No. 82602

IN THE NEVADA SUPREME COURT

Rickie Slaughter,

Petitioner-Appellant,

v.

Charles Daniels, et al.,

Respondents-Appellees.

On Appeal from the Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District, Clark County
(A-20-812949-W | 04C204957)
Honorable Tierra Jones, District Court Judge

Petitioner-Appellant's Opening Brief

Rene Valladares
Federal Public Defender,
District of Nevada
*Jeremy C. Baron
Assistant Federal Public Defender
411 E. Bonneville Ave. Suite 250
Las Vegas, Nevada 89101
(702) 388-6577 | jeremy_baron@fd.org

*Counsel for Rickie Slaughter

NRAP 26.1 DISCLOSURE

Mr. Slaughter lists the following law firms under Nevada Rule of Appellate Procedure 26.1(a), so the judges of this Court may evaluate possible disqualification or recusal:

1. Federal Public Defender, District of Nevada
2. Rickie Slaughter (pro se)
3. Gamage & Gamage
4. Pitaro & Fumo, Chtd.
5. Law Offices of Osvaldo Fumo, Chtd.
6. Stephen B. Wolfson, Chtd.
7. Bush & Levy, LLC
8. Law Office of Paul E. Wommer
9. Clark County Public Defender

/s/Jeremy C. Baron
Jeremy C. Baron
Assistant Federal Public Defender

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes and Rule

JURISDICTIONAL STATEMENT

This is an appeal from a final order denying Mr. Slaughter's March 27, 2020, petition for a writ of habeas corpus. The lower court issued a notice of entry of a written order denying the petition on February 12, 2021. XXII.App.4520-29. Mr. Slaughter filed a timely notice of appeal on March 5, 2021. XXII.App.4530-32. This Court has jurisdiction under NRS 34.575.

ROUTING STATEMENT

Because this post-conviction appeal involves convictions for Category A felonies, this appeal isn't presumptively assigned to the Court of Appeals. *See* Nev. R. App. P. 17(b)(3). This Court should retain this case because it raises important issues regarding, among other things, Mr. Slaughter's innocence.

STATEMENT OF THE ISSUES

The State charged Mr. Slaughter with various crimes related to a home invasion in North Las Vegas. The prosecution's main evidence was four eyewitnesses who purported to identify Mr. Slaughter from a first, suggestive photo lineup. But the police also showed the eyewitnesses a second, less suggestive photo lineup with Mr. Slaughter's photo in it. The prosecution failed to tell the defense the outcome of that second photo lineup viewing and indeed misled the defense about the results. Only in February 2018 did Mr. Slaughter learn *none* of the eyewitnesses identified him from the second photo lineup.

Mr. Slaughter raised this issue (and others) in a 2018 post-conviction petition. While those proceedings were pending, Mr. Slaughter deposed the lead prosecutor, Marc DiGiacomo. Mr. DiGiacomo admitted he didn't disclose the outcome of the second photo lineup to the defense and said he was concerned the second photo lineup would be a liability for the prosecution at trial. Mr. Slaughter unsuccessfully attempted to incorporate that deposition testimony into his 2018 proceedings. After those efforts failed, he filed a new 2020 petition, while the 2018 proceedings

remained pending. Ultimately, this Court erroneously denied Mr. Slaughter's appeal regarding his 2018 petition.

The issues in the present appeal include:

1. Is this Court's previous decision from the last appeal binding in this appeal, even though Mr. Slaughter is relying on new evidence—including deposition testimony from the lead prosecutor showing the State withheld exculpatory evidence—and even though Mr. Slaughter can prove he's innocent?

STATEMENT OF THE CASE

This appeal involves the lower court's dismissal of Mr. Slaughter's successive post-conviction petition.

The State began the relevant criminal proceedings against Mr. Slaughter by issuing a criminal complaint on July 1, 2004. I.App.51-52. Mr. Slaughter initially entered a guilty plea on April 4, 2005. I.App.162-206. The court sentenced him on August 8, 2005. I.App.211-29; I.App.234-35. After multiple appeals, this Court ultimately issued an opinion on March 27, 2009, reversing and remanding the case to allow Mr. Slaughter the opportunity to withdraw his plea. III.App.569-77.

On remand, Mr. Slaughter went to trial, which began on May 12, 2011. IV.App.709-868; V.App.869-1101; VI.App.1102-74. The jury found him guilty on all counts. VI.App.1175-78. The court sentenced him on October 16, 2012. VI.App.1199-268. Mr. Slaughter appealed; this Court affirmed on March 12, 2014. VI.App.1269-74.

Mr. Slaughter filed his first (pro se) state post-conviction petition on March 25, 2015. VII.App.1275-443. The lower court declined to hold a hearing and issued an order denying the petition on July 24, 2015.

VII.App.1504-15. Mr. Slaughter appealed; this Court affirmed on July 13, 2016. VIII.App.1612-14.

Mr. Slaughter filed his second (pro se) state post-conviction petition on February 12, 2016. VIII.App.1516-96. The lower court declined to hold a hearing and issued an order dismissing the petition on June 13, 2016. VIII.App.1597-611. Mr. Slaughter appealed; the Nevada Court of Appeals affirmed on April 19, 2017. VIII.App.1615-19.

Mr. Slaughter filed his third state post-conviction petition—his first counseled petition—on November 20, 2018. XII.App.2443-514. The lower court declined to hold a hearing and issued an order dismissing the petition on April 15, 2019. XIII.App.2754-79. Mr. Slaughter appealed; this Court affirmed on October 15, 2020. XXII.App.4505-13.

Mr. Slaughter filed his fourth state post-conviction petition—the petition at issue in this appeal—on March 27, 2020. XXII.App.4369-437. The State filed a motion to dismiss on April 29, 2020. XXII.App.4442-71. Mr. Slaughter filed an opposition on May 7, 2020. XXII.App.4475-503. The lower court declined to hold a hearing and issued an order dismissing the petition on February 12, 2021. XXII.App.4520-29. Mr. Slaughter filed a timely notice of appeal on March 5, 2020. XXII.App.4530-32.

STATEMENT OF THE FACTS

The State prosecuted Mr. Slaughter for multiple crimes related to a home invasion that took place in North Las Vegas in June 2004. At trial, the prosecution presented four eyewitnesses who claimed to have identified Mr. Slaughter from a photo lineup. But the State failed to tell the defense the same eyewitnesses were unable to identify Mr. Slaughter from a *second* photo lineup.

Mr. Slaughter couldn't confirm that fact until February 2018. At that point, he began to pursue new state court litigation in late 2018. That litigation was ultimately unsuccessful.

While those 2018 proceedings were pending, Mr. Slaughter deposed the lead prosecutor in his case, Marc DiGiacomo. Mr. Slaughter then made various unsuccessful attempts to incorporate Mr. DiGiacomo's deposition testimony into the 2018 proceedings. After those attempts failed, Mr. Slaughter filed a new post-conviction petition in 2020, primarily so the courts could consider Mr. DiGiacomo's testimony along with Mr. Slaughter's claims and arguments. Those 2020 proceedings are the subject of this appeal.

I. Someone breaks into Ivan Young's house and robs the inhabitants.

Two individuals went into Ivan Young's house at 2612 Glory View Lane in North Las Vegas and committed various crimes against Mr. Young, his family, and his friends on June 26, 2004. During the incident, the culprits tied up six victims:

Ivan Young. Mr. Young operated an under-the-table car detailing operation from his garage, where he was working when the culprits first approached him. After bringing Mr. Young into his house and tying him up, the robbers demanded Mr. Young tell them where he kept his money and drugs. Mr. Young repeatedly refused to cooperate, and one of the culprits shot a gun toward the ground near him. The bullet shattered on impact, and the fragments hit Mr. Young in the face. Mr. Young survived. V.App.879-87 (Tr. at 39-72).

Jennifer Dennis. Ms. Dennis is Mr. Young's wife. She was in the house, and the robbers tied her up during the incident. V.App.899-905 (Tr. at 120-43).

Aaron Dennis and Joey Posada. Aaron Dennis is Ms. Dennis's son; Joey Posada is Ms. Dennis's nephew. They were also in the house, and

the robbers tied them up as well. V.App.882 (Tr. at 51); V.App.1015-21 (Tr. at 33-59).

Ryan John. Mr. John was standing outside his girlfriend's house (near Mr. Young's house) at the start of the incident. While he was outside, someone called him over to Mr. Young's house. He walked over, and the perpetrators apprehended him and tied him up. One of the culprits stole his ATM card and demanded his pin number. Later, Mr. John contacted his bank; a representative told him someone had used his ATM card at a 7-Eleven. V.App.951-59 (Tr. at 49-81).

Jermaun Means. Mr. Means went to Mr. Young's house to give him money for a paint job. When he approached the door, the robbers dragged him inside, tied him up, and took his money. His girlfriend, Destiny Waddy, was waiting in the car; she was unaware the crimes were taking place. V.App.876-79 (Tr. at 25-38).

At first, the lead detective (Jessie Prieto) had few leads. But two days after the incident, a confidential informant contacted the police. The informant had "been providing assistance to the [police] in return for favorable consideration for outstanding warrants." I.App.37 (cleaned up). This informant claimed to have "overheard a subject named Ricky

Slaughter bragging about having committed a robbery which was being reported on TV. This robbery was the one which had occurred on Glory View on June 26." *Id.* (cleaned up).

Detective Prieto prepared a suggestive photo lineup with Mr. Slaughter's picture. After showing it to the six victims and Ms. Waddy, four of the victims purported to identify Mr. Slaughter as a perpetrator.

Detective Prieto came to believe another individual, Jacquan Richard, was the second person involved in the home invasion. Detective Prieto created a second photo lineup with a picture of Mr. Richard and showed it to six victims (and possibly Ms. Waddy as well). IX.App.1695-1723. As it turns out, Detective Prieto mistakenly included a *different* photo of Mr. Slaughter (his booking photo from his arrest in this case, mere days after the incident) in the second photo lineup. *Id.* Detective Prieto's report states none of the victims identified *Mr. Richard* from this lineup. But it doesn't say whether any of the victims identified *Mr. Slaughter* from the lineup. Mr. Slaughter didn't learn until February 2018 that *none* of the victims had identified him from the second photo lineup. IX.App.1722-23.

II. Mr. Slaughter mistakenly pleads guilty.

The State arrested Mr. Slaughter and issued a criminal complaint on July 1, 2004. I.App.51-52. The State repeatedly amended the charging documents. I.App.57-100, 147-54.

Mr. Slaughter elected to represent himself pro se and filed multiple pre-trial motions, including a motion to inspect the original photo lineups. I.App.101-09. He asked the court to issue an order requiring the State to preserve "any and all original photo lineups containing an image of" Mr. Slaughter. I.App.104. He also asked the court to allow him to view the original lineups that the witnesses used to identify Mr. Slaughter. I.App.105. The State filed a response, asserting it had already preserved the lineups. I.App.120-22.

Mr. Slaughter also filed a motion to learn the identity of the confidential informant. I.App.110-19. The State opposed that motion. I.App.123-30. In his reply (filed March 18, 2005), Mr. Slaughter explained the State had shown the witnesses different photo lineups on different occasions. Some of the witnesses identified Mr. Slaughter's picture in one of the lineups (the suggestive lineup). But he alleged none of the witnesses identified his picture in a *second*, non-suggestive photo lineup.

I.App.131-46. Relatedly, Mr. Slaughter filed a motion to continue the trial date. I.App.155-61. He explained he was planning to seek a court order requiring the police to disclose his mug shots; he needed his mug shots to prove the police had used one of his photos in that second, non-suggestive lineup.

Before trial, Mr. Slaughter and the State negotiated a guilty plea. I.App.162-206. After entering the plea, Mr. Slaughter pursued various efforts to withdraw it. Those protracted efforts ultimately led to a decision from this Court allowing him to withdraw his plea. III.App.569-77.

III. Mr. Slaughter goes to trial, and the jury convicts him.

On remand, Mr. Slaughter's defense attorneys filed various pretrial motions, including a motion to dismiss the case because the police failed to preserve exculpatory evidence. III.App.578-649. This motion described the second photo lineup: Detective Prieto created the lineup and included a photo of Mr. Richard, but he *also* included a photo of Mr. Slaughter. As the motion explained, it wasn't clear from the discovery whether any witnesses identified Mr. Slaughter from the second lineup, but the defense suspected none of them had. The motion complained

Detective Prieto didn't document the outcome of the second photo lineup as well as other details about the lineup and asked the court for corresponding relief.

The State filed an opposition. IV.App.659-61. It conceded the police showed the second photo lineup to the victims but refused to admit none of them identified Mr. Slaughter from that lineup.

The court held argument on the motion on December 1, 2009. Defense counsel explained the second photo lineup was "apparently shown to some or all of the alleged victims by whom, I'm not sure, when, I'm not sure, and what were the results, I'm not sure." IV.App.673. The prosecutor (Marc DiGiacomo) agreed the police showed the second lineup to the victims. *Id.* But he said it would take a "giant leap . . . to say Rickie Slaughter wasn't picked out of those photo lineups." IV.App.675.

Trial began on May 12, 2011. IV.App.709-868; V.App.869-1101; VI.App.1102-74. The jury found Mr. Slaughter guilty on all counts. VI.App.1175-78. The court sentenced him on October 16, 2012. VI.App.1199-268. Mr. Slaughter appealed; this Court affirmed on March 12, 2014. VI.App.1269-74.

IV. Mr. Slaughter files a first post-conviction petition.

Mr. Slaughter filed his first (pro se) state post-conviction petition on March 25, 2015. VII.App.1275-443. Among other things, he alleged his trial attorneys provided ineffective assistance because they didn't elicit evidence about the second photo lineup. VII.App.1284-86, 96-99. The State filed a response. VII.App.1444-59. It suggested that if the trial attorneys had brought up the second photo lineup, the witnesses might've testified "they did recognize" Mr. Slaughter in the lineup. VII.App.1454. The court declined to hold a hearing and issued an order denying the petition on July 24, 2015. VII.App.1504-15. Mr. Slaughter appealed; this Court affirmed on July 13, 2016. VIII.App.1612-14.

V. Mr. Slaughter files a second post-conviction petition.

Mr. Slaughter filed his second (pro se) state post-conviction petition on February 12, 2016. VIII.App.1516-96. Among other things, he raised another claim involving the second photo lineup. VIII.App.1539. The court declined to hold a hearing and issued an order denying the petition on June 13, 2016. VIII.App.1597-611. Mr. Slaughter appealed; the Nevada Court of Appeals affirmed on April 19, 2017. VIII.App.1615-19.

VI. Mr. Slaughter files a federal petition, and the federal court grants discovery.

While the appeal from his second state post-conviction petition was pending, Mr. Slaughter filed a federal post-conviction petition. The federal court appointed the Federal Public Defender, District of Nevada, to represent Mr. Slaughter. He filed a counseled amended petition and included claims involving the second photo lineup. He then asked for leave to conduct discovery. VIII.App.1620-32. Among other things, he asked for permission to depose Detective Prieto, so he could question him about the second photo lineup.

The federal court granted the discovery motion on November 20, 2017. VIII.App.1633-34. Mr. Slaughter took Detective Prieto's deposition on February 22, 2018. IX.App.1635-1880.[1] Detective Prieto acknowledged, for the first time, that *none* of the witnesses identified Mr.

---

[1] *See also* X.App.1881-2198; XI.App.2199-440 (exhibits). At the risk of overinclusion and duplication, Mr. Slaughter is including a complete set of deposition exhibits in the appendix. That way, the reader can reference the deposition exhibits while reading the deposition transcript, if the reader deems that necessary. Mr. Slaughter includes a table at the start of both volumes that shows which deposition exhibits appear at which appendix page numbers.

Slaughter from the second photo lineup. IX.App.1722-23. Mr. Slaughter also subpoenaed local police agencies and received new exculpatory information that strengthens his alibi. I.App.1-2.

VII. Mr. Slaughter files a third post-conviction petition.

After receiving this new information, Mr. Slaughter filed a new state post-conviction petition on November 20, 2018—within a year of the federal court's order authorizing discovery. XII.App.2443-514.

The lower court held argument on the petition. Mr. DiGiacomo appeared on behalf of the State. The parties discussed the second photo lineup. Mr. DiGiacomo stated, "I would dispute with the defense that Jessie Prieto saying no one picked out Rickie Slaughter from the second lineup means that none of the victims recognized that Rickie Slaughter was in the photo lineup." XIII.App.2722. Mr. DiGiacomo continued, "the reason this came up and the defense even knew about it was because the victims themselves told the State, hey, there's a second photo lineup and Rickie was in it, but . . . we couldn't identify the second suspect." *Id.* In response, undersigned counsel said he was unaware of any evidence supporting that assertion, and "if the State wants to come bring in additional

evidence about that, then we need a hearing to resolve that factual dispute." XIII.App.2725. The court said it intended to deny the petition without a hearing. XIII.App.2727.

Before the lower court entered a corresponding written order, the federal court granted Mr. Slaughter leave to conduct additional discovery by deposing Mr. DiGiacomo. XIII.App.2729-38. In turn, Mr. Slaughter filed a motion in state court asking the court to delay resolving the petition. XIII.App.2739-43. Rather than rule on the petition now, Mr. Slaughter proposed, the lower court should instead stay the case pending Mr. DiGiacomo's deposition. Following the deposition, Mr. Slaughter suggested, the court should allow him to supplement his petition with the new deposition testimony, at which point the court could rule based on a complete record. The State opposed the motion.

Without formally resolving the motion, the lower court issued an order dismissing the petition on April 15, 2019. XIII.App.2754-79.

Mr. Slaughter appealed on May 6, 2019. While the appeal was pending, Mr. Slaughter took Mr. DiGiacomo's deposition, on July 26,

2019. XIV.App.2789-3025.[2] During the deposition, Mr. DiGiacomo provided extensive material testimony about the second photo lineup, among other subjects, which Mr. Slaughter explains in greater detail below.

Following the deposition, Mr. Slaughter turned his attention back to the pending state court appellate proceedings involving his 2018 petition. Specifically, he filed a motion to expand the record on appeal in this Court, or in the alternative for a remand. XXI.App.4053-64. He explained Mr. DiGiacomo's testimony was relevant to the issues on appeal, so the Court should consider the testimony, or it should remand for further proceedings in the lower court. He attached the deposition transcript and various other new evidence. The Court denied the motion on March 11, 2020. XXII.App.4362-63. It then affirmed the lower court's decision on October 15, 2020. XXII.App.4505-13.

---

[2] *See also* XV.App.3028-223; XVI.App.3224-334; XVII.App.3335-528; XVIII.App.3529-642; XIX.App.3643-851; XX.App.3852-93 (deposition exhibits). At the risk of overinclusion and duplication, Mr. Slaughter provides a complete set of deposition exhibits in the appendix. That way, the reader can reference the deposition exhibits while reading the deposition transcript, if the reader deems that necessary. Mr. Slaughter includes a table at the start each relevant volume that shows which deposition exhibits appear at which appendix page numbers.

VIII. Mr. Slaughter files a fourth post-conviction petition.

After the Court denied his motion to expand the record in the appeal involving the 2018 petition, but before the Court reached a final decision on that appeal, Mr. Slaughter filed a fourth post-conviction petition in the lower court on March 27, 2020. XXII.App.4369-437. The 2020 petition is largely identical to the 2018 petition, except the 2020 petition incorporates Mr. DiGiacomo's deposition testimony.

The lower court held a status hearing on the 2020 petition on June 11, 2020. Mr. Slaughter proposed the lower court reach a prompt decision on the 2020 petition; if the court's decision was adverse, Mr. Slaughter explained, he would appeal the decision and seek to consolidate the appeal with his existing appeal involving the 2018 petition. Mr. Slaughter suggested that procedure would be the most judicially efficient. The lower court elected not to take that approach and instead deferred a decision on the 2020 petition until this Court resolved Mr. Slaughter's appeal in the 2018 proceedings. XXII.App.4504.

This Court affirmed the lower court's decision dismissing Mr. Slaughter's 2018 petition on October 15, 2020. XXII.App.4505-13. The lower court then held argument on the 2020 petition on November 16,

2020. XXII.App.4516-19. It entered an order dismissing the petition on February 12, 2021. XXII.App.4520-29. Mr. Slaughter now appeals.

SUMMARY OF THE ARGUMENT

Although Mr. Slaughter previously raised similar claims and arguments in his appeal in the 2018 proceedings, and although this Court previously rejected those arguments, the Court should give those issues a fresh look in this appeal regarding his 2020 petition.

In the last appeal, Mr. Slaughter described his claims for relief involving the second photo lineup: while four witnesses purported to identify Mr. Slaughter from the suggestive first photo lineup, *none* of the witnesses identified him from the non-suggestive second photo lineup, which would've been a highly exculpatory fact in a trial that turned heavily on eyewitness identifications. Mr. Slaughter also described his claims for relief involving his alibi. Mr. Slaughter maintained he had good cause to raise those claims in an otherwise procedurally barred petition for two reasons: (1) because the State previously withheld evidence about the second photo lineup and his alibi, and (2) because he was innocent.

While the last appeal was pending, Mr. Slaughter deposed the lead prosecutor, Marc DiGiacomo. Among other things, Mr. DiGiacomo

admitted he declined to reveal the outcome of the second photo lineup to the defense before trial. The deposition strengthens Mr. Slaughter's claims, along with his good cause arguments and his innocence showing.

Although the Court rejected Mr. Slaughter's previous appeal involving his 2018 petition, that decision shouldn't be binding on this appeal, involving his 2020 petition. While the law of the case doctrine normally precludes reconsideration of issues the Court previously decided, the doctrine doesn't apply when a petitioner relies on substantial new evidence to support previously litigated arguments, or when a petitioner can demonstrate innocence. *See, e.g.*, *Rippo v. State*, 134 Nev. 411, 428, 423 P.3d 1084, 1101 (2018); *Hsu v. County of Clark*, 123 Nev. 625, 631-32, 173 P.3d 724, 728-29 (2007). Here, Mr. Slaughter is now relying on Mr. DiGiacomo's new deposition testimony to support his arguments, and Mr. Slaughter maintains he's proven his innocence. The Court incorrectly rejected his arguments in the last appeal, and it should reconsider the issues in this current appeal.

ARGUMENT

I. Mr. Slaughter has good cause to raise his *Brady* claims.

Mr. Slaughter maintains he previously demonstrated good cause to litigate the three *Brady* claims he raised in his 2018 petition and re-raised in his 2020 petition. Although the Court rejected his arguments in the last appeal, it should reconsider that erroneous decision in this appeal, especially in view of Mr. DiGiacomo's deposition.

A. Mr. Slaughter previously raised meritorious *Brady* claims and demonstrated good cause.

In late 2017 and early 2018, Mr. Slaughter developed new evidence that supports three *Brady* claims: a claim regarding the second photo lineup, and two claims regarding his alibi defense. Mr. DiGiacomo's 2020 deposition added evidentiary support to those claims. The Court should take another look at its prior decision rejecting Mr. Slaughter's good cause arguments.

1. If a petitioner proves the merits of a *Brady* claim, the petitioner also shows cause and prejudice.

Although Nevada law normally requires a petitioner to file a post-conviction petition within a year after the direct appeal (NRS 34.726(1))

and restricts a petitioner to a single post-conviction petition (NRS 34.810(1)), a petitioner can show good cause to overcome those restrictions by pointing to new relevant evidence. In other words, if "the factual or legal basis for a claim was not reasonably available at the time of any default," the petitioner may raise those new claims in an otherwise untimely and successive petition. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003); *see also, e.g.*, *State v. Huebler*, 128 Nev. 192, 198, 275 P.3d 91, 95 (2012). A petitioner must also show actual prejudice, i.e., that the errors "worked to his actual and substantial disadvantage" by creating "error of constitutional dimensions." *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (cleaned up).

When new evidence gives rise to a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), the good cause and prejudice issues overlap with the merits of the *Brady* claim. "A successful *Brady* claim has three components: 'the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material.'" *Lisle v. State*, 131 Nev. 356, 360, 351 P.3d 725, 728 (2015) (quoting *Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000)). Those latter two elements "parallel the good

cause and prejudice showings": proof that "the State withheld the evidence generally establishes cause," and proof that "the withheld evidence was material establishes prejudice." *Id.* (cleaned up). In addition, "'a *Brady* claim [] must be raised within a reasonable time after the withheld evidence was disclosed to or discovered by the defense.'" *Id.* (quoting *Huebler*, 128 Nev. at 198 n. 3, 275 P.3d at 95 n. 3).

2. The State withheld relevant evidence.

As Mr. Slaughter previously explained in his appeal from the 2018 proceedings, the State failed to disclose three pieces of exculpatory evidence before trial: the outcome of the second photo lineup, and two critical details confirming Mr. Slaughter's alibi.

a. The State withheld evidence about the second photo lineup.

The police showed the eyewitnesses two photo lineups with Mr. Slaughter's photo. Four of the seven witnesses claimed to identify Mr. Slaughter from the first, suggestive photo lineup. But *none* of the witnesses identified him from the second, non-suggestive photo lineup. The State repeatedly misrepresented that fact.

Detective Jesus Prieto created the first photo lineup in this case. IX.App.1672-73. That lineup included a photograph of Mr. Slaughter taken a couple months before the incident. The background of Mr. Slaughter's picture is near-white, to the point that it appears transparent. By comparison, the lineup includes five filler photos with blue backgrounds. The background of Mr. Slaughter's picture is distinctive because it doesn't match the others. Mr. Slaughter's picture differs from the filler photos in other important aspects, too, for example the lighting and shadowing on the individuals' faces. In short, Mr. Slaughter's photo stands out from among the rest. *See, e.g.*, IX.App.1669-72, 1827-30, 1840-44; X.App.1896. These factors and others made the lineup suggestive. The lineup suggests, for example, that the five photos with blue backgrounds are stock images that came from the same source, so the non-conforming photo must be the actual photo of the suspect.

Detective Prieto didn't need to design the photo lineup this way. The police had other photos of Mr. Slaughter. *See, e.g.*, IV.App.692-708; IX.App.1676-82. The backgrounds of many of those photos better match the other photos in the lineup and wouldn't have stood out in the same way. However, Detective Prieto instead used a photo with a drastically

different background. Detective Prieto also could've ran a black-and-white version of the lineup, which would've minimized some of the differences. *See, e.g.* IX.App.1719-21. Instead, he insisted on using a suggestive color version.

Given the suggestive nature of this lineup, it's not surprising four of the seven witnesses purported to identify Mr. Slaughter from the lineup. V.App.878-79 (Tr. at 34-37) (Mr. Means); V.App.884-85 (Tr. at 60-62) (Mr. Young); V.App.954 (Tr. at 63-64) (Mr. John); V.App.1018-19 (Tr. at 47-49) (Mr. Posada). Three of those witnesses ultimately made in-court identifications at trial. V.App.881 (Tr. at 48) (Mr. Young); V.App.954-55 (Tr. at 64-65) (Mr. John); V.App.1019 (Tr. at 49-50) (Mr. Posada). Those in-court identifications were by far the most important evidence in the State's case.

As it turns out, Detective Prieto created a *second* photo lineup with Mr. Slaughter's image. Two people committed the home invasion, and Detective Prieto suspected Jacquan Richard was the second suspect. Detective Prieto created a second photo lineup to see if the witnesses would identify Mr. Richard. IX.App.1721; X.App.1958-63. But the lineup mistakenly included a picture of *Mr. Slaughter* as one of the filler photos.

Compare X.App.1958; *with* X.App.1960-63. The picture of Mr. Slaughter in this lineup is much less suggestive than his picture in the first lineup; the picture in the second lineup is his booking photo from his arrest in this case, a mere few days after the incident. Detective Prieto eventually drafted a police report that stated, "Photo line ups of Richard were made and shown to all of the victims. None of the victims were able to identify Richard as a suspect." X.App.1967 (cleaned up). While the report confirmed no one identified *Mr. Richard* from the lineup, it was silent about whether anyone identified *Mr. Slaughter* from the lineup.

Mr. Slaughter tried to find out the outcome of the second lineup for years, to no avail. He filed relevant pro se pleadings back in 2005 (I.App.101-09; I.App.131-46; I.App.155-61), but the State didn't disclose the outcome. He filed a counseled motion about the second photo lineup in 2009 (III.App.578-649); once again, the State didn't disclose the outcome. To the contrary, Mr. DiGiacomo said it would take a "giant leap . . . to say Rickie Slaughter wasn't picked out of those photo lineups." IV.App.675. After his trial, Mr. Slaughter raised a related claim in his first state post-conviction petition. VII.App.1284-86, 96-99. In response,

the State again disputed his allegation that none of the witnesses picked him from the second photo lineup. VII.App.1454.

Finally, in November 2017, the federal court allowed Mr. Slaughter to conduct discovery, and in February 2018, Mr. Slaughter deposed Detective Prieto. In his deposition, Detective Prieto confirmed *none* of the witnesses identified Mr. Slaughter from the second photo lineup. IX.App.1722-23. The State previously withheld this critical fact from Mr. Slaughter, which amounts to a *Brady* violation.

After Detective Prieto's deposition, Mr. Slaughter filed his 2018 petition in state court. While those proceedings were pending, he deposed the lead prosecutor, Mr. DiGiacomo. Mr. DiGiacomo provided significant new testimony about the second photo lineup.

According to Mr. DiGiacomo, he wasn't aware of the second photo lineup until he conducted a pre-trial interview with one of the witnesses at some point during or before 2005. Mr. DiGiacomo couldn't recall precisely who was present, but he guessed it was Mr. Young, Ms. Dennis, and maybe Aaron Dennis. XIV.App.2858-59. Mr. DiGiacomo was asking the witnesses about the photo lineups they saw, and someone—perhaps Mr. Young—said he recalled seeing a second photo lineup with Mr.

Slaughter's photo in it. XIV.App.2859-67. That was supposedly news to Mr. DiGiacomo.

After the meeting, Mr. DiGiacomo said he called Detective Prieto at least once (possibly twice) and expressed his displeasure that Detective Prieto had mistakenly shown the witnesses a second lineup with Mr. Slaughter's photo alongside another suspect's photo. XIV.App.2867-68, 2990. During this conversation, Detective Prieto seemed surprised to learn Mr. Slaughter's photo was in the second photo lineup. *Id.*

After speaking with Detective Prieto, Mr. DiGiacomo tried to talk to all the eyewitnesses about the second photo lineup. XIV.App.2875. Mr. DiGiacomo couldn't say whether any of the other witnesses, aside from the initial witness (probably Mr. Young), reported recognizing Mr. Slaughter's photo in the second photo lineup. XIV.App.2875-78, 2984-87. All Mr. DiGiacomo could say is at least one witness told him he (or she) recognized Mr. Slaughter in the second photo lineup. *Id.*

Mr. DiGiacomo stated he disclosed to the defense the existence of the second photo lineup and Mr. Slaughter's presence in it. XIV.App.2874-75, 2909-10, 2976. Mr. DiGiacomo admitted he didn't specifically tell Mr. Slaughter's attorneys that although one of the witnesses

supposedly recognized Mr. Slaughter from the second photo lineup, *none* of the others did. XIV.App.2909-11. Mr. DiGiacomo said he was concerned the second photo lineup would create a "mess" and would be a "red herring" if the information came out at trial. XIV.App.2886. It would make Detective Prieto look like a bad detective and would give the defense the chance to "attack[] the investigation." XIV.App.2973.

b. The State withheld evidence about Mr. Slaughter's alibi.

In addition to the outcome of the second photo lineup, the State withheld critical evidence supporting Mr. Slaughter's alibi.

The home invasion in this case took place in the evening of June 26, 2004, in North Las Vegas. Mr. Slaughter had an alibi for that evening: he was halfway across town, picking up his girlfriend (then named Tiffany Johnson) from work. To prove the alibi, the defense needed to establish at least two things: (1) the exact time the culprits left the crime scene, and (2) the exact time Mr. Slaughter picked up his girlfriend from work. The State failed to disclose key information regarding both ends of the alibi.

(1) The State withheld the 911 call time.

To establish Mr. Slaughter's alibi, the defense had to prove when the culprits left the crime scene. One of the victims, Jermaun Means, called 911 shortly after the suspects left, so the best evidence of when the suspects left would've been the 911 call time. XXII.App.4533 (a request to transfer this manually filed exhibit from the 2018 proceedings is pending). One minute and 38 seconds into the call, Mr. Means tells the dispatcher the suspects left "about five . . . five minutes ago." *Id.* at 1:38-1:40. Thus, if the defense knew when the 911 call began, they could subtract out roughly three minutes to get an accurate estimate of when the suspects left.

As it stood, the State didn't turn over any materials confirming the 911 call time. While the State turned over police reports to the defense that referenced 7:11 p.m (*see, e.g.*, I.App.3), none explained what that time meant, and none explicitly stated when the police received Mr. Means's 911 call. It wasn't until January 2018 that Mr. Slaughter received a document from the North Las Vegas Police Department confirming the dispatcher received the call at 7:11 p.m. I.App.2. The State therefore withheld the precise 911 call time from the defense. Had the defense

known the call came in at 7:11 p.m., they could've demonstrated the suspects left roughly three minutes earlier, at about 7:08 p.m.

Mr. DiGiacomo criticized the defense at trial for failing to introduce the 911 call time and made misleading comments about the issue. The defense had proposed using a closing PowerPoint that stated the 911 call took place at 7:11 p.m. Mr. DiGiacomo objected. VI.App.1122 (Tr. at 77-78). He said none of the call times were "in evidence," so the defense could say only that Mr. Means placed the call at 7:00 p.m., not 7:11 p.m. The court agreed. VI.App.1122-23 (Tr. at 79, 82). The defense was therefore stuck arguing the call occurred at about 7:00 p.m., even though the suspects were still at the scene until 7:08 p.m. VI.App.1123 (Tr. at 84) (defense's closing argument) ("[T]he suspects left about 7:00 o'clock . . . [the victims] called the police approximately at that time.").

Mr. Slaughter tried to litigate a related issue in his first state post-conviction petition. VII.App.1311-16. In response, the State faulted Mr. Slaughter for failing to present "any evidence showing that the 911 call was in fact made at 7:11p.m." VII.App.1450.

In November 2017, the federal court allowed Mr. Slaughter to conduct discovery, and in roughly January 2018, Mr. Slaughter received a

document confirming the North Las Vegas dispatch received the 911 call at 7:11 p.m. I.App.2. The State committed a *Brady* violation by failing to turn over this document sooner.

After receiving this document, Mr. Slaughter filed his 2018 petition. While those proceedings were pending, he deposed the lead prosecutor, Mr. DiGiacomo. At the deposition, Mr. DiGiacomo admitted he didn't "have an independent recollection of seeing [the relevant] document before," which tends to show he didn't turn over the document to the defense before trial. XIV.App.2927. That testimony further supports Mr. Slaughter's allegations that the State withheld this critical document.

(2) The State withheld impeachment material about Jeffrey Arbuckle.

To establish Mr. Slaughter's alibi, the defense also had to prove when Mr. Slaughter picked up his girlfriend (Ms. Johnson) from work. Ms. Johnson testified Mr. Slaughter arrived "between 7:00 to 7:15; no later than 7:20." V.App.1050 (Tr. at 21). On the other hand, Ms. Johnson's coworker, Jeffrey Arbuckle, testified Mr. Slaughter arrived on or after 7:30 p.m. V.App.946 (Tr. at 41-42). Mr. Arbuckle previously told the police Mr. Slaughter arrived on or after 7:15 p.m., which matches Ms.

Johnson's testimony. I.App.55-56. But he backed away from that estimate at trial, providing a more prosecution-friendly account.

It was important for the defense to get the jury to believe Ms. Johnson and disbelieve Mr. Arbuckle about when Mr. Slaughter arrived. One way to do that would've been to show Mr. Arbuckle had a motive for bias against Mr. Slaughter. In his pro se pleadings, Mr. Slaughter suggested Mr. Arbuckle might've called the police on him on a prior occasion, which would tend to show bias. VII.App.1326. Mr. Slaughter was aware *someone* had placed a call to the police about him. But he lacked definitive proof it was *Mr. Arbuckle* who had placed this call.

In November 2017, the federal court allowed Mr. Slaughter to conduct discovery, and in roughly January 2018, Mr. Slaughter received a document confirming Mr. Arbuckle was the person who called the police on Mr. Slaughter. I.App.1. The State committed a *Brady* violation by failing to turn over this document sooner.

After receiving this document, Mr. Slaughter filed his 2018 petition. While those proceedings were pending, he deposed the lead prosecutor, Mr. DiGiacomo. At the deposition, Mr. DiGiacomo admitted he hadn't seen this document before, which again tends to show he didn't turn over

the document to the defense before trial. XIV.App.2964. That testimony further supports Mr. Slaughter's allegations that the State withheld this critical document.

3. The withheld evidence was material.

Each of these three pieces of evidence is material, both individually and cumulatively, so the State's non-disclosures violated *Brady*, as Mr. Slaughter previously explained in his appeal from the 2018 proceedings.

For the purposes of *Brady*, "evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed." *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). Put another way, the Court should find the evidence material if "the nondisclosure undermines confidence in the outcome of the trial." *Id.* In Nevada, if the defense specifically requests a piece of evidence and the prosecution still fails to turn it over, a petitioner can establish materiality by showing "a reasonable *possibility* that the omitted evidence would have affected the outcome." *Id.* When assessing materiality, "the undisclosed evidence must be considered collectively, not item by item." *Id.*

Each of the three pieces of evidence meets these standards, both individually and collectively.

a. The outcome of the second photo lineup was material.

The eyewitnesses' non-identifications during the second photo lineup were critical information that probably would've changed the outcome of the trial.

As a threshold matter, Mr. Slaughter engaged in motions practice about the second photo lineup, and the State misrepresented the outcome at the relevant hearing. Thus, Mr. Slaughter need show only a "reasonable possibility" (as opposed to a "reasonable probability") the evidence would've altered the verdict. *Mazzan*, 116 Nev. at 66, 993 P.2d at 36.

In any event, the outcome of the second photo lineup is material under either burden of persuasion. The State's strongest evidence at trial (and the only direct evidence against Mr. Slaughter) was the three victims' in-court identifications. The reason the victims identified Mr. Slaughter was because they'd seen an initial suggestive photo lineup with his picture in it. But when the police showed the victims a *second* photo lineup that (unbeknownst to the police) contained *another* picture of Mr.

Slaughter, *none* of the victims was able to identify him. That fact eroded the reliability of the victims' identifications, both from the first lineup and in court. As a matter of logic, either the victims got it wrong on the first lineup and right on the second lineup (as Mr. Slaughter maintains), or they got it wrong on the second lineup and right on the first lineup (as the prosecution would argue); either way, the fact that the victims definitely got it wrong at least once casts a heavy cloud over their purported in-court identifications.

Aside from the identifications, the State's evidence against Mr. Slaughter was weak, as he explains below. If the State had told the defense the outcome of the second photo lineup, and if the defense had told the jury about that second lineup, there's a reasonable probability (and certainly a reasonable *possibility*) the verdict would've been different.

b. The alibi information was material.

Mr. Slaughter's attorneys tried to present an alibi defense at trial, but their timeline was imprecise. The State withheld information that would've filled in those gaps. Had the defense been able to use that evidence, the jury probably would've reached a different result.

The alibi had two key elements: the time the culprits left the crime scene, and the time Mr. Slaughter arrived to pick up Ms. Johnson. It would've taken at least 20 minutes for Mr. Slaughter to drive from the crime scene to Ms. Johnson's workplace (VII.App.1389-99), so if the crime ended fewer than 20 minutes before Mr. Slaughter picked up Ms. Johnson, then Mr. Slaughter couldn't have been involved in the crime.

The missing evidence affected the timeline on both ends. If the State had disclosed the 911 call time, the defense would've been able to prove the culprits left at about 7:08 p.m. As it stood, the defense was stuck saying the culprits left at about 7:00 p.m. Those are a critical eight minutes in a case where every minute mattered. Similarly, if the State had disclosed Mr. Arbuckle's trespassing complaint, the defense would've had an angle to attack his testimony (that Mr. Slaughter didn't arrive until 7:30 p.m. at the earliest) and explain why the jury should believe Ms. Johnson instead (that Mr. Slaughter arrived between 7:00 p.m. and 7:15 p.m., but no later than 7:20 p.m.).

The difference this evidence would've made is striking. At trial, the defense could say only that the suspects left at about 7:00 p.m., and the jury heard unimpeached testimony from Mr. Arbuckle that Mr.

Slaughter arrived no earlier than 7:30 p.m. It's possible (albeit unlikely) that a culprit could've left the crime scene at 7:00 p.m., dropped off the second culprit somewhere, cleaned up any blood or other incriminating material from the car, and gotten to Ms. Johnson's workplace by 7:30 p.m. But with the new evidence, the defense attorneys could've shown (1) the culprits didn't leave until 7:08 p.m.; and (2) there's good reason to doubt Mr. Arbuckle's credibility and conclude Mr. Slaughter probably showed up at 7:15 p.m. It would've been impossible for Mr. Slaughter to have made that drive in seven minutes, which means he has a solid alibi for the crime. But the jury couldn't consider this solid alibi: instead, the State withheld relevant evidence, so the jury heard a watered-down version. Had the jury known the full story, the alibi probably would've produced reasonable doubt.

B. The Court should reach these issues notwithstanding its previous decision.

Mr. Slaughter previously attempted to litigate these issues in his 2018 petition, and the Court rejected his appeal. That decision shouldn't control the outcome here because Mr. Slaughter is relying on new evidence—Mr. DiGiacomo's deposition—and because Mr. Slaughter can

demonstrate his innocence. The Court should reexamine these issues and rule in Mr. Slaughter's favor.

1. The law of the case doctrine has exceptions for new evidence, and for innocence.

The law of the case doctrine generally requires courts to abide by previous rulings. "[W]hen an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and upon subsequent appeal." *Hsu v. County of Clark*, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (2007) (cleaned up). The doctrine "is designed to ensure judicial consistency and to prevent reconsideration," among other policy concerns. 123 Nev. at 630, 173 P.3d at 728 (cleaned up). However, the doctrine isn't a "jurisdictional rule," nor a "limit" on judicial power. *Id.* Under certain circumstances, therefore, a court may depart from law of the case and reconsider earlier rulings.

There are a variety of exceptions to law of the case. For one, this Court will depart from law of the case if a litigant relies on "substantially new or different evidence" in a new appeal. *Rippo v. State*, 134 Nev. 411, 428, 423 P.3d 1084, 1101 (2018). For another, this Court will reconsider

prior rulings if "they are so clearly erroneous that continued adherence to them would work a manifest injustice." *Hsu*, 123 Nev. at 631, 173 P.3d at 729 (cleaned up). For example, law of the case shouldn't apply when the previous decision "would amount to a fundamental miscarriage of justice." 123 Nev. at 632, 173 P.3d at 729 (cleaned up). A fundamental miscarriage of justice may occur if "the defendant is actually innocent of the crime." *Leslie v. Warden*, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002) (cleaned up). And as a general matter, "a court of last resort has limited discretion to revisit the wisdom of its legal conclusions when it determines that further discussion is warranted." *Pellegrini v. State*, 117 Nev. 860, 885, 34 P.3d 519, 535-36 (2001). Thus, in certain situations, the Court may take another look at its prior rulings and reach a different outcome.

2. Those exceptions apply in this case.

Here, the Court's previous decision resolving the 2018 petition isn't binding on this appeal, because (1) Mr. Slaughter is relying on new evidence; (2) the Court's prior decision is clearly erroneous and manifestly unjust; and (3) Mr. Slaughter can demonstrate his innocence.

a. Mr. Slaughter is relying on substantial new evidence.

Mr. Slaughter is now relying on Mr. DiGiacomo's deposition, which wasn't part of the record on appeal when the Court issued its previous decision. The Court should revisit the relevant issues based on the deposition, which amounts to "substantially new or different evidence." *Rippo*, 134 Nev. at 428, 423 P.3d at 1101.

(1) There's substantial new evidence about the second photo lineup.

During his deposition, Mr. DiGiacomo discussed the second photo lineup at length. As described above, Mr. DiGiacomo claimed he learned about the second lineup from an eyewitness; he confronted Detective Prieto about the mistake; and he interviewed the other eyewitnesses to determine if any of them had noticed Mr. Slaughter in the second lineup. He then disclosed the existence of the second lineup to the defense but declined to mention the multiple eyewitnesses who failed to identify Mr. Slaughter from the lineup. He was concerned the jury would discredit Detective Prieto's investigation if it learned about the second lineup.

This testimony is substantial new evidence that warrants a law of the case exception. Specifically, when a prosecutor *directly admits* facts that show the State withheld exculpatory evidence, a court shouldn't be constrained by law of the case. Here, Mr. DiGiacomo admitted he knew there were non-identifications, yet he avoided telling the defense about the outcome. This new testimony justifies the Court taking a fresh look at this claim.

On its face, the new evidence supports Mr. Slaughter's *Brady* claim, but the evidence also demands further factual development. Assuming Mr. DiGiacomo's testimony is true, he knowingly committed a *Brady* violation by withholding the fact that five out of six (or six out of seven) eyewitnesses failed to identify Mr. Slaughter from the second lineup. But despite Mr. DiGiacomo's testimony, Mr. Slaughter still maintains *none* of the six identified him from the second lineup, as Detective Prieto agreed in *his* deposition. Mr. DiGiacomo's testimony creates a factual dispute on that issue and raises more questions than it answers. An evidentiary hearing is appropriate to determine what exactly happened regarding this lineup. *See, e.g.*, *Marshall v. State*, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994) (describing the standard for receiving a hearing).

Under Mr. DiGiacomo's version of events, Mr. Young viewed the second photo lineup; noticed Mr. Slaughter; apparently decided not to tell Detective Prieto he saw Mr. Slaughter; but then, apropos of nothing, decided to tell Mr. DiGiacomo about the second lineup. That's an unlikely series of events. If Mr. Young saw Mr. Slaughter in the second lineup, he probably would've told Detective Prieto. *See* III.App.627 (instructing, "If previously you have seen one or more of the persons in this photo spread, write your initials in the 'INITIALS' space(s) beside the photo(s) of the person(s) you have seen."). It defies common sense to think a witness would've behaved in the manner Mr. DiGiacomo suggests, which means Mr. DiGiacomo's account is probably wrong.

Mr. DiGiacomo's story also doesn't line up with what other witnesses remember. According to Mr. DiGiacomo, he called Detective Prieto about the second lineup; Mr. DiGiacomo was "very unhappy" Detective Prieto had mistakenly included Mr. Slaughter's photo in the second lineup, and Mr. DiGiacomo "express[ed]" to Detective Prieto his "displeasure that this had occurred in this particular case." XIV.App.2868. If such a contentious phone call had taken place, this "unusual situation" would probably be "seared in" Detective Prieto's mind. XIV.App.2867.

But Detective Prieto didn't mention this phone call during his deposition, despite being asked about the second photo lineup at length. If Detective Prieto doesn't remember this call, then it probably didn't happen.

Likewise, Mr. DiGiacomo suggested the original lead prosecutor on the case (Susan Krisko) could confirm his account. XIV.App.2864. But Ms. Krisko doesn't remember anything about the photo lineups in this case. XX.App.3909-10 ¶ 22.

One of the eyewitnesses who identified Mr. Slaughter from the first photo lineup, Ryan John, remembers seeing a second photo lineup but doesn't remember recognizing anyone from that lineup and doesn't remember talking to Mr. DiGiacomo about the lineups before trial. XX.App.3907-08 ¶¶ 5-8. Another of the eyewitnesses who identified Mr. Slaughter from the first photo lineup, Jermaun Means, remembers the first photo lineup but doesn't remember being shown a second photo lineup and doesn't remember talking to Mr. DiGiacomo about the lineups before trial. XX.App.3908 ¶¶ 9-13.

Mr. DiGiacomo thought Mr. Slaughter's trial lawyers would be able to confirm Mr. DiGiacomo's account. XIV.App.2884, 2906-08. But the trial lawyers disagree. XX.App.3894 ¶¶ 4-5; XX.App.3909 ¶ 16.

In sum, despite extensive post-deposition investigation, Mr. Slaughter hasn't spoken to any witnesses—lay witnesses, police officers, prosecutors, or defense attorneys—who verified Mr. DiGiacomo's story. That raises questions about whether his testimony is correct. Nor is there any written evidence corroborating his version of events, like notes about his pre-trial interviews with the eyewitnesses. As Mr. DiGiacomo put it, he didn't memorialize the interviews because they "didn't seem to be of much moment to me" (XIV.App.2881)—even though the situation made him "very unhappy," even though he called Detective Prieto to "express[] [his] displeasure," and even though the incident remains "seared in [his] mind" because it was such an "unusual situation" (XIV.App.2867-68). The lack of any written work product memorializing this "unusual situation" (XIV.App.2867) sheds doubt on whether it occurred.

Similarly, Mr. DiGiacomo made multiple pre-trial statements about the second photo lineup—he personally authored relevant pleadings and made various misrepresentations in court, for example stating it would take a "giant leap . . . to say Rickie Slaughter wasn't picked out of those photo lineups." IV.App.675. But at no point did Mr. DiGiacomo provide

an on-the-record description of the second photo lineup that's consistent with his testimony.

On its face, Mr. DiGiacomo's testimony is suspect because it lacks crucial details. Mr. DiGiacomo couldn't remember which eyewitness reported recognizing Mr. Slaughter's photo from the second photo lineup. He couldn't say how many eyewitnesses saw Mr. Slaughter's photo in the second lineup (although, based on its testimony, it was probably only one at most). He doesn't recall many specifics of the conversations he had with the eyewitnesses or Detective Prieto. He was confused about when, exactly, this all happened: he originally said he first got involved in the case right before or shortly after Mr. Slaughter entered his guilty plea in April 2005 (XIV.App.2817, 2860-64), but then he suggested this pre-trial interview might've happened much earlier (XIV.App.2915-16, 2975). The lack of detail is surprising for such an "unusual situation" that still supposedly remains "seared in [Mr. DiGiacomo's] mind." XIV.App.2867.

To summarize, Mr. DiGiacomo's deposition testimony is important for two reasons: (1) on its face, it supports Mr. Slaughter's *Brady* claim; and (2) it raises serious questions about what, exactly, happened with the

second photo lineup. Given this substantial new evidence, the Court should decline to apply law of the case and should revisit this claim anew.

(2) There's substantial new evidence about the alibi.

As with the second photo lineup, Mr. DiGiacomo provided important testimony about Mr. Slaughter's alibi.

First, Mr. Slaughter questioned Mr. DiGiacomo about a document memorializing when the eyewitnesses called 911. Mr. DiGiacomo admitted he didn't "have an independent recollection of seeing [the relevant] document before," which tends to show he didn't turn over the document. XIV.App.2927. That testimony supports Mr. Slaughter's allegations that the State withheld this critical document.

Second, Mr. Slaughter questioned Mr. DiGiacomo about a document memorializing a call Mr. Arbuckle placed to the police to complain about Mr. Slaughter allegedly trespassing. Mr. DiGiacomo admitted he hadn't seen this document before either, which again tends to show he didn't turn over the document. XIV.App.2964.

This testimony further supports Mr. Slaughter's allegations that the State withheld crucial alibi information. The Court should reconsider these claims given this substantial new evidence.

b. The Court's previous decision is clearly erroneous and manifestly unjust.

When the Court resolved Mr. Slaughter's previous appeal, it reached "clearly erroneous" conclusions regarding all three *Brady* issues. *Hsu*, 123 Nev. at 631, 173 P.3d at 729. That decision created a "manifest injustice" (*id.*) (cleaned up) because it upheld the conviction of an innocent person despite the prosecution's failure to satisfy its *Brady* obligations. The Court should take a second look at these issues and resolve them correctly in this appeal.

(1) The Court incorrectly resolved the second photo lineup issues.

During the previous appeal, the Court rejected Mr. Slaughter's arguments about the second photo lineup. With respect, its conclusions were clearly erroneous.

According to the Court, the State didn't withhold the outcome of the second lineup. "Before trial, [the defense] was provided with copies of the

second photographic lineup and knew that [Mr. Slaughter] was in the lineup." XXII.App.4507. The defense subsequently argued "there was no notation or indication of his being identified." XXII.App.4508. The Court concluded, "[t]he outcome of the second lineup was therefore not withheld." *Id.*

This logic is clearly erroneous. Mr. Slaughter acknowledges the defense knew before trial Detective Prieto had shown the eyewitnesses a second photo lineup with Mr. Slaughter's picture in it. The defense also knew the existing records didn't memorialize any identifications. The defense therefore suspected the eyewitnesses hadn't identified Mr. Slaughter from the second lineup. But the prosecution *refused* to confirm that fact. Indeed, when the defense raised their suspicions, Mr. DiGiacomo affirmatively *misled* Mr. Slaughter and the court, stating it would take a "giant leap . . . to say Rickie Slaughter wasn't picked out of those photo lineups." IV.App.675. A defense attorney may generally assume the prosecutor isn't withholding exculpatory evidence and is accurately characterizing the exculpatory (or inculpatory) nature of evidence in open court. *See, e.g.*, *Strickler v. Greene,* 527 U.S. 263, 286 (1999) (concluding

"conscientious defense counsel" may ordinarily rely on the "presumption" that prosecutors act appropriately).

Mr. DiGiacomo had a reason to mislead the defense. As he admitted in his deposition, he declined to tell the defense there had been no identifications (or, at most, only one identification) from the second photo lineup. XIV.App.2909-11. He believed the second photo lineup made Detective Prieto look sloppy. XIV.App.2886, 2973. Thus, while Mr. DiGiacomo disclosed the *existence* of the second photo lineup, he knowingly withheld the *outcome*.

By analogy, assume the police speak to a key witness but decline to record the interview. The witness makes exculpatory statements. The prosecution discloses to the defense that an unrecorded interview took place but declines to disclose the witness made exculpatory statements. The defense complains about the unrecorded interview to the court and says they suspect the witness may have made exculpatory statements. The prosecutor says that as a matter of fact, the witness didn't make any exculpatory statements. That would be a clear-cut *Brady* violation. While the prosecution told the defense an interview *occurred*, it failed to disclose (and indeed *denied*) the *exculpatory contents* of the interview.

The same is true here. While the prosecution told the defense the second photo lineup *existed*, it failed to disclose (and indeed *denied*) the *exculpatory contents*. The Court's prior contrary ruling is clearly erroneous.

The Court also concluded the evidence wasn't material. In its view, the prosecution presented various incriminating evidence, including the following: (1) "in-court identifications by three of the victims," (2) "surveillance video showing appellant using a victim's ATM card shortly after the incident," and (3) "the fact that appellant's girlfriend owned a vehicle, to which appellant had access, resembling the witnesses' descriptions and containing two firearms consistent with those used in the crimes and ammunition consistent with ballistic evidence recovered from the scene." XXII.App.4508 (cleaned up).

Once again, this logic is clearly erroneous. First, the Court relied on the fact three witnesses identified Mr. Slaughter in court. But those same three witnesses saw the second photo lineup, and *none* of the three (or, at the very most, only one) identified Mr. Slaughter from that lineup. That's a highly exculpatory fact that undercuts the in-court identifications. If the witnesses purported to identify Mr. Slaughter from an initial suggestive lineup but then failed to identify Mr. Slaughter from a second

non-suggestive lineup—a double-blind lineup (because the detective didn't realize Mr. Slaughter's picture was in it), and a lineup featuring a more contemporaneous and less suggestive photo of Mr. Slaughter—then a reasonable juror would likely have reasonable doubt about whether the witnesses' in-court identifications were accurate. After all, as a matter of logic, the witnesses must've gotten it wrong on one of the lineups: either they mistakenly identified Mr. Slaughter in the first lineup and correctly declined to identify him the second time (as Mr. Slaughter maintains), or they correctly identified him in the first lineup but then mistakenly declined to identify him the second time (as the prosecution would suggest). Under either scenario, the mistake casts substantial doubt on the eyewitnesses' abilities to reliably identify the perpetrators.

Second, the Court relied on surveillance video purportedly showing Mr. Slaughter using Mr. John's ATM card shortly after the incident. The police collected surveillance video showing a black male in a 7-Eleven. The court admitted the video at trial. Mr. John testified his bank told him someone used his card at a 7-Eleven shortly after the incident. But the State didn't present any evidence that the video came from the *same* 7-Eleven where someone (perhaps the suspect, perhaps someone else)

supposedly used Mr. John's card. In any event, there's simply no way to tell whether Mr. Slaughter is the black male in the video. Here are three surveillance stills from the video, each of which were separately admitted into evidence at trial:

I.App.27, 29, 31. Here are Mr. Slaughter's photos from the two lineups:

X.App.1896; XX.App.3899. There's no way a reasonable juror could definitively say Mr. Slaughter is the person in the video.

In its opinion, the Court mentioned deference to the lower court's determination the video depicted Mr. Slaughter. XXII.App.4508. But an appellate court can compare the surveillance stills to the photos of Mr. Slaughter just as well as a lower court. In any event, any suggestion the

video specifically depicts Mr. Slaughter is wrong, even granting the most generous deference.

Third, the Court stated Mr. Slaughter had access to a car that generally fit the witnesses' description of the getaway car, and the police found guns and ammunition in the car that were generally consistent with the guns used at the crime scene. Neither of these points is particularly probative.

As for the ballistics evidence, the police found two guns in Mr. Slaughter's girlfriend's car, but neither of them could've produced the bullet fragments found at the crime scene. Thus, those two guns didn't link up to the crime scene in any definitive way. The police also found a .380 shell casing in the car. The State presented testimony that the bullet fragments from the scene could've been from a .380 round. But the bullet fragments could've been consistent with lots of other bullet types as well. *See* VIII.App.1561. The shell casing by itself is a tenuous link to the crime, just like the guns.

As for the car, Mr. Slaughter's girlfriend drove a green Ford Taurus. One witness told the police the getaway car was "possibly a Pontiac Grand Am." I.App.17 (cleaned up). Another said she heard the

perpetrators mentioned owning a Pontiac. I.App.7. Even if the witnesses had consistently described seeing a green Ford Taurus, the fact Mr. Slaughter had access to a green Ford Taurus has only minor evidentiary value, since that's not an uncommon make or color.

In sum, the three categories of allegedly inculpatory evidence the Court referenced—the in-court identifications, the 7-Eleven video, and the supposed matches between crime scene and the cars and guns—are only weakly probative at best. The Court clearly erred when it concluded otherwise. The State's case rose and fell with the in-court identifications. The prosecution's failure to disclose the outcome of the second photo lineup was material because there's a reasonable probability (and certainly a reasonable possibility) the jury would've found reasonable doubt if it knew it couldn't trust the in-court identifications based on the second photo lineup. The Court should decline to apply law of the case and should revisit these issues to prevent manifest injustice.

(2) The Court incorrectly resolved the alibi issues.

With respect, the Court clearly erred when it downplayed the significance of Mr. Slaughter's new alibi evidence.

To recap, in his 2018 petition, Mr. Slaughter presented new, definitive evidence the eyewitnesses called the police at 7:11 p.m. Through simple arithmetic, we can tell the perpetrators left the crime scene at about 7:08 p.m. The evidence also indicates Mr. Slaughter picked up Ms. Johnson (his girlfriend) halfway across town at about 7:15 p.m. It would've taken between 20 and 30 minutes to make that drive at a minimum. Mr. Arbuckle (Ms. Johnson's coworker) initially told the police Mr. Slaughter arrived on or after 7:15 p.m., but at trial he revised his estimate to 7:30 p.m. In turn, Mr. Slaughter presented new, definitive evidence Mr. Arbuckle had a motive for bias: he'd previously called the police on Mr. Slaughter, which explains why he might revise his testimony in a prosecution-friendly manner.

The Court erroneously rejected Mr. Slaughter's alibi claims. As for the 911 call time, the Court concluded the prosecution didn't withhold that information because the defense knew "officers were dispatched in reference to the incident" "at or about 7:11 p.m." XXII.App.4509. But the dispatch time isn't necessarily the same as the 911 call time: there can be delays between when a victim calls 911 and when the dispatcher sends out officers to respond. Indeed, the prosecution took this very position at

trial. Mr. DiGiacomo objected to the defense telling the jury the 911 call took place at 7:11 p.m. because the dispatch time is different from the call time. VI.App.1122-23 (Tr. at 77-82). Instead, he argued, the defense could tell the jury only that the 911 call time was about 7:00 p.m. *Id.* Had Mr. DiGiacomo turned over the actual 911 call records—and Mr. DiGiacomo admitted in his deposition he didn't (XIV.App.2927)—the defense could've admitted them at trial and avoided Mr. DiGiacomo's objection. The Court's contrary reasoning is incorrect.

The Court also mistakenly concluded the call time wasn't material. It noted Mr. Arbuckle's testimony that Mr. Slaughter didn't arrive to pick up Ms. Johnson until 7:30 p.m. XXII.App.4510. But Mr. Arbuckle originally told the police Mr. Slaughter was there at about 7:15 p.m., which is consistent with Ms. Johnson's testimony and Mr. Slaughter's alibi. While he altered his testimony at trial to favor the State, the prosecution withheld evidence showing Mr. Arbuckle had a motive for bias against Mr. Slaughter. On balance, the evidence shows Mr. Slaughter most likely arrived at 7:15 p.m., which is inconsistent with him being one of the perpetrators and leaving the scene at 7:08 p.m.

The Court suggested Mr. Slaughter made statements on recorded jail calls urging Ms. Johnson to fabricate an alibi. XXII.App.4510. The relevant call can't be reasonably understood that way. On the call, Ms. Johnson told Mr. Slaughter about how Detective Prieto had interrogated her. According to her, Detective Prieto had asked Ms. Johnson whether Mr. Slaughter picked her up on time. Ms. Johnson said she told Detective Prieto she "got off [work] a few minutes early, so [Mr. Slaughter] was there before 7:30." I.App.43. In response, Mr. Slaughter said she should've told Detective Prieto he "was there at 7:00," because he was, in fact, "there [] at . . . 7 o'clock." I.App.44.

Mr. Slaughter's response is entirely consistent with a genuine alibi, and it can't be plausibly interpreted as an attempt to coerce false testimony. Ms. Johnson's shift ended at 7:00 p.m. V.App.946 (Tr. at 41); V.App.1049 (Tr. at 20). But she was apparently confused about that when she spoke to Detective Prieto. If she'd gotten off work a few minutes early (i.e., a few minutes before 7:00 p.m.), then Mr. Slaughter would've gotten there at about 7:00 p.m.; if he got there at 7:30 p.m., he would've been half an hour late, not a few minutes early. Mr. Slaughter therefore corrected Ms. Johnson, who had her times wrong. This isn't a situation

where, apropos of nothing, Mr. Slaughter asked Ms. Johnson to manufacture an alibi out of whole cloth. The Court misunderstood this exchange. Nor was there any need for the Court to defer to the lower court's unreasonable description of the call (XXII.App.4510); this Court can review the transcript just as well as the lower court.

The Court then concluded Mr. Slaughter's alibi wasn't convincing because there were three in-court identifications, and because video surveillance showed him using a victim's ATM card. XXII.App.4510. But as Mr. Slaughter already explained, the in-court identifications are unreliable because the victims failed to identify him from the second photo lineup. Nor is the video surveillance probative. Even if these pieces of evidence could be viewed as inculpatory, a firm alibi would necessarily create reasonable doubt: it's not possible for Mr. Slaughter to have left the crime scene at 7:08 p.m. and picked up Ms. Johnson at about 7:15 p.m. The Court's contrary conclusion is clearly erroneous.

Likewise, the Court's analysis regarding Mr. Arbuckle's trespassing complaint is flawed. The Court suggested the State didn't withhold the evidence because Mr. Slaughter knew someone had placed a trespassing complaint against him, and he suspected it was Mr. Arbuckle.

XXII.App.4510-11. But Mr. Slaughter had no way of *proving* Mr. Arbuckle placed the call until 2018. Knowing someone placed a call isn't the same as knowing who placed the call. Meanwhile, Mr. DiGiacomo acknowledged at his deposition he didn't disclose this information. XIV.App.2964. The Court's contrary decision is clearly erroneous.

In sum, Mr. Slaughter received evidence in 2018 that definitively proves his alibi. The Court's previous decision is clearly erroneous and caused manifest injustice. The Court should rule in Mr. Slaughter's favor in this appeal.

c. Adhering to the previous decision would create a fundamental miscarriage of justice.

The law of the case doctrine shouldn't apply because Mr. Slaughter is innocent, as he explains in the next section. *Hsu*, 123 Nev. at 632, 173 P.3d at 729. Because he can demonstrate innocence, the Court should give a fresh look to these issues in this appeal.

II. Mr. Slaughter is innocent.

Mr. Slaughter is innocent, so he should be able to litigate his claims on the merits. Because innocence is an exception to law of the case (*Hsu*, 123 Nev. at 632, 173 P.3d at 729), the Court shouldn't be bound by its

previous erroneous decision on this issue. It should give Mr. Slaughter's innocence a second look.

A. Courts may resolve untimely or successive petitions on the merits if a petitioner is innocent.

If an otherwise procedurally barred petitioner can establish actual innocence, the Court may reach the merits of any otherwise procedurally barred claims. *See, e.g.*, *Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006). The Nevada actual innocence inquiry mirrors the federal inquiry into whether a petitioner has demonstrated actual innocence for the purposes of overcoming similar procedural obstacles. *Id.* (citing federal cases). This exception helps avoid the "fundamental miscarriage of justice" that would result if procedural rules barred relief on "constitutional errors [that] result[ed] in the incarceration of innocent persons." *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (cleaned up).

To establish actual innocence, "a petitioner 'must show that it is more likely than not that no reasonable juror would have convicted him in the light of [] new evidence.'" *Perkins*, 569 U.S. at 399 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). "[O]r, to remove the double negative,"

the petitioner must establish it's "more likely than not any reasonable juror would have reasonable doubt" about guilt. *House v. Bell*, 547 U.S. 518, 538 (2006).

On the one hand, the standard to prove a gateway claim is somewhat high: the petitioner must show all reasonable jurors would've had reasonable doubt. On the other hand, the burden of persuasion is moderate: the petitioner has to prove only that it's "more likely than not" all reasonable jurors would've had reasonable doubt, a burden that mirrors the "preponderance of the evidence" standard. *Gage v. Chappell*, 793 F.3d 1159, 1168 (9th Cir. 2015).

When it comes to gateway claims, petitioners also have a burden of production: they must come forward with "newly presented," "reliable" evidence of innocence that wasn't admitted at trial. *Griffin v. Johnson*, 350 F.3d 956, 961-63 (9th Cir. 2003). This requirement doesn't demand evidence that was "newly discovered" after trial; any evidence outside the trial record will suffice. *Id.* The new evidence need not "affirmatively prov[e]" innocence; it need only "undercut[] the reliability of the proof of guilt." *Lee v. Lampert*, 653 F.3d 929, 938 (9th Cir. 2011).

If the petitioner provides new evidence of innocence, a court must then weigh "all the evidence, old and new, incriminating and exculpatory, admissible at trial or not." *Lee*, 653 F.3d at 938 (cleaned up). "On this complete record, the court makes a probabilistic determination about what reasonable, properly instructed jurors would do" during deliberations. *Id.* (cleaned up).

B. Mr. Slaughter meets the standard to prove innocence.

Mr. Slaughter has proven he's actually innocent, as he previously explained in the 2018 proceedings.

1. Mr. Slaughter has a solid alibi.

Mr. Slaughter presented an alibi defense at trial: at around the same time the home invasion was ending, he was halfway across town, picking up Ms. Johnson from work. But because of a combination of *Brady* violations and ineffective assistance, Mr. Slaughter was unable to present a tight timeline. Based on new evidence, he now has a concrete timeline that proves his innocence.

To start, the suspects left the crime scene at 7:08 p.m. But the jury heard the suspects left around 7:00 p.m.

It would've taken someone about 20 or 30 minutes to get from the crime scene to Ms. Johnson's workplace—and that doesn't account for the time it would've taken to drop off the co-conspirator, change out of the odd clothes the suspects were supposedly wearing, dispose of incriminating evidence, clean up, or anything else. *See* VII.App.1389-99; IX.App.1758-59. But Mr. Slaughter's attorneys ineffectively failed to present this information to the jury, so it didn't hear how long that drive would've taken.

Finally, Mr. Slaughter arrived to pick up Ms. Johnson between 7:00 and 7:15 p.m., but no later than 7:20 p.m. Mr. Arbuckle testified Mr. Slaughter didn't show up until after *7:30 p.m.*, but Mr. Arbuckle previously told the police it was *7:15 p.m.* I.App.55-56; IX.App.1774. The jury didn't learn about Mr. Arbuckle's prior inconsistent statement. Nor did it learn Mr. Arbuckle had a motive to change his testimony in the State's favor. Notably, Mr. Arbuckle and Ms. Johnson agreed Mr. Arbuckle left work right at the same time Mr. Slaughter arrived. V.App.946 (Tr. at 42); V.App.1059 (Tr. at 60). Thus, if Mr. Arbuckle had testified consistently with his prior statement to the police (7:15 p.m.), his account

would've matched Ms. Johnson's perfectly: Mr. Slaughter arrived right at about 7:15 p.m., right when Mr. Arbuckle was leaving work.

In sum, the new evidence supports the following timeline: the suspects left at 7:08 p.m., and Mr. Slaughter arrived to pick up Ms. Johnson at about 7:15 p.m. There's no way Mr. Slaughter could've left the crime scene at 7:08 p.m. and met Ms. Johnson at 7:15 p.m. if the drive would've taken 20 minutes at the absolute bare minimum. That means Mr. Slaughter couldn't have been a perpetrator.

The jury didn't know this. For all it knew, the suspects left the crime scene at about 7:00 p.m.; it would've taken some unknown amount of time to get from the crime scene to Ms. Johnson's workplace; and Mr. Slaughter showed up at the workplace maybe at 7:15 p.m., or perhaps after 7:30 p.m. This timeline was potentially too loose to create reasonable doubt. But if the jury had heard the concrete timeline Mr. Slaughter is now able to present, it would've been much more likely to acquit. *See, e.g.*, *Schlup v. Delo*, 912 F. Supp. 448, 455 (E.D. Mo. 1995) (holding, on remand from the U.S. Supreme Court, that the petitioner had proven his innocence based in part on new evidence involving an alibi timeline, notwithstanding two eyewitness identifications).

2. The victims' identifications aren't reliable.

Three victims purported to identify Mr. Slaughter at trial as one of the two suspects. (Four identified Mr. Slaughter off the first lineup, but only three could identify him in person.) Those identifications aren't reliable. The initial lineup was suggestive. The witnesses then saw a second photo lineup with Mr. Slaughter's picture, but *none* of them (or, at the most, only one of them) identified him from that second, non-suggestive lineup. That fact destroys the reliability of the eyewitness identifications, from the lineup and in court. But the jury wasn't aware of the second photo lineup. If the jury had known about it, it would've had a much harder time crediting the purported identifications.

3. The State's other evidence of guilt was weak.

Aside from the three in-court identifications, the State presented precious little inculpatory evidence, as Mr. Slaughter explains above: the ballistics evidence was equivocal; the 7-Eleven video had little value; and there was no convincing link between the getaway car and Ms. Johnson's car. This other evidence was weak at best, so the case rose and fell with eyewitness identifications. Undercutting those identifications and

establishing Mr. Slaughter's alibi therefore would've created ample reasonable doubt.

4. On balance, a reasonable jury probably would now have reasonable doubt.

Given all the evidence, a reasonable jury probably wouldn't have convicted Mr. Slaughter. Based on new evidence, his alibi is much stronger, and the victims' identifications are much less reliable. The other evidence the prosecution presented was equivocal at best. Meanwhile, there are other reasons to doubt Mr. Slaughter was involved. There was no physical evidence tying Mr. Slaughter to the scene: no fingerprints, no DNA, no proceeds from the robbery in his apartment, no bloody items in his apartment, nothing. *See, e.g.*, V.App.915 (Tr. at 183-84). The police investigation was sloppy; Detective Prieto rushed to judgment and failed to investigate the case fully. *See, e.g.*, IX.App.1759-60. A review of all the evidence in the case points to one conclusion: Mr. Slaughter is innocent of participating in the home invasion.

C. The Court's previous decision is wrong.

Mr. Slaughter asserted his innocence in the previous appeal, and the Court rejected his arguments. However, law of the case isn't binding

on innocence determinations. *Hsu*, 123 Nev. at 632, 173 P.3d at 729. Law of the case also isn't binding when a court's prior decision was clearly erroneous and manifestly unjust. 123 Nev. at 631, 173 P.3d at 729. Here, Mr. Slaughter is innocent, and with respect, the Court's previous decision was clearly incorrect and manifestly unjust. The Court should reach a proper conclusion regarding Mr. Slaughter's innocence.

The Court rejected Mr. Slaughter's innocence argument for much the same reason it rejected his arguments about the second photo lineup and his alibi. XXII.App.4511-12. It believed that even if the perpetrators left the scene at 7:08 p.m. and Mr. Arbuckle had a motive for bias against Mr. Slaughter, his alibi nonetheless wasn't compelling. XXII.App.4512. That argument misstates the full impact of Mr. Slaughter's alibi. Mr. Slaughter can now prove the suspects left at 7:08 p.m.; it would've taken at least 20 minutes (if not 30 minutes) for him to drive to Ms. Johnson's workplace, not counting the time it would've taken to clean up and remove incriminating evidence from the car; Mr. Slaughter arrived to pick Ms. Johnson up at about 7:15 p.m.; while Mr. Arbuckle testified Mr. Slaughter arrived after 7:30 p.m., he previously told the police Mr. Slaughter arrived around 7:15 p.m.; and Mr. Arbuckle was biased against

Mr. Slaughter and therefore had a motive to change his testimony to support the State. This is a convincing alibi—much more convincing than the version presented at trial—and by itself it creates reasonable doubt.

The Court also suggested Mr. Slaughter's new evidence about the second photo lineup didn't tend to show evidence because, along with the in-court identifications, the State presented other supposedly inculpatory evidence. XXII.App.4512. But as Mr. Slaughter has already explained, that evidence—the tenuous link between Ms. Johnson's car and the perpetrator's car; the equivocal ballistics evidence; and the useless 7-Eleven footage—was only marginally helpful to the State. By contrast, the eyewitness identifications were critical. Undercutting those identifications likely would've produced reasonable doubt. Likewise, proving an airtight alibi likely would've produced reasonable doubt. Mr. Slaughter is innocent; the Court clearly erred when it previously concluded he didn't meet the standard; and it should revisit that conclusion in this appeal.

III. The Court should reconsider its decision in *Brown v. McDaniel*.

In his previous appeal, Mr. Slaughter asserted the Court's prior decision in *Brown v. McDaniel*, 130 Nev. 565, 331 P.3d 867 (2014), was

incorrectly decided, and the Court should reach the merits of Mr. Slaughter's claims because Mr. Slaughter lacked counsel when he litigated his first post-conviction proceedings. The Court in its prior decision rejected Mr. Slaughter's argument. XX.App.4512-13. However, Mr. Slaughter maintains *Brown* was incorrectly decided and intends to preserve the issue in a diligent manner.

CONCLUSION

The Court should reverse and remand with instructions to consider all of Mr. Slaughter's claims on the merits. A list of the claims Mr. Slaughter raised, and which the lower court should've considered, is attached to this brief as Appendix A.

Dated July 21, 2021.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ Jeremy C. Baron
Jeremy C. Baron
Assistant Federal Public Defender

APPENDIX A

Ground One: The victims' in-court identifications of Mr. Slaughter stemmed from the State's use of an impermissibly suggestive photographic lineup, in violation of Mr. Slaughter's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as well as under Article 1, Section 8, of the Nevada Constitution.

Ground Two: Trial counsel failed to introduce foundational evidence regarding Mr. Slaughter's alibi, in violation of Mr. Slaughter's rights under the Sixth and Fourteenth Amendments to the United States Constitution, as well as under Article 1, Section 8, of the Nevada Constitution.

Ground Three: Trial counsel failed to fully cross examine and impeach the State's witnesses, in violation of Mr. Slaughter's rights under the Sixth and Fourteenth Amendments to the United States Constitution, as well as under Article 1, Section 8, of the Nevada Constitution.

Ground Four: Trial counsel failed to call additional witnesses to provide exculpatory testimony, in violation of Mr. Slaughter's rights under the Sixth and Fourteenth Amendments to the United States Constitution, as well as under Article 1, Section 8, of the Nevada Constitution.

Ground Five: Trial counsel failed to deliver on promises made during opening statements, in violation of Mr. Slaughter's rights under the Sixth and Fourteenth Amendments to the United States Constitution, as well as under Article 1, Section 8, of the Nevada Constitution.

Ground Six: Trial counsel failed to object to prosecutorial misconduct, in violation of Mr. Slaughter's rights under the Sixth and Fourteenth Amendments to the United States Constitution, as well as under Article 1, Section 8, of the Nevada Constitution.

Ground Seven: The State committed prosecutorial misconduct during closing arguments, in violation of Mr. Slaughter's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as well as under Article 1, Section 8, of the Nevada Constitution.

Ground Eight: The State admitted hearsay evidence that denied Mr. Slaughter his ability to confront the witnesses against him, in violation of Mr. Slaughter's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as well as under Article 1, Section 8, of the Nevada Constitution.

Ground Nine: Direct appeal counsel failed to raise meritorious issues, in violation of Mr. Slaughter's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as well as under Article 1, Section 8, of the Nevada Constitution.

Ground Ten: The prosecutors exercised a racially motivated peremptory challenge, in violation of Mr. Slaughter's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as well as under Article 1, Section 8, of the Nevada Constitution.

Ground Eleven: The prosecutors failed to disclose material, exculpatory information, made relevant misrepresentations in open court, and failed to correct false testimony, in violation of Mr. Slaughter's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as well as under Article 1, Section 8, of the Nevada Constitution.

CERTIFICATE OF COMPLIANCE

1. I hereby certify this brief complies with the formatting requirements of Rule 32(a)(4), the typeface requirements of Rule 32(a)(5), and the type style requirements of Rule 32(a)(6). This brief has been prepared in Microsoft Word using a 14-point proportionally spaced font (Century Schoolbook) in plain, roman style.

2. I further certify this brief complies with the page- or type-volume limitations of Rule 32(a)(7) because, excluding the parts of the brief exempted by Rule 32(a)(7)(c), it has been prepared with a proportionally spaced font and contains only 13,537 words.

3. I further certify I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Rule 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand I may be subject to sanctions in the event the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated July 21, 2021.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/Jeremy C. Baron
Jeremy C. Baron
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2021, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include Alexander Chen.

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:

Rickie Slaughter NDOC #85902 High Desert State Prison P.O. Box 650 Indian Springs, NV 89070	Erica Berrett Deputy Attorney General Office of the Attorney General 555 E. Washington Ave. Suite 3900 Las Vegas, NV 89101

/s/ Richard D. Chavez
An Employee of the
Federal Public Defender