IN THE SUPREME COURT OF THE STATE OF NEVADA

EVARISTO JONATHAN GARCIA, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 80255

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUES

1. Whether the district court appropriately found that Appellant's claims were procedurally barred.

2. Whether the district court appropriately found that Appellant failed to demonstrate good cause and prejudice to overcome the procedural bars.

3. Whether the district court appropriately allowed the State to draft the Findings of Fact, Conclusions of Law.

STATEMENT OF THE CASE

On March 19, 2010, EVARISTO JONATHAN GARCIA (hereinafter "Appellant") 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). X2218-19[1].

On March 17, 2011, pursuant to Guilty Plea Agreement, Appellant pled guilty to SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony – NRS 200.010, 200.030, 193.165). XAA2219. On April 22, 2011, Appellant filed a Motion to Withdraw Guilty Plea. XAA2219. On May 12, 2011, the district court granted Appellant's motion. XAA2219.

Jury trial commenced on July 8, 2013. XAA2219. On July 9, 2013, the State filed its Third Amended Indictment charging Appellant 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

[1]The State has elected to adopt the district court's procedural history in various sections of the instant Statement of the Case to support its assertions as a result of Appellant's failure to include these documents for this Court's appellate review. Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 603 (2007) (noting appellant has the burden of providing this court with an adequate appellate record, and when the appellant "fails to include necessary documentation in the record, [this court] necessarily presume[s] that the missing portion supports the district court's decision''); NRAP 30(b)(3).

GANG (Category A Felony – NRS 193.168, 193.169, 200.010, 200.030, 200.450, 193.165). IIAA281; XAA2219.

On July 12, 2013, the State filed its Fourth Amended Indictment charging Appellant 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). VAA994-96. 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. VIIAA1490-91.

On July 22, 2013, Appellant filed a Motion for Acquittal or, in the Alternative, Motion for New Trial. XAA2219. The State filed its Opposition on July 29, 2013. XAA2219. On August 1, 2013, Appellant's motion was denied. XAA2219.

On August 29, 2013, Appellant 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. VIIAA1492-93. The Judgment of Conviction was filed on September 11, 2013. VIIAA1492.

On October 11, 2013, Appellant filed a Notice of Appeal. VIIAA1494-95. On May 18, 2015, this Court affirmed Appellant's conviction and remittitur issued on October 20, 2015. VIIIAA1586-93.

On June 10, 2016, Appellant filed his first Petition for Writ of Habeas Corpus and Motion for Appointment of Counsel. VIIIAA1594-1610. The State filed its Opposition on September 12, 2016. VIIIAA1611-25. On September 29, 2016, Appellant's Motion and Petition were denied. 1627-29. The district court entered its Findings of Fact, Conclusions of Law and Order on October 25, 2016. VIIIAA1631-39.

On October 13, 2016 and November 16, 2016, Appellant filed a Notice of Appeal. 8AA1640-43; XAA2220. On May 16, 2017, the Nevada Court of Appeals affirmed the district court's denial of Appellant's first Petition and remittitur issued on June 12, 2017. VIIIAA1654-60.

On or about December 13, 2017, Appellant filed a pro se habeas petition in federal district court.[2] Thereafter, Appellant filed a motion to stay the federal action while he completed his state proceedings, which the court granted.

[2] Appellant failed to include the documents filed in Appellant's federal district court case, Evaristo Jonathan Garcia v. Nevada Department of Corrections, No. 2:17-cv-03095-JCM-CWH (D. Nev.). Thus, just as Appellant requested this Court take judicial notice of the documents contained in this case, the State also makes such request.

On March 14, 2019, Appellant filed, under seal, his second state Post-Conviction Petition for Writ of Habeas Corpus ("the Petition"). VIIIAA1669-1704. On August 8, 2019, it appeared from the district court's minutes that the Petition was denied. XAA2220. On August 9, 2019, Appellant filed a Motion for Reconsideration. XAA2220. On September 10, 2019, this Court issued an Order denying the Petition. XAA2220. 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. XAA2220. On September 19, 2019, the district court issued an order vacating the previous Order denying the Petition. XAA2220. On October 10, 2019, the State filed its Response to the Petition. VIIIAA1729-49. On October 17, 2019, Appellant filed a Reply. VIIIAA1705-23. On November 12, 2019, the district court denied the Petition. VIIIAA1750. On November 15, 2019, the district court issued an Order denying the Petition. VIIIAA1466-69. On December 11, 2019, Appellant filed a Notice of Appeal. VIIIAA1784-85.

On November 27, 2019, under seal, Appellant filed a Motion to Alter or Amend a Judgment Pursuant to Nev. R. Civ. P. 59(e). VIIIAA1773-78. On January 29, 2020, the State filed its Opposition to the motion. VIIIAA1801-06. On January 30, 2020, Appellant filed a Reply. IXAA1807-25. On January 31, 2020, the State filed a Supplement to its Opposition. IXAA1826-27. On February 6, 2020, the

district court advised it would allow an evidentiary hearing to be set. IXAA1828. An order unsealing the case was also signed in open court. IXAA1828. On March 2, 2020, an Order was filed denying Appellant's request for an Amended Judgment granting habeas relief, but vacating its November 15, 2019 Order denying the Petition and granting an evidentiary hearing. IXAA1842-43.

On May 1, 2020, Appellant 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. IXAA1846-73. The State filed Oppositions on May 11, 2020. IXAA 1874-1911. Appellant filed Replies on May 18, 2020. IXAA1912-36. On June 2, 2020, the district court denied the Motion to Disqualify, and on June 9, 2020, the district court filed an Order denying the Motion for Discovery. IXAA1937,1979-82.

On September 21, 2020, this matter came before the district court for evidentiary hearing and argument. XAA2024. Roberto Morales, Dr. Kathy Pezdek and Dayvid Figler, Esq. testified, and the district court took the matter under advisement. XAA2026,2148-49. On September 30, 2020, by way of Minute Order, the district court denied the Petition and requested that the State prepare and submit Findings of Fact, Conclusions of Law and Order. XAA2150.

On October 7, 2020, Appellant filed a Motion for Court to Prepare and File Order on Petition for Writ of Habeas Corpus (Post-Conviction), whereby he

requested the district court prepare and file its own order. XAA 2151-63. The district court filed its Findings of Fact, Conclusions of Law and Order on November 18, 2020 and December 10, 2020. XAA2164-85, 2192-2212. On December 15, 2020, the district court held a hearing on Appellant's Motion whereby the district court heard argument by Appellant as well as the State's explanation that it submitted the Findings of Fact, Conclusions of Law and Order in compliance with the district court's previous order, but it would take no position should the district court elected to prepare its own findings. XAA2189. At the end of the hearing, the district court rescinded the filed Findings and explained it would issue its own Findings. XAA2189-90. On January 20, 2021, the district court filed its Findings of Fact, Conclusions of Law and Order. XAA2218-37. On February 2, 2021, Appellant filed an Amended Notice of Appeal. XAA2238-40.

STATEMENT OF THE FACTS

I. JURY TRIAL

The State has elected to adopt the district court's rendition of facts from Appellant's jury trial:

> Crystal Perez was attending Morris Sunset East High School in February of 2006. Among her classmates were Giovanny[3] 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

[3]The State recollects that correct spelling is Giovanny. While Appellant spells his name, Giovanni, both parties are referring to the same person.

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.[4] 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.

[4] 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.

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

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

Harper testified at trial that in February of 2006, he was a member of Puros Locos for a short time and went by the moniker Silent. On the day of the murder, he was at Salvador Garcia's apartment with Lopez, 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.

X AA 2221-25.

II. POST-CONVICTION EVIDENTIARY HEARING

On September 21, 2020, the district court held an evidentiary hearing on Appellant's Petition for Writ of Habeas Corpus (Post-Conviction). XAA2024. The following sections contain a relevant summary of the following witness' testimony: Roberto Morales, Dr. Kathy Pezdek and Dayvid Figler, Esq. XAA2026,2148-49.

A. Officer Roberto Morales

Roberto Morales, a retired Lieutenant of the Clark County School District Police Department (hereinafter "CCSDPD"), testified at the evidentiary hearing on September 21, 2020. XAA2028-29. He explained CCSDPD were considered Category 1 officers, so they had "the full range of NRS statute and application of the law," and had the authority to arrest individuals as well as investigate crimes and refer individuals for charges. XAA2030-31. However, he also explained that in years prior, Nevada law provided that CCSDPD officers were to contact the local jurisdiction and advise when an incident involved a Category A Felony. XAA2030. At this point, the local jurisdiction would either take the case over or permit CCSDPD to continue with the investigation. XAA2030-31. Further, he explained that CCSDPD uses different event numbers for incidents from LVMPD and the CCSDPD's records department was completely different from LVMPD's records department and any reports generated would have been sent to CCSDPD's records department. XAA2037.

Morales explained that CCSDPD officers could write reports and would share those reports upon request. XAA2031,2034-35. However, neither he nor his agency was working directly with the Clark County District Attorney's Office ("CCDA") on this case. X2036-37. Notably, Morales further explained that CCSDPD shared reports with local agencies and the district attorney's office upon request, but he had

no direct knowledge if members of the CCDA had requested the report he drafted in this case. XAA2034-35.

B. Dr. Kathy Pezdek

Dr. Kathy Pezdek, a psychology- professor, also testified for Appellant at his evidentiary hearing. XAA2044. Dr. Pezdek has testified in excess of 300 predominantly criminal trials, but never for the prosecution. XAA2045.

Specific to this case, Dr. Pezdek attempted to apply eleven (11) situational factors that were relevant to Graves's memory for the incident. XAA2055. However, she explained that she could not determine for a fact whether an eyewitness identification factor affected Graves' testimony and, therefore, her testimony comprised largely of generalities. XAA2065-66. In fact, Dr. Pezdek never testified to a reasonable degree of medical or psychiatric certainty or even probability that Graves misidentified Appellant or that the CCSDPD report would have demonstrated such a fact. See XAA2065. She even testified that she could not offer an opinion about the reliability of any eyewitness because she did not review the full evidence. XAA2091.

Dr. Pezdek reviewed the photograph of Giovanny where Graves had written, "went to school where I work, Morris Academy Sunset, always a troublemaker," and noted that Graves new him by his first name. XAA2085-86. Dr. Pezdek did not review any of the other evidence in Appellant'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, the latent fingerprint report, or that Appellant fled to Mexico. XAA2087-88. When asked regarding 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 and could not answer whether Graves' testimony would have been bolstered. XAA2090-91. But most importantly, Graves never identified Appellant at trial. XAA2086,2123. In fact, Dr. Pezdek testified that in her review of this case she realized that Graves did not make an identification and told the jury at trial that she "got old and forgot stuff." XAA2086, 2091.

C. Dayvid Figler, Esq.

Appellant's trial attorney, Dayvid Figler, Esq., who had only joined Appellant's trial team two to three weeks prior to trial, also testified at Appellant's hearing. XAA2097,2109. Figler represented that he had cases with Ms. Demonte and Ms. Pandukht, prosecutors for the CCDA, previously and found that they were both "reliable and professional." XAA2100. Figler 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. XAA2099-2100.

Figler represented that he reviewed all of the discovery his co-counsel, Ross Goodman, Esq., had received and that the CCSDPD Report was not included in the discovery he reviewed prior to trial. XAA2100-10. In fact, Figler recalled that he himself did a file review of all of the original boxes of discovery. XAA2115. Figler admitted that he did not specifically request the CCSDPD report. XAA2116. He further admitted that there was only a general request contained in the Special Public Defender's discovery motion filed on August 25, 2010. XAA2116. Yet, he recalled the school principal Danny Eichelberger testifying regarding CCSDPD being at the school on the day of the incident to investigate an unrelated narcotics infraction. XAA2118. However, he did not find any discovery indicating that CCSDPD conducted any witness interviews. XAA2117.

Regarding witnesses, Figler admitted Graves and Gamboa did not identify Appellant at trial. XAA2123. Further, Cavillo was a critical witness for the State and only testified because of being arrested on a material witness warrant. XAA2123. Further, at the time officers investigated Harper, they did not have an identification of Appellant. XAA2122. Notably, there was no picture of Appellant to see if he had a mustache the night of the murder. XAA2125.

Moreover, Goodman filed about ten pre-trial motions in this case. XAA2118. During closing argument Goodman argued heavily that there were no independent witnesses that identified Appellant. XAA2126. Most importantly, Goodman argued

four alternate suspects to the jury—Giovanny Garcia, Salvatore Garcia, Manuel Lopez, and Edshel Calvillo. XAA2127. Goodman also noted the inconsistent descriptions provided by the witnesses. XAA2126. Further, Harper and Calvillo excluded Giovanny as the shooter. XAA2128-29. Additionally, Appellant's fingerprints were found on the recovered firearm and Giovanny and Lopez were not found on the firearm. XAA2129. Defense also elicited that Perez initially identified Giovanny as the shooter, but then stated at trial he was not. XAA2130. Most importantly, Goodman attempted to discredit Harper and Cavillo about their motive to lie, who were the only witnesses that identified Appellant. XAA2127. Specifically, Goodman extensively argued about Harper's memory based on the expert witness' testimony. XAA2127.

SUMMARY OF THE ARGUMENT

The district court appropriately denied Appellant's Petition. First, the district court properly found that Appellant's claims were procedurally barred. Second, Appellant did not establish good cause and prejudice to overcome the procedural bars through his Brady claim. Finally, the district court did not err in the Findings of Fact, Conclusions of Law and Order it filed. Therefore, this Court should affirm the district court's denial of Appellant's Petition for Writ of Habeas Corpus (Post-Conviction).

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ARGUMENT

I. THE DISTRICT COURT APPROPRIATELY FOUND THAT APPELLANT'S CLAIMS WERE PROCEDURALLY BARRED

A. The Petition is Time-Barred

Appellant'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.

This Court 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 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, this 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 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 Appellant filed a direct appeal on October 11, 2013. VIIAA1492,1494-95. Appellant's conviction was affirmed, and remittitur issued on October 20, 2015. VIIIAA1586-93. Thus, the one-year time bar began to run from the date remittitur issued. The Petition was not filed until March 14, 2019. VIIIAA1669-1704. This is over three (3) years after remittitur issued and in excess of the one-year time frame. Accordingly, the district court properly found that absent a showing of good cause

for this delay and undue prejudice, Appellant's claim had to be dismissed because of its tardy filing.

B. Appellant's Petition was Successive

Appellant'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).

This 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 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.

Appellant filed his first Petition for Writ of Habeas Corpus on June 10, 2016. VIIIAA1594-1610. On September 29, 2016, the first Petition was denied. VIIIAA1627-29. The district court entered its Findings of Fact, Conclusions of Law and Order on October 25, 2016. VIIIAA1631-39. On October 13, 2016 and November 16, 2016, Appellant filed Notices of Appeal. VIIIAA1640-43; XAA2220. On May 16, 2017, the Nevada Court of Appeals affirmed the Court's denial of Appellant's first Petition and remittitur issued on June 12, 2017. VIIIAA1654-60. As this Petition is successive, pursuant to NRS 34.810(2), the district court properly found that it could not be decided on the merits absent a showing of good cause and prejudice. NRS 34.810(3).

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II. THE DISTRICT COURT APPROPRIATELY FOUND THAT APPELLANT FAILED TO DEMONSTRATE GOOD CAUSE AND PREJUDICE TO OVERCOME THE PROCEDURAL BARS

Appellant argues that the district court erroneously found that he failed to demonstrate good cause and prejudice via his Brady claim, whereby he alleged that the State failed to disclose CCSDPD report. AOB at 17-51.

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).

A. The District Court Appropriately Found That the Information Contained in the CCSDPD Report Was Neither Favorable Nor Material

Appellant argues that he demonstrated prejudice to overcome the procedural bars because he proved the materiality of the information contained in the CCSDPD report. AOB at 34-51. Additionally, he argues that the district court conflated its materiality and favorability reasoning and failed to make a separate finding regarding favorability. AOB at 49-51. Thus, he claims the district court erred. AOB at 34-51. Despite Appellant's argument, the district court appropriately found that Appellant failed to demonstrate prejudice and properly found that the information contained in the CCSDPD report was neither favorable, nor material.

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, 514 U.S. at 434, 115 S. Ct .1565. Appellant is unable to demonstrate prejudice and thus his claim fails.

Further, 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.

As a preliminary matter, Appellant seems to attempt to mislead this Court and argue that there were multiple reports that were suppressed referencing statements by Graves: "the suppressed reports reveal she gave a prior inconsistent statement…" AOB at 35. However, the only report at issue was a report authored by CCSDPD Officer A. Gaspardi, which contained information that was neither favorable, nor material to Appellant. IAA31.

The CCSDPD police report indicates an individual by the name of Jose Bonal, a student from a different school, was stopped on a different street nearby. IAA31. Bonal was stopped for approximately fourteen (14) minutes while Betty Graves was brought to make an identification. IAA31. The report indicated Graves had seen the

fight and the shooting and she would be able to identify the suspect. IAA31. However, Graves did a show-up and definitively stated that Bonal was not the shooter. IAA31. Further, Graves also stated she witnessed the fight and did not identify Bonal as a participant in the fight. IAA31.

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, Appellant would need to demonstrate this report linked Bonal to the crime and indicated Appellant was not involved. Evans, 117 Nev. at 626, 28 P.3d at 510. Appellant has merely demonstrated that a report existed which definitively stated Bonal was not the shooter. Accordingly, 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. Moreover, Appellant 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 Appellant guilty beyond a reasonable doubt.

More importantly, Appellant spent nine (9) pages of his Opening Brief asserting irrelevant information regarding Giovanny as an alternate suspect to this Court. Indeed, while Graves did provide a description of the shooter in the report,

Graves did not identify Appellant as the individual that shot the victim in the report, and in fact, never identified the suspect she saw shoot the victim. IAA31. Indeed, testimony was elicited at trial that Graves could not make an identification because she was "old and forgot stuff." XAA2086. Accordingly, even if Appellant had the CCSDPD report that discussed Graves' description of the shooter, accurate or not, Graves had already been impeached through her own admission that due to her age she was forgetful. Thus, despite Appellant's attempt to imply otherwise, Giovanny was not mentioned in the CCSDPD report and therefore, the relevance of Appellant's argument about Giovanny is questionable. Accordingly, the report provided no information that would have been favorable or material for the defense. To the extent Appellant argues that the district court ignored Appellant's materiality argument, his argument is belied by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

At the evidentiary hearing, Appellant's expert, Dr. Kathy Pezdek, testified that she could not determine for a fact whether an eyewitness identification factor affected Graves' testimony and, therefore, she could not apply her research to Graves or Appellant's case specifically.[5] XAA2065-66. In fact, Dr. Pezdek never testified to a reasonable degree of medical or psychiatric certainty or even probability that

[5]To the extent Appellant argues that the findings related to Dr. Pezdek were misrepresentations, the State argues such assertions are not misrepresentations and are supported by the record.

Graves misidentified Appellant or that the CCSDPD report would have demonstrated such a fact. See XAA2065. She even testified that she cannot offer an opinion about the reliability of any eyewitness. XAA2091. Further, Dr. Pezdek did not review any of the other evidence in Appellant'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. XAA2087-88. When asked regarding 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. XAA2091. But most importantly, Graves never identified Appellant at trial. XAA2086,2123. Therefore, Appellant cannot demonstrate prejudice and his claims fail.

Most importantly, in regard to Appellant's prejudice argument and as discussed *infra*, Appellant 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 fact that his own attorneys could

have found this information with an adequate investigation at the time of trial divests Appellant of the ability now to claim otherwise. Indeed, the CCSDPD report could have been discovered by submitting a request to CCSD, which was eventually done by Appellant's present counsel.

Additionally, at the evidentiary hearing, Figler admitted that he did not specifically request the CCSDPD report. XAA2116. He further admitted that there was only a general request contained in the Special Public Defender's discovery motion filed on August 25, 2010. XAA2116. 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. XAA2118. Appellant's own voluntary choice not to request this discovery himself cannot constitute prejudice and, thus, his claim fails.

Finally, any error would have been harmless for two reasons: (1) Appellant impeached Graves at trial and argued alternate suspect theories; and (2) any prejudice Appellant faced would have been overshadowed by the overwhelming evidence of guilt in this case.

As Figler explained at the evidentiary hearing, Appellant was able to impeach Graves during trial. XAA2106-07. More importantly, Figler admitted that his co-counsel was able to argue heavily that there were no independent witnesses that identified Appellant as well as the inconsistent descriptions amongst the different

witnesses. XAA2126-27. Moreover, he admitted that his co-counsel attempted to discredit the only two (2) witnesses that identified Appellant, i.e. Jonathan Harper and Edshel Cavillo. XAA2126-27. Most importantly, Figler's co-counsel was able to argue about the four (4) alternative suspects—Giovanny Garcia, Salvatore Garcia, Manuel Lopez, and Edshel Cavillo. XAA2127-28. Moreover, in addition to Graves excluding Giovanny, there were several other witnesses that excluded Giovanny, including Harper and Cavillo. XAA2128. Further, there was testimony presented at trial that Giovanny and Manuel Lopez's fingerprints were excluded from the prints found on the firearm recovered from the shooting. XAA2129. Notably, even if the defense had the report at trial and had attempted to impeach Graves during the trial about her exclusion of Giovanny, such efforts would have been futile as the district court appropriately noted:

> THE COURT: […] 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.

XAA2134. Accordingly, information of an alternate suspect, which was rightfully excluded by Graves in the CCSDPD report, would not have sown seeds of doubt with the jury. AOB at 44.

Moreover, given the strength of the State's case in general, any prejudice from the stop of a non-suspect pales in comparison to the overwhelming evidence of his guilt. Despite Appellant's attempts to misrepresent the evidence at trial, numerous witnesses testified that they saw a Hispanic man of Appellant's approximate age wearing a gray hooded sweatshirt shoot the victim during the fight at the school. See e.g. IIIAA567,576-78, 633-34. Jonathan Harper testified that he rode in the car with Appellant to the fight, that Manuel Lopez handed his gun to Appellant before getting into the car, that Appellant was wearing a gray hooded sweatshirt that night, that he saw Appellant chase and shoot the victim in the back and "dumped . . . the whole clip in the kid," and that he saw Appellant run into the neighborhood where the gun was later found. IVAA759-60,766. Harper testified that Appellant told him later that "I got him." IVAA767. Harper also overheard several people at Salvador's apartment talking about the gun being hidden. IVAA769-770. Edshel Calvillo testified that Appellant told him that Appellant shot a boy and that he hid the gun in a toilet. IIAA374-75. 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. IIAA289-290. The Firearms Examiner identified two (2) of the bullets recovered at the scene as having been fired by the gun found in the toilet. IVAA944-45. Finally, the Latent Fingerprint Lab Manager identified two (2) latent prints on the gun that were

matched to Appellant.[6] VIAA1196-97. Moreover, the fact that the jury found Appellant guilty of second-degree murder instead of first-degree murder and dropping of the gang enhancement does not alter the analysis. The jury was convinced that Appellant was the perpetrator of the crimes regardless of his level of intent. There was more than enough evidence for a jury to determine Appellant committed the crime beyond a reasonable doubt and, thus, any prejudice to Appellant would be outweighed by the overwhelming evidence of his guilt and would therefore be harmless.

B. The District Court Did Not Err in Finding that Appellant Could Have Discovered this Information

In the instant appeal, Appellant argues that the district court erroneously applied a diligence requirement. AOB at 27-33. Despite Appellant's attempts to attack the district court's reasoning, Appellant's claim fails.

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[6]Appellant attempts to discount the Fingerprint Lab Manager's testimony by arguing that Appellant's fingerprint found on the firearm was located in an "unusual spot." AOB at 46. Such attempt misrepresents the record. The Lab Manager, Alice Maceo, found Appellant's prints on the firearm in multiple areas. Specifically, Maceo identified Petitioner's right ring finger on the upper left side of the grip (L1). VIAA1212. 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). VIAA1212. Although Maceo could not definitively say that the prints indicated that Appellant fired the firearm, 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. IIAA202; VIAA1207-11, 1212-13, 1218.

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 US 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 government may not properly conceal exculpatory evidence from a defendant it does not place any burden upon the government 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).

This 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 P2d 321, 331 (1998). In Steese, the undisclosed information stemmed from collect calls that the defendant made. Id. 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.

On appeal, Appellant cites to Amado v. Gonzalez, 758 F.3d 1119 (9th Cir. 2014), to support his proposition that the district court erred in imputing a diligence requirement and misinterpreted the aforementioned precedent. However, that case is distinguishable from the instant case in several respects. In Amado, the defendant moved for a new trial because the State had failed to disclose a witness's probation report which he claims would have been used as impeachment evidence at the defendant's trial. Id. at 1127-28. The defendant raised this issue in a subsequent habeas petition and then challenged the lower court's decision that found "it was reasonable for the California courts to find that the State had not suppressed evidence, since [the defendant's] trial counsel had had the opportunity to speak with [the witness], but had failed to do so." Id. at 1130. In addressing the State's argument that the defendant had an obligation to seek out the witness' information, the Ninth Circuit explained that placing a blanket requirement of due diligence "would flip"

the State's obligations under Brady, which would be contrary to existing law. Id. at 1136. However, the Court also specifically noted that while defense counsel is not required to conduct interviews or investigations himself to retrieve material information, the existing law does caution that "defense counsel cannot ignore that which is given to him or of which he otherwise is aware." Id. at 1137. Further, the Court elaborated that "when defense counsel [is] put on notice as to potential Brady material and given the opportunity to seek it out, then a defendant likely could not later claim that a Brady violation had occurred." Id. (citing United States v. Dupuy, 760 F.2d 1492, 1501–02 (9th Cir.1985)). Applying this law to the defendant's case, the Court found that no explicit notice regarding the witness' records had been provided to the defendant and it would have been unlikely that an interview with the witness would have produced such facts. Id.

In the instant case, unlike the defendant in Amado, Appellant 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, a point the State does not concede, there was no duty to disclose it because Appellant could have discovered this information on his own. The CCSDPD report could have been discovered by submitting a request to CCSD, which was eventually done by Appellant's present counsel. Further, Appellant could have discovered this

information by contacting CCSDPD at an earlier date because Appellant 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.

VIIIAA 1683-84. The CAD log as well as the referenced LVMPD Officer's Report were disclosed by the State pursuant to its Brady obligations. Moreover, Figler testified at the evidentiary hearing that he recalled the school principal Danny Eichelberger testifying regarding the school police being at the school on the day of the incident. XAA2118. "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. Appellant 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 Appellant of the ability now to claim otherwise. Appellant'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.

Additionally, Appellant's argument that the district court misapplied other precedent fails. The district court's citation to these cases in fact support the district court's conclusion and were not used to run afoul of Ninth Circuit precedent. For example, just as Appellant was aware of CCSDPD's involvement in this case, the Court explained in Steese, 114 Nev. at 495, 960 P.2d at 331, that the defendant was aware of the phone calls and therefore there was no Brady violation. Similarly, like the bank notes in White, 970 F.2d at 336, Appellant was aware of CCSDPD's involvement. The same is true of Meros, 866 F.2d at 1309, where the defendant was also aware of the information that he claims was suppressed. Moreover, the Meros Court also noted that some of the information had not been in the possession of the prosecutor's office, which as discussed *supra*, was the case here as well. Id. Likewise, Appellant could have retrieved the report because he was aware of CCSDPD's investigation, just as the psychologist in U.S. v. Marrero, 904 F.2d 251, 261 (5th Cir. 1990), was aware of the allegedly suppressed information and just needed to interview her own patients to retrieve the evidence. Finally, just as the defendant in Pandozzi, 878 F.2d at 1529, was aware of who was present during an interview that was memorialized in alleged undisclosed reports, here Appellant was

aware of CCSDPD's involvement and even possessed the LVMPD's Officer's Report that listed the seven (7) CCSDPD personnel present at the scene.

Accordingly, the district court did not violate Ninth Circuit precedent and accurately cited to a series of cases to support the proposition that Appellant was aware of CCSDPD's involvement and therefore could have obtained the reports that he finally chose to obtain during the underlying post-conviction proceedings. In other words, despite Appellant's inaccurate argument to the contrary, the district court did not employ an erroneous diligence requirement and instead applied what is required under the law to reach its conclusion. To the extent Appellant argues that it met a diligence requirement for filing a post-conviction petition within four (4) months of learning of the CCSDPD's report, Appellant has not cited to any authority that indicates such time-frame reflects diligence. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

C. The State Did Not Have Constructive Possession of the CCSDPD Reports

Appellant argues that the district court erroneously found that the State did not have possession of the CCSDPD reports based primarily on the incorrect premise that CCSDPD was not a State actor for Brady purposes. AOB at 20-27. However, this claim fails as the district court appropriately found that Appellant failed to

demonstrate that the State affirmatively withheld the information contained in the CCSDPD reports.

In order to qualify as good cause, Appellant 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 (3) 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.

As a preliminary matter, to the extent Appellant elaborates on Bennett in the instant appeal by arguing that the case stands for the proposition that an agency is considered to be in constructive possession of information from any agency that assists in the investigation, his claim still fails as Bennett is completely

distinguishable from the instant case. Indeed, in Bennett, 119 Nev. at 593, 81 P.3d at 4, the defendant and his co-conspirator committed a murder at a convenience store in Las Vegas. After the murder, the defendant returned to Utah and disclosed the murder to his friend. Id. at 594, 81 P.3d at 4. The defendant's friend then reported the information to Utah police, who then contacted LVMPD. Id. Utah police eventually obtained a warrant to search the defendant's home in Utah where they seized various belongings. Id. On appeal, the defendant argued that the State committed a Brady violation when it failed to disclose the defendant's co-defendant's juvenile criminal record and when it failed to disclose to the defense that Utah police had paid a witness for informant work. Id. As for the juvenile criminal record evidence, the Court noted that such information would have been favorable to the defense because the co-defendant's "extensive juvenile records showed his criminal sophistication and lent credibility to Bennett's theory that Beeson acted as the leader in committing the crimes." Id. However, it made no conclusions regarding possession for that evidence. Id. The Court did however make a finding that the State was in possession of paid informant information because a Utah police detective was aware of the evidence, the Utah police assisted in the investigation of the crime and supplied information to LVMPD, and the Utah detective that paid the informant denied that the informant was paid when he testified at trial. Id.

Accordingly, Appellant has misapplied the unique circumstances of Bennett, which are completely distinguishable from the instant case, to present what he thinks is a broad rule regarding possession. Such an elementary reading of the case discounts the factual analysis that led the Court to reach its conclusion and demonstrates the inapplicability of that factual scenario to the instant case. Indeed, the information Appellant complains was suppressed, i.e. the CCSDPD report, was not information for which an individual denied on the stand and created a false narrative for the jury. Moreover, unlike Utah police who appeared to be heavily involved in the Bennett investigation, to the point that they obtained a search warrant and executed that search warrant to provide LVMPD with information, in this case LVMPD was on the scene investigating Appellant's crime within minutes of the crime occurring. Accordingly, this case is completely distinguishable.

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

CCSDPD was not the investigating body for this case and were not tasked with any investigative work by the LVMPD. Clark County, Nevada has a unique characteristic of several agencies having concurrent law enforcement authority (LVMPD, North Las Vegas Police Department, Henderson Police Department, Mesquite Police Department, CCSDPD, Park Police, Taxicab Authority, Transportation Services Authority, Nevada State Gaming Control Board, Nevada Division of Investigations, City Marshalls, Animal Control, Attorney General Investigations, to name just a few). None of these agencies coordinate event numbers or report databases. There was no indication in any of the LVMPD police reports or witness statements that the CCSDPD prepared any reports or statements or interviewed any witnesses in this case.

Further evidence of this fact was presented at trial when Danny Harris Eichelberger, the Principal of Morris Sunset East High School, testified why members of the CCSDPD were present at the school for an unrelated incident. The principal left the CCSDPD officers in his office to finish up with the student who committed a drug infraction when he went outside because of the fight:

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

IIIAA547-48.

To the extent Appellant argues the district court incorrectly found that CCSDPD was not a law enforcement agency, Appellant misconstrues the words of the district court. The district court was not finding that CCSDPD was not a law enforcement agency; instead, as it explicitly stated, CCSDPD was not a law enforcement agency that collaborated with the State of Nevada in this case. Moreover, Appellant further twisted the district court's holding and argued that because the individual prosecutors had no knowledge of the CCSDPD reports, it was not in the State's possession. Instead, the district court found that the State investigating agency, in this case, was LVMPD, who did not have control of this report as it is a separate police agency from CCSDPD.

Indeed, at the evidentiary hearing, 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. XAA2030-31. Here, Appellant was charged with a Category A Felony and, thus, CCSDPD did not have jurisdiction over Appellant's case. Therefore, LVMPD was the sole agency, outside of the CCDA, that the prosecutor had a duty from which to procure any information favorable to Appellant. 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). It also bears noting that the CCSDPD Report states that the shooting occurred at 9:02 PM and indicates that LVMPD's air unit arrived at 9:04 PM, LVMPD officers were on the ground at the scene at 9:06 PM, and LVMPD officers were conducting interviews with witnesses by 9:20 PM. IAA31. Regardless, Morales testified that CCSDPD had a completely separate records department from LVMPD and even used different event numbers. XAA2037. Further, Morales clarified that CCSDPD documents were only provided to the CCDA upon request. XAA2035-38. Morales also testified that he had no direct knowledge of the CCDA ever requesting these documents. XAA2038.

Appellant neither asserted nor set forth facts to show that the CCDA or the LVMPD possessed the impeachment evidence that Appellant discussed in his

Petition. Appellant'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 Appellant failed to substantiate this crucial point, his claim was appropriately denied.

Here, Appellant has not alleged—let alone proved—that the State had any Brady/Giglio information and failed to disclose it. In fact, Appellant has not even pled generally that the State affirmatively withheld information. Appellant 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, Figler 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." XAA2100. 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. XAA2099-2100. Despite the Strickler-Bennett requirement of proving affirmative State "suppression" for there to be a constitutional violation, Appellant 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 concluded, "[The Appellant] 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, Appellant has not offered any authority for this proposition either.

Accordingly, despite Appellant's allegation, the district court did not misinterpret Evans. Evans says what the district court stated. Further, the holding is not inapplicable because Appellant is arguing that the State should have conducted additional investigation. Indeed, as discussed *supra*, the State disclosed LVMPD's Officer Report, which listed the names of various CCSDPD personnel that Appellant could have investigated further. Appellant's attempt to transform his argument post-hoc does not alter the appropriateness of the district court's analysis.

Further, Appellant'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 Appellant seemingly requests would impute to the State any and all knowledge that Appellant'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, Appellant 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. Even if this Court found that the district court erred in finding that the State did not have possession of the CCSDPD reports for Brady purposes, a point the State does not concede, any error would have been harmless because Appellant could not demonstrate that such information was material.

III. THE DISTRICT COURT DID NOT ERR IN ITS FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Appellant argues that the district court violated Appellant's rights when it issued its Findings of Fact, Conclusions of Law and Order. AOB at 51-67. Specifically, he claims that adopting the State's proposed Findings was a violation of separation of powers as well as due process, and the Findings violated Byford v.

State, 123 Nev. 67, 156 P.3d 691 (2007). AOB at 51-67. However, his arguments fail.

The Eighth Judicial District Court rules require the prevailing party to furnish the written order. EDCR 7.21. "The counsel obtaining any order, judgment or decree shall furnish the form of the same[.]" DCR 21. Such proposed findings must "accurately reflect[] the district court's findings." Byford, 123 Nev. at 69, 156 P.3d at 692. However, a court may reject objections to proposed findings that are belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

The prevailing party is not limited to the transcript of oral pronouncement of a ruling when drafting proposed findings. To the contrary, the court need only orally pronounce its decision "with sufficient specificity to provide guidance to the prevailing party in drafting a proposed order." Byford, 123 Nev. at 70, 156 P.3d at 693; State v. Greene, 129 Nev. 559, 565, 307 P.3d 322, 325-326 (2013). This Court recently reiterated that "[i]t is common practice for Clark County district courts to direct the prevailing party to draft the court's order." King v. St. Clair, 134 Nev. 137, 142, 414 P.3d 314, 318 (2018) (quoting EDCR 1.90(a)(5) ("[A] judge or other judicial officer shall order the prevailing party to prepare a written judgment and findings of fact and conclusions of law")). Moreover, this Court has concluded that proposed orders that contain findings and conclusions beyond what is made in a court's oral pronouncement may still be valid, especially when a defendant has an

opportunity to appeal any errors in the court's written order. See Smith v. State, 2019 WL 295686, Docket No. 74373 (unpublished) (Jan. 17, 2019); Zakouto v. State, 2018 WL 5734375, Docket No. 73489 (unpublished) (Oct. 11, 2018).

Here, the district court held an evidentiary hearing for Appellant's Petition on September 21, 2020. XAA2024. At the conclusion of the hearing, the district court took the matter under advisement. XAA2148. On September 30, 2020, by way of Minute Order, the district court provided as follows:

> 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.

XAA2150. On October 7, 2020, Appellant filed a Motion for Court to Prepare and File Order on Petition for Writ of Habeas Corpus (Post-Conviction) whereby he requested the district court prepare and file its own order. XAA 2151-63. In the interim, the State complied with the district court order and submitted proposed Findings, which the Court took possession of and then filed its Findings of Fact, Conclusions of Law and Order on November 18, 2020, and refiled them on December 10, 2020. XAA2164-85, 2192-2212. On December 15, 2020, the district court held a hearing on Appellant's Motion whereby the district court heard argument by Appellant and the State's explanation that it submitted the Findings of Fact, Conclusions of Law and Order in compliance with the district court's previous

order, but it would take no position should the district court elect to prepare its own findings. XAA2189. At the end of the hearing, the district court rescinded the filed Findings and explained it would issue its own Findings. XAA2189-90. On January 20, 2021, the district court filed its own Findings of Fact, Conclusions of Law and Order. XAA2218-37.

Appellant first argues that the district court violated the Separation of Powers Doctrine and Due Process protections when it requested that the State submit a proposed order, which the Court adopted. AOB at 53-63. Such arguments are meritless as Appellant has failed to alert this Court of the specific Eighth Judicial District Court Rule (EDCR) that permits Court's to engage in this practice.

EDCR 1.90(a)(4)-(5) state:

> (4) Time limits for matters under submission. Unless the case is extraordinarily complex, a judge or other judicial officer shall issue a decision in all matters submitted for decision to him or her not later than 20 days after said submission. In extraordinarily complex cases, a decision must be rendered not later than 30 days after said submission. Following the decision of the judge or other judicial officer, the prevailing party shall submit a written order to the judge or judicial officer not later than 20 days from the date of the decision.
>
> (5) Time limits for entry of judgments. Unless the case is extraordinarily complex, a judge or other judicial officer shall order the prevailing party to prepare a written judgment and findings of fact and conclusions of law and submit the same not later than 20 days following trial. In extraordinarily complex cases, the attorney for the prevailing party shall submit a written judgment and findings of fact and conclusions of law to the judge or judicial official not later than 30 days following the conclusion of trial.

While this rule gives the district court the authority to order prevailing parties, such as the State, to prepare orders, it is the district court that ultimately must approve and sign the order. In such process, the district court has the authority to determine the exact wording of the final order. Indeed, the district court may interlineate the order or ultimately decide to write its own order instead. In other words, the district court makes the final determination on the nature of the order as it is the body that must sign the order to make it effective. Thus, not only does the district court have the authority to request prevailing parties prepare proposed orders, but the district court itself, as a neutral arbiter, makes the ultimate decision as to the form of the order for which it signs.

Additionally, this Court has previously rejected Appellant's separation of powers argument in the past for similar reasons when it concluded:

> [W]e conclude that the district court did not abuse its discretion in allowing the prevailing party (here, the State) to draft the order resolving the petition. See Byford v. State, 123 Nev. 67, 69-70, 156 P.3d 691, 692-693 (2007). We reject appellant's argument that allowing the State to draft an order resolving a habeas corpus petition violates the separation of powers doctrine. In doing so the State is not exercising judicial powers as the court directs the content of the disposition and determines whether the drafted order adequately represents its decision, and the drafted order has no effect unless signed by the judge and entered by the clerk. See Rust v. Clark Cty. Sch. Dist., 103 Nev. 686, 688, 747 P.2d 1380 1382, (1987).

Morales v. Baker, 480 P.3d 266, 2021 WL 620489, No. 79853, unpublished (Nev. Feb. 16, 2021). Appellant has failed to acknowledge this precedent and merely cites

to federal cases to support his position. Indeed, Appellant even acknowledges that federal courts have not found the Eighth Judicial District Court's practice unconstitutional. Further, to the extent Appellant claims that this case is especially concerning because he raised a Brady claim, this should not change the analysis because, as stated *supra*, the district court has the ultimate authority regarding the contents of its final order.

Appellant cites Anderson v. Bessemer City, 470 U.S. 564, 572, 105 S. Ct. 1504, 1510-11 (1985), Bright v. Westmoreland Cty., 380 F.3d 729, 732 (3d Cir. 2004), to support his claim. However, these cases are inapposite. In Anderson, while the Court did express criticism for verbatim adoptions of findings of fact prepared by the parties, due in part to "the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge has decided in their favor," Appellant neglects to mention that Anderson also noted that on appeal, "… even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." Anderson, 470 U.S. at 572, 105 S. Ct. at 1510-1511 (citing Marine Bancorporation, Inc., 418 U.S. at 615 n.13, 94 S. Ct. at 2866, and El Paso Natural Gas Co., 376 U.S. at 656-57 & n.4, 84 S. Ct. at 1047 & n.4). "If the district court's account of the evidence is plausible *in light of the record viewed in its entirety*, the court of appeals may not reverse it even though convinced that had it

been sitting as the trier of fact, it would have weighed the evidence differently." Id. at 573-574, 105 S. Ct. at 1511 (emphasis added). While the lack of sufficient judicial guidance might be grounds for a more stringent appellate review, it is not grounds for reversal. Id. There is no error where there is no reason to doubt that the findings issued by the district court represent the judge's own considered conclusions. Id. Likewise, in Bright, 380 F.3d at 731, while the United States Court of Appeals provided policy reasons for why it does not favor a court adopting a party's findings, it also echoed Anderson for the proposition that "*proposed findings of fact and conclusions of law* supplied by prevailing parties after a bench trial, although disapproved of, is not in and of itself reason for reversal."

To the extent Appellant complains that the district court violated Byford, 123 Nev. 67, 156 P.3d 691 (2007), because it did not make specific findings, his argument fails as Byford is distinguishable from the instant case:

> In Byford, on remand, we instructed the district court to reconsider the petitioner's claims of ineffective assistance of counsel. Id. at 69, 156 P.3d. at 692. However, the district court did not place the case back on the calendar, the State submitted a proposed order without obtaining a new ruling and without advising the petitioner, and the district court signed and filed the proposed order without bringing the parties before it or notifying the petitioner. Id. We concluded that both the State and the district court acted improperly for the following reasons: First, the State submitted its proposed order without the district court first ruling. Id. Second, the district court did not provide the petitioner with an opportunity to be heard on the State's proposed findings of fact and conclusions of law before they were entered. Id. at 69–70, 156 P.3d. at 692–93. Finally, "[t]he district court's endorsement of the order drafted unilaterally by the State did not satisfy" our specific instruction to the

> district court to "reconsider" the petitioner's claims of ineffective assistance of counsel. Id. at 70, 156 P.3d. at 693. We noted that "at the very least the district court should have advised both parties that it had reconsidered the claims and stated its new ruling, explaining its findings and conclusions, thereby providing guidance to the State in drafting a new proposed order." Id.

Bickom v. State, 125 Nev. 1020, 281 P.3d 1155 (2009) (citing Byford, 123 Nev. 67, 156 P.3d 691). Here, unlike Byford, the State did not submit its proposed findings until the district court issued its Minute Order, after the evidentiary hearing was conducted, notifying the parties of its decision to deny Appellant's Petition and directing the State to prepare the Findings. While such Minute Order did not contain detailed Findings, it did provide the parties with the Court's decision to deny the Petition. Regardless, Appellant lodged an objection to the State drafting the Findings, for which the district court held a hearing. At the conclusion of this hearing, the district court rescinded the previously filed Findings and subsequently filed its own Findings. Accordingly, Appellant's due process rights were not violated.

To the extent those Findings reflect the State's proposed Findings does not make it improper. Indeed, this is not a case in which the Court did not give Appellant notice of what the ruling was. This is not a case where the State took control of the Court's power. The district court did not conduct an ex parte hearing of any kind. The district court filed the version of the Findings that it did because it was in

compliance with the administration of justice in this case, not solely because the State proposed them. Moreover, to the extent Appellant complains that the Findings are unsupported by the law and record, his claim is meritless as discussed in detail *supra*. Citing to one section of the evidentiary hearing, taken out of context, where the district court questioned counsel does not change the analysis. AOB at 66.

To the extent Appellant complains that he was not sent the original proposed Findings from the State, while the State is unsure if Appellant was sent a draft of the proposed findings, Appellant certainly was given the opportunity to object, which he did in his subsequently filed Motion and during the subsequent hearing.

In sum, unless this Court is prepared to say that the district court failed to exercise independent judgment, there is no error in the verbatim adoption of proposed findings consistent with the arguments and pleadings. Even then, the remedy would only be heightened scrutiny of the Findings on appeal. Drafting proposed findings places a substantial burden on the State, and while the State would have no opposition to the District Court drafting its own findings, the appropriate venue for such a discussion would be an attempt to modify DCR 21 and EDCR 7.21.

CONCLUSION

Based on the foregoing, this Court should affirm the district court's denial of Appellant's Petition for Writ of Habeas Corpus (Post-Conviction).

/ / /

Dated this 2nd day of July, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 13,937 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of July, 2021.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 2nd day of July, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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