

No. 24-6297
IN THE
Supreme Court of the United States

DONALD SHERMAN,

Petitioner,

v.

JEREMY BEAN, WARDEN, ET AL.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

AARON D. FORD
Attorney General of Nevada
HEATHER D. PROCTER*
Chief Deputy Attorney General
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701
(775) 684-1271
hprocter@ag.nv.gov
* *Counsel of Record*

Counsel for Respondent

QUESTIONS PRESENTED

(Capital Case)

During the penalty hearing of Sherman's capital trial, the prosecution presented evidence regarding Sherman's plans to escape and solicitation to kill a physician and correctional officers. The plot was made with jailhouse informant Michael Placencia and involved a second informant, Christine Kalter. During the hearing, Kalter testified. Placencia was not available so Sgt. Gayland Hammack testified as to Placencia's statements regarding the solicitation.

On state post-conviction, Sherman alleged both Placencia and Kalter received undisclosed benefits in exchange for their cooperation and/or testimony. The Nevada Supreme Court found on appeal, addressing a claim that the prosecutor committed misconduct in failing to disclose benefits and to correct Sgt. Hammack's allegedly false testimony regarding benefits, that Sherman failed to prove any benefits received by either witness were connected with their cooperation or for the testimony presented during the penalty hearing.

The federal district court upheld the Nevada Supreme Court's ruling and, as to the question at issue, denied issuance of a certificate of appealability. While Sherman sought to expand the certificate by raising the issue on appeal, the Ninth Circuit declined to do so. The panel specifically found that Sherman did not raise his challenge to the denial of discovery until his reply brief and therefore waived the issue.

The questions presented are:

Whether a circuit split exists as to whether a separate grant of a certificate of appealability to address the denial of discovery by the federal district court is required and, if a split exists, if it applies in this matter?

Whether the Ninth Circuit properly rejected Sherman's request to expand the certificate of appealability on the question of whether the Nevada Supreme Court's findings were not

objectively unreasonable in light of the evidence presented, and rejected Sherman's challenge to the federal district court's denial of discovery as waived as he failed to request a certificate of appealability on the issue?

LIST OF THE PARTIES

Petitioner Donald Sherman is an inmate confined in the High Desert State Prison in Clark County, Nevada. Respondent Jeremy Bean is the warden of High Desert State Prison. Respondent Nevada Attorney General Aaron Darnell Ford is not listed in the caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
LIST OF THE PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES.....	vi
INTRODUCTION	1
STATEMENT OF THE CASE.....	2
REASONS FOR DENYING THE PETITION.....	7
I. Sherman Fails to Identify A Clear Circuit Split of Authority.....	7
II. Even If There Were a Split of Authority, This Court Has Already Opined on The Standard for Obtaining Review of Procedural Issues.	9
III. The Ninth Circuit Declined Consideration of Sherman’s Challenge to the Denial of Discovery Because He Failed to Present the Issue in His Opening Brief.	12
IV. Resolving Any Purported Split does Not Help Sherman Because His Discovery Requests are Too Weak to Warrant Further Review.....	14
A. Sherman’s first federal motion for leave to conduct discovery.	14
B. Sherman’s second federal motion for leave to conduct discovery.	15
C. Sherman’s third and final federal motion for leave to conduct discovery.	17
V. This Court Should Reject Sherman’s Alternative Argument for Summary Reversal.	18
A. Sherman relies upon outdated authority.	19
B. Sherman failed to demonstrate the Ninth Circuit erred in failing to grant a certificate of appealability on the issue regarding the jailhouse informants and <i>Brady</i>	20
1. The Nevada Supreme Court properly rejected Sherman’s claim as did the Ninth Circuit.	21
2. <i>Brady</i> Standard.....	22
3. The prosecution did not affirmatively mislead defense counsel regarding the non-existence of material exculpatory and impeachment evidence relating to cooperating informants.	23

a.	Michael Placencia.	23
b.	Christine Kalter.	25
c.	Even if the prosecution failed to disclose the noted evidence, it was not material.	26

TABLE OF AUTHORITIES

Cases

<i>Banks v. Dretke</i> , 540 U.S. 668 (2004)	22
<i>Bracy v. Gramley</i> , 520 U.S. 899 (1997)	4, 14, 18
<i>Brady v. Maryland</i> , 373 U.S. 83 (1983)	4, 5, 6, 12, 13, 15, 16, 18, 20, 21, 22, 24, 27, 28
<i>Cabana v. Bullock</i> , 474 U.S. 376 (1986)	19
<i>Cone v. Bell</i> , 556 U.S. 449 (2009)	22
<i>Cullen v. Pinholster</i> , 563 U.S. 170 (2011)	11
<i>Cunningham v. United States</i> , 378 Fed. Appx. 955 (11th Cir. 2010)	8
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982)	19
<i>Giglio v. United States</i> , 405 U.S. 150 (1972)	24
<i>Gomez-Diaz v. U.S.</i> , 433 F.3d 788 (11th 2005)	8
<i>Gonzalez v. Thaler</i> , 565 U.S. 134 (2012)	9
<i>Haze v. Poole</i> , 777 Fed. Appx 74 (4th Cir. 2019)	7
<i>Henslee v. North Carolina Dept. of Corr.</i> , 393 Fed. Appx. 979 (4th Cir. 2010)	8
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983)	13
<i>Kemp v. Ryan</i> , 638 F.3d 1245 (9th Cir. 2011)	8
<i>Koerner v. Grigas</i> , 328 F.3d 1039 (9th Cir. 2003)	12
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995)	22, 27
<i>Lindh v. Murphy</i> , 521 U.S. 320 (1997)	19
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	11, 19

<i>Murray v. United States</i> , 145 F.3d 1249 (11th Cir. 1998).....	8
<i>Napue v. Illinois</i> , 360 U.S. 264 (1959)	20, 21, 22, 24, 25, 27
<i>Onuwor v. Moore</i> , 655 Fed. Appx 365 (6th Cir. 2016)	9
<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000)	9, 10, 11
<i>Stephens v. Branker</i> , 570 F.3d 198 (4th Cir. 2009).....	7
<i>Sumner v. Mata</i> , 449 U.S. 539 (1981)	19
<i>United States v. Bagley</i> , 473 U.S. 667 (1985)	22, 23
<i>United States v. Lincks</i> , 82 F.4th 325 (5th Cir. 2023).....	8

Other Authorities

28 U.S.C. § 2244(d)(1)(D)	16
28 U.S.C. § 2253(c)	9, 10
28 U.S.C. § 2253(c)(1)	10
28 U.S.C. § 2253(c)(2)	10
28 U.S.C. § 2253(c)(3)	10
28 U.S.C. § 2254	8, 10, 11, 19
28 U.S.C. § 2254(d)	18, 19, 20
28 U.S.C. § 2254(d)(2)	18, 20
28 U.S.C. § 2254(e)(1)	19
28 U.S.C. § 2255	8
80 Stat. 106	19
Public law 89-712 (Nov. 2, 1966).....	19
Sup. Ct. R. 10	1

Rules

Ninth Circuit Rule 22-1(e)	9
Ninth Circuit Rule 22-1(f)	9

INTRODUCTION

Sherman failed to present this Court with a viable basis to grant review under Sup. Ct. R. 10. First, if there is a split of authority here, it is not well-defined. Even so, this Court previously explained that a different standard applies to a district court's resolution of procedural issues when considering whether to grant a certificate of appealability. And in any event, Sherman failed to preserve the issue, and the Ninth Circuit appropriately declined to address the issue because Sherman improperly raised the issue for the first time in a footnote of his reply brief.

Second, Sherman fails to show that resolution of the split would make any difference to this case. Even in a circuit that would treat the discovery issue as part-and-parcel of the substantive claim, Sherman failed to demonstrate the Ninth Circuit's refusal to expand the certificate of appealability was erroneous. Even if this Court determined that the prosecution erred in disclosing the criminal histories of the two informants, Sherman failed to demonstrate the evidence was material because their statements were overwhelmingly corroborated by other evidence, including an audio recording of Sherman. Therefore, there was no constitutional violation and the Nevada Supreme Court's rejection of the claim is entitled to deference, defeating Sherman's alternative request for a summary reversal.

This Court should deny the petition.

STATEMENT OF THE CASE

1. On June 1, 1994, the dead body of Dr. Lester Bauer was discovered in a blood-soaked bed in a blood-spattered room of his home in Clark County, Nevada. 6-ER-1449, 1462, 1502-05.¹ A forensic pathologist testified that the cause of death was blunt force trauma from several blows to the head with a hammer sometime between the night of May 29 and the early morning of May 30, 1994. 6-ER-1530-33.

2. While in jail in Las Vegas following his arrest for Dr. Bauer's murder, Sherman conceived a plot with another inmate, Michael Placencia (Placencia), to escape. 9-ER-2448-2450. The plan involved killing corrections officers and a physician during an eye appointment outside the jail. 9-ER-2450. Sherman's friend, Christine Kalter (Kalter), would provide money in Sherman's inmate account, which would allow him to make the eye appointment, along with a gun and a vehicle for the escape. 9-ER-2450-2451, 2481-2482. Sherman provided Placencia written instructions for the plan and wrote letters to Kalter asking her to provide the money for the appointment. 9-ER-2451, 2459-2460, 2485-2488, 2492-2495. However, Placencia agreed to cooperate with the police investigation of the escape plan before it occurred, provided law enforcement with the written instructions, and wore a wire during a conversation with Sherman in which the two discussed the plan and Sherman's intent to kill Kalter after escaping. 9-ER-2449-2450, 2454-2456. The prosecution subsequently charged Sherman with solicitation to commit murder; a charge which remained pending at the time of his murder trial. 9-ER-2460.

3. On February 5, 1997, a jury found Sherman guilty of first-degree murder, robbery, and burglary, in the Eighth Judicial District Court, Clark County, Nevada. 8-ER-2263-2265.

¹ All references to the Excerpts of Record found at Dkt. 29-1 (Volume 1) to 29-26 (Volume 26) in the Ninth Circuit record.

4. During the penalty phase of the murder trial, the prosecution presented evidence surrounding the solicitation to commit murder charge. 9-ER-2443-2505. Placencia was released prior to trial and was unavailable so Sgt. Gaylord Hammack (Sgt. Hammack) testified as to Placencia's voluntary statements regarding the murder plot as well as his own investigation of the crime. 9-ER-2449-57. He testified that Placencia hoped for an early release if he cooperated. 9-ER-2461. Sgt. Hammack agreed Placencia thought he could help himself since he had an upcoming court date. 9-ER-2463. Placencia also received \$300 for his participation; Sgt. Hammack testified that he did not recall that Placencia received any other benefits. 9-ER-2463.

Kalter testified that Sherman asked her to help him escape. 9-ER-2478-2479. Sherman told Kalter that he wanted her to drive him away from the jail after the escape, to purchase a firearm to provide to Sherman, and to put money into his jail account to start the plan. 9-ER-2479-2482. She eventually told him she would not help, but Sherman still asked her to put the money into his account so that he could arrange for the doctor's appointment. 9-ER-2482. Placencia then called Kalter about the plan because Sherman was mad at her. 9-ER-2483. The police later contacted Kalter who gave them letters Sherman wrote to her regarding the plan. 9-ER-2485-2488, 2492-2406. She later learned that Sherman planned to kill her after his escape. 9-ER-2496.

The jury found four aggravating circumstances—(1) Sherman had previously been convicted of murder, (2) Sherman was under a sentence of imprisonment when he committed the murder, (3) the murder was committed during the course of a burglary, and (4) the murder was committed during the course of a robbery. 11-ER-2959-2960. The jury also found three mitigating circumstances—(1) the murder was committed while Sherman was under the influence of extreme mental or emotional disturbance; (2) Sherman acted under duress or under the domination of another person; and (3) any other mitigating circumstances. 11-ER-2961-2962. The jury concluded

that the aggravators were not outweighed by mitigators and imposed death. 11-ER-2958. The court filed the judgment of conviction on April 21, 1997. 11-ER-2964-2965.

5. In his counseled appeal from the denial of his second state habeas petition, Sherman alleged in pertinent part that the state district court erred when it found, in relation to his *Brady* claim, no materiality based upon the alleged inducements to witnesses Placencia and Kalter. ECF No. 139-17 at 32; 139-18 at 2, 6-12, 15-21. The state district court denied the petition. App. 094. On May 17, 2010, the Nevada Supreme Court affirmed the lower court. App. 084.

6. After filing his original federal habeas petition in 2002, Sherman filed his initial federal motion for leave to conduct discovery, which included requests pertaining to Placencia and Kalter. ECF No. 19. The district court denied the motion in relation to the two informants, finding the request premature and that Sherman did nothing more than assert trial counsel failed to seek the discovery, which did not meet the good cause standard under *Bracy*.² ECF No. 34 at 22.

Following litigation of his second state habeas action, Sherman filed his second federal motion for discovery in 2011 seeking information regarding the two informants. ECF No. 158. He filed the request within his opposition to Respondents' motion to dismiss and sought evidence to support his arguments of equitable tolling and, in relation to the procedural bars, cause and prejudice, adequacy, and independence. ECF No. 158 at 4. The district court denied the discovery motion, finding the requested discovery relating to the two informants unnecessary as those claims were not untimely, not procedurally barred, or that Sherman failed to establish facts establishing the type of prosecutorial misconduct to support a *Brady*³ violation. 1-ER-25-26.

² *Bracy v. Gramley*, 520 U.S. 899 (1997).

³ *Brady v. Maryland*, 373 U.S. 83 (1983).

Sherman filed his third federal discovery motion in 2014, seeking evidence in part against Placencia. ECF No. 211 at 6. In denying the motion, the district court concluded Placencia did not testify at trial and Sgt. Hammack testified to the benefits he was aware of that Placencia received. 1-ER-55. The court also noted that the Nevada Supreme Court found the prosecution erred in failing to disclose Placencia's criminal history but concluded the evidence was not material given the corroboration of Placencia's statements to Sgt. Hammack supporting the escape plot failure to demonstrate Placencia received favorable treatment in exchange for his cooperation in the investigation. 1-ER-55 (internal record cite omitted). The federal district court concluded discovery might assist in addressing the potential benefits Placencia received but not the corroborating evidence given the corroboration included handwritten documents by Sherman and an audio recording of Sherman discussing the plans. 1-ER-55-56 (internal record cite omitted).

In rejecting the merits of the *Brady* claim regarding the two informants in December 2015, the district court concluded the prosecution corroborated Kalter's testimony and Placencia's information with other evidence, including handwritten instructions, handwritten letters, and the audio recording. 1-ER-35. Given the wealth of corroboration, the evidence was not material as any alleged benefits received by Kalter and Placencia would not have altered the outcome of the trial. 1-ER-35. Finally, the evidence presented by Sherman failed to demonstrate that either informant received benefits not otherwise produced during trial. 1-ER-35. The court also issued a certificate of appealability on a claim not before this Court for review. 1-ER-47-48.

7. On appeal, Sherman filed his opening brief on the one certified claim. Dkt. 31. He also briefed several uncertified issues, including the *Brady* claim as to Placencia and Kalter. Dkt. 31 at 138-149. He sought remand to conduct discovery, but did not otherwise reference the denial of discovery in relation to the *Brady* claim in question. Dkt. 31 at 138-149.

After Respondents filed a supplemental answering brief to the uncertified issues, Dkt. 59, Sherman filed his supplemental reply brief. Dkt. 69. In that brief, Sherman for the first time addressed the denial of his requests for discovery and evidentiary hearing. Dkt. 69 at 36.

The Ninth Circuit published an opinion affirming the denial of the certified issue. App. 002. In an unpublished memorandum, the court denied Sherman's request to expand the certificate of appealability, including the *Brady* claim regarding undisclosed benefits now before this Court. App. 025. In that memorandum, the court found Sherman waived a challenge to the denial of discovery in relation to the *Brady* claim as he never sought a certificate on that denial as he failed to raise it until the supplemental reply brief. App. 040. The court also denied Sherman's petition for rehearing challenging the refusal to expand the certificate to include that *Brady* claim. Dkt. 95. While the court issued an amended memorandum, it did not alter the findings in relation to the question presented to this Court. App. 065-070.

REASONS FOR DENYING THE PETITION

There is no split of authority for the Court to decide here. Sherman seeks nothing more than error correction when there is no error to correct. And in any event, there are multiple alternative grounds for affirmance that obviate the need for this Court to address the issues Sherman presents in his petition.

I. Sherman Fails to Identify A Clear Circuit Split of Authority.

Sherman fails to identify a split of authority worthy of this Court's consideration. He argues that the Ninth Circuit's decision conflicts with published decisions from numerous other circuits regarding whether the court must issue a separate certificate of appealability to consider denial of a request to develop the facts, through either a motion for evidentiary hearing or for leave to conduct discovery. Petition at 14. He also suggests an internal split within the Ninth Circuit. Petition at 14. He also asserts that the issue is important because "the majority of cases where habeas petitioners receive adverse decisions is at the COA stage that determines whether they will receive appellate review of their constitutional claims." Petition at 14.

But Sherman fails to identify a clearly articulated split of authority. The first case he cites to establish a split of authority is from the Fourth Circuit—*Stephens v. Branker*, 570 F.3d 198 (4th Cir. 2009). Petition at 16 n.7. When describing that case, he says, "There was no indication that a separate COA was sought." Petition at 16 n.7. Yet at the same time, that means Sherman provides no basis for this Court to assume that the Fourth Circuit decided that no separate certificate of appealability was required. That is a thin reed to rely on to suggest the existence of a conflict warranting this Court's review. Meanwhile, numerous unpublished decisions of the Fourth Circuit appear to treat the denial of discovery as a discrete procedural issue. *See, e.g., Haze v. Poole*, 777 Fed. Appx 74, 75 (4th Cir. 2019); *Henslee v. North Carolina Dept. of Corr.*, 393 Fed. Appx. 979,

980 (4th Cir. 2010). And that ties in to a point Respondents make below about this Court’s decisions addressing the standards for obtaining a certificate of appealability. *See infra* Part II.

Next, Sherman cites two Ninth Circuit cases to suggest that there is an intra-circuit split within the circuit. But that is no reason for this Court to grant certiorari. He may be right that the Ninth Circuit has an internal split in its authority. He cites *Kemp v. Ryan*, 638 F.3d 1245, 1259 n. 9 (9th Cir. 2011), a case that indicates a separate certificate of appealability is not needed to encompass the denial of discovery. But if there is a split in the Ninth Circuit’s cases, the Ninth Circuit is fully capable of resolving a conflict within its cases. Of course, that Court is entitled to wait for a case—unlike this case⁴—that properly presents the Court with the opportunity to resolve any such split.

Sherman also refers to a “series of decisions” from the Eleventh Circuit, which he says hold that “a COA on an issue encompasses subsidiary issues of factual development.” Petition at 16 n.7. But each of those cases are federal cases brought by motion under 28 U.S.C. § 2255. *See* Petition at 16 n.7 (citing *Cunningham v. United States*, 378 Fed. Appx. 955, 959 (11th Cir. 2010); *Gomez-Diaz v. U.S.*, 433 F.3d 788 (11th 2005); *Murray v. United States*, 145 F.3d 1249 (11th Cir. 1998)). And the same point is true for the Fifth Circuit case Sherman cites. Petition at 16-17 (citing *United States v. Lincks*, 82 F.4th 325 (5th Cir. 2023)). Whether a petitioner is entitled to factual development when challenging a state judgment under 28 U.S.C. § 2254 presents very different issues from when a petitioner is challenging a federal judgment under 28 U.S.C. § 2255. So the Fifth and Eleventh Circuit cases Sherman cites are off the mark and do not prove a split.

Finally, he acknowledges that—like the Ninth Circuit—the Sixth, Eighth, and Tenth Circuits have internal conflicts in their respective decisions. He expressly admits to the internal

⁴ Sherman waived the issue by not raising it until he filed a supplemental reply brief. *See supra* Part III.

splits in the Eighth and Tenth Circuits. Petition at 17-18. And although he initially addresses a single Sixth Circuit decision, a few pages later he notes that the Sixth Circuit issued conflicting decisions. Petition at 19 (citing *Onuwor v. Moore*, 655 Fed. Appx 365 (6th Cir. 2016)). Those circuits are more than capable of resolving any discord within their decisions, just as the Ninth Circuit can.

Given the foregoing, there is no clear split of authority for this Court to resolve. If anything, this Court should wait to address the issue until the circuits resolve their own internal splits of authority and settle on a given rule. By that time, it may or may not be that a clear split will develop for this Court to resolve—it's quite possible no split will develop given the point Respondents make immediately below.⁵

II. Even If There Were a Split of Authority, This Court Has Already Opined on The Standard for Obtaining Review of Procedural Issues.

A prior decision from this Court already provides the path to answer the question Sherman proposes for resolution. In *Slack v. McDaniel*, 529 U.S. 473 (2000), this Court set out a different standard for when a petitioner is entitled to a certificate of appealability on a procedural question. That point furthers the gatekeeping function of the certificate of appealability requirement, which is designed to “screen[] out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels.” *Gonzalez*, 565 U.S. at 144. That function is important for understanding the intent behind the standard for obtaining a certificate of

⁵ Sherman claims that there is confusion that works to the detriment of pro se habeas petitioners. Petition at 19-20. Not so. Sherman's argument overlooks two key points. First, if a Respondent doesn't object to a habeas petitioner including an uncertified discovery issue in the opening brief, 28 U.S.C. § 2253(c) is no bar to the appellate court exercising jurisdiction over the issue. See *Gonzalez v. Thaler*, 565 U.S. 134 (2012). And if the Respondent does object, nothing stops the habeas petitioner from asking the Court to expand the certificate of appealability to include that issue. Second, at least in the Ninth Circuit, the conscientious habeas petitioner that is aware of the issue can raise the discrete issue of the denial of discovery as an uncertified issue in their opening brief. Ninth Circuit Rule 22-1(e). The Respondent can then choose not to address the uncertified issue and wait to see if the court calls for a response. Ninth Circuit Rule 22-1(f).

appealability and the specificity required by 28 U.S.C. 2253(c)(3). And that point takes on additional importance when considering the limitations on factual development in federal court under 28 U.S.C. § 2254.

There is no appeal as a matter of right for state habeas petitioners in federal court; for a state habeas petitioner to proceed with a federal appeal, he must obtain a certificate of appealability. 28 U.S.C. § 2253(c)(1). Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may only issue “if the applicant has made a substantial showing of the denial of a constitutional right.” And in *Slack*, this Court explained that to obtain a certificate of appealability under 28 U.S.C. § 2253(c), a habeas petitioner “must make a substantial showing of the denial of a constitutional right . . . showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (internal citation and quotations omitted). And the certificate must specify the issues that meet the standard imposed by 28 U.S.C. § 2253(c)(2). *See* 28 U.S.C. § 2253(c)(3).

This Court in *Slack* set out the analysis for considering issuance of a certificate of appealability. First, this Court initially recognized that when the district court rejects a constitutional claims on the merits, the “petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong. *Slack*, 529 U.S. at 484. Second, the Court reached the issue that was really at stake in that case: when the district court has dismissed a petition on procedural grounds without reaching the underlying constitutional claims, the court should only issue a certificate “if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, *and* that jurists of reason would find it debatable whether the district court was

correct in its procedural ruling.” *Id.* at 478 (emphasis added); *see also id.* at 484.

Sherman cites *Miller-El* for the standard. Petition at 4 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003)). Sherman is correct that *Miller-El* sets the standard for a certificate for review of a claim on the merits. The standard expressed in *Miller-El* in turn is based upon *Slack*. *Miller-El*, 537 at 327, 342 (citing *Slack*, 429 U.S. at 481.)

But Sherman’s efforts to obtain factual development beyond the state court record present a host of different procedural issues that are not inherently intertwined with review on the merits under 28 U.S.C. § 2254. As a result, a challenge to the denial of discovery is a discrete procedural issue that fits within *Slack*’s standard for granting certificates of appealability on procedural issues.

The existence of this Court’s dual criteria that distinguishes between procedural issues and merits review of claims undercuts Sherman’s argument that this Court needs to step in here. Whether a petitioner is entitled to discovery in a case challenging a state court judgment can present complex procedural questions given the limits Congress has placed on factual development in federal court with the intent of reinforcing AEDPA’s promotion of comity, finality, and federalism. *Cf. Cullen v. Pinholster*, 563 U.S. 170, 185-86 (2011) (explaining that AEDPA’s limits on record development promote comity, finality, and federalism). And requiring a habeas petitioner to obtain a separate certificate of appealability to address those discrete issues furthers the gatekeeping function of the certificate of appealability requirement by ensuring that merits panels are not burdened with addressing those issues in the absence of the petitioner making the initial showing necessary to obtain a certificate of appealability under *Slack*.

So *Slack* already addresses the issue. And if this Court needs to revisit the issue, it can wait until it is presented with a case that presents a conflict with *Slack*.

III. The Ninth Circuit Declined Consideration of Sherman’s Challenge to the Denial of Discovery Because He Failed to Present the Issue in His Opening Brief.

Even if this Court were inclined to address any circuit split that exists, this is not the case to do so. The Ninth Circuit expressly declined to consider this issue below. And for good reason—Sherman failed to preserve the issue and the Ninth Circuit had no basis to address the issue.

Here, in the order denying expansion of the certificate of appealability to encompass the *Brady* claim, the court rejected Sherman’s challenge to the denial of discovery in a footnote. App. 070 at n.5. Specifically, the court found that Sherman raised his challenge to the denial of discovery in relation to the *Brady* claim for the first time in his supplemental reply brief by altering his prior argument and asserting that the issue before the court was not the reasonableness of the Nevada appellate court’s rejection of the *Brady* claim but the district court’s rejection of Sherman’s request to conduct discovery under Rule 6(a) of the Rules Governing Section 2254 Cases. App. 070 at n.5. By contrast, Sherman’s opening brief focused on the merits of his *Brady* claim—as Sherman does now in his petition for certiorari. App. 070 at n.5. And his “only reference to discovery, however, is a single sentence asking the court to remand for discovery and factual development as an alternative remedy.” App. 070 at n.5. The court found that in his opening brief, Sherman did not seek to expand the certificate of appealability with regard to the denial of his motion for leave to conduct discovery, and concluded the “discovery issue is not properly raised. App. 070 at n.5 (“*See Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003) (‘[W]e will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant’s opening brief.’)”).

In the opening brief, Sherman referred to discovery eleven times. In the procedural history, Sherman noted the filing of his 2012 request for discovery, which the district court denied in 2014. Dkt. 31 at 21, citing 1-ER-56, 97. He also referred to the denial in 2012 of a request for discovery. Dkt. 31 at 31, citing 1-ER-70. He requested remand to conduct formal discovery on an unrelated

trial counsel claim. Dkt. 31 at 56. He also argued trial and post-conviction counsel failed to conduct discovery. Dkt. 31 at 58, 114. He raised the issue of the district court repeatedly denying his motions for discovery, but in relation to evidence related to the issue for which the district court granted a certificate of appealability. Dkt. 31 at 133, citing 1-ER-145-149.

In relation to Sherman's request to expand the certificate of appealability to include the jailhouse informants and *Brady* issue, Sherman referred to the prosecutor's alleged failure to comply with disclosure obligations and the trial court's discovery orders. Dkt. 31 at 138-139, 141, citing 3-ER-785-87; 4-ER-817, 829; 19-ER-5516. At the conclusion of the claim, Sherman asked for reversal to conduct formal discovery and further factual development. Dkt. 31 at 148. At no time did Sherman challenge the district court's prior denial of discovery with regard to the informant claim.

The Ninth Circuit declined to address Sherman's challenge to the denial of discovery because he failed to properly preserve the issue. App. 070 n.5. The court's decision is not in conflict with the decisions of any court—not any circuit court nor this Court. Raising the claim for the first and only time in a supplemental reply brief did not properly present the Ninth Circuit with an opportunity to address the claim on appeal. App. 070 n.5. Instead, Sherman waived any challenge to the denial of discovery by failing to properly preserve the claim on appeal.

This Court customarily will not address issues “not pressed or passed on below,” a rule supported by “weighty prudential considerations.” *See, e.g., Illinois v. Gates*, 462 U.S. 213, 224 (1983). Sherman's failure to properly preserve the claim in the first place deprived the Ninth Circuit of the ability to address whether the district court properly denied his request to conduct discovery in the first instance. So even if there was a split that might warrant this Court's consideration, this case does not present this Court with a good opportunity to address the issue.

IV. Resolving Any Purported Split does Not Help Sherman Because His Discovery Requests are Too Weak to Warrant Further Review.

Setting aside the foregoing points, resolving the purported split would not result in Sherman obtaining any sort of relief. He could not receive relief as to his discovery claims if reviewed on appeal because Sherman did not meet the standard for discovery under *Bracy*.

A. Sherman's first federal motion for leave to conduct discovery.

In the district court, Sherman filed his initial motion for leave to conduct discovery in 2003, which included requests about both Placencia and Kalter. ECF No. 19. His request about Placencia sought to obtain evidence of benefits in terms of dropped charges, favorable plea negotiations, and quashed bench warrants, and he sought information about Kalter's prior informant work for law enforcement. ECF No. 19. at 43-49, 54.

The court denied the motion in relation to Placencia and Kalter, finding Sherman did nothing more than assert trial counsel failed to seek the discovery that counsel now sought, and stating, "If no more than that were required for a showing of good cause under *Bracy*, habeas petitions would have a free pass to conduct any discovery remotely related to their case." ECF No. 34 at 22. Further, the federal district court explained that it "will not grant this sort of wide-ranging discovery without a showing that the subject habeas claims are procedurally viable—exhausted and not procedurally defaulted," and "[p]etitioner has made no such showing." ECF No. 34 at 22. Therefore, the court based the denial of discovery on Sherman's failure to properly support his motion.

There was no error in denying the initial motion for leave to conduct discovery because Sherman failed to properly support his motion in compliance with *Bracy*.

B. Sherman's second federal motion for leave to conduct discovery.

Sherman returned to state court and pursued his second state habeas action. 13-ER-3317. It was in this second action that he raised his *Brady* claim regarding alleged undisclosed benefits to Placencia and Kalter; and produced a plethora of evidence regarding the informants' criminal history and other evidence purportedly supporting his claim of benefits in exchange for the testimony at the penalty phase of trial. *See* 13-ER-3559-3580.

While in state court, Sherman also filed a motion for discovery. ECF No. 137-17. In the motion, he sought discovery regarding undisclosed benefits to Placencia and Kalter. ECF No. 137-17 at 13-18.

The state court held a hearing on the motion and the prosecution's motion to dismiss the second amended petition. At the hearing, Sherman went through multiple examples of what he alleged were undisclosed benefits based upon records he obtained and provided in support of his petition. ECF No. 139-1 at 16-20. As to the motion to conduct discovery, Sherman argued that he needed records from law enforcement and the prosecutor's office. ECF No. 139-1 at 20, 24-25. Further, he argued the prosecutor failed to disclose evidence from their files, particularly notes that addressed any witness benefits. ECF No. 139-1 at 25-26.

The prosecutor properly argued that Sherman failed to establish materiality, despite any potential impeachment value. ECF No. 139-1 at 31. Other overwhelming evidence corroborated Placencia's and Kalter's testimony. ECF No. 139-1 at 32. The jury heard a wire recording of Sherman discussing the escape. ECF No. 139-1 at 32. And they also saw an escape note written by Sherman that Placencia gave authorities, in addition to multiple letters that Sherman wrote and sent to Kalter. ECF No. 139-1 at 32.

The state court dismissed the second petition as procedurally barred and found no basis to overcome the bars. ECF No. 139-8. In denying the motion to conduct discovery, the court concluded the alleged *Brady* violations as to the impeachment evidence of Placencia and Kalter were not material. ECF No. 139-8 at 3. And even if true, there was no reasonable possibility that the outcome of the case would have been different. ECF No. 139-8 at 3. Therefore, the *Brady* violation did not constitute good cause to overcome the bars.

After his return to federal court, Sherman filed his second motion for discovery in 2011. ECF No. 158. He noted that he exhausted each of his claims and unsuccessfully sought to develop the necessary facts in state court as required by the district court's prior orders. ECF No. 158 at 4. And he sought discovery in relation to Respondents' motion to dismiss to establish (1) equitable tolling, timeliness under 28 U.S.C. § 2244(d)(1)(D), (2) cause and prejudice to overcome procedural defaults, and (3) that Nevada's procedural defaults were not adequate and independent. ECF No. 158 at 4. In pertinent part, he again sought law enforcement and prosecution files related to undisclosed benefits to Placencia and Kalter. ECF No. 158 at 7-10.

In March 2012, the federal district court denied the discovery motion. 1-ER-96-97.⁶ First, the court found the second amended petition timely, so discovery was not necessary to address equitable tolling or timeliness under 28 U.S.C. § 2244(d)(1)(D). 1-ER-25, 26. The court also addressed the claims associated with the *Brady* claims—Claim Two (Q) (ineffective assistance of counsel); Claim Three (subparts 7-17) (*Brady* violations); and Claim Eight (prosecutorial misconduct). Claim Three was not procedurally defaulted so a showing was unnecessary, and the subclaims in Claim Eight in which Sherman alleged delay based upon the alleged nondisclosure were subsumed into Claim Three. 1-ER-25-26. Finally, the court found Sherman failed to allege

⁶ The district court initially denied Sherman's motion to conduct an evidentiary hearing. 1-ER-96-97. The court then denied his discovery motion based by adopting for the same reason.

facts establishing the type of prosecutorial misconduct that demonstrated an “intentional concealment of evidence and misrepresentation as to compliance with *Brady* to be entitled to discovery for the purpose of showing the prosecution’s alleged suppression of evidence prevented him from raising his allegations in Claims Two and Eight (E) in the first state habeas proceedings. 1-ER-25-26.

The court denied the second motion for leave to conduct discovery because the requested discovery did not assist the court in its determination of the motion to dismiss.

C. Sherman’s third and final federal motion for leave to conduct discovery.

Sherman filed his final request by renewing his prior motion for discovery as to Claim Three within a motion for evidentiary hearing in 2014. ECF No. 211 at 6. As to the issue before this Court, Sherman limited his motion to information about Placencia, not Kalter. ECF No. 211 at 6. Specifically, he sought the information to rebut the state court’s findings of the absence of a link between the alleged undisclosed benefits and Placencia’s cooperation in Sherman’s case and “whether the State’s prosecutorial misconduct is merely the tip of the iceberg and whether there is additional exculpatory and impeachment evidence contained in its actual or constructive possession.” ECF No. 211 at 6.

In denying the motion, the district court concluded that Placencia was not called as a witness at trial and instead Sgt. Hammack testified about the information Placencia provided to the police regarding the failed escape plan and solicitation to commit murder. 1-ER-55. While Sherman alleged Placencia received favorable treatment related to then-pending criminal matters in exchange for his cooperation, as well as information regarding prior felony convictions, which could have been used for impeachment purposes, the Nevada Supreme Court found the prosecutor improperly withheld the information about Placencia’s criminal history but concluded the

disclosure of the information would not have changed the outcome of the penalty hearing given “the overwhelming evidence supporting Sherman’s involvement in planning his escape.” 1-ER-55 (internal record cite omitted). The court also noted the state appellate court found “that Sherman had failed to connect ‘any favorable treatment in the disposition of any criminal case’ to Placencia’s ‘cooperation in the investigation of Sherman’s escape plot.’” 1-ER-55 (internal record cite omitted). The Court concluded discovery “might help Sherman rebut the latter finding, but not the former” given Placencia’s information was corroborated by other evidence, including written instructions regarding the escape plan and murder plot which a handwriting expert confirmed were in Sherman’s hand; a transcript of a wiretap recording of Sherman discussing the escape plot with Placencia; and letters Sherman wrote Kalter, also confirmed to be in Sherman’s hand, that contained information consistent with the information Placencia provided regarding the plan. 1-ER-55-56 (internal record cite omitted).

Sherman failed to demonstrate any error in denying his motion for leave to conduct discovery regarding the *Brady* claim at issue. The discovery Sherman sought did not overcome the failure to produce facts that supported the claim or to demonstrate any such evidence would have rendered the allegedly exculpatory evidence material. Sherman failed to satisfy the *Bracy* requirements.

V. This Court Should Reject Sherman’s Alternative Argument for Summary Reversal.

Sherman’s alternative ground for reversal of the Ninth Circuit’s judgment also lacks merit. He argues the Ninth Circuit’s failure to review his claims under 28 U.S.C. § 2254(d)(2) was “an egregious error,” particularly when he provided the court with evidence that substantiated the merits of his claim or, at minimum, justified further factual development. Petition at 1-2.

A. Sherman relies upon outdated authority.

Sherman begins his argument by relying on pre-AEDPA law to argue the Ninth Circuit failed to explain why it accepted the presumption of correctness of the state court's findings. Petition at 2 (citing *Sumner v. Mata*, 449 U.S. 539 (1981)).

Sumner expressly relied upon the 1966 version of 28 U.S.C. § 2254. *Sumner*, 449 U.S. at 551. At that time, written findings by a state court were presumed to be correct unless the federal habeas petitioner could establish, it appeared, or Respondents admitted, one of eight enumerated points to show the state court record as a whole did not fairly support such factual determination, at which point the burden rested upon the petitioner "to establish by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d), Public law 89-712 (Nov. 2, 1966), 80 Stat. 106. In *Sumner*, this Court held that when a federal court granted a habeas writ, it must set forth its reasoning for concluding the first seven factors under 28 U.S.C. § 2254(d) were present or were not fairly supported by the record. 449 U.S. at 551.

Under AEDPA in 1997, what survived is the presumption of correctness of state court findings. *Lindh v. Murphy*, 521 U.S. 320, 345 (1997) (Rehnquist, J., dissenting) (citing *Sumner*, 449 U.S. at 539, 549-551); see also *Miller-El v. Cockrell*, 537 U.S. 322, 356 (Thomas, J., dissenting) (noting 28 U.S.C. § 2254(e)(1) language virtually identical to factual deference provision of pre-AEDPA as cited in *Sumner*).

Sherman continues his erroneous reliance by citing *Cabana v. Bullock*, 474 U.S. 376, 388 n.5 (1986). Petition at 2. However, footnote 5 is dicta as it provides examples of when appellate factfinding specifically relates to a claim under *Enmund v. Florida*, 458 U.S. 782 (1982). In *Enmund*, this Court found imposition of the death penalty on an aider or abettor violated the Eighth Amendment, in which a presumption of correctness applies to appellate factfinding.

The current version of 28 U.S.C. § 2254(d) does not retain the mandate that the federal courts must detail all findings as to correctness, nor does Sherman point to contemporary requirement from this Court mandating a detailed explanation, when denying a petition. Nevertheless, the Ninth Circuit's rejection of Sherman's request to expand the certificate to include his *Brady* claim sufficiently addressed the Nevada Supreme Court's findings regarding deference as is shown in the next subsection.

B. Sherman failed to demonstrate the Ninth Circuit erred in failing to grant a certificate of appealability on the issue regarding the jailhouse informants and *Brady*.

In the alternative, Sherman argues in favor of summary reversal as the Ninth Circuit failed to acknowledge or address Sherman's arguments under 28 U.S.C. § 2254(d)(2). Petition at 15. Specifically, he argues his evidentiary proffer showed jail house informants received benefits related to their cooperation with the prosecution "where contrary findings were made on appeal without notice or any opportunity for factual development." Petition at 15. He argues that this purportedly egregious error impacted the validity of his sentence mandating reversal. Petition at 15.

Sherman argues the Ninth Circuit erred in denying his request to expand the certificate of appealability because, while the Nevada Supreme Court addressed Sherman's claims under *Brady v. Maryland*, 373 U.S. 83 (1983), it failed to address his related claims under *Napue v. Illinois*, 360 U.S. 264 (1959). Petition at 5, 11-12. But the Ninth Circuit did address the state appellate court's rejection of Sherman's claims under *Brady* and further acknowledged and rejected the *Napue* component.

1. The Nevada Supreme Court properly rejected Sherman's claim as did the Ninth Circuit.

Sherman failed to demonstrate his claim had merit. First, the Nevada Supreme Court properly rejected Sherman's claim regarding a *Brady* violation. App. 087. The court expressly considered the numerous records Sherman presented in support of his claim that *Brady* was sufficient to overcome the procedural bars applied to the second state habeas petition, including the criminal records for Placencia and Kalter that Sherman relied upon to raise his *Brady* claim regarding benefits Placencia and Kalter allegedly received. App. 087. The court found the prosecution improperly withheld information regarding the criminal history for the two but "disclosure of that information would not have altered the outcome of the penalty hearing in light of the overwhelming evidence supporting Sherman's involvement in planning his escape." App. 087. And "nothing in the documents Sherman submitted shows that any favorable treatment in the disposition of any pending criminal case against them was related to their cooperation in the investigation of Sherman's escape plot." App. 087.

Sherman is correct that the Nevada Supreme Court did not directly address the substantive claim of a *Napue* violation. However, even under a *de novo* standard, Sherman failed to demonstrate that the prosecution knowingly presented false testimony because he failed to demonstrate that the informants received benefits not otherwise addressed at the time of trial.

The Ninth Circuit reviewed the evidence, noted that the jury heard of Placencia's history with law enforcement and evidence that corroborated his statements and independently supported Sherman's role in the escape plan. App. 037. And the evidence regarding Kalter's work as a confidential informant had general impeachment value. App. 037. But Sherman failed to explain how, even if the prosecution disclosed the evidence he referenced, there was a reasonable probability that the outcome would have been different. App. 037 (citing *Kyles v. Whitley*, 514

U.S. 419, 435 (1995).

Regarding the subsequent treatment of pending criminal cases as to Placencia and Kalter, which Sherman alleged were in exchange for their cooperation in the Sherman case, the panel cited the Nevada Supreme Court's finding that any favorable treatment received was not related to their cooperation, which was not an unreasonable factual determination. App. 038. And the panel agreed with the district court that given the strength of the corroborating evidence of Sherman's involvement in the escape plot, no inducements or benefits allegedly received by the two informants would have undermine the court's confidence in the outcome of the trial. App. 038.

Finally, when rejecting the allegations under *Napue*, which Sherman limited to the testimony of Sgt. Hammack, the panel concluded that as there was no evidence of undisclosed benefits, so no reasonable jurists would conclude that the testimony was false. App. 040.

2. *Brady* Standard.

The suppression by the prosecution of evidence favorable to an accused (exculpatory information) violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith of the prosecutor. *Brady*, 373 U.S. at 87

A *Brady* violation contains three components: (1) favorable evidence that was exculpatory or impeaching, (2) was suppressed by the State willfully or inadvertently, and (3) was material or resulted in prejudice. *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (citation omitted). Evidence is material under *Brady* "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009) (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood

as a trial resulting in a verdict worthy of confidence.”). A “reasonable probability” is a probability sufficient to undermine confidence in the outcome, i.e. the result would have been different. *United States v. Bagley*, 473 U.S. 667, 681-82 (1985) (citation omitted).

3. The prosecution did not affirmatively mislead defense counsel regarding the non-existence of material exculpatory and impeachment evidence relating to cooperating informants.

In his opening brief on appeal from his second state habeas petition, Sherman argued the state district court granted his motion to compel the NCIC reports related to the murder-for-hire witnesses Placencia and Kalter and the existence and substance of benefits or preferential treatment received in exchange for their cooperation with the prosecution. Dkt. 31 at 138-39. He argued the prosecutor sent defense counsel a letter purportedly revealing all of the material exculpatory and impeachment evidence in the possession of the prosecution relating to Placencia and Kalter. Dkt. 31 at 139. The prosecutor disclosed that Placencia received Secret Witness funds and Kalter was anticipated to receive favorable sentencing in an involuntary manslaughter conviction to which she had already plead guilty. Dkt. 31 at 139.

a. Michael Placencia.

Sherman argued the prosecution failed to disclose information related to *quid pro quo* benefits allegedly received by Placencia, specifically a sentence reduction from a previous battery conviction, elimination of a 90-day consecutive sentence for contempt of court, and assistance in three pending criminal cases. Dkt. 31 at 140-41. He alleged the prosecution presented the testimony of Sgt. Hammack at the penalty phase, who falsely testified Placencia did not receive any benefits beyond a \$300 cash payment from Secret Witness in exchange for his cooperation in Sherman’s case. Dkt. 31 at 140-41.

It is undisputed that Placencia did *not* testify at Sherman’s murder trial. It is therefore unclear how any of the allegedly undisclosed evidence was exculpatory or impeachment material

when he did not testify. Nor does Sherman demonstrate that Sgt. Hammack lied during his testimony or that the prosecution failed to correct any false statements by Sgt. Hammack.

Sherman provided little more than speculation and hypothesis that the prosecution provided Placencia with undisclosed benefits. Even if Placencia hoped to receive a benefit, a witnesses' hope or subjective belief in improved chances do not create a violation under *Giglio v. United States*, 405 U.S. 150, 153 (1972).

As to *Napue* claim, Sherman argued Sgt. Hammack lied when he testified that Placencia received no benefits other than the \$300 payment. Dkt. 31 at 141.

During the penalty phase of the murder trial, Sgt. Hammack testified regarding Placencia's voluntary statement in the solicitation to commit murder plot and his own investigation in that case. 9-ER-2449-57. Placencia wanted an early release in a prior case. 9-ER-2461. Sgt. Hammack agreed that Placencia thought he could help himself since he had a court date coming up. 9-ER-2463. Placencia received \$300 for his participation in the solicitation to commit murder case, but Sgt. Hammack testified he did not recall Placencia receiving any other benefits. 9-ER-2463.

Where a witness whose reliability "may well be determinative of guilt or innocence," nondisclosure of evidence which may affect that witness's credibility falls within *Brady*. *Napue*, 360 U.S. at 269. The knowing use of false or perjured testimony against a defendant to obtain a conviction is unconstitutional. *Id.* at 259. This also applies when the State "although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*

Even if the court found that the prosecution somehow made a promise or deal with Placencia, Sherman must demonstrate that the allegedly false testimony could "in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271). Placencia never testified at the murder trial. And Sherman failed to demonstrate that

Sgt. Hammack knew of any other benefits—if any additional benefits existed—or that his testimony was false.

Sherman's allegations of improper benefits are not supported by the record. He failed to demonstrate a failure to correct false or misleading testimony presented by Sgt. Hammack. And any alleged promise or deal would not have materially affected the judgment of the jury.

b. Christine Kalter.

Sherman argued the prosecution failed to disclose that Kalter was a paid narcotics informant for the LVMPD at the time police first approached her for information on Sherman. Dkt. 31 at 141-42. And the prosecution failed to disclose the existence of imposed conditions on Kalter's ability to receive probation on her involuntary manslaughter conviction. Dkt. 31 at 141-42. Sherman did not raise a *Napue* claim as to Kalter in his opening brief before the Ninth Circuit. *See* Dkt. 31 at 148.

In the documents provided by Sherman, Kalter's former trial counsel (and one of Sherman's trial counsel) stated she learned that Kalter was previously an informant, and that she suspected Kalter continued to be an informant after her release in February 1996. 20-ER-5820-22, 20-ER-5833-32. Sherman provided no evidence that Kalter testified in exchange for undisclosed benefits or that the prosecution failed to disclose exculpatory or impeachment evidence other than speculation by Kalter's own previous counsel.

During the penalty hearing, Kalter testified, when asked if police promised her anything in exchange for her statement, "[t]hey didn't promise me anything and they didn't intimidate me or try to intimidate me, but I was scared." 9-ER-2504-05. She also denied lying to the police. 9-ER-2505.

Kalter further testified that she was in prison for involuntary manslaughter, had a prior felony for possession of a credit card without the cardholder's consent, and cooperated with police after they approached her regarding Sherman. 9-ER-2471-2505, 2515. Sherman's counsel had a full opportunity to cross-examine Kalter. And with this evidence before the jury, Sherman failed to demonstrate any additional information regarding benefits that would have changed the outcome of the trial or created greater doubt as to Kalter's credibility.

The prosecution informed Sherman prior to trial that Kalter was awaiting sentencing on a homicide charge at the time she testified before the grand jury on the solicitation to commit murder case; and while the prosecutor believed Kalter expected to receive benefits in exchange for her testimony, they explained "in unequivocal terms" that Kalter would not receive any benefits in exchange for her testimony. 20-ER-5837-38. Kalter testified at Sherman's trial that she did not receive any undisclosed benefits for her testimony. 9-ER-2505. Sherman failed to demonstrate any plea made by Kalter as to her murder conviction a year earlier was based upon her testimony against Sherman regarding the escape plot.

c. Even if the prosecution failed to disclose the noted evidence, it was not material.

The allegedly undisclosed inducements to Placencia and Kalter would not have undermined the credibility of any of the witnesses nor affected the outcome of Sherman's trial. Sufficient evidence corroborated Sherman's participation in the murder-escape plot, and nothing regarding Placencia or Kalter would have altered that evidence.

During Sherman's penalty phase, Sherman's own written instructions regarding the plot served to corroborate the testimony of Kalter and Sgt. Hammack (regarding Placencia's statements) addressing Sherman's involvement in the murderous escape plot. 9-ER-2451-53. A handwriting expert confirmed Sherman wrote the instructions regarding the plot which Placencia

provided to the police. 9-ER-2451. The prosecution also introduced an audio recording of a wire worn by Placencia of Sherman discussing the details of the escape plan with Placencia, during which Sherman discussed shooting and killing several people during the escape and killing Kalter after the escape for her lack of cooperation. 9-ER-2449, 2454-55. Sherman also wrote letters to Kalter pressuring her to take the role assigned in the plot; again the handwriting expert confirmed Sherman authored that unsolicited correspondence. 9-ER-2459-60, 2492-95. The prosecution provided sufficient evidence to corroborate Placencia and Kalter's statements and testimony.

Based on the evidence from the guilt and penalty phases of trial, even if this Court found the State failed to disclose *Brady* evidence or undisclosed inducements to Placencia and Kalter, or uncorrected false testimony under *Napue*, such evidence and/or allegedly false testimony was not material as it did not put the whole case in such a different light as to undermine confidence in the verdict. *Kyles*, 514 U.S. at 434-35. While though Sherman cites other cumulative evidence, including matters outside the escape plot, to show materiality, he failed to present anything concrete as to alleged benefits received by the two informants, or that there was cumulative error.

* * *

The allegations regarding *Brady* violations as to Placencia and Kalter were, at best, limited in scope. Sherman failed to demonstrate the prosecution intentionally withheld information. He also failed to demonstrate that even with the discovery in question, the outcome of the trial would have altered given the support evidence of the murderous escape plot.

Respectfully submitted,

AARON D. FORD

Attorney General of Nevada

HEATHER D. PROCTER*

Chief Deputy Attorney General

State of Nevada

Office of the Attorney General

100 North Carson Street

Carson City, NV 89701

(775) 684-1271

hprocter@ag.nv.gov

** Counsel of Record*