No. 80255

IN THE NEVADA SUPREME COURT

Evaristo Jonathan Garcia,

Appellant,

v.

James Dzurenda, et al.,

Respondents.

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

Petitioner-Appellant's Reply Brief

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Evaristo Garcia was convicted of crimes arising from a shooting at a school. The prosecution did not disclose reports authored by Clark County School District Police Department ("CCSDPD") officers, who were the first to respond to the scene. The reports reveal that a witness, Betty Graves, gave a previously unknown description of the shooter that was inconsistent with her later descriptions. With this information, the defense at trial could have impeached Graves's memory of the shooter and her exclusion of the most likely alternate shooter, Giovanni Garcia. Garcia's rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated by the State's non-disclosure. His rights were further violated when the district court adopted a State-drafted order as its own after making no factual findings or legal conclusions following an evidentiary hearing.

In defense of the district court's conclusion that Garcia's petition was procedurally barred, Respondents echo the district court's deeply flawed reasons on good cause—the CCSDPD was not acting on behalf of the State and *Brady* includes a diligence requirement—both of which are

contrary to the law.[1] They further ignore Garcia's prejudice argument instead of arguing against it.[2] And they do not even bother to argue the ultimate merits of Garcia's claim and the favorability prong of *Brady*.[3] Finally, Respondents contend the district court appropriately adopted the State's order as its own because this procedure is allowed by local rule and because the court announced the ultimate disposition of the case before the State drafted the order.[4] This ignores that a local rule cannot trump constitutional protections and that the district court was required to make findings of fact and law, not just pronounce the ultimate outcome of the case.

Respondents' attempts to salvage the district court's order fail. Because Garcia has shown suppression and materiality, he has shown good cause and prejudice to overcome the imposed procedural defaults. And because he has also shown favorability, he succeeds on the merits of his *Brady* claim. The Court should therefore reverse the denial of his

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[1] *See* Answering Br. at 31–46.

[2] *See id*. at 22–31.

[3] *See id*. at 1, 22.

[4] *See id*. at 46–54.

petition and grant him relief. At the very least, the Court should remand for the district court to write its own order reflecting its independent findings of fact and conclusions of law.

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

Garcia has shown good cause and prejudice to overcome the procedural bars imposed by the district court. This Court has made clear that if a petitioner can establish two of the three *Brady* prongs—suppression and materiality—then good cause and prejudice, respectively, have been shown. *State v. Huebler*, 128 Nev. 192, 198, 275 P.3d 91, 95–96 (2012). Garcia met these standards. Respondents offer little more than a recitation of the district court's flawed reasoning to argue otherwise. For the reasons discussed in Garcia's Opening Brief and below, the decision of the district court was in error. This Court should find Garcia has overcome all procedural obstacles and review his *Brady* claim on the merits.

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

Garcia has shown good cause to excuse the imposed procedural

defaults because he established under *Brady* that the State suppressed the CCSDPD reports. *See Huebler*, 128 Nev. at 198, 275 P.3d at 95–96. Respondents repeat the district court's errors regarding suppression and argue the CCSDPD was not an agency that was encompassed by the term "the State" in the *Brady* context, meaning the State did not have possession of the reports, and that *Brady* includes a diligence requirement.[5] Respondents' arguments are unavailing.

1. The prosecution had constructive possession of the reports.

Respondents first rely on the district court's conclusion that the CCSDPD was not acting on behalf of the State, so the prosecution did not withhold the CCSDPD reports.[6] Initially, despite the aspersions cast by Respondents, there is more than one CCSDPD report.[7] Although one goes into the most detail,[8] another report also includes that a witness (Graves)

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[5] *Id.* at 31–46.

[6] *See id.* at 37–43.

[7] I.App.29–34; *see* Answering Br. at 24.

[8] I.App.30–31.

was asked to identify a suspect.[9] In any event, as Garcia explained in his Opening Brief, Respondents' position concerning the CCSDPD's status is unsupported by the law and the facts of this case.[10]

The prosecution "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). This Court applied this principle in *State v. Bennett*, 119 Nev. 589, 81 P.3d 1 (2003), and held that a Nevada prosecutor had a duty to disclose evidence known to a Utah police officer because the Utah police assisted in the investigation. Respondents try to avoid the clear application of the law to Garcia's case and argue that *Bennett* is inapplicable for two reasons.

First, they point to the fact that in *Bennett* a Utah detective who was aware of the suppressed information denied that the information existed at trial.[11] It is unclear why Respondents believe this distinction

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[9] I.App.32; *see* Opening Br. at 13–14 (describing the two reports). There is also a third report that does not discuss Graves. It does, however, show that LVMPD requested video surveillance from the CCSDPD (I.App.33–34), highlighting the CCSDPD's involvement in the case, which Respondents dispute as discussed below.

[10] *See* Opening Br. at 20–27.

[11] Answering Br. at 39–40.

is relevant to the suppression analysis. A CCSDPD officer did not have to give false testimony on the stand and "create[] a false narrative for the jury"[12] for the prosecution to constructively possess the CCSDPD reports. Garcia is not making a claim under *Napue v. People of State of Ill.*, 360 U.S. 264 (1959), that the State knowingly presented false evidence. Instead, Garcia need only show that the CCSDPD was "acting on the government's behalf in this case." *Kyles*, 514 U.S. at 437.

To that end, Respondents contend the CCSDPD was not acting on the government's behalf because in *Bennett* the Utah police were "heavily involved" in the investigation, whereas the CCSDPD was not.[13] But what matters is that CCSDPD participated in the investigation—regardless of how much—and produced favorable, material information that was subsequently withheld. Like here, the Utah police in *Bennett* were not the primary investigative agency; they assisted LVMPD by taking a statement from a witness to whom Bennett had confessed and executing a search warrant on Bennett's Utah home. *See Bennett*, 119 Nev. at 594,

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[12] *Id.* at 40.

[13] *Id.*

81 P.3d at 4. And this Court did not discuss the extent of the Utah police's involvement when determining the Nevada prosecutor had constructive possession of the information known to the Utah police. Instead, the Court stated: "We conclude that it is appropriate to charge the State with constructive knowledge of the evidence because the Utah police *assisted in the investigation of this crime* and initially supplied the information received from [the witness] to the LVMPD." *Id.* at 603, 81 P.3d at 10 (emphasis added).

Bennett clearly applies here because the CCSDPD assisted in the investigation of the shooting of Victor Gamboa. CCSDPD officers assisted by advising dispatch there was a fight at the school, updating dispatch there had been a shooting, checking to see if Gamboa was responsive, calling for medical assistance and backup, interviewing witnesses (including Graves), taking descriptions of the shooter from witnesses, giving a broadcast of the description, searching for the shooter in the surrounding areas, detaining a possible suspect and asking Graves to identify him, and providing video surveillance to LVMPD.[14] Additional

[14] I.App.30–33.

CCSDPD officers responded to the scene after Officer Gaspardi—who was already at the school for an unrelated incident—requested assistance.[15] And CCSDPD officers remained on the scene after LVMPD arrived.[16] The CCSDPD therefore clearly assisted in the investigation, as they were the first law enforcement personnel on the scene and in fact initiated the investigation. Respondents' attempts to distinguish *Bennett* fail.

Respondents' other arguments that the CCSDPD did not assist in the investigation are likewise unavailing. It does not matter whether LVMPD "tasked" the CCSDPD with investigation because CCSDPD was on the scene conducting investigation before LVMPD arrived, as laid out above.[17] It is further unclear what relevance there is in the fact a CCSDPD officer, Officer Gaspardi, was already at the school on an unrelated incident when the shooting occurred.[18] As the suppressed reports make clear, Gaspardi responded to the shooting and was the first

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[15] I.App.30–32.

[16] *See* I.App.31.

[17] *See* Answering Br. at 41.

[18] *Id.* at 41–42.

officer from any agency on the scene.[19] This is not changed by the fact that LVMPD then took over jurisdiction of the case.[20] It is simply illogical to argue the CCSDPD is a law enforcement agency with "concurrent law enforcement authority" but "was not a law enforcement agency that collaborated with the State of Nevada in this case."[21]

Respondents also suggest that because LVMPD was the primary investigative agency, the relevant question is whether that agency possessed the CCSDPD reports or knew of their contents.[22] Respondents are incorrect. The question is not whether LVMPD possessed the reports or even whether the prosecutors[23] possessed the reports. Instead, the question is whether the CCSDPD is an agency whose materials the prosecution was responsible for disclosing, regardless of whether or not

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[19] *See* I.App.30; *see also* I.App.52 (LVMPD report listing Gaspardi as first on the scene).

[20] *See* Answering Br. at 43.

[21] *Id.* at 41, 42.

[22] *See id.* at 41–43.

[23] Figler's testimony that he viewed the prosecutors as "reliable and professional" (X.App.2100), relied upon by Respondents (Answering Br. at 44), is therefore irrelevant. It is also irrelevant to a constructive possession inquiry whether the prosecutors requested the files from the CCSDPD. (*See* Answering Br. at 43.) *See Kyles*, 514 U.S. at 437–38.

the reports were in fact known to anyone outside of the CCSDPD. Again, the answer is clear. CCSDPD is indisputably a police department. *See* Nev. Rev. Stat. § 289.190(1) ("A person employed or appointed to serve as a school police officer . . . has the powers of a peace officer.").[24] As a police entity that participated in the case, the CCSDPD's reports unquestionably qualify as within the possession of the State.

Next, Respondents rely on the district court's incorrect reading of *Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001), *overruled in part by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015).[25] In *Evans*, the Court ruled the State was not required to conduct investigation that could have generated helpful, though not material, evidence for the defense. *Id.* at 626–27, 28 P.3d at 510–11. Garcia is not arguing that the State—the State as a whole as opposed to the individual prosecutors—should have conducted additional investigation. Instead,

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[24] *See also* VIII.App.1724–28; X.App.2029–31. Garcia did not argue that the district court ruled that the CCSDPD was not a law enforcement agency. (*See* Answering Br. at 42.) Instead, the district court erroneously ruled that even though the CCSDPD is a law enforcement agency, the prosecution had no duty to disclose its reports. (*See* X.App.2230–32.)

[25] Answering Br. at 44–45.

his argument is that the prosecutors had a duty to turn over materials related to the investigation they did do: the reports that had already been created by an investigating agency.

Finally, Respondents exaggerate Garcia's position in order to argue it is unreasonable.[26] Garcia of course is not arguing *Brady* would be violated any time the defense discovered new evidence after trial, including evidence the State did not constructively possess. Instead, Garcia's suppression argument is a straightforward application of precedent from this Court and the United States Supreme Court: because the CCSDPD was a police agency that participated in the investigation in this case, the prosecution had a duty to disclose its favorable, material reports regardless of the actual knowledge of the individual prosecutors (or LVMPD).

The district court incorrectly found the CCSDPD did not qualify as an agency from which the prosecution had a duty to gather favorable information. As a result of this incorrect finding, the court ruled Garcia had not proven suppression. Respondents offer nothing to save the

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[26] *Id.* at 45–46.

district court's ruling.

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

Respondents next try to defend the district court's conclusion that Garcia has not proven suppression on the basis that he could have independently discovered the CCSDPD reports through the exercise of due diligence.[27] As Garcia argued in his Opening Brief, the imposition of a diligence requirement undermines the *Brady* obligation and contradicts United States Supreme Court precedent.[28] Respondents cannot escape this clear precept.

Respondents first argue that the Ninth Circuit's decision in *Amado v. Gonzalez*, 758 F.3d 1119 (9th Cir. 2014), is distinguishable.[29] They argue that unlike in *Amado*, Garcia "could have obtained the evidence in question through his own diligent discovery."[30] Even if this were true, Respondents' reasoning is illogical. In *Amado*, the Ninth Circuit ruled

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[27] *See id.* at 31–37.

[28] *See* Opening Br. at 27–33.

[29] Answering Br. at 33–34.

[30] *Id.* at 34.

the imposition of a diligence requirement by the state court was contrary to clearly established United States Supreme Court precedent and "would flip" the *Brady* obligation. *Id.* at 1136–37. Respondents cannot argue *Amado* is inapplicable because Garcia would fail to meet a diligence requirement when *Amado* holds that *Brady* does not include a diligence requirement.

Respondents' attempt to salvage the district court's reliance on a series of distinguishable cases to support its diligence requirement likewise fails.[31] They argue that because Garcia actually was aware of the CCSDPD's involvement in the case, there can be no *Brady* violation. First, Respondents ignore that the defense requested *all* police reports and did not receive any from the CCSDPD.[32] The defense was entitled, under *Brady*, to rely on the prosecutors' representation that they provided all requested material. *See Banks v. Dretke*, 540 U.S. 668, 695 (2004) ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution

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[31] *Id.* at 36–37.

[32] I.App.170–71; X.App.21100, 2130.

represents that all such material has been disclosed.").

Moreover, there is a distinction between Garcia knowing the CCSDPD was involved in the case and knowing it had authored reports or knowing about the information contained in the reports. As the Ninth Circuit explained in *Amado*, "defense counsel cannot ignore that which is given to him or of which he otherwise is aware," but counsel is not "obliged to conduct interviews or investigations himself" to discover information in the State's possession. *Amado,* 758 F.3d at 1137. In the cases Respondents and the district court rely on, the defense either had the suppressed evidence or was aware of its existence.[33] This Court should recognize the distinction between evidence the defense might have been able to find and evidence the defense was actually aware of. The former category, the one applicable here, can still be suppressed evidence.

The only relevant diligence question is whether Garcia filed his petition raising the *Brady* claim within a reasonable time of discovering the suppressed evidence. *See Huebler*, 128 Nev. at 198 & n.3, 275 P.3d at

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[33] *See* Opening Br. at 30–32 (discussing cases).

95 & n.3. He clearly did so because he filed the petition within four months. *See, e.g.*, *Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018) (establishing one year after claim becomes available as reasonable time within which to file claim of post-conviction counsel ineffectiveness). Respondents make no real argument to the contrary.[34]

3. Conclusion

It is undisputed that the State never disclosed the CCSDPD reports to the defense. Because it cannot be seriously disputed that CCSDPD was acting on the government's behalf when it investigated the case and produced the reports, the prosecution had a duty to disclose them. Respondents have offered no argument that suggests otherwise. Garcia established suppression and thus good cause to overcome the imposed procedural bars.

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

On the issue of prejudice to overcome the procedural bars, Respondents, like the district court, argue Garcia has not shown

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[34] *See* Answering Br. at 37.

materiality under *Brady* by refusing to engage with his actual materiality argument.[35]

As an initial matter, the materiality question is whether, with the suppressed reports, there is a reasonable probability or possibility of a different outcome. *See Bennett*, 119 Nev. at 600, 81 P.3d at 8; *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). Garcia maintains that the reasonable possibility standard applies because the defense made a specific request for police reports. *See Mazzan*, 116 Nev. at 66, 993 P.2d at 36. Respondents instead assert Figler testified the defense made only a general request.[36] This was not his testimony.

Figler testified he did not specifically request the CCSDPD reports because he did not know of the reports' existence.[37] He agreed there was only one discovery request; he did not agree that the request was a general one.[38] Indeed, the discovery request the defense made included a

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[35] *See id*. at 22–31.

[36] *Id.* at 28.

[37] X.App.2116.

[38] *Id.*

request for reports from *any* law enforcement agency.[39] And Figler testified the request should have covered the CCSDPD reports.[40] Under either the reasonable possibility or the reasonable probability standard, however, Garcia has shown materiality.

As he made clear in his Opening Brief,[41] Garcia's main materiality argument relates to Graves, who was the non-interested witness who excluded the prime alternate suspect, Giovanni, as the shooter. The suppressed reports reveal she gave a prior inconsistent statement that shows she did not have a good memory for the suspect at any point, and in particular at the time of trial. With this evidence the defense would have been able to impeach her and cast doubt on the quality of her memory and, thus, her exclusion of Giovanni. Without Graves's exclusion, the defense that Giovanni was the real shooter becomes compelling and there is a reasonable possibility or probability that at least one juror would have voted to acquit Garcia.

Respondents make no answer to this argument. Instead, they

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[39] I.App.170–71.

[40] X.App.2130.

[41] *See* Opening Br. at 34–49.

incredibly fault Garcia for spending "nine (9) pages of his Opening Brief asserting irrelevant information regarding Giovanny as an alternate suspect to this Court."[42] Because Garcia's argument is that with the impeachment of Graves's exclusion of Giovanni as the shooter, Giovanni would have become a compelling alternate suspect, the evidence implicating Giovanni is clearly relevant.

Respondents instead focus on Graves's exclusion of Jose Bonal as a suspect.[43] Aside from this not being the focus of Garcia's argument, the information regarding Bonal cannot be so easily dismissed. The fact that there was another alternate suspect who was detained by police because he matched the description of the shooter also would have sown seeds of doubt with the jury. He was excluded only by Graves, whose initial perception of the shooter was weak, and so also could have been presented as a potential alternate suspect. The location at which school police stopped this suspect was highly probative—it was in the direction witnesses saw the shooter flee and was just past the location the shooter

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[42] Answering Br. at 25.

[43] *Id.*

stashed the murder weapon.[44] That Graves excluded this suspect at the scene therefore does not mean he could not have been presented as an alternate suspect.

In their argument concerning Bonal, Respondents further err by incorrectly stating the relevant prejudice inquiry: "Appellant would need to demonstrate this report linked Bonal to the crime and indicated Appellant was not involved."[45] They rely on *Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001), for this proposition, but take language from *Evans* out of context. In *Evans*, the relevant allegedly suppressed evidence was information concerning investigation into potential alternate suspects. *Id.* at 626, 28 P.3d at 510. But more than one person committed the crime. The Court held that because more than one person was culpable, in order for evidence concerning other suspects to undermine confidence in the outcome of trial, it would have to tend to inculpate an alternate suspect and exculpate the defendant. *Id.* That requirement is unique to cases where two or more individuals committed the crime. In cases where only

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

[45] Answering Br. at 25.

one person has committed a crime, inculpating another person would necessarily exculpate the defendant. The language Respondents rely on therefore was not an articulation of the general standard for materiality, but instead an application of the standard to the facts of that case.

Respondents next repeat the district court's attacks on Dr. Pezdek, which are not supported by the record.[46] As this is merely a recitation of what the district court already said, and not the advancement of any new argument, Garcia relies on his argument in his Opening Brief as to why these points are in error.[47]

Finally, Respondents confusingly conclude their argument about materiality by saying "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."[48] If Respondents are trying to argue that there is a harmlessness inquiry over and above the materiality standard for *Brady*, they are mistaken. *See Huebler*, 128

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[46] *Id.* at 26–27.

[47] *See* Opening Br. at 47–48.

[48] Answering Br. at 28.

Nev. at 198, 275 P.3d at 95–96 (explaining materiality under *Brady* is "parallel" to the prejudice inquiry for cause and prejudice to overcome procedural bars).

In any event, the two reasons offered are not persuasive. First, the assertion that Graves was impeached at trial is contradicted by the record. As Figler explained at the evidentiary hearing, "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."[49] Respondents are incorrect that Graves was "impeached through her own admission that due to her age she was forgetful."[50] Although Graves volunteered that she had forgotten things generally, she still affirmatively testified Giovanni was not the shooter and did not claim memory loss as to this issue.[51]

Nor does the fact that the defense was presenting alternate suspects mean Garcia has not shown materiality. It is instead because

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[49] X.App.2105–06. Respondents misstate Figler's testimony to be the opposite of what it was. (Answering Br. at 28.)

[50] Answering Br. at 26.

[51] *See* II.App.584–85.

this was the theory of defense that the CCSDPD reports matter. Garcia's argument at trial that Giovanni was the shooter was undermined by Graves's exclusion of Giovanni. This would not have been so had this exclusion been impeached; Giovanni instead would have been a viable alternate suspect.

Next, Respondents, like the district court, cannot overcome the fact that the evidence against Garcia was weak by simply asserting the contrary. Respondents really make a sufficiency of the evidence argument, stating "[t]here was more than enough evidence 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."[52] The *Brady* materiality inquiry is, of course, not a sufficiency of the evidence test. *See Mazzan*, 116 Nev. at 66, 993 P.2d at 36.

In any event, the evidence against Garcia was far from overwhelming. As was true at trial and during district court proceedings on the instant petition, Respondents lean heavily on the testimony of

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[52] Answering Br. at 31.

Edshell Cavillo and Jonathan Harper to argue the strength of the evidence at trial.[53] As explained extensively in Garcia's Opening Brief, they were both flawed witnesses whose testimony suggests it was influenced by the gang of which Giovanni was a member.[54] As also explained in the Opening Brief, the presence of Garcia's fingerprint on the recovered gun—the other piece of evidence Respondents cite—does not prove he shot it.[55] Respondents' argument does not change the evidentiary landscape. The evidence against Garcia was weak, and with the ability to impeach Graves's exclusion of Giovanni as the shooter, there was a reasonable probability or possibility at least one juror would not have voted to convict Garcia.

Respondents repeat the errors of the district court and ignore Garcia's materiality argument in order to try to defeat it. Garcia showed that with the suppressed CCSDPD reports, Graves and her memory of the shooter could have been impeached. This means her exclusion of Giovanni Garcia as the shooter would have been undermined and

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[53] *Id.* at 30.

[54] *See* Opening Br. at 7–12.

[55] *Id.* at 45–46; *see* Answering Br. at 30–31.

because she was the disinterested witness to exclude him, he would have become a viable alternate suspect. Garcia has therefore shown materiality and thus prejudice to overcome procedural barriers.

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

Because the showing of good cause and prejudice is co-extensive with suppression and materiality under *Brady*, once Garcia has overcome the procedural default of his claim, he only needs to prove the final prong: that the suppressed evidence was favorable to the defense. The district court made no separate favorability finding, instead it collapsed the favorability and materiality prongs of *Brady*.[56] Respondents do the same, and incorrectly mention favorability under their discussion of prejudice to overcome the procedural bars.[57] They do not address the ultimate merits of Garcia's claim, and even fail to include whether the State violated its *Brady* obligations in their articulation of issues on appeal.[58] The State's silence speaks volumes. *See Ozawa v. Vision Airlines, Inc.*,

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

[57] Answering Br. at 22.

[58] *Id.* at 1; *see* Opening Br. at ix–x.

125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious).

The evidence here was clearly favorable because it was impeachment evidence of a key witness. *See United States v. Bagley*, 473 U.S. 667, 676 (1985). Because Garcia has satisfied all three prongs of *Brady*, he is entitled to relief.

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

The district court initially denied Garcia's petition in a minute order that offered no reasoning and no findings, either of fact or law.[59] After granting Garcia's motion requesting the court write its own order instead of filing one written by the State,[60] the court simply filed a new order that was materially indistinguishable from the State-drafted order.[61] Respondents do not contest that the ultimate order filed by the

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[59] X.App.2150.

[60] X.App.2186–90.

[61] *See* X.App.2217–37.

court is substantively the same as the earlier State-drafted order.[62]

The court's grant of Garcia's motion that it write its own order was an exercise in form over substance as the court did not, in the end, write its own order. The court's actions are baffling because Garcia's motion rested on the same arguments presented here—adopting the State's order in this way violated Garcia's constitutional rights and this Court's ruling in *Byford v. State*, 123 Nev. 67, 69–70, 156 P.3d 691, 692–93 (2007). The district court must have thought those arguments had merit because it granted the motion. But it then simply re-issued the State's order, ignoring the problems raised by Garcia. The district court acted improperly. This assignment of the judicial function to a member of the executive branch violates separation-of-powers and due-process provisions of the state and federal constitutions. Further, even if the court could assign such duties to a party, here the court did not provide any guidance regarding its decision, as required by *Byford*.

Respondents' first position is that the district court acted appropriately because the practice of having the prevailing party draft

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[62] *See* Answering Br. at 49, 53.

an order is permitted by the Eighth Judicial District Court rules.[63] This does not answer the question at issue, as a court rule cannot trump constitutional requirements.

Respondents further argue there is no constitutional concern with the prosecution drafting orders because the court ultimately signs the order, thus signing off on the included reasoning.[64] But merely rubber stamping an order written by the party alleged to have committed the constitutional violation at issue in the case is not performing the judicial function. This Court should find that the district court "failed to exercise independent judgment."[65] Tellingly, the court ordered an evidentiary hearing on the merits of Garcia's *Brady* claim,[66] but the ultimate order denied the petition on procedural grounds.[67]

Respondents do offer that even if this Court does not agree with

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[63] *Id.* at 47, 49.

[64] *Id.* at 50–52.

[65] *Id.* at 54.

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

[67] *See* X.App.2217–37.

Garcia that the way the order came about warrants reversal on its own, it still impacts the appeal. They argue that although "the lack of sufficient judicial guidance" is not a basis to reverse a district court order, it "might be grounds for more stringent appellate review."[68] This is certainly true. For example, 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. Moreover, although Respondents do not acknowledge as much, because this case concerns a *Brady* claim, the Court should be additionally wary of the order drafted by the very actors charged with violating Garcia's rights at trial.

Turning to the *Byford* violation, Respondents argue that because the district court issued a minute order denying the petition, *Byford* is

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[68] Answering Br. at 52; *see also id.* at 54.

satisfied.[69] But in *Byford* the Court explained "the district court must make a ruling and state its findings of fact and conclusions of law before the State can draft a proposed order for the district court's review." *Id.* at 69, 156 P.3d at 692. The district court here offered no findings of fact and conclusions of law at the hearing, in the minute order that followed, or at the hearing following Garcia's challenge to the initial adoption of the State-drafted order.[70] Conveying the ultimate disposition of the case was not sufficient.

In the end, after granting Garcia's motion and ruling that it would draft its own order denying Garcia's petition, the district court simply adopted the order the State drafted. [71] This order was drafted without any guidance from the court. This procedure is effectively the one disallowed by this Court in *Byford*.

CONCLUSION

The State violated Garcia's due process rights because it did not disclose favorable, material reports from the Clark County School

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[69] *Id.* at 52–54.

[70] X.App.2024–2150, 2186–90.

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

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

Dated August 31, 2021.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

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

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:

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

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

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion

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

Dated August 31, 2021.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

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

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 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: Karen Mishler.

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