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 Petition for Rehearing

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INTRODUCTION

Evaristo Garcia petitions this Court for rehearing of its order affirming the denial of his post-conviction petition in which he challenged the State's suppression of evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). Garcia presents three bases for rehearing. First, the Court overlooked and misapprehended several facts concerning the evidence offered against Garcia at trial. *See* Nev. R. App. P. 40(c)(2)(A). Second, the Court overlooked and misapprehended facts about the defense presented at trial and the impact of the suppressed evidence on that defense. *See id.* Finally, the Court's ruling on the problematic district court procedure that resulted in the final order denying Garcia's petition warrants rehearing. The Court mischaracterized the content of the two relevant orders. *See id.* Additionally, the Court overlooked Garcia's argument that the district court's adoption of a State-drafted order, written without any guidance by the court, violated *Byford v. State*, 123 Nev. 67, 156 P.3d 691 (2007). The Court therefore overlooked and failed to consider a "decision directly controlling" this case. *See* Nev. R. App. P. 40(c)(2)(B). Rehearing is necessary for any and all of these reasons.

ARGUMENT

Evaristo Garcia was convicted of crimes arising from a shooting at a school. Clark County School District Police Department ("CCSDPD") officers were the first to respond to the scene. School police conducted some investigation before the Las Vegas Metropolitan Police Department took over the case. This investigation included gathering a description of the shooter from campus monitor Betty Graves as well as stopping a suspect and asking Graves if he was the shooter. The school officers authored reports.[1]

The State did not disclose the CCSDPD reports to the defense before trial, violating their obligation under *Brady v. Maryland*, 373 U.S. 83 (1963). The reports show Graves gave a previously unknown description of the shooter that was inconsistent with her later descriptions. Armed with this information, the defense could have impeached Graves at trial based on the unreliability of her memory of the shooter to combat the State's presentation of her as a disinterested, reliable witness. The key part of her testimony was her affirmative

[1] *See* I.App.27–34.

exclusion of a suspect in the case, Giovanni Garcia, as the shooter.[2] Other evidence pointed to Giovanni as the most likely alternate suspect.[3] Therefore, if the defense had the CCSDPD reports, they could have impeached Graves's exclusion of Giovanni as the shooter, making the defense that he was the shooter viable.

This Court affirmed the denial of Garcia's successive post-conviction petition in which he challenged the State's suppression under *Brady*.[4] The Court agreed with Garcia the CCSDPD reports were suppressed but determined he failed to establish their materiality.[5] In so doing, the Court relied on the perceived strength of the evidence against Garcia and what it characterized as the non-impact of Graves's previously unknown, prior inconsistent description of the shooter.[6] The Court, however, overlooked and misapprehended key facts in its analysis.

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[2] III.App.584.

[3] *See* Opening Br. at 35–38.

[4] 3/31/22 Order.

[5] *Id.* at 2–4.

[6] *Id.* at 3–4.

The Court also, in a footnote, rejected Garcia's argument that the district court's adoption of an order written by the State without guidance by the court violated his constitutional rights.[7] It did not, however, address his argument that even if the procedure were constitutional, it violated this Court's decision in *Byford v. State*, 123 Nev. 67, 156 P.3d 691 (2007).[8] *Byford* directly controls Garcia's case, and the Court failed to apply it by ignoring Garcia's argument.

I. The Court overlooked and misapprehended facts concerning the strength of the State's evidence at trial.

The Court first overlooked and misapprehended several facts in determining that Garcia had not established that the suppressed evidence was material under *Brady* based on the strength of the evidence against him. The Court offered four reasons for finding the evidence against Garcia was sufficiently strong to negate any impact from the suppressed evidence, and each is flawed.

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[7] *Id.* at 4 n.2.

[8] *See* Opening Br. at 64–66.

First, the Court reasoned Garcia matched the description of the shooter.[9] But the general description was vague: a Hispanic male, around nineteen years old, with an average build.[10] And Garcia did not even match this description, as he was only sixteen.[11] The only defining feature of the general description, which police and then the State emphasized, was that the shooter was wearing a gray hoodie.[12] But it was Jonathan Harper, a gang member with brain damage and motivation to lie, as discussed below, who testified Garcia was wearing a gray hoodie.[13] At the preliminary hearing, however, he testified Garcia was wearing a top with black sleeves, not a gray hoodie.[14] Edshel Cavillo was the other person called at trial who knew Garcia, and he told police Garcia was wearing a black t-shirt.[15] There was no reliable evidence Garcia was

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[9] 3/31/22 Order at 3.

[10] VI.App.1100.

[11] *See* VII.App.1400.

[12] *See, e.g.*, VI.App.1100.

[13] IV.App.762.

[14] IV.App.781.

[15] III.App.489–90.

wearing a gray hoodie. His "match" of the description was therefore that he was an average sized Hispanic teenager.

Second, the Court relied on the fact that Garcia's fingerprints were on the gun.[16] But the evidence established Garcia had held this gun on occasions prior to the shooting. The gun belonged to Manuel Lopez.[17] And Cavillo testified the gun was passed around amongst friends.[18] Indeed, there was another fingerprint found on the gun that did not belong to Garcia.[19] That Garcia's fingerprint and palm print were present on the gun does not mean they were placed there during the shooting.[20]

Moreover, although Garcia's right ring fingerprint was found on the gun, its placement was in an unusual spot; it was on the left side of the grip in the 2 o'clock position.[21] This fingerprint could not have been the result of firing the gun. The part of the grip that would have been held

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[16] 3/31/22 Order at 3.

[17] V.App.1133.

[18] III.App.502.

[19] VI.App.1204.

[20] *See* V.App.1215.

[21] V.App.1196, 1210.

by the shooter, the textured part, did not yield any fingerprints.[22] Additionally, Garcia was excluded for the fingerprint taken from the toilet where the gun was stashed.[23]

Therefore, that Garcia's fingerprint and palm print were on the gun proves only what no one was disputing: that Garcia held the gun at some point in time.[24] It does not prove he fired it. Certainly, it is not such definitive evidence that there is no reasonable probability or possibility of a different outcome in the face of a viable alternate suspect. *See generally Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

Third, the Court relied on Jonathan Harper's testimony that he rode to the school with Garcia and saw Lopez hand Garcia the gun before the shooting.[25] But Harper was not a disinterested witness. After the shooting at Morris Sunset, Harper was shot in the head by fellow gang

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[22] V.App.1213.

[23] V.App.1199.

[24] *See* II.App.202–03.

[25] 3/31/22 Order at 3.

member Salvador Garcia.[26] Salvador and Giovanni are brothers.[27] Harper suffered brain damage as a result.[28]

The Court ignored the problems with Harper's testimony, including on the two points it emphasized. At the preliminary hearing Harper did not say he saw Lopez hand Garcia the gun.[29] And Harper did not tell police Garcia was at Salvador's house the day of the school shooting until police interviewed him in connection with his own shooting, about five weeks after he was shot.[30] He similarly did not testify to the grand jury that Garcia was at Salvador's apartment before the shooting and stated he did not speak to Garcia after the shooting. He even testified before the grand jury that he did not see who the shooter was.[31]

Harper's testimony is not the strong evidence of guilt the Court painted it as. Harper only implicated Garcia after Salvador, Giovanni's

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[26] *See* IV.App.799.

[27] *See* II.App.193.

[28] *See* V.App.1234–47.

[29] IV.App.778–79.

[30] IV.App.774, 776–77, 791, 796–97.

[31] IV.App.787, 790.

brother, shot him in the head, at which point he was suffering from brain damage. And he was not consistent in his testimony on the points the Court credited—that he drove to the school with Garcia and saw Lopez hand Garcia the gun.

Finally, the Court relied on Edshel Cavillo's testimony that Garcia admitted his guilt after the shooting.[32] Again, the Court ignored the context of Cavillo's testimony. Crucially, Cavillo told different versions of when Garcia made incriminating statements and also was inconsistent about whether he had in fact heard Garcia make the incriminating statements or if he had been told about them by Harper and Giovanni.[33]

Moreover, Cavillo also was a member of Giovanni and Salvador's gang.[34] He had previously lied at Salvador's behest when he gave false information about who shot Harper in order to protect the gang.[35] In this case, Cavillo did not tell the police anything about Garcia's involvement in his first statement to police; he provided this information after

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[32] 3/31/22 Order at 3.

[33] *See* II.App.365–67; III.App.492, 501, 512.

[34] *See* II.App.335.

[35] III.App.475–76.

Giovanni had been arrested.[36] This was over five months after the incident.[37]

Cavillo testified that at the time of the shooting, fellow gang members like Salvador were "like family."[38] At the time of Garcia's trial, however, Cavillo testified he was afraid of Salvador.[39] It is a reasonable inference that Cavillo was again lying at the behest of Salvador in order to save Giovanni. Garcia was not in the gang and was in special education classes.[40] It was therefore easy to pin the shooting on him in order to protect Giovanni. The Court overlooked all of this when relying on Cavillo to determine there was no reasonable probability or possibility of a different outcome.

The Court ruled the evidence against Garcia was so strong that impeaching Graves's exclusion of the prime alternate suspect would not have impacted the outcome of trial. Ultimately, the Court relied on a

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[36] III.App.477; V.App.1112.

[37] *See* VII.App.1420.

[38] II.App.377; III.App.460.

[39] III.App.509–10.

[40] *See* III.App.478, 490.

vague description, not particularly probative fingerprints, and the suspect testimony of two gang members who provided inconsistent stories and had compelling motivations to lie. Contrary to the Court's characterization, the evidence against Garcia was weak. There were no independent witnesses at trial who identified Garcia as being the shooter, having a gun, wearing a gray hoodie, or even being at the school where the shooting took place.[41] Given the Court's misapprehension of the evidentiary landscape, rehearing is warranted.

II. The Court overlooked or misapprehended facts concerning the defense that would have been possible with the suppressed evidence.

In addition to overlooking or misapprehending facts about the strength of the evidence against Garcia, the Court made the same error concerning the impact of the suppressed evidence on the defense. First, the Court reasoned that the ability to undermine Graves's exclusion of Giovanni would not have "supported Garcia's defense at trial" because Giovanni's fingerprints were not on the gun.[42] The Court again

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[41] *See* VII.App.1395.

[42] 3/31/22 Order at 3.

over-emphasized the importance of fingerprints in this case. The absence of Giovanni's fingerprints does not mean he was not the shooter. The fingerprint examiner testified that there were likely other fingerprints on the gun that were not clear enough to pull for comparison.[43] Indeed, although the gun belonged to Manuel Lopez and the evidence all suggested he stashed the gun after the shooting,[44] his fingerprints also were not found on the gun.[45] The lack of identifiable fingerprints does not undermine the fact that Giovanni would have been a compelling alternate suspect if Graves's exclusion of him had been impeached.

The Court's focus on the lack of fingerprints further ignores the other compelling evidence pointing toward Giovanni. He started the fight at the school that ended in the shooting, and he called fellow gang members to back him up in the fight.[46] On the night of the shooting, there were twenty calls between Giovanni and Lopez.[47] The gun used belonged

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[43] VI.App.1202–03.

[44] *See* IV.App.906; VI.App.1133, 1135.

[45] VI.App.1188.

[46] *See* II.App.355–56; III.App.627–28.

[47] VI.App.1102–03.

to Lopez.[48] Lopez was the one who went back to try to retrieve the gun from where it was hidden.[49] And the location where the gun was stashed was a construction site where Lopez had previously worked.[50]

Detective Mogg testified that a witness told him he heard someone yell Giovanni had a gun before hearing gunshots.[51] Crystal Perez also initially identified Giovanni as the shooter, though she later retracted this.[52] As explained above, the two witnesses to implicate Garcia—Harper and Cavillo—were members of Giovanni's gang and had motives to protect him.

Giovanni was therefore a strong alternate suspect because a great deal of evidence pointed toward him and away from Garcia. The ability to impeach Graves's exclusion of him as an alternate suspect therefore would have supported Garcia's defense, contrary to the Court's ruling.

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[48] VI.App.1133.

[49] VI.App.1135.

[50] IV.App.906.

[51] VI.App.1129.

[52] III.App.635.

The Court next reasoned that Graves's prior inconsistent description of the shooter would not have impacted the outcome of the trial because Graves already was impeached at trial.[53] This is belied by the record. As defense counsel Dayvid 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."[54] The Court is incorrect that Graves "impeached her own testimony because she indicated that she forgot things due to her age."[55] 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.[56] She therefore was not impeached on what mattered about her testimony—her exclusion of Giovanni as the shooter. The suppressed reports would have afforded the defense this avenue of direct impeachment.

The Court thus misapprehended or overlooked key facts in

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[53] 3/31/22 Order at 3–4.

[54] X.App.2105–06.

[55] 3/31/22 Order at 3–4.

[56] *See* II.App.584–85.

determining there was not a reasonable probability or possibility of a different outcome had the defense been provided the suppressed evidence. Graves 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. The Court's dismissiveness of the impact of the suppressed evidence is not in line with the evidence, meriting rehearing.

III. The Court overlooked and failed to consider controlling authority on State-drafted orders.

In addition to his challenge to the district court's *Brady* ruling, Garcia challenged the way in which that ruling came about.[57] The Court's treatment of this argument also merits rehearing.

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[57] *See* Opening Br. at 51–66.

Following the evidentiary hearing, the district court entered a minute order stating in full: "Upon review of the documentation provided, and input from counsel, this Court has DENIED Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction)[.] State is to prepare order."[58] After this order, Garcia filed a motion requesting the court write its own order instead of delegating the responsibility to the State.[59] However, on November 18, 2020, the court filed a Findings of Fact, Conclusions of Law, and Order that was drafted by the State.[60] The State never provided Garcia with a copy before it was submitted. Instead, Garcia saw it for the first time when the court filed a signed copy.

On December 10, 2020, the hearing on Garcia's motion proceeded. The court rescinded the order and ruled it would issue its own findings of fact and order.[61] On January 20, 2021, the court filed a new Findings of Fact, Conclusions of Law, and Order. It is materially indistinguishable

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[58] X.App.2150 (original capitalization).

[59] X.App.2151–62.

[60] X.App.2163–84. The court later refiled the same document on December 2, 2020, though Garcia does not know why. *See* X.App.2191–2214.

[61] X.App.2186–90.

from the one prepared by the State.[62] Therefore, although the court in the end filed a new order, it in fact adopted the one written by the State.

This Court in its order of affirmance dispensed with this troubling history in a footnote:

> We also conclude that Garcia's argument that the district court's adoption of the State's language into its order violated Garcia's Constitutional rights and the separation of powers doctrine lacks merit. The record demonstrates that the district court did not adopt the State's proposed order verbatim, and EDCR 7.21 requires the prevailing party to provide the court with a draft order or judgment.[63]

This ruling is flawed.

Initially, the Court mischaracterized the extent of the similarities between the State-drafted order and the order ultimately submitted by the district court. It is not simply that the district court "adopt[ed] the State's language into its order."[64] The district court wholesale repeated the State's order, which was written with absolutely no guidance by the district court. There are only minor differences between the two orders,

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[62] X.App.2217–37.

[63] 3/31/22 Order at 4 n.2.

[64] *Id.*

none of which impact the court's reasoning or ruling.[65] Respondents did not dispute that the orders are materially indistinguishable.[66]

Most egregious, however, is that the Court ignored Garcia's challenge to the district court's order under *Byford v. State*, 123 Nev. 67, 156 P.3d 691 (2007). This challenge was distinct from the constitutional arguments the Court rejected. In *Byford*, the Court held that a district court erred when it adopted a proposed order that was not founded in the court's rulings and findings of fact and conclusions of law. *See id.* at 69–70, 156 P.3d at 692. The Court explained that "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 (emphasis added).

The district court failed to do so here. The initial minute order denying Garcia's petition offered no supporting reasoning. It referred only to "input from counsel," not even recognizing the evidentiary hearing held on September 21, 2020, on the merits of Garcia's *Brady* claim or the

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[65] *Compare* X.App.2192–2211, *with* X.App.2218–37.

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

three witnesses who testified.[67] The State then prepared an order before hearing from the court again. The State therefore came up with its own reasons for denying Garcia's petition. When the court finally issued its own order, it was materially indistinguishable from the State's order.[68] Therefore, this was an exercise in form over substance. Although the court filed the order itself, it was drafted by the State.

This does not comply with *Byford*. The district court needed to make findings of fact regarding the testimony—something only the trier of fact can do. This case shows the importance of the *Byford* procedures. For example, the court ordered an evidentiary hearing on the merits of Garcia's *Brady* claim,[69] but the ultimate order denied the petition on procedural grounds.[70] The district court thus abdicated all decision making to the State.

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[67] X.App.2150.

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

[69] *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)").

[70] *See* X.App.2217–37.

This Court, however, failed to address the *Byford* argument, focusing only on Garcia's distinct constitutional challenges. The effect of the Court's ruling is that district courts will be able to circumvent *Byford*. The Court has condoned the State drafting an order without any guidance whatsoever from the district court as long as the district court makes minor, non-substantive edits to the order. Because the Court failed to consider controlling precedent, rehearing is imperative.

CONCLUSION

Even though the State suppressed impeachment evidence for a key State witness on a pivotal issue—the identity of the shooter—the Court ruled Garcia had not shown materiality under *Brady*. Rehearing of this decision is needed because the Court's decision misconstrues the strength of both the State's evidence at trial and the defense that could have been proffered had the suppressed evidence been disclosed. Additionally, the Court ignored the troubling procedure used in the district court to produce the ultimate order denying Garcia's petition. The Court's decision did not acknowledge controlling precedent, which its decision undermines. Garcia urges the Court to rehear this case in order to correct these errors.

Dated April 15, 2022.

Respectfully submitted,

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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:

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Dated April 15, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2022., 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.

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

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