

A I have, not in a criminal trial. I've testified for the state attorney general's office in a civil trial. I've done that in maybe six different civil trials for the AG's office in Los Angeles. But I've never turned down a case for the prosecution, I'm just very rarely asked to testify for the prosecution. At one time I was asked to testify for the prosecution in a criminal trial. I agreed to do so and they decided not to have me testify. But I have never turned down a case for the prosecution.

Q Have you ever turned down a case for the defense in a criminal trial?

A Yes. Most weeks I do, quite honestly. The first point of contact between me and any attorney is usually a phone call. Based on that phone call, I spend about 10 minutes with the

attorney just getting an outline of the facts of the case. And at the end of that conversation, I tell them, Just based on what you've told me, if you retained me on the case, this is what I could say, this is what I could not say. And based on that summary that I give them at that point in time, in about 80 percent of the cases, I'm not actually retained by the attorney.

It's always the attorney's decision, of course, whether to have me testify in a case and whether to retain me, but after I tell them my assessment of the case. Most of the time, my assessment is that the eyewitness evidence is reliable, sounds like the eyewitness has the right guy. And once I offer that opinion, the attorney does not retain me on the case.

Q And are you aware if there have been any studies on whether juries in criminal trials understand factors that impact the accuracy of identifications without the benefit of expert testimony?

A Yes. I have done a couple of studies on that topic. Dr. Green is someone who has done a lot of that research. And it's kind of interesting. What she compared is how effective is -- how much do people understand about the factors that affect the accuracy of eyewitness identification. And, generally, there is not a good understanding by the lay public about when memory tends to be accurate and when it does not tend to be accurate. People generally don't -- do not have a good understanding of that. And, in fact, what she has found is comparing the jury instructions from a judge to the testimony of an expert witness in terms of informing

people about how eyewitness memory works, the expert testimony is more effective in terms of making juries sensitive to when eyewitnesses are likely to be correct and when they're likely to be correct.

Q And as part of staying current in your field of eyewitness identification research, are you familiar with research on cases in which more than 300 people were initially convicted were later exonerated when it was found that they were actually innocent?

A Yes. I follow that research with interest. This is what's called the Innocence Project. The biggest of the Innocence Projects is a project out of New York. And I do follow their work regularly. And this is work in which -- I just consulted their website last night, actually, and they now have 375 cases where people were initially convicted and then later found to be factually innocent. So they were exonerated after having been found to be factually innocent.

And what's interesting to people in my field is, so you've got this corpus of 375 cases of people who were falsely convicted, basically. What we want to know is what was the evidence in those cases that led to the erroneous conviction? So those cases have been studied. And of the 375 cases, 70 percent of those cases were cases where the initial conviction turned on eyewitness evidence. And then going through that, people look at, okay, so what is it about the eyewitness evidence that led to 70 percent of these cases being false -- falsely -- people being falsely convicted. And what's been found is that, you know, for example, 40 percent of them are

cross-race cases, where the individual is looking at someone of a different race than they are. So all the factors that I'm going to talk about today have been -- most of them have been studies in these cases.

But the important point is that in this corpus of cases where we know a person was factually innocent, and yet they were convicted, when, in fact, most of the time their initial conviction had turned on eyewitness evidence, eyewitness evidence that turned out to be wrong.

Q And you're, of course, paid for your expertise, aren't you?

A Yes. Once I'm retained on a case, yes.

Q Of course. And your fee is $200 an hour for preparation and consultation and $2,000 for testimony; is that correct?

A That's correct, yes.

Q And could you look at and identify Exhibit 21 in your binder.

A Yes, I have it.

THE COURT: Who just jumped on?

MS. SMITH: Your Honor, I believe that's my client's parents, just to watch.

THE COURT: Okay. All right. Go ahead, counsel.

MS. SMITH: Thank you, Your Honor.

BY MS. SMITH:

Q And is Exhibit 21 an accurate representation of your educational and professional history?

A Yes, it is.

MS. SMITH: And, Your Honor, I'd ask that that exhibit be moved into evidence.

THE COURT: State, any objection?

MS. DEMONTE: No.

THE COURT: So admitted.

[Plaintiff's Exhibit No. 21 admitted.]

MS. SMITH: Thank you, Your Honor.

And I would also ask that Dr. Pezdek be recognized as an expert in the field of cognitive [indiscernible; audio distortion] and eyewitness identifications.

THE COURT: Doctor can testify.

MS. SMITH: Thank you, Your Honor.

BY MS. SMITH:

Q Dr. Pezdek, turning to this case specifically, have you familiarized yourself with the facts of the case?

A I have, yes.

Q And did you author a declaration in this case?

A Yes, I did.

Q And could you look at and identify Exhibit 20 in your binder?

A Yes. I'm looking at it.

Q Is that the declaration that you authored?

A That is, yes.

MS. SMITH: And, Your Honor, I would also ask that that

be moved into evidence.

THE COURT: State, any objection?

MS. DEMONTE: No objection.

THE COURT: So admitted.

[Plaintiff's Exhibit No. 20 admitted.]

BY MS. SMITH:

Q And does the list on Bates numbered pages FPD1347 to 1348 in that exhibit represent all the materials that you reviewed in this case?

A Yes, it does.

Q Thank you.

So what was the purpose of your review in this case?

A The purpose of my review in this case is summarized on the second page of my declaration. There were five points that are important. I was first asked to review the file and look at the facts of the case as reported in the materials that you just referred to. In the process of doing that, I was asked to identify the factors that would have been relevant to the eyewitness identification of Ms. Betty Graves, both in terms of her memory for the incident that happened on February 6, 2006, and her memory for the appearance of the shooter. So there are two parts of this were important for me and I was asked to assess. Her memory for the incident that occurred and her memory for the appearance of the shooter. So those two things.

The third part was to determine if there was information

in the newly discovered incident report from the school district that would have shed new additional light on what factors may have been operating at the time that Ms. Betty Graves made her observation of the incident and the shooter.

The fourth thing was to assess whether there was important information that I thought needed to be determined to assess the likelihood that she made an accurate identification initially. So that -- Point Number 4 is in addition to what was in the file, were there -- was there other information that could have or should have been obtained that would inform the reliability of the eyewitness identification and Ms. Betty Graves' memory for the event itself.

And then to make a determination as to whether, today, at this point in time on today's date, now, she would be a reliable source of information about what happened at the time of the event and what the shooter looked like. So there were five points that I was asked to keep in mind as I went through the file materials.

Q Thank you.

Generally, does memory of an event improve over time?

A No. No. That was a major point that I was noting as I read through the case file here. In general, the finding on the effect of time delay on memory is one of the oldest findings in psychology. And that is a person's memory is most accurate, is most likely to be reliable close in time to an event. So shortly after an incident occurred, a shooting incident, you know, anything that

happened, shortly afterwards, an eyewitness's memory is going to be best in terms of memory for what they say, memory for what the shooter looked like and so forth. Memory's going to be best close in time to the event.

And the longer you wait after that, hours later, days later, months later, et cetera, memory declines with the passage of time. So I'm showing with my hands here, just for the record, a graph where memory declines over time, that's called the forgetting curve. And that was reported for the first time well over 100 years ago, that no matter what we give people to learn, their memory for that information is going to be best close in time to the event and it's going to drop off over time.

Q But does that mean that, generally, a first description is most likely to be accurate?

A Well, yes. Assuming that the witness was questioned and asked. Sometimes at the scene of the crime, the -- a police officer asks the witness for information and they've kind of -- on the run and it's clear that they're doing this very quickly. And then that's not the best source of information from an eyewitness. But if the officer is there taking notes and is carefully writing down what the person said, that documentation of the initial interview will always be more accurate and have information that is most relevant to assessing the eyewitness identification accuracy.

So my point is that all things being equal, if an eyewitness is asked about an event close in time to the event, the information

in her description is going to be most accurate than at any point in time after that.

Q And can you explain to us just generally how memory works?

A Yes. And if it's all right, I'm going to start by talking about how memory does not work. Many people think that memory works like a camera or a video camera, so that, for example -- this is actually a good example -- me. You're looking at me and you're seeing a video of me testifying. Many people think that if memory worked like a camera, then what you would have in memory about my testimony, which be a recording of a video and an audio recording of what's transpiring right now, and that's wrong. But if memory did work that way, then the process of remembering me or remembering what I'm saying would just be a process of playing back this videotape. And if that was the case, every time you play back the videotape, we would just read off the videotape and say what you -- what you saw.

And memory does not work this way. Memory is not that precise a process. Memory is not the same every time you recall an event. And just -- memory is not that perfect.

A better metaphor for how memory works is more like a computer processing system where a computer retains information after it is first encoded into the computer. In human terms, that would be the perception stage; when an eyewitness sees a person, that's the perception stage. And, quite honestly, the perception

stage just relates to how clearly did the eyewitness see the perpetrator and the incident to begin with? Very straightforward, how clear did she see the incident and the perpetrator to begin with?

The second stage is called the storage stage. And the storage stage is the process of holding onto that information over time. So information, if it was well-perceived, like, presumably, you know, you look -- you're doing nothing but looking at a computer screen right now, so there should be no distraction or whatever. Even if you perceive me well now, over time your information about what I'm saying, information about what's happening, what -- all that information is going to decline over time, because the storage stage was not designed to be a permanent storage system.

And then Step 3 is called the identification stage, which on a computer is how you get the information out of the computer. In eyewitness identification terms, that relates to how an eyewitness's memory was tested. Were they shown a fair and unbiased photographic lineup or not? And when we -- to answer your question, how does memory work, it works like this three-stage process, where in order to evaluate how likely a witness's memory is likely to be, you need to evaluate what happened at the perception stage, what happened at the storage stage, and then what happened at the identification stage.

Q And so when you're looking at and evaluating the potential accuracy of a witness's description of an event, are there

specific factors that you look to?

A Yes, there are. Yes.

Q And were any of those factors present in this case as concerns Betty Graves?

A Yes. I identified -- in reviewing this case, I identified a list of 11 such factors that I think are relevant to evaluating Ms. Betty Graves' memory for the incident that happened down on February 6, 2006, and her memory from the shooter during that incident.

Q And can you look at and identify Exhibit 22 in your binder?

A Yes.

Q Is this a list of those factors that you prepared for the Court?

A It is, yes.

Q And were these factors, in their role in assessing witness memory, well known in 2013, at the time of Mr. Garcia's trial?

A Absolutely, yes.

Q And were they well known in 2006, at the time of the shooting at issue in this case?

A Absolutely, yes.

Q And is the use of these factors in evaluating a witness's memory supported by scientific research and literature?

A Yes, it is. For each of these points, there is scientific research that elucidates how that factor effects reliability of memory. And in my declaration, I, in fact, presented extensive

research supporting each of these points.

Q When you see a description that is a questionable accuracy, what, if anything, does that tell you about the truthfulness of the witness?

A Just to clarify what truthfulness means, when I'm talking about how memory works and the fact that sometimes memory -- eyewitness memory is highly reliable and sometimes eyewitness memory is not reliable. And I'm interested in understanding, from a cognitive science point of view, when eyewitness memory is likely to be reliable or not.

If any eyewitness makes a mistake in her identification, if an eyewitness makes a mistake in terms of her description of an event, I would never assume that that eyewitness it not being truthful. In other words, in my role as an eyewitness expert witness, I always assume that the eyewitnesses are honest eyewitnesses being truthful, trying their best to be accurate and reliable in what they say. I make that assumption. And if an eyewitness or me or you or any of us makes a memory mistake, which, in fact, we probably do on a regular basis, under predictable circumstances, if we make a mistake, it's not because we're not being truthful or being -- you know, not trying to be honest or whatever; accuracy of memory, accurate or inaccurate, I'm -- is -- has no implications for me, anyway, about whether an eyewitness is being truthful.

Q And so your role is to discuss how memory works and

memory factors that are present in a case, but then you're not evaluating the witness's specific memory ability in general; is that right?

A That's right. I could analyze, you know, for any eyewitness in any case, I could give that witness a battery of memory tests, I could evaluate strengths and weaknesses of her memory and get a full assessment of her memory ability. I'm capable of doing that as a scientist.

However, as an expert witness in court, that is not what I'm permitted to do. I am not testifying about any witness as a person and whether they tend to be reliable or not. And, quite honestly, I'm glad that I'm not doing that, because even someone who has the best memory in the world is going to be more reliable under some circumstances and less reliable under other circumstances. So if the viewing conditions are lousy, for example, and a witness isn't tested for months afterwards, et cetera, et cetera, a witness's memory is not going to be -- is not likely to be accurate regardless of how good their general memory ability is.

So what I'm talking about are situational factors. This list of 11 factors that I'm going to talk about, these are situational factors that determine for all people studied, regardless of whether they've got generally good or generally bad memory, these are situational factors that will determine when a witness is relatively more likely to be correct and when a witness is relatively less likely to be correct.

Q So turning to those 11 factors, I want to take them one at a time. So first can you briefly describe to us how exposure duration relates to the accuracy of eyewitness memory?

A Yes. Exposure duration, I am very simply -- I'm repeating myself now, but very simply referring to how much time did the eyewitness have to look at the incident or to look at the perpetrator of the incident. So let me talk about looking at the shooter, for example.

Okay. If we're talking about how well a witness is likely to remember what a shooter looks like, it's important to determine how much time she had to look at the face of the shooter. And I focus on the face of the shooter, just because most often a person is identified from a photograph of that person from the shoulders up, a head shot, basically. So if memory is going to be tested either by a head shot of a person, or by looking at someone sitting in court from the waist up, basically, or from the chest up at counsel table, then it's important to determine how much time did the eyewitness have to look at the shooter initially from that vantage point.

And the research on the effect of exposure time on memory has shown that consistently across studies, if you give people a long time to look at an individual, like you're looking at my face right now for a pretty long period of time, if you look at a face without interruption, no coverings on my face or anything, for a pretty long time, you are more likely to correctly identify me later

and less likely to make a misidentification.

To the extent that you shorten the amount of time available to look at me and not look at me for a much shorter period of time, take the extreme where you only look at my face for, say, five or 10 or 15 seconds, when you're looking at a face for only a matter of seconds, then the probability of correctly identifying that person later, even if you test people the next day, is lower, and the probability of a misidentification is higher.

So we have this tradeoff between correct identification and misidentification. And if you have a long exposure time, you're more likely to make a correct identification -- if you have a brief exposure time. If you have a long exposure time, you're more likely to make a correct identification, less likely to make a misidentification. If you have a brief exposure time, you're more likely to make a misidentification and less likely to make a correct identification. So it's just a like a switch almost that you could turn that people aren more accurate if they have more time to look at the face of a perpetrator.

Q So having reviewed the material in this case, what is the impact of exposure duration on the accuracy of Ms. Graves' memory?

A Well, I can't answer -- I don't know -- none of us know exactly what effect exposure time had on Ms. Graves' memory. I mean, it's -- that's impossible to determine in the person, for a particular person. But based on my reading of the materials, she

had a very short time to look at the shooter's face. I don't know -- none of us know how much time she had. But based on her initial description, a person stood in front of her for a while and she wasn't sure what was happening. And then pretty soon after that, that person turned and ran away. And at that point, she could only see him from the back.

So based on my reading in the materials, it's not clear, actually, how much time she had to look at the face and the perpetrator. But it couldn't have been very long, based on her description of the event.

Q And would it be useful to ask Ms. Graves now how long she was looking at the face of the perpetrator?

A No. One of the main points of my assessment of this case is that -- and I've said it already -- but memory declines with the passage of time. Not only does memory decline with the passage of time, but in the duration between when a witness sees something initially and when they're tested sometime later, if they've been talking to other people or just thinking about the case and ruminating about what happened, the process of self-rumination, the process of talking about a case with somebody else, all of that can contaminate an eyewitness's original memory for what happened, so that as someone is thinking about what happened, they might exaggerate to themselves how much time they had to look at the face. As they're talking to somebody else, saying it might get someone else's description for what the shooter

looked like.

And over time, their own memory for what happened and what the shooter looked like is going to get worse, and their memory is more likely to be contaminated by other sources of information. So, unfortunately, by the time a case goes to trial, it's really -- and then years later, like in this particular case, it's impossible to determine what the eyewitness's original memory was. You can't -- over time, you lose acts that we, me as an expert witness, police officers as forensic investigators, lawyers, everyone, we lose the ability to find out what Ms. Graves in this case -- what Ms. Graves' original memory was. And the farther you get away from the event, it's impossible to access what her original memory actually was.

We have to go back to what she said initially in the first available report about what she saw, what she remembered, and so forth. And that's where we're going to get the most accurate information about what was in her head shortly after this incident. What did she see? What did she remember? What was in her memory at that point in time? With the passage of time, particularly at this point in time now, it's impossible to go back and kind of assess that. It doesn't exist anymore.

Q So, Doctor, does that fact that there might be missing details here impact your opinion of whether exposure duration is a relevant factor here?

A It does not. Yeah, and there are two parts -- I want to

make -- clarify, there are two parts to your question, and I want to answer both of them. Exposure time has an effect on memory. How much time she had to look at a person will absolutely have affected her memory for the shooter.

But the fact that we can't determine how long the exposure time was, it's just very unfortunate. It's very unfortunate that she was never asked in particular detail how much time she had to look at the face as he ran away, did he ever turn back towards her, was she able to look at the shooter's face after that point in time? How many people were obstructing between where she was standing and then where she was watching this person run away and so forth; all of those details about how much time she probably had to look at the shooter's face, I don't think she was ever asked that. It's not -- I couldn't find the information that I needed.

But that doesn't mean that eyewitness memory is not affected by exposure time; it is. We just no longer have access to information to determine what the exact exposure time was in this case.

Q And can you explain the next factor, distraction?

A Yes. By distraction, I simply mean it relates to exposure time, but distraction is what else was going on during the available time that an eyewitness had to look at a person's face. So if a person is -- an eyewitness is looking at a shooter, for example, and has only a brief period of time to look at that shooter, and then that

person runs away, and there are other people in between them or there are other people doing things at the time, if an eyewitness indicates that she was doing anything else besides just staring at that person, that's what I'm referring to by distraction.

And an extreme case would be if a bank teller is being robbed, and she's just looking at the face of the robber, who's across the counter from her, nothing is between her and the robber, and there's nobody else in the bank, there's no distraction. If she was with that bank robber for a minute, she could have had a minute to look at the bank robber. But if we're talking about another kind of situation where a shooting occurs, there are lots of people around, she indicates that she's looking at other people, she's assessing whether there might be danger, she's watching someone run away and so forth, then there are multiple sources of distraction.

And the way I think about this is if we know that -- I think of a pie chart. If there's a pie chart and the pie chart represents all of the time that an eyewitness had to look at the shooter's face, and let's say all of the time available to look at the shooter's face was 15 seconds, I then look at, within that 15 seconds, what else was Ms. Graves doing? What was she doing with her eyes? Was she just looking at this person? Was she looking at her colleague? Was she looking at other kids exiting the school? Was she looking at cars driving by? Was she -- you know, what else was she looking at?

And to the extent that she was looking at anything besides the face of the shooter, that's like a slice out of my pie chart. So if the whole pie chart is 15 seconds to look at the shooter, then you have these slices looking at other students, other cars, maybe something that he had in his pocket, you know, maybe something else, those are slices away from being able to look at the shooter.

And I want to point out --

Q I want to talk to --

A Yes. I'm sorry.

Q I just -- were there other slices being taken out at the pie here that you identified?

THE COURT: Counsel, let's do that, let's continue these questions dealing with the facts of this case instead of generalities.

MS. SMITH: Thank you, Your Honor.

BY MS. SMITH:

Q So can you tell us how distraction was a factor here in this case with Ms. Graves?

A Well, this situation was described as mayhem. There were so many students, they -- around and so forth and running away. Yes, there seem to have been multiple sources of distraction in this case, based on Ms. Graves' description.

Q And so the next factor is distance and lighting. So can you explain to us how the impact of distance on Ms. Graves' description of the shooter here?

A Yes. The closer you are to someone, the more you can

see them in detail. If you're going to recognize a shooter, you have to see not just general information about that person, that they were Hispanic, male, about 18 years old, about my height, but you have to be able to see specific details of their face. And that's what you can't see so well when the lighting is dim. So if a person is being observed at night, they can't be seen in as specific detail. If a person is look -- is being observed in a parking lot, like in this case, or running across a parking lot or across a field at school, it's important to know where were the sources of lighting and how much of the time was that lighting illuminating the person's face versus their back.

THE COURT: Doctor, do you have any --

THE WITNESS: Just obvious points like the --

THE COURT: Doctor, do you have any of that information in regards to Ms. Graves' testimony?

THE WITNESS: Unfortunately, none of us do. I don't think she was ever asked this information. It's important to consider, I don't think we have any information, because she was never asked.

THE COURT: But it's a factor that you could not testify to a reasonable degree of medical probability under psychiatry as to the effect distance and lighting had on Ms. Graves in this case.

THE WITNESS: Well, I can really testify about the influence of any factor on any particular witness. I can just say that the trier of fact should consider this, because it's an important

factor. The fact that incomplete investigation left us with insufficient information for me is not a reason not to include that factor. It's not a reason not to consider that factor. It's a reason to say this is really unfortunate that relevant information was not determined from a complete investigation.

THE COURT: So, Doctor, you don't know whether or not Ms. Graves was directly under a light when she saw the individual, or the defendant was directly under a light when she witnessed him?

THE WITNESS: It's not possible to determine from any information that was in the record. I agree.

THE COURT: Okay. Counsel, next question.

MS. SMITH: Thank you, Your Honor.

BY MS. SMITH:

Q How was weapon focus a factor in this case?

A Weapon focus is a particularly salient form of distraction. When a person has a weapon or a suspected weapon or whatever, people tend to focus on that weapon. So in this case, for example, Ms. Graves said that she -- that the person in front of her had something that she suspected to be a weapon in his front hoodie pocket. And she -- that his hand was down there, so -- which means she must have looked down there to see that his hand was down there in his front pocket. She suspected that it was a weapon.

She could not describe the weapon, because I don't think

she ever saw it. But she -- her eyes clearly went down there to the pocket of the hoodie, where the -- she suspected a weapon.

So that just indicates for me that, first of all, that the level of stress in the situation, which I'll talk about soon, was very high, because she's suspecting that there's a person out there with a weapon. And it also suggests that she wasn't looking at the shooter's face for the full duration, that, in fact, part of that time was spent looking at this front pocket and the hoodie.

Q Next, was cross-racial identification a factor here?

A Yes, it was. Because the -- Ms. Graves is African-American, and she's looking at shooter who is Hispanic. And she described him as a Hispanic male, that was part of her description. The research on cross-race identification shows that people are more accurate identifying someone of their own race or ethnicity than they are identifying someone of a different race or ethnicity. And this is consistent across all peoples' study. It exists even for people who live in racially mixed areas. It has nothing to do with how bigoted or racially biased a person may or may not be. It's just that we have -- that we are -- we grew up learning about faces, looking at faces of people of our own race or ethnicity and we're better than -- better able to make those identifications.

And, like I said before, of the 375 cases of wrongful convictions reported by the Innocence Project, the 70 percent of those that involved eyewitness identifications, 40 percent of those were cross-race cases, misidentifications of people of a different

race than we are, are quite common. Misidentifications are more likely to occur when eyewitnesses are looking at people of a different race. So Ms. Graves, being African-American, looking at an Hispanic male, that would have been a cross-race factor in this case.

Q Next, was there a disguise present in this case?

A Yes. And I should clarify, by disguise, I'm not meaning something as dramatic as a Halloween mask or something like that. By disguise I mean simply anything that covers a part of a perpetrator's head or face would qualify as a disguise, the way I'm talking about this here. In this case, Ms. Graves described the person as wearing a gray hoodie. And if the person had their hoodie up over their head when she was looking at it, then, particularly when a person is observed at night with a hood up over their head, if that hood was at all forward on that head, as my hands are showing now, if the lighting is overhead, which is probably the case in a parking lot or outside a school at night, if the lighting source is overhead and a person has on a hoodie that extends over the front of their head, that should shade their face and obscure the ability of an eyewitness to fully see the whole face and head of that person. So --

Q And was Ms. Graves consistent here about whether or not there was a hood up over the head?

A She was not. No. No, she early on said it was not pulled up. If I've got the facts right, she early on said the hood was not up

and then later said that the hood was up. If the hood was up, she was never asked how was it positioned on the head, how far forward was it, how far back was it? Was it up all the time? Or whatever.

So she did say that the hood was up. She was inconsistent about this, but she also was not questioned in any amount of detail about where the hood was and how far forward on the head or how far back on the head and so forth.

Q And, again, would it be useful to ask her that today?

A No, it would not. Because given that there -- we already have inconsistencies where initially she said the hood was not up, and then at some point in time later, she said the hood was up, some -- her memory for that fact and lots of facts in this case -- it wasn't very good to begin with, which is why there are all these inconsistencies. So to ask her that now would be absolutely fruitless, because her memory has changed so much over time that right now her memory would not be reliable for what she remembered about the shooter, and particular in this questions about the hood and the placement of the hood.

Q Thank you.

Next, turning to familiarity of the perpetrator. Based on the materials that you reviewed, was Ms. Graves familiar with the suspect in this case before the shooting?

A She initially and fairly consistently said she was not familiar with the shooter, that he was not someone that she knew

or had seen before. That's what she initially said.

Q And did you review Exhibit 1 in preparation for this case?

A Yes, I did.

Q And it's your understanding that that's a series of photos that was shown to Ms. Graves?

A Yes.

Q And do you recall that Ms. Graves made handwritten comments about who she was familiar with in this series of photos?

A I do, yes.

Q And what do you recall about the accuracy of those written comments?

A Well, excuse me a minute while I look at --

THE COURT: Counsel, are you asking --

Wait, hold on a second.

Counsel, are you asking her --

MS. SMITH: Yes, Your Honor.

THE COURT: -- to make a professional expert opinion as to the truthfulness of Ms. Graves' handwriting on this?

MS. SMITH: I'm sorry. No, Your Honor, I'm not. I can be more direct.

BY MS. SMITH:

Q If you look at the last photo there, which -- is that your understanding, that that is a photo of Mr. Evaristo Garcia?

A It is. That's my understanding, yes.

Q And on the bottom there, does it say that he attended

Morris High School?

A Attended Sunset --

Q Or Sunset.

A Sunset.

Q Thank you.

A Yeah. Yes. That's what she wrote at the bottom of this picture.

Q And based on the materials provided to you, did Evaristo Garcia attend Morris Sunset Academy?

A He did not. Based on the materials that I reviewed, he did not attend Morris Sunset Academy.

Q So what does this error tell us about Ms. Graves' memory?

A What it says is that she's really confused about who was the shooter and that her memory for the shooter is not very clear. Because when she initially looked at the shooter, and then shortly thereafter said, I had not seen him before, and then at some point later, prior to the trial -- but I don't think this material's dated -- she was shown this photograph and said that she recognized this person, who you and I just identified as Evaristo Garcia, attends Sunset. And then she described he was hanging with some kids and so forth.

When she's looking at this person and saying, This is someone who went to Sunset Academy, but she had said that the shooter did not go to school, it says to me that her memory from

what the shooter looked like is not very clear. She did not have a good memory for what the shooter looked like. That, initially, she thought she'd never seen him before, and then sometime later, maybe after talking to other people or ruminating about the situation, she's later saying --

Q Well, Doctor --

A -- yeah, that I look at --

Q So -- just so I'm clear, so she is misidentifying Evaristo Garcia here as someone that she knows from the school; is that correct?

A Yes. It appears that that's the case. She's misidentifying Evaristo Garcia as a student at school and -- when he wasn't. We know that from the school records.

Q And so that's a type of memory error; is that fair to say?

A Yes. That's my point is that is at least one of possibly many memory errors she made in this case. Yes.

Q And so does the fact that there's one memory error, this one about Mr. -- about Evaristo Garcia being a student, the fact that that has occurred, does that impact the likelihood of other memory errors occurring here?

A Well, yes. I think that's a significant memory error and one that should be considered in determining how good her initial memory for the shooter was. Because that's a critical question here, is how good was her memory for the appearance of a shooter anyway? So going back to the time of the incident, how well did

she see the shooter? How accurate is her memory? If we have a very strong memory for someone, then we're going to consistently describe that person over time and we're not going to make mistakes with our identification. We're going to be very consistent over time in identifying that person.

But if we have a weak initial memory and you only see a person very briefly and don't have much information about what they look like because of the 11 factors that I'm talking about today, that's a situation where you're going to get lots of inconsistencies and incorrect identifications afterwards.

So to answer your question, the fact that at some point in time she looked at this photograph that we're talking about and said that, Yeah, he was a student at this -- at the academy where I work, and that's wrong, he was never a student there, indicates to me, anyway, that, you know, I've got questions about -- serious concerns about how well she ever saw the shooter's face to begin with.

Q And you've touched on this, but can you briefly tell us how stress was a factor here?

A Yes. Just, basically, let me say that a significant amount of research has shown that memory is better under a kind of lower levels of stress. When people are in a very high stress situation, their memory gets worse. And it's really important to understand. Most people have this effect backwards. Most people think that if I was under a high level of stress, I would be really good at

remembering what happened. And if I can just take a -- just a second to say that I did a study on memories of the events of 9/11. Now, I'm not saying that any of us will ever forget that 9/11 happened. Any of us who lived through 9/11/2001 will never forget that that happened. That's for sure.

Will we remember which plane hit which tower first? Which tower started to fall first? All the details of that horrible day? No. I tested peoples' memory seven weeks after the events of 9/11 and already their memory was quite unreliable. They had facts wrong and so forth. And that doesn't -- that's what I'm talking about, is under high levels of stress, people forget the details of things. They don't remember information very well.

This was clearly a life-threatening situation for Ms. Betty Graves, potentially life-threatening for her, potentially life-threatening for the students that she was watching over and so forth, as soon as she suspected that there was a weapon present, that would have elevated her level of stress. And under a high level of stress, our body releases stress hormones that are known to negatively impact reliability of memory.

So in this case, the fact that it was a very stressful event would have impaired Ms. Graves' memory for the face of the shooter in that situation.

Q And you've already explained time delay to us, so I just want to ask, in light of the stress and the distractions that you've identified, what does that mean about how quickly Ms. Graves'

memory would decline in this case?

A Okay. There's an effect called Jost's Law, that's J-O-S-T-'-S Law. And I talk about the forgetting curve. Jost's Law is more specific, and says if you have a very strong memory for something, your memory's going to decline more gradually than if you have a weak memory for something. So -- and this kind of makes sense. It should.

So you're looking at my face for a long period of time, you're going to have a strong memory for what I look like. That strong memory is going to stay with you, basically, for a longer period of time. And so the -- basically, I'm talking about the slope of the forgetting curve. The slope of the forgetting curve is going to be more gradual for information that you know really well. You're looking at my face, you've got a good memory for what I look like, you're going to forget details of my face, my appearance and so forth, more gradually compared to if you look at a person for a brief period of time. Ms. Graves looked at the shooter for only a matter of 10 or 15 seconds. Her memory is going to be -- I'll just generally characterize it as a weak memory. It's not going to have much of the details of that shooter's face, his appearance and so forth. She's going to have a weak memory.

And weak memories decline more quickly over time. The slope of the forgetting curve for a weak memory is quite steep. So in this case, based on these factors that I'm talking about today, there's every indication that Ms. Graves had a weak memory for

what the shooter looked like even initially. Even, you know, minutes or an hour or so later, she just never saw that person very clearly to begin with. And therefore, her -- the forgetting curve for Ms. Betty Graves for the shooter's face is going to be a steep drop-off and she's going to forget the information more quickly.

Q Next, turning to the idea that memory is reconstructed -- is a reconstructive process over time, did you find examples in this case that suggested Ms. Graves' memory was reconstructed over time?

A Well, there are inconsistencies or at least changes in her memory for what she said at different points in time. And, you know, there are some notable changes in her memory over time. And those changes could be because of the passage of time, that at different points in time she's recalling information less accurately. But it could also, give -- it could also be because -- give -- what I got to -- the file that I reviewed in this case, Ms. Betty Graves was working in a school. And this was probably the most notable -- the shooting was probably the most notable thing that happened in that school for the principal, Mr. Eichelberger, for her colleague, Mr. Terra Berkley [phonetic]. It was -- for the kid in the school -- so mostly likely over time she was talking to other people about the event, what they thought happened, what they saw to happen, and so forth.

And people are thinking about an event that -- they're talking about the event and so forth. They are reconstructing it over

time. So -- and as they do that, their memory is morphing. And that's a natural process in memory. That happens all the time, particularly for events that we never saw well to begin with. So we do that all the time, and most likely, Ms. Betty Graves was doing that and she had a very weak memory for what happened in this situation and what the shooter looked like, and what he did when. And then as she's talking to other people and hearing what they have to say and then, like I say, ruminating about the situation herself, she's probably reconstructing this event, which initially was probably kind of an incoherent event for her. She didn't know what was happening, she didn't know what this person was going to do. And she just kind of looking at these things happening very quickly and literal mayhem.

And then over time, she's trying to make sense out of it. And only after the event occurred did she understand that this guy was a shooter who's going to shoot someone in that school yard. And so then, with that as hindsight, she goes back and reconstructs the whole thing as, wow, I must have really noticed a lot, because this was a pretty salient event. And then she reconstructs what the guy looked like even, and maybe even -- well, in this case, she actually said at trial, He was the strangest-looking young man. She said that at trial, but had never said that previously. And I spent a lot of time thinking if she thought he was the strangest-looking young man, you would think she would -- he would -- she would have said that at some earlier point in time, but she ever did.

I couldn't find anything in the record that referred to her having said or thought that he was the strangest-looking young man until the time of the trial, which was, you know, a long time afterwards. And I -- one interpretation of that is in the process of reconstructing this event and thinking about it and so forth, she came up with this memory of the shooter as being kind of strange-looking, even though she had never said that before. So that's just one example of, in this case, how she probably reconstructed the events.

Q And you mentioned in your explanation, also, the fact that she could have spoken to other witnesses. So that ties into the last factor about post-event contamination because witness cross-talk, right?

A Yes. Exactly. That's another basis for reconstruction of a memory. It's literally a contamination. And we understand how evidence, fingerprint evidence, blood evidence can get contaminated by mixing sources or getting diluted or whatever. The same thing happens with memory, it's literally contamination. If two vials of blood get mixed and they're all mixed together, it's contaminated. If two eyewitnesses talk to each other about what they saw happen, their memory is contaminated. And then once it's contaminated, it's not possible to pull out what was Ms. Graves' memory, what was the principal's memory for what happened that day. And it's just like the two vials of blood; once they're mixed, you can't unmix them. You can't unring that bell. They're

contaminated, you can't uncontaminate them.

The same thing is true with eyewitness memory is once eyewitnesses have talked to each other, which in some situations like this, they work together and they inevitably talk to each other about this event. The process of talking to each other about the event is going to contaminate memory and all of this is making it harder and harder to determine, by the time you get to trial, what actually did happen. What did she remember? Is she a reliable eyewitness or not? How good was her memory minutes after the event, let alone months or years afterwards? So this is just contamination from witness cross-talk.

Q Doctor, did you review Exhibit 2 in preparation for this case? The reports prepared by the Clark County School District Police Department?

A I did. Yes.

Q And was this the first description of the shooter given by Ms. Graves that you reviewed? First --

A That's my understanding. That is my understanding, yes.

Q And you previously mentioned that there were inconsistencies or differences in Ms. Graves' various descriptions. And what were those differences that were evident because of this initial description in this report?

A Okay. This -- I refer to it in my declaration on page 21, the major points I noted were that in this incident report, she says that the shooter had a medium build. And then by the time she got to

trial, she described him as heavyset. In the initial report, she described the shooter as having a mustache. And that was -- I couldn't find that she had mentioned a mustache at any point after that, including through the trial.

In the initial report, she describes him as a dark-skin Hispanic male, and then did not mention dark skin after that. And then at the time of the trial, like I said, she said he was the strangest-looking young man, and nothing in this initial incident report from the school district refers to anything strange-looking about the shooter.

So those are the inconsistencies that I noticed based on this incident report.

Q And what, if anything, can these inconsistencies tell you about the strength of her initial memory?

A Well, what it says to me, again, is that strong memories are going to be consistently recalled over time. It's weak memories where there are usually inconsistencies over time. So the fact that there are these inconsistencies that were not notable until the incident report, but the fact if there were inconsistencies suggested to me that Ms. Graves probably had a weak memory for what the shooter looked like, which is why there are these changes over time.

Q So then these inconsistencies also speak to whether her memory deteriorated over time?

A These inconsistencies speak to how clearly she saw the

person initially, how much her memory probably deteriorated over time, how much -- referring to my list of factors again, Number 11, how much post-event suggestion there may have affecting her memory. If she had initially said medium-build, maybe one of the other witnesses kept talking about this guy being kind of chubby or heavyset of whatever, her memory's contaminated by that, so she's later referring to this person, hypothetically, as heavyset, because she heard someone else say it.

So these inconsistencies raise questions about how clearly she ever saw the shooter to begin with, what happened to her memory over time in terms of just the fading of memory and it becoming less reliable, and post-event suggestion sources that probably affected her memory over time too.

Q Do you remember, based on what you reviewed, if Ms. Graves testified about whether or not Giovanni Garcia was the shooter in this case?

A She testified that he was not. I do remember that, yes.

Q And so what do these identified inconsistencies tell you about the potential accuracy of that exclusion?

A Well, there's a direct link there. Because, as I've been talking about this case, there's every indication that Ms. Graves did not have a good, strong memory for what the shooter looked like. And if she did not have a good, strong memory for what the shooter looked like, then she's less likely to correctly -- when she makes an identification, that's less likely to be correct, and when

she makes and exclusion of someone, which is the case here in terms of Giovanni Garcia, that's less likely to be correct. Because if you don't have a strong memory, anything you compare to that memory is not going to be reliably compared. So identification of someone is not likely to be correct. The exclusion of someone is not likely to be correct, because she doesn't have a strong memory for what the shooter looked like anyway.

Q And, Doctor, do you believe that memory is just always flawed?

A Always flawed? No, absolutely not.

Q All right.

A In fact, I think that most of the time eyewitness memory is dependable and trustworthy. But I make that determination on a case-by-case basis, based on the facts of the case that are likely to have affected memory one way or another.

Q And so based on everything that you've reviewed, do you believe that Betty Graves' memory of the events in this case was likely flawed?

A Was likely flawed? Yes. Based on the 11 specific factors that I've been testifying to, yes, I think that her memory for the appearance of the shooter and what sequence of events happened is likely to have been flawed.

Q Thank you, Doctor.

MS. SMITH: No further questions, Your Honor.

THE COURT: Cross.

MS. DEMONTE: Thank you.

THE WITNESS: May I ask for a bio break before we proceed?

THE COURT: Yes, that'd be great. Take about 15 minutes. We'll see you back here at 10 after the hour.

[Court recessed at 9:54 a.m., until 10:35 a.m.]

THE COURT: Can you hear us, Mr. Garcia?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Are they giving you a chair?

THE DEFENDANT: Yes.

THE COURT: Okay. Perfect.

THE DEFENDANT: Thank you.

THE COURT: All right. We're going to go ahead and continue.

Counsel, cross-examination.

MS. DEMONTE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. DEMONTE:

Q Dr. Pezdek, you spend the primary focus of your report on the limitations and aspects regarding any identifications made by one Betty Graves. Were you asked to issue an opinion as to any other versions in this case?

A I was not. I don't believe I was, no.

Q Okay. So I'm going to -- I'll stay with Betty Graves for the moment, and then I'll get into the other issues.

You sort of make a few conclusory statements about Betty Graves' ability to rule out Giovanni Garcia as a suspect. And -- but one of the things you mention on your report is that familiar people are more likely to be correctly identified than strangers. And that holds true, correct?

A Yes. If someone looks at a person who's familiar, they're more -- it's easier to remember them than a stranger, right.

Q Okay. So if I saw Ms. Pandukht, my co-counsel, commit a murder, it's probably not going to factor into all these things that factor into an identification that I make are going to be different if I see a complete stranger do something, correct?

A That is true, but how well you know the other person is very important to consider. In other words, your co-counsel is very familiar to you, you spend a lot of time with her, you know when and where and so forth. But if an eyewitness says that she knows a person generally from among the 1,000-plus students in the school, or I saw him at the park last summer, I call that casual familiarity and that's a little bit of a different thing. But yes, in general, someone who's highly familiar to you is going to be more accurately recognized.

Q And -- now, based on what you were given in this case, can you actually make a determination as to how well Betty Graves was familiar with Giovanni Garcia?

A No. In fact, that was one of the areas that I identified for which it would have been critically important to know how well did

Betty Graves know Giovanni Garcia. And I couldn't find any place in the materials where she was asked how many times did you see him? For what period of time? How long ago was that? Et cetera. So --

Q Okay.

A -- amazingly, to me, she was never asked, I don't think, how she knew or how well she knew Giovanni Garcia. So that's not possible to determine from any information available.

Q Okay. But from what you were given, she was shown a photograph of him and wrote that he went to the school and said he was always a troublemaker. And you were provided a copy of her -- is that yes?

A I'm sorry, the -- yes, I'm looking at that picture. Went to school where I work, Morris Academy Sunset, always a troublemaker. And then she signed it.

Q Okay. And then you were given a copy of her trial transcript where she was specifically asked about -- and I'm looking at Tab 12 of the exhibit binder that you have, and it's page 131 of that exhibit. And it says:

Do you remember someone who went to school by the name of Giovanni?

Answer: Yes, ma'am.

Was Giovanni the shooter?

No, ma'am.

Did you see Giovanni in the fight, though?

Yes, ma'am.

Do you remember what Giovanni was wearing?

No.

Was it a gray sweatshirt, though?

No.

So she knew him enough to know him by his first name.

A Correct.

Q Okay. Now, let me ask you about generally things. Now, as I touched on before, generally speaking, what you focus on is when a assailant is unknown to the witness, correct?

A No. Those situations, I testified in cases that -- in which there is a familiar person who's identified, like I said, what's important for me to evaluate in all cases is the basis for the familiarity, how familiar is the eyewitness with the --

Q Okay.

A -- person being asked about.

Q Now, would you agree with me that Betty Graves did not make an identification?

A Correct.

Q Okay. And, in fact, at trial when she was asked if she could make an identification, I believe her language was, I done got old and forgot stuff.

A Something like that, right.

Q Okay. Now, in your report, you reference materials that were provided to you by the Federal Public Defender's Office. Now,

were you provided with a complete case file to your knowledge?

A I don't know, but I doubt it, because I would only review the information relevant to the eyewitness identification in any case. So if there was any kind of other information, I would never be provided that, because I can't evaluate anything but the eyewitness evidence.

Q Okay. So you were not provided with a trial transcript for one Edshel Calvillo?

A That -- I'm pretty sure that's correct. I don't know whether I was provided that or I just knew that that didn't relate to the eyewitness evidence and didn't review it. But I don't think I received that information, no.

Q How about a trial transcript for one Jonathan Harper?

A Same answer.

Q Okay. How about a Las Vegas Metropolitan Police Department recorded statement of Edshel Calvillo?

A I don't believe so, no.

Q How about a Las Vegas Metropolitan Police Department recorded statement of Jonathan Harper?

A I had information about no other witnesses in this case.

Q Okay.

A Except for those relevant to the eyewitness --

Q Now, just bear with me and answer yes or no --

A -- identification.

Q -- to all of these.

How about a statement by one Manuel Lopez?

A I don't believe so, no.

Q How about a preliminary hearing transcript of the testimony of Melissa Gamboa?

A I don't believe so, no.

Q How about any trial transcripts or statements by a woman by the name of Crystal Perez?

A I don't believe so, no.

Q How about a latent fingerprint report for this case?

A No.

Q Okay. And finally, were you given any evidence or anything in the documentation that Mr. -- of Evaristo Garcia had actually fled to Mexico shortly after this crime?

A No.

Q Okay. Now, in the materials you were given, were you aware from those materials that you reviewed that Edshel Calvillo, Jonathan Harper, and Manuel Lopez, all knew Evaristo Garcia, as well as Giovanni Garcia, and knew him quite well?

A I don't know anything about those other people.

Q Okay. Doctor, in answering a question that the judge had posed to you, you had referenced that this was an incomplete investigation. Given the fact that you were not provided a boatload of materials, are you still of the opinion that an incomplete investigation was done in this case?

A Well, just to be clear, that opinion only related to the

eyewitness evidence, and particularly the eyewitness evidence by Betty Graves. So I'm not -- I can't -- and I didn't evaluate any other evidence in this case, except for the eyewitness evidence, and I was simply commenting that in terms of the circumstances under which Betty Graves saw the incident and saw the shooter, she was never questioned in any detail, as would usually be the case, in an investigation of an eyewitness. So that opinion was only pertaining to the eyewitness evidence by Ms. Betty Graves.

Q Okay. Now, so would you share the opinion if I were to tell you that Edshel Calvillo, Jonathan Harper, Manuel Lopez, who all knew Evaristo Garcia, had all stated that Mr. Garcia was the one who did the shooting. Jonathan Harper having witnessed it himself, going as far to say that Giovanni was run alongside Mr. Garcia, saying, Shoot him, shoot the fucker; that Edshel Calvillo had informed police and testified at trial that after the shooting, Evaristo Garcia told him he had done it, and that Manuel Lopez had indicated that he was the one that provided to gun to Evaristo Garcia.

Given all of that, do you believe that perhaps Ms. Graves' information that she provided in this case was probably not as significant as the materials you were provided seem to suggest?

MS. SMITH: Your Honor, I have to object. That was both a compound question --

THE COURT: It is a compound question.

MS. SMITH: -- if she could break that up.

THE COURT: But, counsel, I have allowed those all day long, including narratives questions.

MS. SMITH: Okay. Thank you.

THE COURT: I'll allow the doctor to answer.

THE WITNESS: Okay. Two things. I cannot evaluate any other evidence in this case. So you asked me about those other factors, so I can't evaluate any of that other information. So, you know, I don't have enough information. I assume, you know, that was unpacked at trial. But I don't have information about those other circumstances. I can't evaluate any of that to see how much of it is true or honestly presented or well-intended or whatever.

And the second thing is it's kind of a legal decision, I think. Certainly, not my decision as to the reliability, whether Ms. Graves' identification would have been bolstered by other evidence. Legally, it's incredibly important to evaluate each line of evidence separately. So just because in a given case --

THE COURT: Doctor. Doctor.

THE WITNESS: -- there might be 12 lines of evidence --

THE COURT: Doctor, please stick to your expertise. Do not give me a legal opinion. Okay. Give me an opinion about eyewitness testimony and its credibility.

THE WITNESS: Okay. Eyewitness evidence needs to be evaluated for each eyewitness, separate from all other evidence. And I'm just evaluating whether Ms. Graves' eyewitness evidence is likely to be reliable or not.

THE COURT: Doctor, does there not have -- is there not studies that show corroboration by other eyewitnesses give credence to a witness's testimony? That it verifies, in fact, the witness saw --

THE WITNESS: Corroboration is --

THE COURT: -- what they saw?

THE WITNESS: Sir, corroborating evidence is important for the trier of fact to consider in evaluating any line of evidence. I'm -- I can't offer an opinion about the reliability of any eyewitness. That comes from evaluating the totality of the evidence, which I don't do.

THE COURT: Counsel, continue.

MS. DEMONTE: Thank you.

BY MS. DEMONTE:

Q But you will ultimately agree with me that Betty Graves never made an identification of anyone in this case?

A Right.

Q Okay. And will you at least agree with the possibility that her role in this investigation was relatively minor? Just the possibility.

A I can't evaluate that. Oh, I'm sorry. I can't evaluate that, just because, as I said, I did not review the totality of the evidence in this case. I -- that's not my role. So I can't determine that.

MS. DEMONTE: Nothing further.

THE COURT: Redirect.

MS. SMITH: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MS. SMITH:

Q First, Doctor, you -- there were a series of questions about Ms. Graves' familiarity with Giovanni. And you testified, didn't you, that in that series of photographs in Exhibit 1, Ms. Graves stated that Evaristo Garcia went to her school, even though he did not; is that correct?

A Yes. That's correct.

Q So does that tell us that she's not necessarily accurate about who she does and does not know?

A That's what it suggests to me, that when she pointed to one person, who's Evaristo Garcia, and said, He's a student who goes to my school, and was wrong about that, then when she pointed to another person, Giovanni Garcia, and said, He's a person who's going to my school, you know, it raises questions about how well she even remembers him from the school. Yes.

Q And you testified that we don't know, because Ms. Graves was not asked, specifically, how well she knew Giovanni Garcia, correct?

A That's right. I looked for that very carefully in the materials and was not able to find any information about how well she knew Giovanni Garcia.

Q Does that lack of specificity change your ultimate conclusion about the likely accuracy of her exclusion of Giovanni

Garcia at trial?

A No. It just -- it's, like so many things in this case in terms of Ms. Betty Graves, it's -- I couldn't determine that. There wasn't enough information me to determine that.

Q And if you --

A It does not change my opinion. It just means that I'm kind of -- was not able to make a determination as to how well she knew Giovanni Garcia.

Q And is your ultimate conclusion based on a combination of all 11 factors that you identified and not just one factor, such as the familiarity of the witness and the perpetrator?

A Yeah. Yes. For example, even familiar people are likely to be misperceived if they are observed very briefly at night under a hood, cross-race conditions, and so forth, under high levels of stress. So yes.

In a case like this, I thought there were 11 factors that are relevant to think about together, and they all need to be considered in evaluating the reliability of eyewitness evidence.

Q And, Doctor, do we know anything about the circumstances surrounding Betty Graves being shown that series of photographs in Exhibit 1?

A I didn't know anything. I was curious about that. I saw the date on the material, it's February 19, 2090 [sic], but I don't know -- know what the circumstances were. All of these people do not match the description that she gave of the shooter, so this

clearly wasn't a sequential photographic line-up.

THE COURT: Doctor, you have no opinion about that, then, right? Doctor, you have no opinion about it in regards to that, you're just curious about it, right?

THE WITNESS: I could not make a determination, that's right.

THE COURT: Counsel, move on.

MS. SMITH: Thank you, Your Honor.

BY MS. SMITH:

Q You were asked a series of questions about other evidence in this case. Would statements by, for example, Edshel Calvillo be -- help you assess Betty Graves' memory and her description in this case?

A I don't know who that person is, so I can't really answer that question.

Q If there are witnesses whose testimony do not testify that they interacted with Betty Graves during this incident, would that testimony -- is that likely to be helpful or necessary to your evaluation?

A Could you rephrase that and specify what you mean by interact with? Do you mean talked to her at the time of the shooting? Or -- just restate the question, if you could, please.

Q Is it necessary for you to -- when you're evaluating one witness's memory, is it necessary for you to review all of the evidence presented in a case?

A No. No. A lot of that evidence would not relate to the eyewitness evidence at all.

Q And so is the purpose of your evaluation and your testimony to give an assessment of the importance of Betty Graves' identification or testimony or lack of identification and exclusion here?

A No. I'm not able to make that determination, I was never asked to make that determination. That's just not something that an expert witness would be able to determine because of the focus of what I was doing in this case.

Q And your focus here was on Betty Graves specifically, and not on any other witnesses, correct?

A Well, if any other witnesses were standing there with her and observed what she saw or whatever, you know, that would be relevant. But otherwise, I agree with you, it would not.

Q And you weren't asked to make an assessment about anyone else's memory other than Betty Graves, correct?

A That's correct. I was not.

MS. SMITH: No further questions, Your Honor.

THE COURT: Any follow-up to that, counsel?

MS. DEMONTE: No, Your Honor.

THE COURT: Okay. Thank you, Doctor. You may be excused.

THE WITNESS: Okay. Thank you.

THE COURT: Counsel, call your next witness.

MS. BIZZARO: Your Honor, I call Attorney Dayvid Figler.

While Mr. Figler is getting connected, the parties have a stipulation to report to Your Honor.

THE COURT: Okay.

MS. BIZZARO: The parties stipulate to the admission of all the exhibits contained in the binder. And we further stipulate that Exhibits 3 through 8 were disclosed to the defense in discovery by the State.

MS. DEMONTE: That is correct. 3 through 8 were disclosed. That's, you know, a fraction of what was disclosed to the defense.

THE COURT: Right.

MS. DEMONTE: So it's not the sum total of what was disclosed.

THE COURT: But 3 through 8 in their entirety were disclosed to the defense during the trial preparation?

MS. DEMONTE: Yes.

THE COURT: Okay.

MS. DEMONTE: And that is correct.

THE COURT: All right. They're all admitted.

[Plaintiff's Exhibit Nos. 1 through 19, and 22 admitted.]

THE COURT: Mr. Figler, good morning. Can you hear us?

MR. FIGLER: Good morning, Your Honor. Yes, I can.

THE COURT: If you'd please rise and raise your right hand, sir.

DAYVID FIGLER,

[having been called as a witness and first duly sworn, testified via BlueJeans as follows:]

THE COURT CLERK: Please be seated and please state and spell your first and last name.

THE WITNESS: My name is Dayvid Figler, first name is spelled D-A-Y-V-I-D, last name is F-I-G-L-E-R.

THE COURT: Counsel, your witness.

MS. BIZZARO: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. BIZZARO:

Q Mr. Figler, can you hear me okay?

A I can, thank you.

Q How are you currently employed?

A I'm a private attorney in Las Vegas, Nevada.

Q Do you specialize in any particular areas?

A My practice for the last two decades has primarily been in criminal defense.

Q Have you received any awards for your service?

A Over the years, yes. Most recently and notably, in 2019, the State Bar of Nevada awarded me the Medal of Justice for my efforts in the realm of criminal defense and work with regard to representing individuals and diversion courts.

Q Could you please estimate the number of jury trials you've participated in?

A Since the beginning of my career, I believe that number is somewhere hovering between 25 and 30 jury trials.

Q Can you estimate how many of those are homicide trials?

A The vast majority of those would be homicide trials.

Q How did you become actively involved in this case?

A With regard to Mr. Garcia's case, I was contacted by an attorney who I, at the time, frequently collaborated with named Ross Goodman. Mr. Goodman and I had done a number of trials together, and I often provided either consultation support for him, sometimes just on the collegiate level, sometimes on a professional level. And then at times, I would actually come into cases that originated from his office.

Q What was the purpose of your role in this case?

A Mr. Goodman was prepping for trial. He had called me with a question or two about some issues and I recall telling him that I was available if he needed me. And then mostly for preservation of appellate issues, which is one of the things that I bring to the table. We have differing, but we like to think complementary, styles. And so I was brought fairly late, I believe, in the game into trial representation for Mr. Garcia. And then my role expanded as the trial got closer and actually began. This is all within a two- to three-week period prior to the trial beginning in what I believe was July.

Q So by the time you arrived in the case, the defense had already filed the discovery motion that is Exhibit Number 9; is that

right?

A Just for the record, I was given a binder of materials entitled Garcia versus Dzurenda, with a Petitioner's Exhibits 1 through 22, is what's being referred to. So I have a copy of that in my office. And I am looking at what was identified as the Exhibit Number 9. And, yes, that Motion for Discovery would have predated my participation in the case.

Q Once a discovery motion is filed, is it your practice to continually file new discovery motions?

A No.

Q If you don't receive certain reports, do you assume that they don't exist or the State is hiding them?

A I --

MS. DEMONTE: Objection, leading.

THE COURT: Hold on.

Counsel?

MS. BIZZARO: I can rephrase.

THE COURT: Rephrase.

BY MS. BIZZARO:

Q If you don't receive something from the State after a discovery demand's been filed, what's your assumption?

A I deal with professionals over in the Clark County District Attorney's Office all the time, unless I have reason -- specific reason to doubt their obligation is being fulfilled, I just assume that it is being fulfilled. Certainly, in this case, I've worked with both of the

prosecutors before and I would have no reason to believe that they would not turn over all of the discovery that was either private -- previously ordered or which they felt was important for the defense. They are both reliable and professional individuals.

Q And how did you get your discovery in this case, given your relationship with Mr. Goodman?

A All my discovery would have come from going through Mr. Goodman's files. And if there was something specific that I needed to work on that was in digital format, Mr. Goodman's legal assistant would forward the same to me.

Q Did you review all of the discovery that Mr. Goodman provided to you?

A I did review all the discovery that Mr. Goodman provided to me, as would be my practice as well in prepping for a homicide trial. And I have specific recollection of reviewing every document that Mr. Goodman sent my way.

Q I'd like to turn your attention to Exhibit Number 2, beginning at FPD0008.

A I've turned to that document.

Q Did you receive this document in discovery?

A Prior to trial?

Q Prior to trial.

A No.

Q The trial in this case was on one count of conspiracy to commit murder and one count of murder, each with the intent to

promote further or assist a criminal gang; is that correct?

A That's my recollection.

Q What happened to the gang enhancements?

MS. PANDUKHT: Objection. Relevance.

THE COURT: Hold on, counselor.

What's the relevance?

MS. BIZZARO: Judge, it goes to materiality, when the impact of this document will have --

MS. PANDUKHT: I don't see that materiality.

MS. BIZZARO: -- on the trial.

THE COURT: Materiality of a Clark County School District report on whether or not this individual was in a gang?

MS. BIZZARO: No, Judge. The point I'm trying to make is what happened at trial and how the jury decided it. And then later, what the impact of this document would have had in Mr. Figler's opinion.

MS. PANDUKHT: Okay. I object. Can I make an offer of proof?

THE COURT: Go ahead, make an offer.

MS. PANDUKHT: I object to that, because, as Mr. Figler knows, the gang enhancement was the subject of much debate during the trial. And the gang enhancement is a very large issue as it related to this trial. There were many motions pre and post-verdict that were done regarding the gang enhancement. It was a very big issue on appeal. I just don't think that all of the

multitude that was that issue in this trial is relevant to these proceedings.

THE COURT: I'm trying to figure out how it's relevant to this specific evidentiary hearing --

MS. BIZZARO: Yes.

THE COURT: -- then, specifically, with this Clark County School District record. I mean, Betty Graves didn't -- I mean, it's not her statement that makes him -- identifies him as a gang member that Metro's gang unit got involved or homicide got involved. What's the relevance?

MS. BIZZARO: Judge, my point is that all of the legal arguments that went into it, and I think because the transcripts have been admitted into evidence, just the fact that the gang enhancement was dismissed from the case is fact that this Court can consider.

THE COURT: I can consider it, but what's the relevance?

MS. BIZZARO: The relevance, I think later, as I will show with Mr. Figler, is that this was a close case, and the defense was one of misidentification. And so how this document feeds into this close case matters. So I just simply was trying to point out that the gang enhancement fell away in the middle of trial.

THE COURT: Okay. Continue on.

BY MS. BIZZARO:

Q Mr. Figler, did the State prevail on the conspiracy to commit murder count?

A Our jury verdict? No.

Q What about the murder count?

A So the -- obviously, the verdict speaks for itself. But it was something that we, at the time, and have -- and continued in post-conviction to refer to as a compromise verdict that was not supported by either side's theory and was a second-degree murder -- it was a second-degree murder verdict.

Q What was the State's theory at trial?

A That Evaristo [indiscernible; audio distortion] premeditation and deliberation shot the decedent in the matter.

Q And you --

A And that would amount to first-degree murder.

Q And the theory of the --

A And that he conspired with others to do the same. I'm sorry.

Q And the theory of the defense?

A The theory of defense is that they had the wrong person. That, obviously, the decedent was shot, but that the identification was [indiscernible] reliable and that there was no other forensic evidence that rose to level of proof beyond a reasonable doubt that Evaristo Garcia, over any other number of people, was the person responsible for the death.

Q Why was Betty Graves important to the State's case?

A Well, I can't speak to the State's case, per se. Only in terms of how the defense perceives the State's case. And how we

approach witnesses as such. In that context, what I conclude is that Betty Graves was the independent witness who saw the shooter, or purportedly saw a person who could have been the shooter, face to face in close proximity.

There were other individuals who had testified against Mr. Garcia we believed had motives to falsify information and to intentionally and wrongfully identify Mr. Garcia as the shooter and protection of themselves or others.

THE COURT: Mr. Figler, did you bring --

THE WITNESS: Ms. Graves --

THE COURT: Mr. Figler, did you bring that out during trial in front of the jury?

THE WITNESS: Yes. We definitely did that. But as it regards -- as it focuses on Ms. Graves -- Ms. Graves was the trickiest witness that we had, Your Honor. Ms. Graves was an independent person who entered the courtroom with an infinite degree of likability. And because of her age and her demeanor and the fact that she had no, you know, motive to falsify information, she was going to come across, unless we figured out a way otherwise, as supportive of the person who called her. In other words, Ms. Graves did two things for the State that we had to struggle with, because we just didn't have the tools it diminish it, and so we came up with what was ultimately a third strategy, which neither Mr. Goodman or I particularly found out that was all that we had at the time.

Ms. Graves presented to the jury information that would have been consistent if not corroborative with the witnesses who we felt had the motives and was able to, essentially, take away one of our prime alternative suspects that we were pushing the jury towards. And she did it in a very folksy and pleasant demeanor in which it would have been virtually -- it was -- it would have been very hard for us to beat up on her or to, in any way, sort of diminish her impact more than the very light cross-examination that I did. And I did a very light cross-examination, because I didn't have anything hard or fast to sort of take Ms. Graves and make her a defense witness. So we just kind of left her, Oh, good God, and bless her soul, and, you know, her empathetic and sympathetic portrayal of the scene and her information sort of alone, especially when she said things like, Well, I'm old and I don't remember well. And that was as best as we were going to get out of it.

So, you know, had there been -- and I know we're going to get to this, Your Honor, but had there been ways to take Ms. Graves back in time and establish what she saw or was reporting at the time, whether it be with regard to photos or her own statements or statements that she gave to law enforcement, that cross-examination certainly would have gone in a different direction to the extent that we would have made Betty Graves our best witness and in my belief, would have been able to convince the jury that the witnesses who were testifying that Evaristo Garcia was the shooter were doing this solely on ill motive, and that there

was nothing that either corroborated or was consistent with their testimony. Indeed, there would have been things that were opposite, and we would have used Betty Graves as the lynchpin for that tact.

But as you can see from the transcript, we didn't. My cross-examination was probably the shortest cross-examination that I've done in my career, because I just didn't have anything physical to either impeach or redirect her or to make her my own, if you will. I mean, that's my terminology, is to use a great State's witness to become a great defense witness, and that was not accomplished in this case.

THE COURT: Okay. Counsel, next question.

BY MS. BIZZARO:

Q How would Exhibit 2 have made Ms. Graves into a defense witness?

A Okay. So having thoroughly reviewed Defense Exhibit 2 now, there are quite a few things in there that would have been useful at the time. Most noteworthy, of course, would her depiction right away of the individual with the mustache. All my recollection of photos and depictions of Mr. Garcia at the time had no mustache or would not have had any sort of mustache prominent.

So what we would have done, just on that fact alone, is to lock Betty Graves into saying that you -- at the time, you say now that your memory is not very good, but at the time, you gave a direct description of the individual and you indicated to law

enforcement, when you had no reason to lie, when it was the freshest in your mind, that the individual had a mustache.

This would have been, I would say, the cornerstone bit of -- for lack of the better word, but certainly in the broadest sense, the impeachment moment. That would have brought Betty Graves over to our side with regard to the veracity of that characteristic.

Now, secondarily, she did a one-on-one interview with another individual. So, first of all, we have now another individual to look at. Now, the individual who Betty Graves initially described as wearing a hoodie, this individual who was stopped was wearing a hoodie, she said that she didn't think that was the person. However, by the same token now, we are building off of the mustache. We don't know if this person had the mustache or not. I don't know if there was a photo that was taken of the person at the time or if it was her depiction of his hair or what it was. But, certainly, if there was a chance that the person who was stopped with the what appeared to be a one-on-one identification with Jose Bonal was in any way connected to or affiliated with any of the players in this particular event or anything else. I mean, it -- you know, this is how cross-examination works effectively, if you sort of build on one fact after another and you go down these --

THE COURT: Counselor, I don't need a law school lecture. Let's just get to the facts.

THE WITNESS: I understand, Your Honor. I appreciate that, Your Honor. It's just this is my process. I --

THE COURT: I understand how you develop -- I understand how you were going to develop it.

THE WITNESS: -- it's my process, Your Honor. Thank you, Your Honor.

THE COURT: Next question, counsel.

MS. BIZZARO: I don't have any further questions.

THE COURT: Cross.

CROSS-EXAMINATION

BY MS. PANDUKHT:

Q Good morning, Mr. Figler.

A Good morning.

Q I'm going to take -- good morning. Can you hear me well?

A I can hear you either way.

Q It's nice to see you. It's been a long time. So.

A It seems [indiscernible; audio distortion] now.

Q Yes.

A [Indiscernible; audio distortion.]

Q So you were actually the fourth attorney to represent Mr. Garcia, correct, in this case?

A Well, with Mr. Goodman, we were subsequent counsel. There were definitely counsel before us.

Q So Bill Terry represented him at the preliminary hearing level, and Mr. Momot and the special public defender, Scott Bindrup [phonetic], represented him at trial, correct?

A That is correct.

Q Okay. And then you come on the case. My recollection was the same as yours, that it was a week or two or so before trial started?

MS. BIZZARO: Judge, I'm just going to object to any insertion of recollection just going forward from the DA.

THE COURT: We'll allow it, counsel. This is an evidentiary hearing. You're just refreshing Mr. Figler's -- this is foundational, is it not? Okay.

Go ahead.

MS. PANDUKHT: Thank you.

BY MS. PANDUKHT:

Q So --

A Yeah. It was about two to three weeks prior is when I first probably came into the case as counsel, and shortly thereafter, counsel of record.

Q Okay. So you were not --

A With Mr. Goodman.

Q Correct. So you were not part of the years' worth of discovery process that had been previously conducted with prior counsel, correct?

A No, I was not.

Q Okay. But you were aware that there was a Metro evidence review done by prior counsel, Mr. Bindrup, Mr. Momot, and the prosecutors, correct?

A I don't have independent recollection of that being

conveyed to me. So I would take your word for it if that occurred. But that wasn't communicated to me.

Q Well, and if it would refresh your recollection, there was testimony by Detective Ken Hardy in this case and you actually cross-examined him; do you recall that?

A I do recall cross-examining Hardy, yes.

Q Okay. And when you cross-examine Mr. Hardy, isn't it true that Detective Hardy testified on December 29th, 2010, he retrieved the firearm and the evidence out of the evidence vault and conducted a file review and an evidence review with the counsel for the defense and counsel for the prosecution?

A I assume he would say -- I wouldn't know the scope of that, but I would have no reason to believe that Ken would have perjured himself on the stand for that point. So I accept it.

Q And then --

A I accept that that was --

Q Thank you.

A -- the representation made.

Q And then you, though, also, when you came on the case, you contacted Ms. Demonte and I by e-mail and asked us for some additional discovery and also trial-related issues; you recall that?

A I don't have explicit recollection of it, but I probably would have if there was a point that came up, I certainly would have communicated it.

Q In fact, isn't it true that you sent us an e-mail on

July 2nd, 2013, specifically making four requests. And those four requests being regarding the penalty hearing, regard Jonathan Harper, regarding the homicide detective -- gang detective request for file review, and promises and inducements?

A So -- and now we're working off of recollection, so without having the e-mail in front of me, I would say, one, that does appear to be something that would be consistent with my practice if we were going through trial or we were either close to or right before trial, that there would have been communication, if there was something specific that I would need on a specific topic. If you give me a copy of that e-mail, I could probably be a little bit better.

But I often communicate with other counsel during the trial and just want to make sure we're all on the same page on different topics, especially as it relates to witness inducements, which is not typically covered. We usually don't get a unsolicited notice of witness inducement. At least we didn't back then. And, you know, that would be important for me if I felt that witnesses were going to be called in the State's case in chief and we didn't know if there was an inducement or a promise or something to impeach them with. But if you show me the e-mail, it would probably refresh my recollection of what I specifically would be asking for. If -- I don't know if that's possible outside of court.

THE COURT: That's very difficult to do it. Counsel approach. You saw -- oh, I thought you'd seen a copy of it.

MS. BIZZARO: No, I haven't seen it.

THE COURT: Oh, I'm sorry.

It looks like, Mr. Figler, this is an e-mail, it's beginning with your name from Ms. Demonte, July 2nd, 2013, at 9:31 p.m. It also was cc'd to Taleen, Noreen, Ross Goodman, Joanna, and a group of others. And it lays out exactly what she just said. There's no way to show it to you directly, Mr. Figler.

MS. DEMONTE: I'm texting it to him.

THE COURT: Okay. She's going to fax it and text it or whatever she's going to do.

MS. PANDUKHT: So before --

THE WITNESS: Am I looking for a text message?

MS. DEMONTE: Yes.

THE COURT: Yeah, you'll be receiving from -- one from Ms. Demonte.

THE WITNESS: Okay. I just received that document. Can I have a moment to review it?

MS. PANDUKHT: Yes.

THE COURT: Go ahead, Mr. Figler.

THE WITNESS: Thank you, Your Honor.

[Pause in proceedings.]

THE WITNESS: I just got a second one from --

MS. DEMONTE: It's three parts.

THE WITNESS: -- Ms. Demonte, so please hold.

[Pause in proceedings.]

THE WITNESS: And a third. All right. Let me review all

the --

[Pause in proceedings.]

THE WITNESS: All right. I'm going to keep that up on my screen for reference for a second, but I'm not going to look at it unless I tell you that I'm looking at it. But that does refresh my recollection on communications with myself and the State.

MS. PANDUKHT: Thank you, Mr. Figler.

THE COURT: Okay.

BY MS. PANDUKHT:

Q I wanted to draw your attention to the section that spoke about your request for a file review with a detective, Detective Mogg, who was the lead homicide detective in this case. And if you'll recall, the State's response, my response, was:

> We will ask Detective Mogg tomorrow what time would work for him for you to go over his file at Metro headquarters and you're welcome to come review our file on Friday at 8:30 a.m.

And then you'll recall that you responded by saying:

> Friday at 8:30 would be perfect. If you have a contact number for Mogg, I'll work that out with him.

And then we talked about other things. But you recall that it was in your e-mail now?

A Yeah. If there was a -- we were really -- I do and I recall the context, and the context is actually in that chain of e-mails. There were two things that we were focused on, because the same

thing happened at the grand jury transcripts. One was somewhat [indiscernible; audio distortion], which is the witness payment issue. That was very hot issue for me at the time --

Q Well, can I interrupt you just for a --

A -- as related to --

Q Can I interrupt you for just a second? Because I don't want the judge to get mad at me that I'm taking too long.

I wanted to keep you focused on that Mogg issue. So did you ever meet with Detective Mogg to review his file?

A I don't recall. Because the specific issue we were focused in on was the gang stuff for impeachment of Edshel Calvillo and Jonathan Harper and just that -- all that stuff that was coming in. And that was prior to the gang enhancement being dismissed. When we felt that there wasn't sufficient basis for the gang to be in there, so we were hyper focused, or at least I was, on that.

Q Absolutely.

A And if there were any communications with Mogg, it was to get that gang stuff, which later was fodder for the Motion to Dismiss that I filed, that was successful, of the gang enhancement.

Q I see.

A So that's what we were focused on at that point.

Q Absolutely.

A Yes, I recall that.

Q Also, isn't it true that on that Friday at 8:30 in the morning, you came over to the district attorney's office, and in our file room,

we had all the original boxes of discovery, and you reviewed all of that discovery with another DA by the name of Patrick Burns for approximately an hour and a half; do you recall that?

A I have a recollection of being with Patrick and going over it. Really, again, the gang stuff was the stuff we were really looking for. Because that gang stuff we determined, and I think that was you and I were --

THE COURT: Counselor, Mr. Figler, the answer was yes, correct?

THE WITNESS: The answer was there was a meeting, but it was limited, Your Honor, yes.

THE COURT: Okay. But you had the opportunity --

THE WITNESS: [Indiscernible; audio distortion] subject matter.

MS. PANDUKHT: But it was --

THE COURT: But you had the opportunity to review the entire file at that time?

THE WITNESS: Yeah. And if I were to have seen anything else in there, I would have marked it and Mr. Burns would have given it to me if there was something not previously provided.

THE COURT: Next question, counsel.

THE WITNESS: And --

MS. PANDUKHT: Thank you, Your Honor.

THE WITNESS: Yeah.

BY MS. PANDUKHT:

Q Okay. So during the e-mails and during that process, isn't it true that you didn't specifically ask for this Clark County School District police report?

A I'm going to be honest, I didn't know of its existence. If I did, I would have asked for that.

Q Understood. And so there was only a general request that was in the special public defender motion that was filed August 25th, 2010?

A That's -- that -- in the only discovery request by way of motion --

Q Correct.

A -- that I'm aware of in the case.

Q Okay. And we haven't been in communication since this whole postconviction proceeding has been progressing, correct? You and I?

A About this case? No.

Q Yes.

A About other things, yes, we have.

Q Yes. But not about this case.

A Correct.

Q And you have been in contact with the federal public defender, Ms. Bizzaro and her previous co-counsel, Mr. Spelman, because they prepared the declaration?

A [Indiscernible; audio distortion.] Yeah, and I did a dec for -- I did a declaration for the federal public defender and they

sent me this binder, this very large binder, which I will return to them at the end of these proceedings, because space is limited.

Q And did they inform you of the motions that they filed for discovery and also to disqualify the prosecutors that were the subject of a June 2nd, 2020, hearing?

A I don't have specifics on that. But I am aware -- I think I even brought it up that I don't like how prosecutors are allowed to be part of a postconviction, where they are potentially witnesses. But I don't know any extent of any other discovery motions or motion practice. I haven't looked this up on odyssey.

Q Okay. So you're not aware, then, of the content of the State's opposition in which we stated we didn't have a copy of this report?

A No. I don't know the opposition.

Q All right. Moving on, there is no indication in any of the witness statements, either taped or handwritten, that any Clark County School police officers conducted any of those witness interviews, correct?

A I don't recall there being any indication of a school district officer interviewing anyone. It certainly wasn't referenced in Betty Graves' statement, which we poured over.

Q But if I were to tell you --

A Her [indiscernible; audio distortion].

Q -- would you have any reason to disagree with me that after going through all the witness statements in this case, none of

them were witnessed by a Clark County School police officer or conducted by them?

A Correct.

Q So that wouldn't surprise you?

A No.

Q Okay. Now, you recall the testimony of the principal of the school, Danny Eichelberger, at trial where he testified that the school police were there for an unrelated narcotics infraction?

A That sounds familiar. I haven't reviewed the principal's [indiscernible; audio distortion] the only testimony that I reviewed in preparation for today, because I feel that needs to be part of the record, was Ms. Graves'.

Q Okay. But you would agree with me that that's your recollection of the testimony?

A That's consistent with my recollection, yes.

Q Okay. Then on --

MS. PANDUKHT: And, this, Your Honor, is relevant for the prejudice prongs, if you can indulge me --

THE COURT: Okay.

MS. PANDUKHT: -- on these questions.

THE COURT: Let's hear the question.

MS. PANDUKHT: Okay.

BY MS. PANDUKHT:

Q Did you assist or at least were you aware that Ross Goodman filed 10 motions in this case?

A I'm -- I would not be surprised that Mr. Goodman filed additional motions in the case. I participated in some of the motions, as well, especially the gang stuff. That was kind of my issue.

Q So just for the record, isn't it true that Mr. Goodman filed --

MS. PANDUKHT: And if I can list these for the record?

THE COURT: Go ahead.

MS. PANDUKHT: There's some that are very significant.

BY MS. PANDUKHT:

Q So he filed the Motion to Withdraw Guilty Plea on April 22nd, 2011, of course. That's how --

A Right.

Q -- you guys came on the case. Then he filed --

A Correct.

Q -- several Motions for Appointment of Expert and Appointment of Investigator motion. So he filed it on March 5th, 2012, March 15th, and March 19th of 2012, correct?

A To aid with the investigation, absolutely, yes.

Q And would you agree that he also filed a Motion to Compel Fingerprint Evidence pursuant to the NRS, that was filed on June 22nd, 2012?

A Okay.

Q And --

A I agree that that was filed.

Q Thank you.

And then also a Motion to Suppress the In-Court Identification of Melissa Gamboa on September 25th?

A Right. I worked on that one.

Q I'm sorry?

A Correct. I believe I worked on that one. I believe I worked on that one, as well.

Q Thank you. And that was September 25th, 2012.

Then he filed the Motion for Evidentiary Hearing to determine competency of State's primary witness, Jonathan Harper, and Order Compelling Production of Medical Records and Psychological Examination and Testing to Determine Extent of Memory Loss; and that was filed on September 27th, 2012?

A I remember that also. And I just want to correct myself. The Gamboa stuff I worked on, on the appeal. Not on the -- not at the trial. I'm sorry.

Q Okay. Thank you.

A That's my recollection. The Motion to Suppress was an appellate issue and I assisted Mr. Goodman in post verdict on that issue. I want to make that clear. I did not do the other issue. The other motion.

Q But you were aware that he filed those motions?

A Yeah [indiscernible; audio distortion].

Q Thank you.

A [Indiscernible; audio distortion.]

Q And then he filed an expert notice and actually called an expert named Dr. Norton Roitman at the trial to talk about the extent of Jonathan Harper's injuries from being shot by one of the alternate suspects, Salvatore Garcia, two weeks after the murder?

A Correct.

Q Right? And then he --

A Yeah.

Q -- of course, he filed a sentencing memorandum. And you've already mentioned how he was found not guilty of conspiracy to commit murder, as well as not guilty of first-degree murder; he was found guilty of second with use, correct?

A Correct.

Q What I also --

A Yes.

Q -- wanted to bring up is, isn't it true that you got the now-Justice Silver to give an accomplice instruction for Jonathan Harper, correct?

A Not the one I think we asked for, but we did get an accomplice instruction. I know that was an issue in the appeal as well, but yes.

Q And that accomplice instruction required the State to show corroboration, right?

A Correct.

Q And then --

A Yes.

Q And then you exhaustively cross-examined the State's witnesses, you engaged in vigorous --

A With the exception of my Betty Graves one that I indicated, we did our cross-examination of every witness. I don't think there were too many that we passed on. There might have been a couple of witnesses that we did not have cross-examination for. But for, like, Jonathan Harper, Edshel Calvillo, those were -- I would agree to the extent compared to Betty Graves, which was not.

Q In fact, isn't it true that you cross-examined Edshel Calvillo for 56 pages and Jonathan Harper --

A I would not be surprised.

Q -- for 31 pages. But, as you've said --

A When I said [indiscernible; audio distortion].

Q -- Betty Graves -- I'm sorry.

A Yeah.

THE COURT: [Indiscernible] counselor.

THE WITNESS: I agree. We're in agreement on that, counsel.

BY MS. PANDUKHT:

Q Okay. And then you actually only testified -- you actually cross-examined Betty Graves for two pages; you would agree with that?

A Yeah.

Q Okay. And then --

A We -- yeah, we just [indiscernible; audio distortion].

Q So, based upon the cross-examination alone, you would agree that Betty Graves was not the State's star witness in this case?

A We could agree to disagree on that. The purpose of Betty Graves was very strategic for the prosecution and very problematic for the defense.

Q But she didn't identify the defendant at trial?

A She did not. And neither did Melissa Gamboa. But that is also difficult for the defense, the way that the State proceeded with that.

THE COURT: Counselor, stick to the questions and answer just the questions, please.

THE WITNESS: Okay, Your Honor.

BY MS. PANDUKHT:

Q So Melissa Gamboa identified the defendant at the preliminary hearing two years after the murder, but she couldn't identify him at the trial, which was seven years after, correct?

A That is correct.

Q Okay. And then Edshel Calvillo was a critical witness for the State; you would agree with that?

A He was a critical witness for the State, yes.

Q Yes. And, in fact, you couldn't locate Mr. Calvillo, and we only got him to testify because we arrested him on a material witness warrant.

A I can't speak to your processes or what you have knowledge of.

Q Okay.

A But I do know he was brought in as a material witness [indiscernible; audio distortion].

Q Okay. And then we actually -- we conducted the direct examination that day and then you had the evening to talk to him, and then you cross-examined the next day, correct?

A That is correct.

Q And you'll also recall that Detective Hardy testified that they did not make any arrests on February 6th, 2006, the night of the murder?

A That sounds -- I will accept your representation and that sounds consistent with my recollection.

Q And it was an open case for a few months?

A Again, that was my recollection of how the Metro was approaching the matter.

Q And then on April 1st, 2006, Detective Hardy interviewed Jonathan Harper, and prior to interviewing Jonathan Harper, they didn't have an identification on the defendant?

A I would agree again that that sounds consistent with the testimony to my recollection that you've now refreshed.

Q And you'd agree with me that the defendant wasn't arrested until October of 2008, after he was extradited back from Mexico?

A That that -- it would be a consistent timeline to my recollection.

Q Okay. And we had --

A Yes.

Q Oh, I'm sorry.

And we had a booking photo taken of the defendant on that -- at that time, in October of 2008, right?

A I would agree that there was a booking photo, yeah.

Q But it wasn't taken on the night of the murder, it was taken in October of 2008?

A Correct.

Q And then we have a driver --

A Obviously.

Q -- license picture of Mr. Garcia that's dated June 4th, 2005. So, like, eight months before the murder?

A Okay.

Q But my point is, is we don't have a picture of the defendant on the night of the murder to see whether or not he had a mustache?

A Given his age and my recollection of him and other pictures I've seen of him around this timeframe, there does not appear to be a mustache that would have been notable to a witness.

Q But you --

THE COURT: Mr. Figler, you're not telling me you're a

facial hair expert, right?

THE WITNESS: Well, as a early adapter to facial hair, Your Honor, I feel that I do have some personal experience in the matter. And that said, my recollection of Mr. Garcia was -- and, actually, the photo that was in the packet that came my way, as well, seems to be consistent with Mr. Garcia being a baby-faced person.

THE COURT: Okay.

BY MS. PANDUKHT:

Q But you weren't there the night that the victim was murdered, so you don't know what Mr. Garcia looked like on that day?

A I do not.

Q Okay. And you did not do the closing argument in this case, but I thought the closing argument would be the easiest way to address exactly what your defense theory was in this case. And so you heard Mr. Goodman's lengthy closing argument, correct?

A I was there, yes.

Q Of course.

A And I listened. Yes.

Q Of course. And in that closing argument, Mr. Goodman argued heavily that there were no independent witnesses that identified the defendant, correct?

A Correct.

Q He talked about all of the inconsistent descriptions amongst the different witnesses, correct?

A Correct.

Q He attempted to discredit the only witnesses who identified the defendant, Jonathan Harper and Edshel Calvillo?

A Correct.

Q And he went on and on, ad nauseam, regarding all their inconsistent statements, correct?

A If your characterization, Mr. Goodman definitely hit those points, correct.

Q He hit them, okay. And he also argued extensively about Dr. Norton Roitman's testimony regarding Jonathan's memory, because of the gunshot wound, correct?

A Yeah. I do recall that. And again, we could differ as to the adjectives. But those were points that were hit as well, correct.

Q But he definitely talked about their inconsistent statements and their motive to lie, and, specifically, Edshel Calvillo he called a lair, because he testified a certain way at Sal Garcia's trial; remember that?

A Correct.

Q And he also called out, you know, Jonathan Harper as an accomplice based upon that instruction, requiring corroboration.

A You did.

Q But most importantly, Mr. Goodman argued four alternative suspects to the jury being Giovanni Garcia, Salvatore Garcia, Manuel Lopez, and Edshel Calvillo, correct?

A Yeah. Except -- and I have to qualify the answer there,

there was -- the other problem with Betty Graves is that she excluded one of those witnesses, as well, and Mr. Goodman glossed over that, because that was a problem with Betty Graves' testimony again, why it was so important. But I wouldn't disagree with you otherwise in generality that he certainly went to alternative suspects. That was the theory of defense, that Mr. Garcia was not the shooter at this time, nor was he a conspirator with the shooters or shooter.

Q I'm glad you mentioned that, that Betty Graves excluded Giovanni. Because, isn't it true that several other people excluded Giovanni, so Jonathan Harper excluded Giovanni as being the shooter, correct?

A Well, of course. But that all falls within the same category again. Betty Graves being the only independent person who excluded any of our alternate suspects.

Q No, I understand what you're saying. But Edshel Calvillo also --

A [Indiscernible; audio distortion.]

THE COURT: Counsel, we're not going to argue back and forth. Mr. Figler, wait for the question, answer the question.

Allow him to answer, counselor.

MS. PANDUKHT: I'm sorry.

BY MS. PANDUKHT:

Q Edshel Calvillo also excluded Giovanni Garcia as being the shooter, correct?

A Yes.

Q And the fingerprint evidence that identified the defendant, the palm print around the grip of the gun, the handle of the gun, the fingerprints were identified to the defendant, correct?

A Yes --

Q But --

A -- asterisk.

Q Okay. But the fingerprints were excluded from Giovanni and Manuel Lopez, as well.

A They were not found. I don't think that excluded -- there was an --

And, Your Honor, I just have to explain the context. There was another testimony about different parties who had handled the gun --

THE COURT: Right.

THE WITNESS: -- in short proximity for it being used. I'm sure you're aware of that.

THE COURT: I was aware of the handing it around, letting everybody play have gun holder.

THE WITNESS: Right.

BY MS. PANDUKHT:

Q But Manuel Lopez and Giovanni Garcia's prints were not found on the gun.

A Correct. Correct.

Q And also Crystal Perez also excluded Giovanni Garcia at

trial; isn't that true?

A That I don't recall. I'm sorry.

Q Well, if you'll recall, she testified that originally she tried to blame it on Giovanni, because she didn't like him. But then she said she lied at trial and said that he didn't do the shooting.

A Well, right. There was that -- she provided a basis of him being an alternative suspect --

Q Right.

A -- and then she recanted later.

Q Right.

A That's correct. I recall that.

Q You recall that? Okay.

MS. PANDUKHT: Court's indulgence.

THE COURT: Go ahead.

MS. PANDUKHT: No further questions.

THE COURT: Redirect.

MS. BIZZARO: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MS. BIZZARO:

Q Mr. Figler, the discovery request that's got copies of statements given by any State witness on any case, specifically including any reports of said information provided, prepared by any law enforcement agent, in your opinion, would that cover the Clark County School District Police Department report in this case?

A Yes.

Q Requests for other discovery, do they negate a prior discovery request?

A No, they do not.

Q And it's common to communicate with opposing counsel leading up to a trial as you hone in on specific issues, correct?

A I've never had a case where I didn't communicate even with counsel that wouldn't say hello to me in the hallway because of animosity. We still find a way to talk about a trial before the trial is about to occur.

Q In Exhibit 2 tells you that the Clark County School District Police Department was on the scene and conducted an investigation, correct?

A That's what the report says.

Q The State spent a lot of time going over the robust defense that you and Mr. Goodman provided. How does this report play into that defense?

A Defenses are obviously malleable. And not to school the Court, the Court knows how this works. But from my perspective, in approaching a case, is you have to play the hand that you're dealt with. If you have an extra part, your play is different.

And so this report -- and I won't sign the declaration if I didn't mean it. There's no reason for it. It doesn't help my career or help anything other than being straight with the Court and, you know, talking about how I handle cases. This would have been a very different approach had this report been in our possession.

There's no doubt in my mind about that. And I would not have signed that declaration if that wasn't accurate.

There was no strategic decision not to cross-examine Betty Graves in any way other than based on the information we had, and that would have changed, had we had this report.

MS. BIZZARO: I don't have any further questions, Your Honor.

THE COURT: Any recross on that?

MS. PANDUKHT: No more questions.

THE COURT: Thank you.

Thank you, Mr. Figler.

THE WITNESS: Thank you, Your Honor.

Thank all counsel for your professionalism. I appreciate you.

MS. BIZZARO: Thank you.

Judge, we have no other witnesses. And I believe there was a prior motion to take judicial notice of the underlying criminal case in this sort of technically civil matter. And in light of the government's records, the other motions and things, I think it makes sense. And so I'm just moving --

THE COURT: Okay.

MS. BIZZARO: -- let the Court take judicial notice.

THE COURT: I will expand my reading, because I was limited in my reading until that, and now I will expand my 26,000 pages of reading now.

Anything else, counsels? Any witnesses on behalf of the State?

MS. DEMONTE: No, Your Honor.

MS. PANDUKHT: No, Your Honor.

THE COURT: Do you wish to summarize?

MS. BIZZARO: I'm going to let Attorney Smith do that, Your Honor.

THE COURT: Ms. Smith, go ahead and summarize.

CLOSING ARGUMENT FOR THE PLAINTIFF

MS. SMITH: Thank you, Your Honor.

So, of course, a *Brady* claim has three prongs and I want to touch on the first two just briefly and focus on materiality. So the first question is if the State withheld the Clark County School District police reports that are in Exhibit 2. And so the question is, did those acting on the government's behalf possess the reports? And did the State provide them to the defense?

And Lieutenant Morales's testimony made clear that the Clark County School District Police Department are police that function like any other police department. They provide their incident reports to the district attorney's office or to Metro whenever they're requested.

So even if the DAs here didn't actually have these reports in their possession, they still, under *Brady*, qualify as withheld, because there's an obligation to obtain them, because they were in possession of the school district's police, who assisted in the

investigation. And as Mr. Figler testified, they were not provided to the defense.

Next is if the evidence was favorable. And any evidence that tends to call the government's case into doubt is favorable. This includes impeachment evidence. And as Mr. Figler testified, this evidence could have been used to impeach Betty Graves.

THE COURT: Let me ask you that --

MS. SMITH: So materiality --

THE COURT: Counsel, let me stop you there, because I wanted -- like given summaries, I want to be able to be clear of what your position is.

Looking at Betty Graves' transcript, she didn't testify to anything. I mean, her testimony, basically, was when it came to material facts, I don't know, I've gotten old. So what would have -- besides pure perspective, pure guesswork, what would Betty Graves had said differently than, I don't recall, I'm just getting old? Even if you brought to light that she did make those statements, her statement throughout her testimony, when it came to questions, was, I don't know.

So how is that material? How does that affect the outcome of the jury if she would have just continued to say, I'm old, I don't know.

MS. SMITH: What she did say affirmatively, Your Honor, was that Giovanni Garcia was not the shooter. And as Mr. Figler explained, this was a case where they were putting on a defense of

misidentification. But a strength of the State's case to counteract that defense was Betty Graves. She was one of the few impartial reliable witnesses and she said that Giovanni Garcia, who was the most likely alternate suspect, she said he didn't do it. And she wasn't --

THE COURT: Well, wait a second, counsel. Your own expert says she's not reliable at all. I just listened to a doctor get up here for two hours and tell me that Ms. Graves has basically no credibility, that if she got on the stand, she has no credibility, because her memory is tainted or her memory is wrong. I think you even said, basically, it's memory failure. So how would that have changed anything?

MS. SMITH: Yes, Your Honor.

That would have allowed the defense to impeach Ms. Graves' exclusion of Giovanni Garcia, because she testified that it was not Giovanni Garcia who was the shooter. So if the defense had been able to impeach her memory, they could have impeached that exclusion.

And their defense here was that Mr. Evaristo Garcia, not the shooter, said it was someone else. And Giovanni Garcia was the most likely alternate suspect. But Betty Graves really cut that defense out at the knees, because as Mr. Figler testified, she came across as reliable, and they didn't have anything to impeach her with.

So if they could have impeached her, the defense's

argument that someone else did this, that perhaps Giovanni Garcia was the shooter, would have again become a viable defense.

I mean, the point here is that because of these reports, we know that Ms. Graves gave a prior inconsistent statement that showed that she didn't have a good memory for the suspect at any point, in particular at trial, when she was the non interested witness to exclude Giovanni. And then with this report, she could have been impeached on that exclusion. And without that exclusion, the defense, again, becomes viable.

And this case was not a slam dunk for the State. You know, Mr. Figler referenced what he viewed as a compromised verdict. The trial judge even commented that this wasn't the strongest case that was ever brought in court. So there was room here for a defense. And the defense's misidentification and with these suppressed reports, the defense could have gone after her -- a strong piece of the State's ability to counteract their defense.

THE COURT: Okay. Now, you used the term --

MS. SMITH: And that's why it's material. And I think --

THE COURT: Counsel, you used the term suppressed reports. Defined suppressed, then, for me.

MS. SMITH: So it can either be actual or constructive. And here we're arguing that it was constructive. The reports were in the possession of some -- of an agency that was assisting in the investigation and acting on the government's behalf. And then those reports were not turned over to the defense.

And so under *Kyles v Whitley*, the United States Supreme Court case, and *State v Bennett* out of the Nevada Supreme Court, that's all we have to show to prove that this was withheld or suppressed.

THE COURT: Okay. Continue.

MS. SMITH: Going back to materiality briefly, Your Honor. I just -- it's important to keep in mind that we don't have to prove that Mr. Garcia -- we don't have to affirmatively prove that he's innocent. The question is now that we know that Ms. Graves could have been impeached and her exclusion of the key alternate suspect could have been impeached, is confidence in the verdict undermined? Is there either a reasonable possibility or probability that there would have been a different outcome?

This is not a very high burden. And Mr. Figler explained how this evidence would have been used. How it would have been used to impeach Betty Graves, who, again, was really the only reliable witness to say that Giovanni Garcia was not the shooter. And that's how it's material. Thank you, Your Honor.

THE COURT: Thank you.

State.

CLOSING ARGUMENT FOR THE DEFENDANT

MS. PANDUKHT: Thank you, Your Honor.

First of all, let me -- first of all, Your Honor, I want to make sure we start with the fact that this petition is time-barred pursuant to NRS 34.726(1). It's also successive and abuse of the writ,

pursuant to NRS 34.810(2).

So the only way that we are here before Your Honor is if they can show good cause and prejudice. So there is no good cause in this case. And I want to be specific with citing to the case law, because defense counsel speaks about what the law is, but that is not what the law actually says. And I want to go through it very carefully.

To establish good cause, petitioners must show that an impediment external to the defense prevented their compliance, a factual or legal basis for a claim that was not reasonably available at the time of default.

So here, one of the most important cases is *Steese vs. State*, 114 Nev. 479, a 1998 case. And it states:

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 defense from other sources, including diligent investigation by the defense.

In this case, the defense knew about the Clark County School District police officer potential involvement. And the way they knew was, of course it wasn't brought up today, but there was an officer's report, they were listed in the officer's report under the list of witnesses, but not having done any of the statements later on.

But the most important thing is that it was in the CAD

incident recall report. So we turned over in discovery the CAD report. And what's very significant that was not brought up by any of the defense witnesses, is that it was the same. The description in the CAD report is the same as what we have been listening to today. It says, on approximately -- let's see, like, the 10th or 11th line down, it said:

Suspect is Latin male adult, dark complexion, 6-foot, medium build, short, dark hair, mustache, gray pullover.

And then I think it says black jeans.

So they have this information. And just as Investigator Tammy Smith for the federal public defender made a simple request in a letter to the Clark County School District Police Department, she got back this report within 30 days, no problem. No, Go see the legal department, contact the State. She just got it. So there is no reason the defense couldn't have gotten this before trial had they decided to do so.

And then what's important is that these reports are not *Brady* material. So there's a case that's very important in this case, in *Evans vs. State.* It talked about how -- and *Evans vs. State* is 117 Nev. 609. And in that case, they talked about how 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. And the defense simply hasn't done that.

They have not even linked Jose Bonal as an alternate

suspect. This kid was just going to another school, he was a Hispanic adult male -- I don't even know if he was an adult. He was a Hispanic male wearing a gray hoodie. He had bushy hair, he didn't have short hair, and he was lighter skinned. There's been no evidence that he was actually linked to this crime, and there's been no evidence presented today that the defendant has not been linked to this crime and he wasn't involved in this crime. Because, as I'll discuss later, we still have all the other evidence in the case, none of which was reviewed by the defense expert, that did link the defendant to the crime.

So then we also would note that Metro got on the scene 20 minutes after the shooting. So that was contained in that incident report. That also -- but it's been admitted into evidence, but it wasn't addressed by the witnesses. But Metro got there by 9:20 and started conducting the witness interviews and setting up the perimeter. So there's no indication that the school police did anything of import in this case.

Also, you had testimony from the lieutenant, the limited testimony from the lieutenant that said that Category A felonies, local jurisdiction has to be called in order to handle the case. And, here, this is obviously a Category A felony of murder.

He also said that he had no knowledge of a direct contact with the DA or the, you know, the contact between the DA and the school police on this case. There's different records departments, different agencies. And he also said that the incident report isn't

sent to anyone unless they request it. So there was no evidence that Metro had the evidence and, obviously, the State has conceded that we did not have it.

Now, he stated that he had no direct knowledge that a request was made. And --

THE COURT: Why not, counsel?

MS. PANDUKHT: I'm sorry?

THE COURT: If we're saying that the defense has no due diligence argument they could see, they look on there, there's a bunch of CCSD names after that with obvious officers' names, if they have an obligation to look into that, don't you to determine what the truth is, to find out all of the witnesses and all the evidence?

MS. PANDUKHT: And we didn't know it existed in this case. So we didn't know they did a report, is the bottom line. So the defense didn't know.

But what I'm trying to say is that we provided all the evidence -- and I wanted to get to the *Kyles v. Brady* [sic] -- because she talked about what was the *Brady* violation, the three things. So, basically, a *Brady* violation has to have these three separate components. And first, whether it was favorable to the defense.

So there would be a big difference if this incident report actually said that Betty Graves identified an alternate suspect. Obviously, that would be favorable to the defense. So here, she said that he didn't identify him. There's no evidence that that was

favorable to the defense, and, as I've stated, the descriptions they had before.

But they cannot prove the State suppressed the evidence. They can't prove that we actually had the evidence and suppressed it. Obviously, we had it if we knew about it, we would turn it over. And that's why I asked Mr. Figler all those questions about how we made our whole file with all the boxes available. And he came for an hour and a half and reviewed all the boxes.

I let him talk to the Detective Mogg. I don't know if he actually -- he doesn't remember if he actually did talk to him, but there was a file review and an evidence review with prior counsel with Metro's file and with the evidence.

There was -- also what's important is a general discovery request. And that's very significant in this case, because with a general discovery request, they have to prove that there was a reasonable probability of a different outcome at trial. And in this case, the discovery motion filed by the special public defender was just a general request for any other law enforcement reports.

And that's what gets me to the no prejudice or reasonable probability of a different result.

THE COURT: Well, counselor, is the CCSD considered another law enforcement division?

MS. PANDUKHT: It is, Your Honor.

THE COURT: Okay.

MS. PANDUKHT: They weren't the investigating body in

this case. Correct. Thank you.

They weren't the investigating body in this case; it was Metro. And there was also reason to believe that, you know, the State talked to the witnesses. Danny Eichelberger testified that school police was only there for an unrelated traffic incident and -- I'm sorry, narcotics --

THE COURT: Narcotics incident.

MS. PANDUKHT: -- infraction. And so --

THE COURT: But they got -- they definitely got involved. They did a report.

MS. PANDUKHT: Right.

THE COURT: I mean, it's not like they just said, Well, there's a gang shooting, we'll wait for Metro.

MS. PANDUKHT: Right.

THE COURT: We're just going to keep our heads in our car. They went out and actually did a report.

MS. PANDUKHT: But there's no evidence that they told any about it or sent it to anybody. And clearly they didn't, because we didn't have it, we didn't know about it. So -- and Mr. Figler did not know about it, either.

And then -- so the case with regard to the different standards, because defense counsel mentioned possibility. And it's not the standard for possibility, it's for probability of a different result. And that case is *Mazzan vs Warden*, 116 Nev. 48. So also the United States has stated:

The mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not establish materiality of the constitution -- in the constitutional sense.

That's *United States vs Agurs,* 427 U.S. 97.

So the reason I got into all of the prejudice prong and what defense counsel did do at trial is what's really important in this case is that the State convicted this defendant based upon the testimony of people who knew the defendant. So none of the eyewitnesses identified -- they couldn't identify the defendant at trial. Even Melissa Gamboa, seven years later, could no longer identify the defendant. And as we've stated ad nauseam, Betty Graves couldn't identify the defendant at any point.

So we had Jonathan Harper and we had Edshel Calvillo, who did identify the defendant. And that's because they knew him. They were in the same gang together, they were really close friends, they were, in fact, more like family. And they knew each other. They were there before the crime, they were there together after the crime. The defendant confessed to Edshel Calvillo that he shot a boy and laughed. They -- the alternate suspects were excluded from the fingerprints on the gun, but the defendant's handprint was wrapped around the handle of that gun.

And so we have that evidence that the defense expert has completely ignored. She wasn't given any of the evidence in the case that actually had anything to do with how he was convicted.

She was just given evidence regarding Betty Graves, and she just focused on this little thing about how Betty Graves, you know, was such an important witness. Well, she wasn't. Mr. Figler cross-examined her for two pages and Edshel Calvillo for 56 pages. She wasn't an important witness in this case. And as Your Honor stated, you know, she got old and forgot things. And she didn't say much of anything.

So they presented the alternate suspects to the jury that I've already mentioned. They presented all of them. They argued everything regarding inconsistent statements, inconsistent descriptions. There's nothing that the defense didn't do in this case with regard to these alternate suspects. And having this report wouldn't have changed anything. There's nothing else they could have done.

Because also too, I wanted to focus on the fact that there was a difference with regard to why Betty Graves said that Giovanni wasn't the shooter. She actually put, at the end of that paper, you know, the end of the photo --

THE COURT: I saw it.

MS. PANDUKHT: -- that he was the troublemaker at the school. Now, she's the campus monitor. And if he's the school troublemaker, she's going to have contacts with him. But the reality is that she knew Giovanni because he went to the school, and Evaristo didn't go to the school. That was the first time she had seen him. So I think that's an important distinction.

But there was substantial guilt in this case. This case -- not only was he convicted, it was affirmed on appeal. The first petition was denied.

And also let me argue that this information, the same description with the Clark County School Police was in the CAD report. It could have been raised in the first petition. It was available before the time bar lapsed and before the first petition was filed. And yet they didn't include it in the timeframe for the time bar or in the first petition.

So I -- they haven't met their burden, and I'd ask that it be denied.

THE COURT: Okay.

Counsel, rebuttal close, quickly.

REBUTTAL CLOSING ARGUMENT FOR THE PLAINTIFF

MS. SMITH: Yes, Your Honor.

First, on the issue of suppression, it doesn't matter if the DA didn't actually know about the reports. They had a constitutional obligation to find them. They absolutely knew that the Clark County School District Police Department was involved in the case. That is clear from Exhibits 6, 7, 8, and 10. A Clark County School District Police Department officer is listed as the first to respond to the scene. So they certainly knew of their involvement and they had a constitutional obligation to go out and find this evidence, because that agency was acting on the government's behalf and assisting in the defense.

And counsel noted that the CAD log had this description. In the CAD log, the description is not attributed to Betty Graves, so it could not have been used to impeach her in the way the Clark County School District police reports could have.

Again, the question under materiality is whether confidence in the outcome of the verdict is undermined. And yes, there were people who identified Evaristo Garcia as the shooter, but they were flog witnesses, they were members of the gang that Evaristo Garcia was not a member of. They were interested in protecting themselves and each other. Jonathan Harper had been shot in the head by a gang member and Edshel Calvillo had lied in that case at the behest of the gang. These were interested witnesses.

And this was a close case, and we know that based on the jury verdict. So again, there was room here for a defense and the defense could have impeached Betty Graves with this evidence, as Mr. Figler testified. And the reason his cross of Betty Graves was only two pages was because he didn't have these reports and didn't have anything to impeach her with. And if he'd had these reports, he could have impeached her.

THE COURT: Thank you, counsel.

MS. SMITH: And quickly, just on the argument about procedural bars. The Nevada Supreme Court has held that if a *Brady* claim is proven, that gets over procedural bars on the merits of the claim. There is no due diligence requirement. The Ninth

Circuit has actually ruled that a State court that imputed a due diligence requirement into a *Brady* claim had unreasonably applied clearly established federal law. That's the *Amado vs. Gonzales*, 6758 F.3d, 1119. So on the merits of the claim, there's no diligence requirement. The State had the duty to go get this evidence, because it was in the possession of an agency that was assisting in the investigation.

Thank you, Your Honor.

THE COURT: Thank you, counsels.

And now that I've been asked to deftly read, I'm going to have to do my best to comply with the chief judge's order also. I'll be taking this over the weekend.

Thanks, counsel.

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MS. BIZZARO: Thank you, Judge.

MS. PANDUKHT: Thank you, Your Honor.

THE COURT: Thank you. Always you guys do a great job in your cases.

MS. DEMONTE: Thank you, Your Honor.

THE COURT: Please stay safe.

[Proceeding concluded at 12:04 p.m.]

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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. Please note: Technical glitches which resulted in distortion in the BlueJeans audio/video and/or audio cutting out completely were experienced and are reflected in the transcript.

Shawna Ortega, CET*562

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A-19-791171-W

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**September 30, 2020**

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

September 30, 2020 **3:00 AM** **Minute Order**

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

COURT CLERK: Michaela Tapia

JOURNAL ENTRIES

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

State is to prepare order.

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

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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 NOT REQUESTED**

MOTION FOR COURT TO PREPARE AND FILE ORDER ON PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

POINTS AND AUTHORITIES

Petitioner Evaristo Garcia moves this Court to rescind the portion of its Minute Entry Order directing the State to draft the order in this case and respectfully asks this Court to draft the Order itself.

On September 30, 2020 at 3:00 a.m., this Court entered a Minute Order stating in full: "Upon review of the documentation provided, and input from counsel, this Court has DENIED Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction)[.] State is to prepare order."[1]

Although the minute entry refers only to "input from counsel," there was in fact an evidentiary hearing held September 21, 2020, on the merits of Garcia's *Brady* claim, at which three witnesses testified. Accordingly, this Court is required to make findings of fact regarding the testimony—something only the trier of fact can do. Thus, the Court should write the order itself. But even if this Court could assign such duties to a party, especially the party that was the subject of the *Brady* claim, it could not do so here because the Court has not provided any guidance regarding its decision, as required by *Byford v. State*, 156 P.3d 691, 693 (Nev. 2007). In any event, such assignment of its judicial function to a member of the executive branch violates the Nevada Constitution's explicit separation-of-powers clause, in addition to the separation-of-powers principle from the federal constitution applied to the states through the Fourteenth Amendment. On top of that, such abdication of judicial responsibility violates the Due Process Clauses of the State and Federal Constitutions. Practically, prevailing-party-drafted orders rarely represent the neutral findings and holdings to which the losing party is entitled.

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[1] 9/30/20 Minute Entry (original capitalization).

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

Under the Nevada Constitution, persons charged with carrying out powers of the executive branch of the Nevada government, such as respondents and the attorneys of the Clark County District Attorney's Office, may not perform judicial functions, such as drafting judicial orders. NEV. CONST. ART. 3 §1 cl. 1. However, it is nonetheless common practice in certain judicial districts in this state for prevailing parties to be ordered to draft the final Findings of Fact, Conclusions of Law, and Order. Indeed, in some places, this is a common practice in every area of law, not just criminal post-conviction practice. But it should not be—this practice is roundly criticized and rejected around the United States. "The cases admonishing trial courts for the verbatim adoption of proposed orders drafted by litigants are legion." *In re Colony Square Co. v. Prudential Insurance Co. of America*, 819 F.2d 272, 274 (11th Cir. 1987) (*citing, inter alia*, *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 571–72 (1985)); *see also Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960, 962 (5th Cir. 1975); *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 737 (5th Cir. 1962); *In re Las Colinas, Inc.*, 426 F.2d 1005, 1009 & fn.4 (1st Cir. 1970) *cf. Alcock v. SBA*, 50 F.3d 1456, 1459, n.2 (9th Cir. 1995) ("Findings of fact prepared by counsel and adopted by the trial court are subject to greater scrutiny than those authored by the trial judge.").

Whatever the arguable merits of such a practice in other areas of law, the Nevada Constitution outright forbids this practice when the prevailing party and/or counsel for the prevailing party is a person or entity who exercises powers of the executive branch of the Nevada government, such as respondents and the attorneys of the Clark County District Attorney's Office. The Nevada Constitution contains an explicit and straightforward separation-of-powers clause. Article 3 states that the powers of the government "shall be divided into three separate departments," the

executive, legislative, and judicial, and "no persons charged with the exercise of powers belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution." NEV. CONST. ART. 3 §1 cl. 1.

It is hard to square this explicit separation-of-powers clause with the practice of ordering respondents and their counsel—literally, "persons charged with the exercise of powers properly belonging to" the executive branch—to draft a judicial order, and thus exercise one of the core functions of the judicial branch. The only reason this practice likely carries on in some judicial districts nonetheless is simply because the Nevada Supreme Court has not been asked to rule on whether the practice complies with Article 3, section 1 of the Nevada Constitution. It does not.

It goes without saying that respondents and the Clark County District Attorney are persons charged with the exercise of executive powers. Their function is not to legislate nor adjudicate cases and controversies. Rather, they are charged with the "executive power," which the Nevada Supreme Court has defined as the power to "carry[] out and enforc[e] the laws enacted by the legislature." *See Del Papa v. Steffan*, 915 P.2d 245, 250–51 (Nev. 1996); *see also Executive Branch*, Black's Law Dictionary (11th ed. 2019); *Executive*, Black's Law Dictionary (11th ed. 2019). This is exactly what respondents and the District Attorney do.

Yet drafting a judicial order, especially those containing specific findings of fact, conclusions of law, and case-ending adjudications, is a quintessential *judicial* function. *See Del Papa*, 915 P.2d at 250–51. The Nevada Supreme Court has defined the "judicial power" as the authority to "hear and determine justiciable controversies," and to "enforce any valid judgment, decree, or order." *Id.* To this end, judging is not just the act of declaring winners and losers—crucial to its functioning, a court must do much more. Namely, in order to "hear and determine justiciable controversies," the court must first make findings of fact, decide upon the

law, and apply the law to those facts. And in Nevada, it is by the *written* order that judges complete these judicial functions: "[a]n oral pronouncement of judgment is not valid for any purpose; therefore, only a written judgment has any effect." *Div. of Child & Family Servs., Dep't of Human Res., State of Nevada v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 92 P.3d 1239, 1243–44 (Nev. 2004). Thus it is true in Nevada as elsewhere: "Judicial opinions are the core work-product of judges." *Bright v. Westmoreland Cnty.*, 380 F.3d 729, 732 (3rd Cir. 2004).

Yet "[w]hen a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions." *Id.; see also Chicopee Mfg. Co. v. Kendall Co.*, 288 F.2d 719, 724–25 (4th Cir. 1961) (criticizing a district court's adoption of an opinion prepared by the prevailing party as "the failure of the trial judge to perform his judicial function"). That is, "[t]he quality of judicial decision making suffers when a judge delegates the drafting of orders to a party; the writing process requires a judge to wrestle with the difficult issues before him and thereby leads to stronger, sounder judicial rulings." *In re Colony Square*, 819 F.2d at 274 (citations and footnotes omitted); *accord Cuthbertson v. Biggers Bros., Inc.,* 702 F.2d 454, 458 (4th Cir. 1983) (relating the court has repeatedly condemned the practice of adopting the prevailing party's proposed findings of facts and conclusions of law); *see also In re Discipline of Schaeffer*, 25 P.3d 191, 195–96 (Nev. 2001), *as modified by Order Denying Rehearing* (Sept. 10, 2001) (disbarring an attorney for, *inter alia,* submitting a proposed order that contradicted a prior oral ruling). This is especially true where, as here, this Court has not provided any guidance to the State about what to put in the order.

This is important in a material way, not simply in the abstract. A court's specific way of completing its central functions—here, the exact language it settles upon for its resolution of the factual and legal issues before it—may impact the life, liberty, and property interests of the parties far beyond the "win" or "loss"

designation at the end of the order. For instance, exactly how factual findings are worded may mean affirmance or reversal on appeal, and may impact future proceedings and cases by operation of *res judicata*. *See, e.g.*, *Jackson v. Groenendyke*, 369 P.3d 362, 365 (Nev. 2016) ("This court reviews a district court's factual findings for an abuse of discretion and will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence.") Or if the petitioner needed to proceed to the federal judiciary after the conclusion of his or her state-court litigation, the specific wording of this Court's findings of fact may be entitled to deference in the federal courts. *See* 28 U.S.C. § 2254(d)(2). And the legal conclusions also may be entitled to deference. *See* 28 U.S.C. § 2254(d)(1). Thus, the specific language of this Court's order may affect a petitioner's liberty for the rest of his or her life. This is why the act of drafting the judicial order is a *judicial* function, and should not be left to a motivated party to complete.

When the motivated, prevailing party is charged with carrying out executive power in Nevada, this adds another, critical layer to the problem. Nevada's founders did not trust the members of the legislative and executive branches to carry out the powers of the judicial branch—so much so that they explicitly forbade it. *See* NEV. CONST. ART. 3 § 1. The Nevada Supreme Court has explained why:

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

Galloway v. Truesdell, 83 Nev. 13, 19, 422 P.2d 237, 241 (1967) (*citing* NEV. CONST. ART. 3 § 1). Although the court in *Galloway* was discussing the inverse of the problem here—the judiciary usurping executive powers—the same logic applies to this situation. The founders intended to prevent the risk of oppression they foresaw by permitting the executive and judicial powers to reside in the same person or

entity. Therefore, Section 1 of Article 3 of the Nevada Constitution expressly forbids it.

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

The separation-of-powers requirement is vital to our system of constitutionally-limited government—it does not yield to the day's demands of expediency. Solving the burden on this Court's docket must be done in a different way; the Nevada Constitution does not allow a breakdown in the separation of powers as a solution. Regardless of whether this practice is endorsed by local rule or common practice, it is unconstitutional because it violates Section 1 of Article 3 of the Nevada Constitution—any law purporting to allow it is thus void. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

This case is a prime example of why the Nevada founders feared allowing the executive branch to perform judicial functions. While the judiciary's interest is in determining the truth, it is easy to see how a prosecutor—an agent of one of the political branches of government, who is also operating in an adversarial legal system—may instead be pressured or motivated to draft a judicial order in such a way that best protects the prosecutor's "win" from reversal, as opposed to simply writing nuanced factual findings in a way that best reflects a neutral arbiter's view

of the evidence. This is particularly tempting here because this Court has not provided any guidance on the contents of the order. *See Byford v. State*, 156 P.3d 691, 693 (Nev. 2007) (requiring the Court to announce its findings of fact and conclusions of law "to the parties with sufficient specificity to provide guidance to the prevailing party in drafting a proposed order"). This Court has not provided any guidance on its assessment of the witnesses or the application of the *Brady* test to the evidence Garcia presented. Presumably, this Court denied Garcia's petition on the merits in light of the fact that it ordered the hearing on the merits,[2] but even that is unknown. Given the Court's current two-sentence minute entry order, there is nothing to stop the State from drafting an order that denies Garcia's petition on procedural grounds, as it argued for at the end of the hearing. There's no reason to think the prosecutors in this case won't rise above the instinct to draft an order denying relief on procedural grounds, but the founders did not leave it to chance—the separation-of-powers doctrine leaves the job of deciding and announcing the facts and law of a case to the judge, who is to remain impartial in the case at hand. And so far in this case, this Court hasn't articulated a single finding or legal conclusion following the evidentiary hearing.

The way this Court explains its findings and holdings in its written order can affect Garcia for the rest of his life, as it will affect the ways future courts review what happened here. For this reason, the Nevada Constitution's separation-of-powers clause, and the federal constitution's implicit separation-of-powers requirement, provide for—indeed, require—a better system, one in which the neutral arbiter explains its own views and conclusions on the case in an order it drafts itself, without the skew of advocates for the executive branch. This process

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[2] *See* 4/23/20 Order (granting hearing "to hear evidence on the merits of petitioner's post-conviction claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963)").

will allow future courts to better evaluate the *actual* decisions of this Court for what they are, right or wrong, good or bad. This correction would not better protect the Dzurenda's chances of winning on appeal, but would serve a much higher purpose: it would advance this Court's interest in ensuring truth and justice are obtained. *See* Nev. Sup. Ct. R. CJC Preamble, Canon 1–2.

Ordering the same prosecutors who were the subject of Garcia's *Brady* claim to draft the judicial order in this case is unconstitutional, in direct contradiction with the express prohibition of executive branch personnel performing judicial functions found in Article 3, Section 1 of the Nevada Constitution, and also in violation of the separation-of-powers doctrine inherent in the federal constitution, imposed upon the states by incorporation into the Fourteenth Amendment. This Court should rescind its minute entry order directing the State to draft the order and instead draft it itself.

II. Prevailing-party drafted orders violate due process.

On top of the separation-of-powers problem, ordering the prosecutors to draft the order in this case violates the Nevada and federal due process clauses. NEV. CONST. ART. 1 Sec. 8(2) (2018); U.S. CONST. AMEND. XIV. It denies the petitioner his right to have his case decided by a neutral and detached magistrate—including the right to one that *appears* neutral—as is otherwise guaranteed by the constitutions. This is particularly true where, as here, this Court has not articulated any findings or conclusions of law to guide the state in drafting the order. Further, the quality of judicial decision making suffers by this process. The United States Supreme Court has "criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties." *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985). Many decades ago, the Supreme Court stated: "Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and

conclusions of law and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules." *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656–57 & fn.4 (1964); *see also United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 615, fn.13 (1974) (noting that the lower court's verbatim adoption of the prevailing party's proposed findings of fact "failed to heed this Court's admonition voiced a decade ago").

The United States Supreme Court is only one of a chorus of courts admonishing this practice. For instance, the Third Circuit stated, "Judicial opinions are the core work-product of judges . . . . When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions." *Bright v. Westmoreland Cnty.*, 380 F.3d 729, 732 (3rd Cir. 2004). Similarly, the Fourth Circuit has criticized a district court's adoption of an opinion prepared by the prevailing party as "the failure of the trial judge to perform his judicial function." *Chicopee Mfg. Co. v. Kendall Co.*, 288 F.2d 719, 724–25 (4th Cir. 1961).

While the federal judiciary has not held this practice to be unconstitutional, the concerns about this practice the federal judiciary has raised for decades represent the exact reasons why this practice is, indeed, a denial of due process. Due process requires a case or controversy to be resolved by an impartial tribunal—moreover, beyond the requirement of *actual* neutrality, due process requires the tribunal to *appear* neutral. *See Marshall v. Jerrico*, 446 U.S. 238, 242 (1980).

The written order is the central, core work-product of the judiciary. Indeed, the Nevada Supreme Court gives legal effect to *only* the written order—in this state, it is the only source to find the Court's final conclusions about a case. *See Bright v. Westmoreland Cnty.*, 380 F.3d 729, 732 (3rd Cir. 2004). It's through only the written order, then, that the public and future courts scrutinize the proceedings in the district court. And this review is critical to the vitality and reliability of a

well-functioning court system. But when a final order is drafted by one of the parties—as opposed to the Court itself—this utterly belies the appearance of neutrality that due process requires. This is never more true than under these circumstances, in which this Court has provided no guidance on the contents of the order. Thus, allowing a prevailing party to draft a final order is a denial of due process.

CONCLUSION

This Court should rescind the portion of its minute entry directing the State to draft an order, and instead draft the order itself. To do otherwise violates Garcia's constitutional rights.

Dated October 7, 2020.

Respectfully submitted,
Rene L. Valladares
Federal Public Defender

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

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 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 and Noreen DeMonte.

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

Electronically Filed
11/20/2020 8:19 AM
Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

EVARISTO GARCIA,

Petitioner,

vs.

JAMES DZURENDA,

Respondent,

Case No: A-19-791171-W

Dept No: XXIX

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

PLEASE TAKE NOTICE that on November 18, 2020, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on November 20, 2020.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 20 day of November 2020, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Evaristo Garcia # 1108072
P.O. Box 650
Indian Springs, NV 89070

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

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

FCL
STEVEN B. WOLFSON
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

EVARISTO JONATHAN GARCIA,
#2685822,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-19-791171-W
10C262966-1

DEPT NO: XXIX

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE OF HEARING: SEPTEMBER 21, 2020
TIME OF HEARING: 8:00 AM

This cause having come on for hearing before the Honorable DAVID M. JONES, District Judge, on September 21, 2020, the Petitioner being present, represented by Federal Public Defenders AMELIA BIZZARRO and EMMA SMITH, the Respondent being represented by STEVEN B. WOLFSON, District Attorney, through TALEEN PANDUKHT and NOREEN DEMONTE, Chief Deputy District Attorneys, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, testimony of Roberto Morales, Dr. Kathy Pezdek and Dayvid Figler, Esq. and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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STATEMENT OF THE CASE

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

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

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

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

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

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

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

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 May 16, 2017, the Nevada Supreme Court affirmed the Court's denial of Petitioner's first Petition and remittitur issued on June 12, 2017.

On March 14, 2019, Petitioner filed, under seal, 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. On May 1, 2020, Petitioner filed a Motion for Discovery (NRS 34.780(2)) and a Motion to Disqualify Noreen Demonte and Taleen Pandukht from Representing Respondents at the Upcoming Evidentiary Hearing. The State filed Oppositions on May 11, 2020. Petitioner filed Replies on May 18, 2020. On June 2, 2020, the Court denied the Motion to Disqualify, and on June 9, 2020, the Court filed an Order denying the Motion for Discovery.

On September 21, 2020, this matter came before the Court for evidentiary hearing and argument. Roberto Morales, Dr. Kathy Pezdek and Dayvid Figler, Esq. testified, and the Court took the matter under advisement. On September 30, 2020, the Court denied the Petition. The Court now rules 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 (4) bullets and six (6) expended cartridge cases. All six (6) of the cartridge cases were head stamped Wolf 9mm caliber Makarov. On the North side of Washington, across from the school, Proietto located four (4) bullet strikes on the wall adjacent to the sidewalk and one bullet embedded in the wall.

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

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

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

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

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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.

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

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

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

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

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with Petitioner. Petitioner admitted he shot a boy and laughed. Petitioner also told Calvillo that he hid the gun in a toilet. Calvillo stated Harper told him he saw the whole thing.

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

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

ANALYSIS

I. PETITIONER'S CLAIMS ARE PROCEDURALLY BARRED.

a. Petitioner's Petition is Time-Barred.

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

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this

> subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

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

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

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

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

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

In the instant case, the Judgment of Conviction was filed on September 11, 2013, and Petitioner filed a direct appeal on October 11, 2013. The Petitioner's conviction was affirmed, and remittitur issued on October 20, 2015. Thus, the one-year time bar began to run from the

date remittitur issued. The instant Petition was not filed until March 14, 2019. This is over three (3) years after remittitur issued and in excess of the one-year time frame. Absent a showing of good cause for this delay and undue prejudice, Petitioner's claim must be dismissed because of its tardy filing.

b. Petitioner's Petition is Successive.

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

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

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

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

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

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

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

In this case, Petitioner claimed he has recently discovered a Clark County School District Police Department ("CCSDPD") report that should have been disclosed under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963) and that provides good cause to overcome the procedural bars. Due Process does not require simply the disclosure of "exculpatory"

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

The Nevada Supreme Court has followed the federal line of cases in holding that Brady does not require the State to disclose evidence which was available to the defendant from other sources, including diligent investigation by the defense. Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). In Steese, the undisclosed information stemmed from collect calls that the defendant made. This Court held that the defendant certainly had knowledge of the calls that he made and through diligent investigation the defendant's counsel could have obtained the phone records independently. Id. Based on that finding, this Court found that there was no Brady violation when the State did not provide the phone records to the defense. Id.

Petitioner could have obtained the impeachment evidence in question through his own diligent discovery. "Brady does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense." Steese, 114 Nev. at 495, 960 Nev. at 331. Even if the prosecution or one of the agencies acting on its

behalf had the impeachment evidence, there was no duty to disclose it because Petitioner could have discovered this information on his own. The CCSDPD report could have been discovered through submitting a request to CCSD, as it apparently eventually was. Further, Petitioner could have discovered this information by contacting CCSD as an earlier date. The State did not in any way prevent or hinder Petitioner from making such contact, thus Petitioner could have discovered such information through reasonably diligent efforts. In fact, Petitioner admitted as much in the instant Petition, which states:

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

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

Moreover, the CCSDPD reports are not Brady material. In Evans v. State, 117 Nev. 609, 625-27, 28 P.3d 498, 510-11 (2001), overruled on other grounds by Lisle v. State, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015), the defendant, on appeal, argued that the State had the obligation to continue investigating alternate suspects of the crime, and speculated the State had evidence one of the victims had been an informant previously, which

would have demonstrated others had motive to kill her. Id. at 626, 28 P.3d at 510-11. The Court found that the defendant had not demonstrated that such an investigation would have led to exculpatory information. Id. at 626, 28 P.3d at 510. To undermine confidence in a trial's outcome, a defendant would have to allege the nondisclosure of specific information that not only linked alternate suspects to the crime, but also indicate the defendant was not involved. Id. at 626, 28 P.3d at 510. Further, the Court found that the victim's mere acting as an informant, without at least some evidence that she had received actual threats against her, would not implicate the State's affirmative duty to disclose potentially exculpatory information to the defense because such information must be material. Id. at 627, 28 P.3d at 511.

Here, the CCSDPD police reports indicate an individual by the name of Jose Bonal, a student from a different school, was stopped on a different street nearby. Bonal was stopped for approximately fourteen (14) minutes while Betty Graves was brought to make an identification. The report indicated Ms. Graves had seen the fight and the shooting and she would be able to identify the suspect. Ms. Graves did a show-up and definitively stated that Bonal was not the shooter. Further, Ms. Graves also stated she witnessed the fight and did not identify Bonal as a participant in the fight. Bonal was also a Hispanic male wearing a gray hoodie. However, he did not match the rest of the description 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.

Further, 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.

In fact, at the evidentiary hearing, retired CCSDPD Lieutenant Roberto Morales confirmed that, as of approximately the year 2000, the NRS was amended to require CCSDPD to contact and advise the local jurisdiction, in this case LVMPD, of any incidents involving Category A felonies. Recorder's Transcript of Hearing ("Transcript"), September 21, 2020, p. 7-8. Here, Petitioner was charged with a Category A Felony and, thus, CCSDPD did not have jurisdiction over Petitioner's case. Therefore, LVMPD was the sole agency, outside of the Clark County District Attorney's Office (CCDA), that the prosecutor had a duty from which to procure any information favorable to Petitioner. See Kyles, 514 U.S. at 437–38, 115 S. Ct. at 1567–68 (explaining that the prosecutor has a duty to learn of information favorable to the accused secured by *others acting on the State's behalf in the case*) (emphasis added). Moreover, Morales testified that CCSDPD documents were only provided to the CCDA *upon request*. Transcript at 12, 15. Morales also testified that he had no direct knowledge of the

CCDA ever requesting these documents. Id. at 15. Petitioner has neither asserted nor set forth facts to show that the CCDA or the LVMPD possessed the impeachment evidence that Petitioner discusses in his Petition. Petitioner's failure to show such exclusive possession is critical because if the State did not suppress, conceal, or exclusively control the CCSDPD reports, then no impediment external to the defense existed sufficient to constitute good cause. As Petitioner fails to substantiate this crucial point, his claim is denied.

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

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

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

Court in United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397 (1976) explaining that Brady violations *only occur* when information was known—actually or constructively—by the prosecution. The new rule Petitioner seemingly requests would impute to the State any and all knowledge that Petitioner's post-conviction counsel discovers ad infinitum, regardless of the State's actual or constructive knowledge of such evidence's existence at the time of the original trial. Fashioning such a broad rule would be unreasonable. See Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998); Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). To require the State in future cases to search out, gather, and package every shred of possible impeachment evidence, nationwide, would essentially lead to the anomalous result that the prosecution has to develop the defense for a defendant. It would also impose an "unreasonable and likely cost-prohibitive burden upon the State." As such, Petitioner has not demonstrated good cause to overcome the fact that his successive Petition was filed over two (2) years late, and his Petition is denied.

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

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112 Nev. at 618-19, 918 P.2d at 692; Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994).

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

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

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

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

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

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

Finally, even if Petitioner could demonstrate prejudice, given the strength of the State's case, any prejudice from the stop of a non-suspect pales in comparison to the overwhelming

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

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

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ORDER

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

DATED this 12 day of November, 2020.

DISTRICT JUDGE

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

BY /s/ TALEEN PANDUKHT
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #5734

CERTIFICATE OF SERVICE

I certify that on the 17th day of November, 2020, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

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

BY /s/ J. HAYES
Secretary for the District Attorney's Office

06F11378A/TP/ss/jh/GANG

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**December 10, 2020**

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

December 10, 2020 **10:15 AM** **Motion**

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

COURT CLERK: Michaela Tapia

RECORDER: Melissa Delgado-Murphy

PARTIES PRESENT:	Bizzaro, Amelia L.	Attorney for Defendant
	Demonte, Noreen C.	Attorney for Plaintiff
	Pandukht, Taleen R	Attorney for Plaintiff

JOURNAL ENTRIES

- Deft. not present.

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

NDC

Electronically Filed
12/15/2020 10:02 AM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

EVARISTO GARCIA, Plaintiff(s), vs. JAMES DZURENDA, Defendant(s).	Case No. A-19-791171-W DEPT. XXIX

BEFORE THE HONORABLE DAVID M. JONES,
DISTRICT COURT JUDGE

THURSDAY, DECEMBER 10, 2020

TRANSCRIPT OF PROCEEDINGS RE:
MOTION FOR COURT TO PREPARE AND FILE ORDER ON PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

(Via BlueJeans)

(Appearances on page 2.)

RECORDED BY: MELISSA DELGADO-MURPHY, COURT RECORDER

APPEARANCES:

For the Plaintiff(s): AMELIA L. BIZZARO, ESQ.
Assistant Federal Public Defender
(Appearing via BlueJeans)

For the Defendant(s): TALEEN R. PANDUKHT, ESQ.
Chief Deputy District Attorney
NOREEN C. DeMONTE, ESQ.
Chief Deputy District Attorney
(Appearing via BlueJeans)

LAS VEGAS, NEVADA, THURSDAY, DECEMBER 10, 2020

[Proceeding commenced at 11:25 a.m.]

THE COURT: Page 21, A-19-791171, Garcia versus James Dzurenda.

MS. BIZZARO: Good morning, Your Honor. Attorney Amelia Bizzaro, appearing on behalf of Mr. Garcia. We waived his appearance for the purposes of this hearing.

THE COURT: Thank you, counsel.

MS. DEMONTE: Noreen Demonte and Taleen Pandukht for the State.

THE COURT: Okay. This is a motion for the Court to prepare and file an order on petition for the writ of habeas corpus. If I understand correct, didn't the State just file an order on findings of facts and conclusions of law? And it's your understanding, counsel, that you believe that's unconstitutional.

MS. BIZZARO: Yes, Your Honor. We filed our motion a week after the Court entered its minute entry order ordering the State to prepare the order. I won't repeat the constitutional arguments. I think that they're laid out there.

I will just say, though, that under *Biford*, the Nevada Supreme Court has provided guidance. When it allows a party to draft an order, there are two conditions that have to be met. Once -- the first one is that the Court has to provide guidance regarding its decision. It basically has to say what the decision is so

that a party can write it down. And second, that the drafter of that order has to provide it to the opposing party to give them an opportunity to object. Neither of those conditions have been met here.

So we're asking this Court to rescind the order to vacate it. And it's our preference that it drafted itself, but based on the constitution arguments, I understand, though, if the Court doesn't agree with that, that it at least provide the guidance necessary for the State to draft the order, especially in light of the fact that there was an evidentiary hearing here. Only this Court can make the factual findings that are necessary that go into such an order. And here, allowing the party that we accused of violating the law to now interpret the law is a constitutional problem in addition to violating *Biford*.

THE COURT: State?

MS. DEMONTE: Your Honor, we, essentially, basically, just complied with this Court's order and prepared the findings. I know this Court very well and you're not shy about telling me if I got something wrong. So I believe our findings were with -- based on the -- because we used the transcript, as well, the comments made by this Court. But, of course, we take no position if this Court wants to prepare its own findings.

THE COURT: Be it due to the fact that the Court -- or as to counsel's raised, those particular arguments, the Court's going to rescind the order that was filed by the Court previously. Court will

issue its own findings of fact and decisions in regards this matter. I'll have that over to you as soon as possible.

MS. DEMONTE: Perfect. Thank you, Your Honor.

THE COURT: Thank you.

MS. BIZZARO: Thank you.

[Proceeding concluded at 11:28 a.m.]

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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. Please note: Technical glitches which resulted in distortion in the BlueJeans audio/video and/or audio cutting out completely were experienced and are reflected in the transcript.

Shawna Ortega, CET*562

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

EVARISTO GARCIA,

Petitioner,

vs.

JAMES DZURENDA,

Respondent,

Case No: A-19-791171-W

Dept No: XXIX

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

PLEASE TAKE NOTICE that on December 2, 2020, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on December 10, 2020.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 10 day of December 2020, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Evarito Garcia # 1108072
P.O. Box 650
Indian Springs, NV 89070

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

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #5734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

EVARISTO JONATHAN GARCIA, #2685822,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-19-791171-W
10C262966-1

DEPT NO: XXIX

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE OF HEARING: SEPTEMBER 21, 2020
TIME OF HEARING: 8:00 AM

This cause having come on for hearing before the Honorable DAVID M. JONES, District Judge, on September 21, 2020, the Petitioner being present, represented by Federal Public Defenders AMELIA BIZZARRO and EMMA SMITH, the Respondent being represented by STEVEN B. WOLFSON, District Attorney, through TALEEN PANDUKHT and NOREEN DEMONTE, Chief Deputy District Attorneys, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, testimony of Roberto Morales, Dr. Kathy Pezdek and Dayvid Figler, Esq. and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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STATEMENT OF THE CASE

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

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

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

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

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

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

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

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 May 16, 2017, the Nevada Supreme Court affirmed the Court's denial of Petitioner's first Petition and remittitur issued on June 12, 2017.

On March 14, 2019, Petitioner filed, under seal, 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. On May 1, 2020, Petitioner filed a Motion for Discovery (NRS 34.780(2)) and a Motion to Disqualify Noreen Demonte and Taleen Pandukht from Representing Respondents at the Upcoming Evidentiary Hearing. The State filed Oppositions on May 11, 2020. Petitioner filed Replies on May 18, 2020. On June 2, 2020, the Court denied the Motion to Disqualify, and on June 9, 2020, the Court filed an Order denying the Motion for Discovery.

On September 21, 2020, this matter came before the Court for evidentiary hearing and argument. Roberto Morales, Dr. Kathy Pezdek and Dayvid Figler, Esq. testified, and the Court took the matter under advisement. On September 30, 2020, the Court denied the Petition. The Court now rules 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 (4) bullets and six (6) expended cartridge cases. All six (6) of the cartridge cases were head stamped Wolf 9mm caliber Makarov. On the North side of Washington, across from the school, Proietto located four (4) bullet strikes on the wall adjacent to the sidewalk and one bullet embedded in the wall.

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

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

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

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

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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.

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

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

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

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

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with Petitioner. Petitioner admitted he shot a boy and laughed. Petitioner also told Calvillo that he hid the gun in a toilet. Calvillo stated Harper told him he saw the whole thing.

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

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

ANALYSIS

I. PETITIONER'S CLAIMS ARE PROCEDURALLY BARRED.

a. Petitioner's Petition is Time-Barred.

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

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this

> subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

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

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

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

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

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

In the instant case, the Judgment of Conviction was filed on September 11, 2013, and Petitioner filed a direct appeal on October 11, 2013. The Petitioner's conviction was affirmed, and remittitur issued on October 20, 2015. Thus, the one-year time bar began to run from the

date remittitur issued. The instant Petition was not filed until March 14, 2019. This is over three (3) years after remittitur issued and in excess of the one-year time frame. Absent a showing of good cause for this delay and undue prejudice, Petitioner's claim must be dismissed because of its tardy filing.

b. Petitioner's Petition is Successive.

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

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

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

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

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

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

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

In this case, Petitioner claimed he has recently discovered a Clark County School District Police Department ("CCSDPD") report that should have been disclosed under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963) and that provides good cause to overcome the procedural bars. Due Process does not require simply the disclosure of "exculpatory"

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

The Nevada Supreme Court has followed the federal line of cases in holding that Brady does not require the State to disclose evidence which was available to the defendant from other sources, including diligent investigation by the defense. Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). In Steese, the undisclosed information stemmed from collect calls that the defendant made. This Court held that the defendant certainly had knowledge of the calls that he made and through diligent investigation the defendant's counsel could have obtained the phone records independently. Id. Based on that finding, this Court found that there was no Brady violation when the State did not provide the phone records to the defense. Id.

Petitioner could have obtained the impeachment evidence in question through his own diligent discovery. "Brady does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense." Steese, 114 Nev. at 495, 960 Nev. at 331. Even if the prosecution or one of the agencies acting on its

behalf had the impeachment evidence, there was no duty to disclose it because Petitioner could have discovered this information on his own. The CCSDPD report could have been discovered through submitting a request to CCSD, as it apparently eventually was. Further, Petitioner could have discovered this information by contacting CCSD as an earlier date. The State did not in any way prevent or hinder Petitioner from making such contact, thus Petitioner could have discovered such information through reasonably diligent efforts. In fact, Petitioner admitted as much in the instant Petition, which states:

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

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

Moreover, the CCSDPD reports are not Brady material. In Evans v. State, 117 Nev. 609, 625-27, 28 P.3d 498, 510-11 (2001), overruled on other grounds by Lisle v. State, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015), the defendant, on appeal, argued that the State had the obligation to continue investigating alternate suspects of the crime, and speculated the State had evidence one of the victims had been an informant previously, which

would have demonstrated others had motive to kill her. Id. at 626, 28 P.3d at 510-11. The Court found that the defendant had not demonstrated that such an investigation would have led to exculpatory information. Id. at 626, 28 P.3d at 510. To undermine confidence in a trial's outcome, a defendant would have to allege the nondisclosure of specific information that not only linked alternate suspects to the crime, but also indicate the defendant was not involved. Id. at 626, 28 P.3d at 510. Further, the Court found that the victim's mere acting as an informant, without at least some evidence that she had received actual threats against her, would not implicate the State's affirmative duty to disclose potentially exculpatory information to the defense because such information must be material. Id. at 627, 28 P.3d at 511.

Here, the CCSDPD police reports indicate an individual by the name of Jose Bonal, a student from a different school, was stopped on a different street nearby. Bonal was stopped for approximately fourteen (14) minutes while Betty Graves was brought to make an identification. The report indicated Ms. Graves had seen the fight and the shooting and she would be able to identify the suspect. Ms. Graves did a show-up and definitively stated that Bonal was not the shooter. Further, Ms. Graves also stated she witnessed the fight and did not identify Bonal as a participant in the fight. Bonal was also a Hispanic male wearing a gray hoodie. However, he did not match the rest of the description 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.

Further, 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.

In fact, at the evidentiary hearing, retired CCSDPD Lieutenant Roberto Morales confirmed that, as of approximately the year 2000, the NRS was amended to require CCSDPD to contact and advise the local jurisdiction, in this case LVMPD, of any incidents involving Category A felonies. Recorder's Transcript of Hearing ("Transcript"), September 21, 2020, p. 7-8. Here, Petitioner was charged with a Category A Felony and, thus, CCSDPD did not have jurisdiction over Petitioner's case. Therefore, LVMPD was the sole agency, outside of the Clark County District Attorney's Office (CCDA), that the prosecutor had a duty from which to procure any information favorable to Petitioner. See Kyles, 514 U.S. at 437–38, 115 S. Ct. at 1567–68 (explaining that the prosecutor has a duty to learn of information favorable to the accused secured by *others acting on the State's behalf in the case*) (emphasis added). Moreover, Morales testified that CCSDPD documents were only provided to the CCDA *upon request*. Transcript at 12, 15. Morales also testified that he had no direct knowledge of the

CCDA ever requesting these documents. Id. at 15. Petitioner has neither asserted nor set forth facts to show that the CCDA or the LVMPD possessed the impeachment evidence that Petitioner discusses in his Petition. Petitioner's failure to show such exclusive possession is critical because if the State did not suppress, conceal, or exclusively control the CCSDPD reports, then no impediment external to the defense existed sufficient to constitute good cause. As Petitioner fails to substantiate this crucial point, his claim is denied.

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

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

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

Court in United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397 (1976) explaining that Brady violations *only occur* when information was known—actually or constructively—by the prosecution. The new rule Petitioner seemingly requests would impute to the State any and all knowledge that Petitioner's post-conviction counsel discovers ad infinitum, regardless of the State's actual or constructive knowledge of such evidence's existence at the time of the original trial. Fashioning such a broad rule would be unreasonable. See Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998); Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). To require the State in future cases to search out, gather, and package every shred of possible impeachment evidence, nationwide, would essentially lead to the anomalous result that the prosecution has to develop the defense for a defendant. It would also impose an "unreasonable and likely cost-prohibitive burden upon the State." As such, Petitioner has not demonstrated good cause to overcome the fact that his successive Petition was filed over two (2) years late, and his Petition is denied.

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

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112 Nev. at 618-19, 918 P.2d at 692; Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994).

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

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

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

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

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

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

Finally, even if Petitioner could demonstrate prejudice, given the strength of the State's case, any prejudice from the stop of a non-suspect pales in comparison to the overwhelming

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

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

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ORDER

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

DATED this _____ day of November, 2020.

Dated this 2nd day of December, 2020

DISTRICT JUDGE

47B 26E 4C13 EB0E
David M Jones
District Court Judge

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

BY /s/ TALEEN PANDUKHT
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #5734

CERTIFICATE OF SERVICE

I certify that on the 17th day of November, 2020, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

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

BY /s/ J. HAYES
Secretary for the District Attorney's Office

06F11378A/TP/ss/jh/GANG

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Evaristo Garcia, Plaintiff(s)	CASE NO: A-19-791171-W
vs.	DEPT. NO. Department 29
James Dzurenda, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Final Accounting was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 12/2/2020

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If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 12/3/2020

Steven Wolfson	Juvenile Division - District Attorney's Office 601 N Pecos Road Las Vegas, NV, 89101

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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: December 10, 2020

Time of Hearing: 10:15 A.M.

ORDER

This matter came before the Court on December 10, 2020 on Petitioner's motion for this Court to prepare and file the order on the post-conviction petition. Present were counsel for petitioner and respondents. After reviewing the motion, and hearing from both parties, this Court grants Petitioner's motion, and hereby rescinds the prior Findings of Fact, Conclusion of Law and Orders entered on November 18, 2020, December 2, 2020, and the Notice of Entry filed December 10, 2020.

This Court will draft and file the Order as soon as possible. Petitioner's counsel shall provide a copy of this Order to the Nevada Supreme Court as soon as possible in the pending appeal, *Garcia v. Dzurenda*, Case No. 80255.

THEREFORE,

IT IS HEREBY ORDERED that the Motion for Court to Prepare and File Order on Petition for Writ of Habeas Corpus (Post-Conviction) is **GRANTED**.

IT IS HEREBY ORDERED the November 18, 2020 and December 2, 2020 Findings of Fact, Conclusions of Law and Notice of Entry of the December 2 2020 Order is **RESCINDED**.

IT IS HEREBY ORDERED this Court will draft and file the Order and Notice of Entry of the Order on Garcia's post-conviction petition as soon as possible.

IT IS HEREBY ORDERED that Petitioner provide the Nevada Supreme Court with a copy of this order as soon as possible in the pending appeal, *Garcia v. Dzurenda*, Case No. 80255.

DATED this 17 day of December, 2020

DISTRICT COURT JUDGE

RENE L. VALLADARES
Federal Public Defender

BY */s/ Amelia L. Bizzaro*
Amelia L. Bizzaro
Assistant Federal Public Defender
Nevada Bar # 14278

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

EVARISTO GARCIA,

Petitioner,

vs.

JAMES DZURENDA; ET.AL.,

Respondent,

Case No: A-19-791171-W

Dept No: II

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

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

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

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

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

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Evaristo Garcia # 1108072
P.O. Box 650
Indian Springs, NV 89070

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

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

FFCO

DISTRICT COURT
CLARK COUNTY, NEVADA

EVARISTO JONATHAN GARCIA, #2685822,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-19-791171-W
10C262966-1
DEPT NO: XXIX

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE OF HEARING: SEPTEMBER 21, 2020
TIME OF HEARING: 8:00 AM

This matter having come on for hearing before the Honorable DAVID M. JONES, District Judge, on September 21, 2020, the Petitioner being present, represented by Federal Public Defenders AMELIA BIZZARRO and EMMA SMITH, the Respondent being represented by STEVEN B. WOLFSON, District Attorney, through TALEEN PANDUKHT and NOREEN DEMONTE, Chief Deputy District Attorneys, and after the Court having considered the matter, testimony of Roberto Morales, Dr. Kathy Pezdek and Dayvid Figler, Esq. including briefs, transcripts, arguments of counsel, now therefore, the Court makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

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

I. PROCEDURAL TIME LINE OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. PETITIONER'SCLAIMS ARE PROCEDURALLY BARRED.

a. The Petition is Time-Barred.

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

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

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

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

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

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

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

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

a. Petitioner's Petition is Successive.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

DATED this 20 day of January, 2021.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

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

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Nevada Supreme Court

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

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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

AMENDED NOTICE OF APPEAL

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

Dated February 2, 2021.

Respectfully submitted,
Rene L. Valladares
Federal Public Defender

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

[1] Following suspension of the briefing in the Nevada Supreme Court, it remanded the matter to the district for an evidentiary hearing. The Court further held: "[A]ny party aggrieved may file an amended notice of appeal from the new order." *See* 4/10/20 Order. This Court provided its new order to the Nevada Supreme Court, which has already reinstated the briefing. This Amended Notice is filed out of an abundance of caution and to comply with the April 10, 2020 Order.

CERTIFICATE OF SERVICE

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

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

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