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 En Banc Reconsideration

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INTRODUCTION

Evaristo Garcia petitions this Court for en banc reconsideration of the panel 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). Reconsideration en banc is warranted because the panel decision conflicts with this Court's precedent in two ways. *See* Nev. R. App. P. 40A(a). First, the panel applied an incorrect standard for materiality under *Brady*. Second, the Court's ruling on the problematic district court procedure that resulted in the final order denying Garcia's petition contravenes *Byford v. State*, 123 Nev. 67, 156 P.3d 691 (2007), which is directly controlling of this case. Garcia therefore urges the en banc Court to reconsider the case.

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 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.

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[1] *See* I.App.27–34.

[2] III.App.584.

[3] *See* Opening Br. at 35–38.

The panel affirmed the denial of Garcia's successive post-conviction petition in which he challenged the State's suppression under *Brady*.[4] The panel agreed with Garcia the CCSDPD reports were suppressed but determined he failed to establish their materiality.[5] In so doing, the panel 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 panel, however, applied the wrong standard for materiality in conducting this analysis.

The panel 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. The panel ignored

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[4] 3/31/22 Order.

[5] *Id.* at 2–4.

[6] *Id.* at 3–4.

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

[8] *See* Opening Br. at 64–66.

Byford, which its ruling undermines.

I. The panel applied a heightened standard for materiality that is not supported by caselaw.

In order to satisfy the materiality prong of *Brady*, Garcia only had to show either a reasonable possibility or a reasonable probability the suppressed evidence would have affected the outcome of his trial. The former standard applies "[i]n Nevada, after a specific request for evidence." *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). The latter standard applies when "a defendant makes no request or only a general request for information." *State v. Bennett,* 119 Nev. 589, 600, 81 P.3d 1, 8 (2003). The panel did not decide which standard applies to Garcia's case.[9] But the standard the panel applied was even more onerous than the reasonable probability standard, the harder of the two options.

In order to show a reasonable probability of a different outcome, Garcia did not have to show there was insufficient evidence to convict; instead, he needed to demonstrate "the favorable evidence could reasonably be taken to put the whole case in such a different light as to

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

undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 434–35 (1995). The question for the panel was simply whether there is even a reasonable probability a juror could have found an alternative explanation of the evidence other than Garcia's guilt—and thus harbored reasonable doubt—in light of the suppressed reports. This is a low standard, and the answer is inescapable. Without Graves's exclusion of Giovanni, the jury could have reasonably had doubt that Garcia was the shooter as opposed to Giovanni. Instead of applying the long-established standard for materiality, the panel ignored reasonable alternate views of the evidence that would have led to reasonable doubt.

A. The panel did not acknowledge alternate views of the evidence against Garcia.

The panel offered four reasons to characterize the evidence against Garcia as strong. For each reason, however, the panel ignored compelling alternate explanations of the evidence. In so doing, the panel did not ask the correct question. The question is not whether there was any evidence that could support finding Garcia guilty but whether it is reasonably probable a juror would have believed the innocuous explanations of the evidence, meaning the evidence against Garcia did not weigh as heavily

as the panel stated.

First, the panel reasoned Garcia matched the description of the shooter.[10] But the general description was vague: a Hispanic male, around nineteen years old, with an average build.[11] And Garcia did not even match this description, as he was only sixteen.[12] The only defining feature of the general description, which police and then the State emphasized, was that the shooter was wearing a gray hoodie.[13] 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.[14] At the preliminary hearing, however, he testified Garcia was wearing a top with black sleeves, not a gray hoodie.[15] Edshel Cavillo was the other person called at trial who knew Garcia, and he told police Garcia was wearing a black t-shirt.[16] There was no reliable evidence Garcia was

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[10] 3/31/22 Order at 3.

[11] VI.App.1100.

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

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

[14] IV.App.762.

[15] IV.App.781.

[16] 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 panel relied on the fact that Garcia's fingerprints were on the gun.[17] But the evidence established Garcia had held this gun on occasions prior to the shooting. The gun belonged to Manuel Lopez.[18] And Cavillo testified the gun was passed around amongst friends.[19] Indeed, there was another fingerprint found on the gun that did not belong to Garcia.[20] That Garcia's fingerprint and palm print were present on the gun does not mean they were placed there during the shooting.[21]

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.[22] 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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[17] 3/31/22 Order at 3.

[18] V.App.1133.

[19] III.App.502.

[20] VI.App.1204.

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

[22] V.App.1196, 1210.

by the shooter, the textured part, did not yield any fingerprints.[23] Additionally, Garcia was excluded for the fingerprint taken from the toilet where the gun was stashed.[24]

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.[25] It does not prove he fired it.

Third, the panel relied on Jonathan Harper's testimony that he rode to the school with Garcia and saw Lopez hand Garcia the gun before the shooting.[26] But Harper was not a disinterested witness. After the shooting at Morris Sunset, Harper was shot in the head by fellow gang member Salvador Garcia.[27] Salvador and Giovanni are brothers.[28] Harper suffered brain damage as a result.[29]

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[23] V.App.1213.

[24] V.App.1199.

[25] *See* II.App.202–03.

[26] 3/31/22 Order at 3.

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

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

[29] *See* V.App.1234–47.

The panel 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.[30] 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.[31] 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.[32]

Harper's testimony is not the definitive evidence of guilt the panel painted it as. Harper only implicated Garcia after Salvador, Giovanni's 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 panel credited—that he drove to the school with Garcia and saw Lopez hand Garcia the gun.

Finally, the panel relied on Edshel Cavillo's testimony that Garcia

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[30] IV.App.778–79.

[31] IV.App.774, 776–77, 791, 796–97.

[32] IV.App.787, 790.

admitted his guilt after the shooting.[33] Again, the panel 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.[34]

Moreover, Cavillo also was a member of Giovanni and Salvador's gang.[35] He had previously lied at Salvador's behest when he gave false information about who shot Harper in order to protect the gang.[36] 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 Giovanni had been arrested.[37] This was over five months after the incident.[38]

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[33] 3/31/22 Order at 3.

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

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

[36] III.App.475–76.

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

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

Cavillo testified that at the time of the shooting, fellow gang members like Salvador were "like family."[39] At the time of Garcia's trial, however, Cavillo testified he was afraid of Salvador.[40] 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.[41] It was therefore easy to pin the shooting on him in order to protect Giovanni.

The panel 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 panel relied on a vague description, not particularly probative fingerprints, and the suspect testimony of two gang members who provided inconsistent stories and had compelling motivations to lie. 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

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

[40] III.App.509–10.

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

shooting took place.[42] Even if this evidence can be viewed as pointing toward Garcia's guilt, that is not the proper analysis. The question is whether a reasonable juror could have viewed the evidence—including the CCSDPD reports—and had a reasonable doubt that there was another explanation other than Garcia's guilt. The panel over-emphasized that some evidence could be viewed as supporting Garcia's guilt in making its materiality ruling, which should not be equivalent to a sufficiency of the evidence analysis.

B. The panel further failed to acknowledge alternate views of Garcia's potential defense.

The panel similarly acknowledged only one view of the evidence in order to rule the suppressed evidence would not have done much to assist Garcia at trial, ignoring that a reasonable juror could view the evidence differently. The panel 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.[43] The panel again over-emphasized the importance of fingerprints in this case. The

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

[43] 3/31/22 Order at 3.

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.[44] Indeed, although the gun belonged to Manuel Lopez and the evidence all suggested he stashed the gun after the shooting,[45] his fingerprints also were not found on the gun.[46] 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 panel'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.[47] On the night of the shooting, there were twenty calls between Giovanni and Lopez.[48] The gun used belonged

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[44] VI.App.1202–03.

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

[46] VI.App.1188.

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

[48] VI.App.1102–03.

to Lopez.[49] Lopez was the one who went back to try to retrieve the gun from where it was hidden.[50] And the location where the gun was stashed was a construction site where Lopez had previously worked.[51]

Detective Mogg testified that a witness told him he heard someone yell Giovanni had a gun before hearing gunshots.[52] Crystal Perez also initially identified Giovanni as the shooter, though she later retracted this.[53] 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 panel did not acknowledge this and that a reasonable juror could harbor doubt about Garcia's guilt as a result.

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[49] VI.App.1133.

[50] VI.App.1135.

[51] IV.App.906.

[52] VI.App.1129.

[53] III.App.635.

The panel 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.[54] This is belied by the record, and so certainly a reasonable juror could have a different view of the evidence. 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."[55] The panel is incorrect that Graves "impeached her own testimony because she indicated that she forgot things due to her age."[56] 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.[57] 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.

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[54] 3/31/22 Order at 3–4.

[55] X.App.2105–06.

[56] 3/31/22 Order at 3–4.

[57] *See* II.App.584–85.

As it did with the evidence it viewed as supporting Garcia's guilt, the panel did not ask whether a juror could have an alternate view of Garcia's defense in light of the suppressed reports. The panel did not acknowledge the change in the evidentiary landscape that would have been possible the impeachment of Graves's exclusion of Giovanni.

C. Conclusion

The panel thus did not apply the proper standard when determining there was not a reasonable probability or possibility of a different outcome had the defense been provided the suppressed evidence. It reasoned that because there was evidence that *could* be viewed as supporting Garcia's guilt and the suppressed evidence *could* be discounted, Garcia had not shown materiality. Instead, the proper inquiry was the inverse: whether there is a reasonable probability a juror could have harbored doubt and believed there was an alternative explanation for the evidence other than Garcia's guilt. 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 panel applied an incorrect standard, and reconsideration is needed to maintain uniformity of this Court's decisions.

II. The panel's decision contravenes *Byford v. State*.

In addition to his challenge to the district court's *Brady* ruling, Garcia challenged the way in which that ruling came about.[58] The panel's treatment of this argument also merits en banc reconsideration because the decision undermines *Byford v. State*, 123 Nev. 67, 156 P.3d 691 (2007).

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."[59]

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[58] *See* Opening Br. at 51–66.

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

After this order, Garcia filed a motion requesting the court write its own order instead of delegating the responsibility to the State.[60] However, on November 18, 2020, the court filed a Findings of Fact, Conclusions of Law, and Order that was drafted by the State.[61] 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.[62] On January 20, 2021, the court filed a new Findings of Fact, Conclusions of Law, and Order. It is materially indistinguishable from the one prepared by the State.[63] Therefore, although the court in the end filed a new order, it in fact adopted the one written by the State.

The panel in its order of affirmance dispensed with this troubling history in a footnote:

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[60] X.App.2151–62.

[61] 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.

[62] X.App.2186–90.

[63] X.App.2217–37.

> 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.[64]

This ruling cannot stand.

The panel's ruling ignored *Byford*, which imposes limitations distinct from the constitutional ones Garcia urged and the panel rejected. In *Byford*, this 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

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[64] 3/31/22 Order at 4 n.2.

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 three witnesses who testified.[65] 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.[66] 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

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[65] X.App.2150.

[66] *Compare* X.App.2163–84, *and* X.App.2191–2214, *with* X.App.2217–37. The panel 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." 3/31/22 Order at 4 n.2. 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, none of which impact the court's reasoning or ruling. Respondents did not dispute that the orders are materially indistinguishable. *See* Answering Br. at 49, 53.

Garcia's *Brady* claim,[67] but the ultimate order denied the petition on procedural grounds.[68] The district court thus abdicated all decision making to the State.

The panel, however, failed to address the *Byford* argument, focusing only on Garcia's distinct constitutional challenges. The effect of the panel's ruling is that district courts will be able to circumvent *Byford*. The panel 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 panel's decision undermines this Court's precedent, reconsideration en banc 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 panel ruled Garcia had not shown materiality under *Brady*. Reconsideration of this decision en banc is needed because the panel applied an incorrect

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[67] *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)").

[68] *See* X.App.2217–37.

standard for materiality. The panel's decision also undermines controlling precedent about how district court orders can be drafted. Garcia urges the en banc Court to reconsider this case in order to guarantee uniformity of its decisions.

Dated May 9, 2022.

Respectfully submitted,

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/s/ Emma L. Smith
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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:

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Dated May 9, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 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: Alexander G. Chen, Karen L. Mishler, Taleen R. Pandukht.

I further certify that some of the participants in the case are not registered appellate electronic filing system users. I have mailed 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 person:

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