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 Appendix to the Opening Brief Volume XIII of XXII

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VOLUME I

Dated July 21, 2021.

Respectfully submitted,

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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:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

RICKIE SLAUGHTER, Petitioner, v. RENEE BAKER, et al., Respondents.	Case No. A-18-784824-W (04C204957) Dept. No. III Date of Hearing: January 10, 2019 Time of Hearing: 9:00 a.m.

OPPOSITION TO THE STATE'S MOTION TO DISMISS

ARGUMENT

After developing new exculpatory evidence through the federal discovery process, Mr. Slaughter filed a new post-conviction petition in this Court. The State has filed a response (in substance, a motion to dismiss) raising alleged procedural bars. But those bars do not apply here because Mr. Slaughter has shown new evidence to support his claims, and because he is actually innocent. The Court should hear Mr. Slaughter's claims on the merits and should grant him relief.

I. Mr. Slaughter can overcome the procedural bars with respect to his new *Brady* claims (and his related *Strickland* claims).

As Mr. Slaughter's petition explains, he has found new evidence within the past year that supports claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264, 266 (1959). Because the State withheld this evidence, Mr. Slaughter has good cause to present these claims. Meanwhile, the evidence is material, so Mr. Slaughter can establish prejudice. The Court should reject the State's counterarguments and consider the merits of these claims.

A. If a petitioner can prove the merits of a *Brady* claim, the petitioner has necessarily shown good 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)(B)), 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).

When new evidence gives rise to a claim under *Brady v. Maryland*, the issues of good cause and prejudice overlap with the merits of the *Brady* claim. *See Lisle v. State*, 131 Nev. Adv. Op. 39, 351 P.3d 725, 728 (2015). "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.'" *Id.* (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.* 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 197 n.3, 275 P.3d at 95 n.3). Mr. Slaughter can make these showings.

B. The State withheld favorable evidence.

The State failed to disclose three specific pieces of new evidence. It maintains it didn't actually withhold this information, but those arguments fall flat.

1. The State withheld relevant 911 records.

The first piece of evidence, a 911 record, is relevant to Mr. Slaughter's alibi. At about the time the home invasion was ending, Mr. Slaughter was halfway across town, picking up his girlfriend from work. To establish this alibi, Mr. Slaughter had to show when the home invasion ended. The State withheld an important piece of evidence on that front: a record showing the North Las Vegas Police Department received a 911 call from one of the victims at 7:11 p.m. Exhibit 6. Based on that record (and the substance of the 911 call), the suspects left the crime scene at about 7:08 p.m. The State failed to turn this record over to the defense and instead argued the call came in at about 7:00 p.m. These actions violated Mr. Slaughter's rights under *Brady* and its progeny. In addition and/or in the alternative, trial counsel was ineffective for failing to obtain the 911 record.

Mr. Slaughter previously alleged in this Court and in federal court that if he could get ahold of the 911 logs, they would show Mr. Means called 911 at 7:11 p.m. But Mr. Slaughter was unable to prove those allegations previously, because the State failed to turn the record over, his defense attorney never got it, and Mr. Slaughter wasn't able to get it himself while he was litigating his post-conviction case pro se. For that reason, after the federal court appointed counsel to represent Mr. Slaughter in his federal habeas case, Mr. Slaughter asked for leave to conduct discovery to get the 911 records. The federal court authorized discovery on November 20, 2017, and Mr. Slaughter received the 911 record on or about January 8, 2018. This new record proves the North Las Vegas police received the 911 call at 7:11 p.m., which provides a new "factual basis" for Mr. Slaughter's *Brady* and *Strickland* claims.

The State argues it didn't withhold this evidence because even if it didn't turn over Exhibit 6 before trial, the defense nonetheless knew the 911 call came in at 7:11 p.m. In support of that argument, the State observes the defense attorneys intended to say the call came in at 7:11 p.m. during their closing argument. Response at 10. But the prosecutor successfully stopped the attorneys from saying the call came in at 7:11 p.m., because the attorneys hadn't proved that fact at trial. Tr. 5/20/11 at 77-82. The reason the attorneys weren't able to prove that fact was because they didn't have any evidence proving the call came in at 7:11 p.m. Instead, all they had were police reports that "*seem* to *suggest*" the call might've come in at 7:11 p.m. Response at 11 (emphasis added); *see* Exhibits 2, 3, 4, 7, 9 (listing a time of "19:11," but failing to state explicitly what that time referred to). The defense attorneys even admitted to the Court they weren't sure exactly when the call came in. Tr. 5/20/11 at 78 ("We can't authenticate when the call was made, what time it was made."). For his part, the prosecutor said there was "a dispatch report that shows the time the call was transferred from Metro to North Las Vegas," but he blamed the defense for failing to put that report "in evidence." *Id.* at 79. But the defense didn't admit that report into

evidence precisely because the State withheld it. It wasn't until well after trial—not until the federal discovery process in 2018—that Mr. Slaughter finally received the dispatch report. Exhibit 6. The State withheld that information from the defense attorneys, so Mr. Slaughter has good cause to raise these claims in this petition.

In addition, the prosecution separately violated Mr. Slaughter's due process rights by suggesting the defense should say the 911 call came in at 7:00 p.m. Tr. 5/20/11 at 82. In reality, as the evidence shows, the call came into North Las Vegas at 7:11 p.m., and the suspects left the scene at about 7:08 p.m. As the 911 record establishes, the prosecutor misrepresented the relevant facts to the Court. The State's motion fails to respond to this separate violation of *Brady* and its progeny.

2. The State withheld Mr. Arbuckle's trespassing complaint.

The next piece of evidence, also involving Mr. Slaughter's alibi, has to do with the time Mr. Slaughter arrived at his girlfriend's workplace to pick her up. At trial, there was a dispute between Mr. Slaughter's girlfriend (Tiffany Johnson) and her coworker (Jeffrey Arbuckle) about when that happened. Ms. Johnson testified Mr. Slaughter came between 7:00 p.m. and 7:15 p.m., and no later than 7:20 p.m. That account was consistent with Mr. Slaughter's alibi. For his part, Mr. Arbuckle testified Mr. Slaughter showed up when he left work, at about 7:30 p.m. That testimony was inconsistent with Mr. Arbuckle's pre-trial statement to police (that he left work at 7:15 p.m.), but it was a much better fit for the State's timeline. In order to convince the jury to believe Ms. Johnson, not Mr. Arbuckle, the defense needed to attack Mr. Arbuckle's credibility. But the State withheld important impeachment evidence about this witness: during the same month as the home invasion, Mr. Arbuckle called the police and placed a trespassing complaint against Mr. Slaughter. If the defense had known Mr. Arbuckle went so far as to call the police on Mr. Slaughter, they would've been able to argue Mr. Arbuckle was biased against Mr. Slaughter and had a motive to change his testimony to help the prosecution. The State violated its *Brady*

obligations by failing to disclose this impeachment material, and in the alternative, trial counsel was ineffective for failing to get ahold of the trespassing complaint.

Mr. Slaughter previously alleged in this Court and in federal court that if he could get ahold of the relevant police records, they would show Mr. Arbuckle had placed a trespassing complaint against him. As part of these allegations, Mr. Slaughter explained he had gotten into a confrontation with Mr. Arbuckle at about the time of the home invasion, and someone had placed a trespassing complaint against him at about the time of the home invasion. Mr. Slaughter suspected Mr. Arbuckle had placed the trespassing complaint, but he wasn't able to prove that suspicion previously. For that reason, after the federal court appointed counsel to represent Mr. Slaughter in his federal habeas case, Mr. Slaughter asked for discovery so he could try to get a copy of the trespassing complaint. The federal court authorized discovery on November 20, 2017, and Mr. Slaughter received a relevant record on or about January 8, 2018. Exhibit 1. That record proves Mr. Arbuckle was the person who placed the trespassing complaint against Mr. Slaughter, so it creates a new "factual basis" for Mr. Slaughter's *Brady* and *Strickland* claims.

The State says it had no obligation to disclose this evidence because it came from a different police agency: the North Las Vegas Police Department investigated the home invasion, but the trespassing complaint went to the Las Vegas Metropolitan Police Department. Response at 23. But as the State acknowledges (*id.*), it doesn't matter whether the prosecutor had actual knowledge of the impeachment evidence; the prosecutor is nonetheless obligated to affirmatively search for evidence in possession of any "other state agents, such as law enforcement officers." *Jimenez v. State*, 112 Nev. 610, 620, 918 P.2d 687, 693 (1996). It doesn't matter which agents have the information; so long as the State has it, the prosecutor is obligated to find it.

The State cites *State v. Bennett*, 119 Nev. 589, 81 P.3d 1 (2003), but that case supports Mr. Slaughter's point. In *Bennett*, the Nevada Supreme Court held a Nevada prosecutor had constructive knowledge of impeachment evidence in the possession of a Utah police agency that helped investigate the crime. 119 Nev. at 603, 89 P.3d at 10. If the Court has forced Nevada prosecutors to seek out defense-friendly information from relevant out-of-state agencies, then surely Las Vegas prosecutors must seek out relevant information from Clark County's major police departments. Here, the prosecutor had constructive knowledge of the trespassing complaint, and the State violated Mr. Slaughter's constitutional rights by failing to turn it over.

3. The State withheld the results of the second photo lineup.

Finally, the prosecution suppressed material evidence undercutting the victims' identifications of Mr. Slaughter. The police showed the seven victims and witnesses an initial, first photographic lineup. That lineup was highly suggestive, and four of the victims purported to identify a photo of Mr. Slaughter from the lineup as one of the two culprits. But the police showed the same victims and witnesses a *second* photo lineup with a more contemporaneous, non-suggestive photo of Mr. Slaughter. As the lead detective testified during a 2018 federal deposition, *none* of the victims or witnesses identified Mr. Slaughter from that lineup. The State failed to disclose that fact to the defense, so the prosecution violated its *Brady* obligations. In addition or in the alternative, trial counsel should've proven that fact.

Mr. Slaughter previously alleged in this Court and in federal court that none of the victims or witnesses identified Mr. Slaughter from the second photo lineup, but he was previously unable to prove that allegation. However, after the federal court appointed counsel to represent Mr. Slaughter in his federal habeas case, Mr. Slaughter asked for discovery about the second photo lineup. The federal court authorized discovery on November 20, 2017, and Mr. Slaughter deposed Detective Prieto on February 22, 2018. During his deposition, Detective Prieto admitted none of the victims

or witnesses identified Mr. Slaughter from the second photo lineup. This testimony created a new "factual basis" for Mr. Slaughter's *Brady* and *Strickland* claims, so he has good cause to re-raise these claims in this petition.

The State says this evidence isn't new because Mr. Slaughter previously argued during the pre-trial proceedings that none of the witnesses identified him from the second photo lineup. Response at 12. This argument confuses the record. Mr. Slaughter filed a pre-trial motion complaining about the State's failure to preserve evidence about the second photo lineup. 10/27/09 Motion (included in the State's response as Exhibit B). At a hearing, the prosecutor admitted the police showed the witnesses the second photo lineup but said it would take "a giant leap . . . to say Rickie Slaughter wasn't picked out of those photo lineups." Tr. 12/1/09 at 9; *cf.* Tr. 5/18/11 at 60-67. This was a misrepresentation—as a matter of fact, he *wasn't* picked out of those lineups—and it compounded the State's *Brady* violation. *See, e.g.*, *Stickler v. Greene*, 527 U.S. 263, 284 (1999) (observing the prosecutor falsely represented he'd turned over all exculpatory information). The prosecution never cured this misstatement and never admitted that, in fact, *none* of the witnesses identified Mr. Slaughter from the lineup. Ever since the trial, Mr. Slaughter has maintained none of the victims identified him from the lineup. But he was unable to affirmatively prove that allegation until he conducted his deposition of Detective Prieto. Because Detective Prieto's testimony is new, Mr. Slaughter is entitled to raise his related claims now.

C. The State failed to disclose this evidence, even if trial counsel could've gotten it independently.

As the previous section explains, Mr. Slaughter's *Brady* claims (and related *Strickland* claims) rely on new evidence the State previously failed to disclose, so he has good cause to present these claims now.

For its part, the State argues that even if the evidence is new (i.e., even if the defense never had this information), some of it wasn't technically withheld, because

defense counsel could've obtained it through reasonable diligence. *E.g.*, Response at 11 (stating trial counsel didn't "do his due diligence" to get Mr. Arbuckle's trespassing complaint); *id.* at 12, 14 (similar arguments about Detective Prieto's testimony). This argument misunderstands what it means to withhold evidence. "A rule [] declaring 'prosecutor may hide, defendant must seek,' is not tenable." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). Indeed, the U.S. Supreme Court has "never recognized an affirmative due diligence duty of defense counsel as part of *Brady*." *Dennis v. Sec'y*, 834 F.3d 263, 290 (3d Cir. 2016) (en banc) (citing *Banks*). To the contrary, "a prosecutor [may] not be excused from producing that which the law requires him to produce, by pointing to that which conceivably could have been discovered had defense counsel expended the time and money to enlarge his investigations." *Amado v. Gonzalez*, 758 F.3d 1119, 1136-37 (9th Cir. 2014) (citing *Banks*); *see also, e.g.*, *Lewis v. Conn.*, 790 F.3d 109, 121-22 (2d Cir. 2015).

While the Nevada Supreme Court has suggested there may be a "due diligence" exception to *Brady* in certain unique circumstances, none of those cases is relevant here. For example, in *Steese v. State*, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998), the Court declined to find a *Brady* violation based on the failure to disclose call records, because the defendant had placed the relevant calls and therefore already knew he'd made them. In *Rippo v. State*, 113 Nev. 1239, 1257-58, 946 P.2d 1017, 1028-29 (1997), the Court declined to find a *Brady* violation because the State had an open file policy and the defense could've found the relevant information by inspecting those files. These cases stand for the uncontroversial proposition that if a defendant has first-hand knowledge of exculpatory information or if the State has an open file policy, the State doesn't violate *Brady* merely because the defense doesn't follow up. But that doesn't apply here. Mr. Slaughter didn't have first-hand knowledge of when Mr. Means called 911, whether Mr. Arbuckle was the person who called the cops on him for trespassing, or whether any of the victims or witnesses identified him from the

second photo lineup. Meanwhile, the State didn't have an open-file policy; to the contrary, it hid the relevant facts. Thus, the State can't avoid its *Brady* obligations by arguing the trial lawyers should've done a better job tracking down the information. *E.g.*, *Amado*, 758 F.3d at 1136-37. The State failed to turn over this information, so it violated *Brady*, and Mr. Slaughter has good cause to present this evidence now.

D. The evidence is material, so Mr. Slaughter can show prejudice.

Each of the three withheld pieces of evidence is material and exculpatory, so Mr. Slaughter can show actual prejudice.

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). This is a less demanding standard than a preponderance of the evidence test. *Id.* 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 simply 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 undisclosed pieces of evidence is material, individually and collectively. To start, the 911 records and Mr. Arbuckle's trespassing complaint would've been material at trial because they helped prove Mr. Slaughter's alibi. If the defense had the 911 records, they could've introduced evidence that the call came in at 7:11 p.m., so the incident ended at about 7:08 p.m. If the defense had Mr. Arbuckle's complaint, they could've explained why Mr. Arbuckle had a motive to walk back from his first statement to police (that he left work at 7:15 p.m.) and provide harmful testimony at trial (that he left work not at 7:15 p.m., but at 7:30 p.m.).

In all, these two pieces of evidence gave the defense a much stronger argument that (1) the incident ended at 7:08 p.m., and (2) Mr. Slaughter picked up his girlfriend at 7:15 p.m., which would've been impossible if he'd been at the crime scene a mere seven minutes earlier. As it stood, the defense was stuck arguing the incident ended sometime before or at 7:00 p.m., and they failed to impeach Mr. Arbuckle's testimony that Mr. Slaughter showed up at 7:30 p.m. The first version of the timeline proves Mr. Slaughter's innocence; the second version doesn't prove much. Had the State turned over this critical information, there's at least a reasonable probability the outcome of the trial would've been different.

The State doesn't argue the 911 records were immaterial (although they wrongly argue the defense had access to the information anyway, *see supra* at 3-4). That's for good reason: the time the 911 call came in was the best evidence of when the incident ended. But as for the trespassing complaint, the State argues it isn't true impeachment material, since at most it shows Mr. Arbuckle had a motive to lie. Response at 22. But evidence of a witnesses' bias is straightforward impeachment evidence. *See, e.g.*, *United States v. Bagley*, 473 U.S. 667, 676 (1985). The trespassing complaint would've helped the defense convince the jury to disbelieve Mr. Arbuckle and instead believe Ms. Johnson, so it would've been made a difference.

Next, the results of the second photo lineup were material. 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. *See supra* at 7. The defense's motion was the functional equivalent of a specific request for information, and the State failed to respond with candor. Thus, Mr. Slaughter need show only a "reasonable possibility" that the evidence would've altered the jury's verdict. *Mazzan*, 116 Nev. at 66, 993 P.2d at 36.

In any event, the outcome of the second photo lineup is material under any 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 of Mr. Slaughter. 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 were able to identify Mr. Slaughter. That fact eroded the reliability of the victims' identifications. If the jury had known this, there's a reasonable probability (and at the very least a reasonable possibility) the jury would've had a reasonable doubt about the identifications.

The State says the results of the second photo lineup aren't exculpatory because the police showed the lineup to the witnesses in the hopes they would identify a different suspect (Jaquan Richard), not Mr. Slaughter. Response at 12-13. But the lineups asked the witnesses whether they had "previously seen *one or more of* the persons in the line up in regards to the crime in question" (emphasis added). 10/27/09 Motion (included in the State's response as Exhibit B) at 76, 78, 80, 82; *see also id.* at 74 (similar). Based on those instructions (and on common sense), if the witnesses thought they could identify either or both of the two suspects from the lineup, they would've said so. But *none* of the witnesses identified Mr. Slaughter when they saw the second lineup. It doesn't matter that the police were hoping the suspects would identify the picture of Jaquan Richard: the fact the witnesses couldn't identify *either* Mr. Richard *or* Mr. Slaughter is exculpatory.

E. Mr. Slaughter is raising these claims within a reasonable time.

A petitioner may bring an otherwise untimely or successive petition in order to raise claims based on new evidence, so long as the petitioner raises those claims "within a reasonable time after the [relevant] evidence was disclosed to or discovered by the defense." *Lisle*, 351 P.3d at 728. Filing within a year of discovery is reasonable. *See Rippo v. State*, 134 Nev. Adv. Op. 53, 423 P.3d 1084, 1097 (2018).

Mr. Slaughter filed this petition within a reasonable time because he filed within a year after he obtained the relevant new evidence. Specifically, Mr. Slaughter received authorization from the federal court to conduct discovery on November 20, 2017. Exhibits 12, 13. He served subpoenas on the police agencies and the district attorney's office in December 2017 and received documents on a rolling basis in December 2017 and January and February 2018. Mr. Slaughter conducted his deposition of Detective Prieto on February 22, 2018. Exhibit 14. He then filed the instant petition on November 20, 2018—within a year after he got authorization from the federal court to conduct discovery. These timeframes are reasonable.

The State argues Mr. Slaughter missed the deadline because he alleged in his August 2017 federal petition that trial counsel was ineffective for not presenting this evidence to the jury. Response at 11-13. Thus, the State says, Mr. Slaughter had the new evidence at least by August 2017, so he failed to file this new state petition within a reasonable time (i.e., by August 2018). But the State confuses allegations with facts. Mr. Slaughter has previously *alleged* (in this Court and in federal court) that the 911 call came in at 7:11 p.m.; Mr. Arbuckle called the cops on Mr. Slaughter; and none of the witnesses identified Mr. Slaughter from the second photo lineup. But until now, Mr. Slaughter couldn't *prove* those allegations, because he didn't have the relevant evidence. It wasn't until the federal discovery process (which began on November 20, 2017) that Mr. Slaughter actually got the documents and testimony that confirm these allegations. Because Mr. Slaughter filed this petition within a year of obtaining the new evidence—indeed, he filed within a year of the federal court's order allowing discovery—he has filed these claims within a reasonable time.

F. Mr. Slaughter can show good cause and prejudice regarding the related *Strickland* claims.

As this section has explained at length, the State failed to disclose three key pieces of material exculpatory evidence: the 911 records, Mr. Arbuckle's trespassing

complaint, and the results of the second photo lineup. The State therefore violated Mr. Slaughter's rights under *Brady* and its progeny, and Mr. Slaughter has good cause to present those claims in this petition.

In addition to the *Brady* claims, Mr. Slaughter has claimed, in addition (and/or in the alternative), that trial counsel was ineffective for failing to elicit this information independently. Specifically, Ground Two(A) alleges counsel was ineffective for failing to show the 911 call came in to North Las Vegas at 7:11 p.m.; Ground Two(D) alleges counsel performed ineffectively in their cross-examination of Mr. Arbuckle, in part because they failed to establish his motive for bias based on the trespassing complaint; and Grounds Three(A) and Four(A) allege counsel was ineffective for failing to prove the outcome of the second photo lineup. To be clear, the State is at fault for withholding this information, and the prosecution can't be excused from its *Brady* obligations simply because counsel could've gotten the evidence through its own efforts. But in any event, Mr. Slaughter still alleges trial counsel was ineffective for failing to find and introduce this evidence at trial.

A petitioner can show good cause to present a claim in an otherwise untimely or successive petition if the "factual or legal basis for a claim was not reasonably available at the time of any default." *Clem*, 119 Nev. at 621, 81 P.3d at 525. That is the case here. The factual basis for these claims wasn't available for two reasons: (1) trial counsel was ineffective for failing to get this information (*see Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003)), and (2) the State withheld this information from the defense and continued to withhold the information during the post-conviction proceedings—which violates *Brady* in its own right (*see Mazzan*, 116 Nev. at 74, 993 P.2d at 41). Nonetheless, Mr. Slaughter acted diligently in his efforts to get this evidence. He alleged the exculpatory evidence existed (even though he wasn't able to prove it), and he asked for a hearing in this Court and for counsel in order to investigate these claims. 3/25/15 Petition at 17, 21, 31, 36, 42, 47, 55, 57, 62, 66, 70,

72, 78; 7/15/15 Reply at 2, 4, 20-21; *Slaughter v. State*, Docket No. 68532, Order of Affirmance, filed July 13, 2016, at 3 n.2.; *cf.* 7/22/11 Motion (post-trial motion seeking relevant *Brady* information, including 911 records and information about the photo lineups); *Martinez v. Ryan*, 566 U.S. 1, 11-12 (2012). But despite his diligent efforts in this Court, he was unable to uncover the evidence the prosecution previously withheld and his lawyers ineffectively failed to obtain. Thus, the factual basis for his new *Strickland* claims wasn't reasonably available when he defaulted these claims, and Mr. Slaughter has good cause to litigate these claims now.

In addition to showing good cause, Mr. Slaughter can also show actual prejudice because the *Strickland* claims are winning claims for relief. An attorney provides ineffective assistance under *Strickland* if the attorney performs deficiently, and if the deficient performance caused prejudice. An attorney's performance is deficient if it falls below "an objective standard of reasonableness." 466 U.S. 668, 688 (1984). Meanwhile, deficient performance causes prejudice if there's a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Mr. Slaughter's claims for relief in his petition explain why trial counsel was ineffective, and Mr. Slaughter respectfully incorporates those discussions by reference here. In short, it should've been obvious to any reasonable attorney that the alibi timeline depended in part on when the culprits left the scene. A reasonable attorney would've subpoenaed the 911 records and introduced them at trial to prove the suspects left at about 7:08 p.m. It should've been equally obvious to any reasonable attorney that the alibi timeline also depended on when Mr. Slaughter got to his girlfriend's workplace. Mr. Slaughter's attorneys knew Mr. Arbuckle would be testifying for the prosecution on that point and knew there was a chance Mr. Arbuckle had called the police on Mr. Slaughter. His attorneys should've investigated that angle and introduced that impeachment evidence at trial. Finally, it goes without

saying that any reasonable attorney would've done everything possible to undercut the victims' identifications of Mr. Slaughter. Given the litigation around the second photo lineup, it seemed likely none of the victims had identified Mr. Slaughter from that lineup. A reasonable attorney would've investigated that question and established that fact at trial. The defense attorneys provided deficient performance by failing to introduce these three categories of evidence. Meanwhile, those failures were prejudicial: as this section has already explained (with respect to the *Brady* claims), this evidence was material, and there's a reasonable probability the evidence would've changed the outcome at trial. Mr. Slaughter can therefore prove the merits of his *Strickland* claims and can prove actual prejudice as well.

II. Mr. Slaughter can show good cause and prejudice with respect to other new claims based on new evidence.

In addition to the claims discussed in Section I (the *Brady* claims and the related *Strickland* claims), Mr. Slaughter's petition brings a series of additional claims that also rely on new evidence. In Section A of the Statement Regarding Cause and Prejudice in his petition, Mr. Slaughter explains specifically which of his claims rely on new evidence developed through the federal discovery process. This new evidence provides a new "factual . . . basis" for these claims that wasn't "reasonably available" to Mr. Slaughter when he litigated his previous post-conviction petitions in this Court. *Clem*, 119 Nev. at 621, 81 P.3d at 525. Mr. Slaughter therefore has good cause to litigate those claims in this new, third petition.

The State takes these claims one-by-one and argues either there's no good cause or no prejudice. Each of its arguments is unconvincing.

1. The Court should consider Ground One on its merits.

As Mr. Slaughter's petition explains, he is re-raising Ground One because he has new evidence supporting that claim. Ground One alleges the first photo lineup was unduly suggestive. While Mr. Slaughter raised a related claim on direct appeal,

he now has new evidence supporting that claim: the witnesses saw a second lineup with Mr. Slaughter's picture in it, and none of the witnesses identified him from that lineup. This fact undermines the reliability of the first photo lineup and helps prove it was suggestive.

The State argues there's no prejudice because the Nevada Supreme Court's ruling on this issue is law of the case, so this Court is therefore bound by that ruling. Response at 14-15. But law of the case doesn't apply when a petitioner presents "substantially new or different evidence" in support of a claim. *Rippo*, 423 P.3d at 1101. This exception makes sense, since it fits with the rule that a petitioner can show good cause to present a claim in an untimely or successive petition if there's a new factual basis for the claim. Here, the federal discovery proceedings have developed new evidence—the results of the second photo lineup—that supports this claim for relief. Law of the case therefore doesn't affect the analysis.

The State also thinks the new evidence is irrelevant to the claim. As a consequence, it argues law of the case still applies, and it also says there's no good cause to re-raise this claim. Response at 15. But the State fails to appreciate how the outcome of the second photo lineup throws the outcome of the first lineup into question. The witnesses weren't able to identify Mr. Slaughter from a second lineup. That suggests the outcome of the first lineup was unreliable: if the victims and witnesses really could identify Mr. Slaughter as one of the two culprits, they would've presumably picked him out of *both* lineups. The outcome of the second lineup also indicates the reason the victims identified Mr. Slaughter off the first lineup (but not the second lineup) is because the first lineup was suggestive (while the second lineup wasn't). Similarly, Mr. Slaughter can show actual prejudice. As the outcome of the second lineup shows, the first lineup was suggestive, and the Court violated Mr. Slaughter's due process rights by allowing the victims to make tainted identifications at trial.

Meanwhile, there is an exception to law of the case when a petitioner can show "manifest injustice" or a "fundamental miscarriage of justice" would result if the Court failed to re-review the petitioner's claims. *Clem*, 119 Nev. at 620 & n.21, 81 P.3d at 524 & n.21 (citing *Leslie v. Warden*, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002). In other words, if petitioners can show they are actually innocent, law of the case doesn't apply to defeat their claims. Here, as Mr. Slaughter will explain in the next section (Section III), he can prove that in light of all the relevant evidence, it's more likely than not that a reasonable jury would've acquitted him. Thus, neither the procedural bars nor law of the case apply to the claims in his petition.

2. The Court should consider Ground Two on the merits.

As Mr. Slaughter's petition explains, Grounds Two(A), (B), (C), and (D) all rely on new evidence. These grounds for relief cover Mr. Slaughter's alibi: trial counsel was ineffective for (A) not proving the 911 call came in at 7:11 p.m.; (B) not explaining that if the 911 call came in at 7:11 p.m., the culprits probably left at about 7:08 p.m.; (C) not showing it would've taken between 20 and 30 minutes (at least) to get from the crime scene to Ms. Johnson's workplace; and (D) not eliciting that Mr. Arbuckle previously told the police Mr. Slaughter arrived at 7:15 p.m. (as opposed to 7:30 p.m.), and that Mr. Arbuckle had a motive to change his testimony in the State's favor. Had counsel performed effectively in all these ways, Mr. Slaughter would've had an air-tight alibi. But because of counsel's failures, the alibi was loose enough that the jury didn't find it convincing. Mr. Slaughter therefore suffered prejudice.

The State maintains this information isn't new: in its view, the 911 call time isn't new, nor is Mr. Arbuckle's trespassing complaint, nor is Detective Prieto's deposition. Response at 15. But the State's arguments on this front simply rehash the same arguments it made in connection with the *Brady* claims. As this opposition has already explained (*supra* at 2-9), all of this evidence is new: the State withheld it, trial counsel ineffectively failed to develop it, and Mr. Slaughter was unable to get it

(despite his diligent pro se efforts) until the federal discovery process. Mr. Slaughter therefore has good cause to re-raise these claims.

The State also says there's no prejudice, because the underlying claims are meritless. According to the State, the Nevada Supreme Court previously determined there was overwhelming evidence of Mr. Slaughter's guilt at trial, so (it argues) the evidence supporting Mr. Slaughter's alibi wouldn't have changed the outcome. Response at 16. But as Mr. Slaughter's other claims for relief explain—and as some of the new evidence shows—the case against Mr. Slaughter wasn't nearly as overwhelming as the Nevada Supreme Court thought. The next section (Section III) describes the evidence against Mr. Slaughter and explains why none of it is reliable, much less overwhelming, particularly in light of new evidence. But the Nevada Supreme Court didn't have an opportunity to consider the impact of this new evidence, so its previous conclusion about the strength of the State's case is outdated.

Even if the trial evidence against Mr. Slaughter had truly been strong, the State's argument still wouldn't make sense. Mr. Slaughter has presented ironclad new evidence that proves his alibi: there's no way he could've been at the crime scene at 7:08 p.m. and at Ms. Johnson's workplace by 7:15 p.m. It doesn't matter how convincing the other evidence against him may have been: there's a reasonable probability that this alibi alone would've given the jury reasonable doubt.

The State does little to try to address the merits of Mr. Slaughter's alibi. Instead, it relies solely on a single snippet of a brief jailhouse phone call between Mr. Slaughter and Ms. Johnson to argue Mr. Slaughter manufactured his alibi. Response at 16. During that call, Ms. Johnson told Mr. Slaughter about how Detective Prieto had interrogated her. Detective Prieto had asked Ms. Johnson whether Mr. Slaughter was on time to pick her up. Ms. Johnson said she responded by explaining she "got off [work] a few minutes early, so [Mr. Slaughter] was there before 7:30." Exhibit

21 at 4. 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." *Id.*

According to the State, this brief exchange is evidence Mr. Slaughter didn't have an alibi and was trying to make one up out of whole cloth. That is a serious stretch. Ms. Johnson didn't get off work at 7:30 p.m.; her shift ended at 7:00 p.m. Tr. 5/17/11 at 41; Tr. 5/19/11 at 20. If she had gotten off work a few minutes early, that would've been before 7:00 p.m., not 7:30 p.m. With that in mind, her comments over the phone (that she got off work a few minutes early, so Mr. Slaughter was there at 7:30) didn't make sense. It might be one thing if, apropos of nothing, Mr. Slaughter asked Ms. Johnson to reach out to Detective Prieto and make up an alibi. But that's not what happened. Instead, Mr. Slaughter was reacting to Ms. Johnson apparent misstatement to the police about what time she got off work. But at the very worst, the call is ambiguous. It certainly doesn't undercut all the other evidence showing Mr. Slaughter did, in fact, pick up Ms. Johnson at about 7:15 p.m. Thus, if the defense attorneys presented all the alibi evidence at trial, the jury would've had a reasonable doubt about Mr. Slaughter's guilt, notwithstanding this brief phone exchange. Mr. Slaughter can therefore show actual prejudice with respect to these claims.

Finally, the State argues Mr. Slaughter hasn't shown new evidence to support Ground Two(E), about the defense lawyers' inexplicable decision to call Noyan Westbrook as an alibi witness. Response at 15. But the new evidence explains why the trial lawyers should've focused on the solid evidence of Mr. Slaughter's alibi, not the tenuous testimony Ms. Westbrook had to offer. Had the attorneys adequately investigated the issues discussed in Grounds Two(A) through Two(D), there would've been much less need to call Ms. Westbrook. Even if the new evidence doesn't have a direct connection to Ground Two(E), the Court should still analyze the prejudicial impact of this error along with all the other ineffectiveness claims, both new and old. *See* 11/20/18 Petition at 25-26; *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992). In any

event, Mr. Slaughter may still re-raise this claim because he is actually innocent. *See* Section III, *infra*. The Court may therefore reach the merits of this claim, too.

3. The Court should consider Ground Three on the merits.

Ground Three alleges trial counsel did an ineffective job of cross-examining the State's witnesses at trial. As Mr. Slaughter's petition explains, Ground Three(A) in particular relies on new evidence. That subclaim alleges trial counsel should've cross-examined the victims about the second photo lineup. This claim relies on the newly discovered outcome of the second photo lineup: as Detective Prieto confirmed at his 2018 deposition, *none* of the victims or witnesses picked Mr. Slaughter from the second photo lineup. Trial counsel should've elicited that fact from the victims at trial.

The State rehashes its argument that the outcome of the second photo lineup isn't new evidence, so Mr. Slaughter doesn't have good cause to raise this claim now. Response at 16. But as this opposition has already explained (*supra* at 2-9), the information qualifies as new. The State suppressed and misrepresented the outcome of the lineup; trial counsel ineffectively failed to find out what had really happened; and despite his diligent efforts, Mr. Slaughter wasn't able to discover the outcome until the federal discovery proceedings. But Mr. Slaughter now has affirmative proof that none of the victims identified him from the second photo lineup. This information is new, and it provides a new factual basis for this claim for relief.

The State also observes (as it does with Ground Two) that the Nevada Supreme Court previously described the evidence against Mr. Slaughter as overwhelming, so Mr. Slaughter can't prove prejudice. But the key fact at trial was the three victims' in-court identifications of Mr. Slaughter. Without those identifications, the State's case would've been entirely circumstantial and thoroughly unpersuasive. Had defense counsel been able to tell the jury the victims weren't able to identify Mr. Slaughter from a second, non-suggestive lineup, the jury would've had much greater doubt about the reliability of those identifications, and there's a reasonable probability at

least one juror would've had reasonable doubt. The Nevada Supreme Court wasn't aware Mr. Slaughter would eventually be able to prove none of the victims identified him from the second photo lineup, so its prior ruling isn't binding here.

As for the other subclaims in Ground Three, Mr. Slaughter agrees the new evidence isn't directly relevant to those claims. But the Court should still analyze the prejudicial impact of this error along with all the other ineffectiveness claims, both new and old. *See* 11/20/18 Petition at 25-26. In any event, Mr. Slaughter can re-raise these claims because he is actually innocent. *See* Section III, *infra*. The Court may therefore reach the merits of these claims, too.

4. The Court should consider Ground Four on the merits.

Ground Four alleges trial counsel should've called additional exculpatory witnesses. As Ground Four(A) explains, counsel should've started by calling Detective Prieto, who could've testified about the second photo lineup, Mr. Arbuckle's original statement that he left work at 7:15 p.m., and various other exonerating facts.

The State again argues Mr. Slaughter doesn't have good cause because Detective Prieto's deposition isn't new, and Mr. Slaughter can't show prejudice. But as this opposition has reiterated in response to similar arguments (e.g., *supra* at 2-9), Detective Prieto's 2018 deposition does qualify as new: the State withheld some of the information to which Detective Prieto could've testified; trial counsel ineffectively failed to call Detective Prieto anyway; and despite Mr. Slaughter's diligent efforts, he wasn't previously able to get Detective Prieto to testify during the prior post-conviction proceedings. Meanwhile, Mr. Slaughter can show prejudice: as Ground Four(A) explains, Detective Prieto's testimony would've (among other things) verified the outcome of the second photo lineup and confirmed Mr. Arbuckle changed his story about when Mr. Slaughter picked up Ms. Johnson. There's therefore a reasonable probability his appearance at trial would've changed the outcome, and the Nevada Supreme

Court's prior decision (which it issued without the benefit of Detective Prieto's testimony) is not binding on this new claim.

As for the other subclaims in Ground Four, Mr. Slaughter agrees the new evidence isn't directly relevant to those claims. But the Court should still analyze the prejudicial impact of this error along with all the other ineffectiveness claims, both new and old. *See* 11/20/18 Petition at 25-26. In any event, Mr. Slaughter can re-raise these claims because he is actually innocent. *See* Section III, *infra*. The Court may therefore reach the merits of these claims, too.

5. The Court should consider Ground Five on the merits.

Ground Five explains trial counsel was ineffective for making empty promises during the opening statements. New evidence supports this claim. For example, trial counsel promised Detective Prieto would testify; trial counsel failed to deliver; and now, by virtue of his testimony, we know what he would've said at trial. The State again argues the deposition isn't new, and Mr. Slaughter can't show prejudice. But for the same reasons explained just above (with respect to Ground Four), those arguments are unpersuasive. The Court should hear this claim on the merits.

6. The Court should consider Ground Six on the merits.

Ground Six alleges trial counsel was ineffective for failing to object to unfair comments the prosecutor made during closing arguments. Grounds Six(C), (D), and (E) have to do with disparaging comments about Mr. Slaughter's alibi; those claims rely on the new facts Mr. Slaughter has developed proving that his alibi has merit. The State again disagrees those facts are new, but as this opposition has explained repeatedly, the State's position is wrong: the new evidence creates a new factual basis that supports these claims for relief. Meanwhile (as the petition explains), these subclaims have merit, so Mr. Slaughter can show prejudice.

As for the other subclaims in Ground Six, Mr. Slaughter agrees the new evidence isn't directly relevant to those claims. But the Court should still analyze the

prejudicial impact of this error along with all the other ineffectiveness claims, both new and old. *See* 11/20/18 Petition at 25-26. In any event, Mr. Slaughter can re-raise these claims because he is actually innocent. *See* Section III, *infra*. The Court may therefore reach the merits of these claims, too.

7. The Court should consider Ground Seven on the merits.

Ground Seven alleges prosecutorial misconduct related to the ineffectiveness claims in Ground Six. For example, Ground Six(A) alleges trial counsel was ineffective for failing to object when the prosecutor incorrectly said the witnesses described a suspect as trying to fake a Jamaican accent; Ground Seven(A) alleges the prosecutor violated Mr. Slaughter's due process rights by making the exact same comment. The other subclaims in Ground Seven similarly map onto the subclaims in Ground Six. For the reasons discussed just above (with respect to Ground Six), Mr. Slaughter has valid reasons to present the due process claims, too. The Court should therefore hear these claims on their merits.

8. The Court should consider Ground Eight on the merits.

Ground Eight alleges the State violated Mr. Slaughter's Confrontation Clause rights by eliciting hearsay from a witness, who testified an employee at his bank told him someone had used his debit card at a specific 7-Eleven in Las Vegas. Mr. Slaughter agrees the new evidence isn't directly relevant to this claim. But Mr. Slaughter can re-raise this claim because he is actually innocent. *See* Section III, *infra*. The Court may therefore reach the merits of this claim, too.

9. The Court should consider Ground Nine on the merits.

Ground Nine alleges Mr. Slaughter's direct appeal counsel was ineffective for failing to raise various issues. Subclaims (C)(3) and (4) relate to Ground Six(C) and Six(D). For the reasons discussed with respect to Grounds Six(C) and Six(D), Mr. Slaughter has good cause to raise subclaims Nine(C)(3) and (4). Mr. Slaughter agrees

the new evidence isn't directly relevant to the other subclaims. But Mr. Slaughter can re-raise these claims because he is actually innocent. *See* Section III, *infra*. The Court may therefore reach the merits of these claims, too.

10. The Court should consider Ground Ten on the merits.

Ground Ten alleges the State violated Mr. Slaughter's due process rights by exercising a peremptory challenge on an African American juror based solely on her race. Mr. Slaughter agrees the new evidence isn't directly relevant to this claim. But Mr. Slaughter can re-raise this claim because he is actually innocent. *See* Section III, *infra*. The Court may therefore reach the merits of this claim, too.

11. The Court should consider Ground Eleven on the merits.

Ground Eleven raises the *Brady* claims discussed in Section I of this opposition. For the reasons already discussed in Section I, the Court should hear these claims on their merits.

III. Mr. Slaughter is actually innocent.

Mr. Slaughter did not participate in the home invasion. As new evidence shows, he is actually innocent. The Court should therefore review all the claims in his petition in order to prevent a fundamental miscarriage of justice.

A. If a petitioner is actually innocent, the Court may consider an otherwise untimely and successive petition on the merits.

If an otherwise procedurally barred petitioner can establish that he or she is actually innocent of the crimes of conviction, 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 innocence inquiry mirrors the federal inquiry into whether a petitioner has demonstrated innocence for the purposes of overcoming similar procedural obstacles. *Id.* 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) (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)).

In order to establish a "gateway" actual innocence claim, "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. Adv. Op. 96, 363 P.3d 1148, 1154 (2015). "[O]r, to remove the double negative," the petitioner must establish it's "more likely than not [that] any reasonable juror would have reasonable doubt" about his or her 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. But on the other hand, the burden of persuasion is moderate: the petitioner has to prove only that it's "more likely than not" that 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, 962-63 (9th Cir. 2003). This requirement does not 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]" the petitioner's innocence; it need only "undercut[] the reliability of the proof of guilt." *Lee v. Lampert*, 653 F.3d 929, 932, 943 (9th Cir. 2011) (quoting *Sistrunk v. Armenakis*, 292 F.3d 669, 673 (9th Cir. 2002)).

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 (quoting *House*, 547 U.S. at 538) (quotation mark omitted). "On this complete record, the court makes a probabilistic determination about what

reasonable, properly instructed jurors would do" during deliberations. *Id.* (quoting *House*, 547 U.S. at 536, in turn quoting *Schlup*, 513 U.S. at 329).

B. Mr. Slaughter has demonstrated his innocence.

Mr. Slaughter has proven he is actually innocent, so the Court should consider all the claims in his petition on the merits. In Section B of the Statement Regarding Cause and Prejudice in his petition, Mr. Slaughter lays out his innocence argument in detail. This section provides a summary of the new evidence and also highlights some of the relevant trial testimony.

To start, Mr. Slaughter has new evidence proving his alibi: the home invasion ended when the suspects left at about 7:08 p.m.; Mr. Slaughter was at Ms. Johnson's workplace by about 7:15 p.m.; and it would've taken at least 20 or 30 minutes to get from the crime scene to Ms. Johnson's workplace (not counting the extra time it would've taken to drop off the other culprit, change outfits, and clean up the car so Ms. Johnson wouldn't suspect anything). *See* Exhibits 1, 6, 14; Grounds Two(A), Two(B), Two(C), Two(D), Eleven(A), Eleven (C). The only way Mr. Slaughter could've been one of the culprits is if he was in two places at once. That's impossible, which means he's innocent. *See, e.g.*, *Schlup v. Delo*, 912 F. Supp. 448, 455 (E.D. Mo. 1995) (holding, on remand from 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).

Meanwhile, the supposed "overwhelming" evidence of Mr. Slaughter's guilt falls apart in light of what we know now. While some of the victims identified him as a suspect after seeing a highly suggestive photo lineup, Mr. Slaughter can now prove the same victims saw a *second* lineup with his picture in it, and *none* of the victims identified him again. *See* Exhibit 14 at 87-88; Grounds One, Three(A), Four(A), Eleven(B). That creates serious doubt about whether the victims could accurately recall Mr. Slaughter as one of the suspects. Meanwhile, there are other reasons to

doubt the identifications. The victims' descriptions of the suspects are inconsistent with Mr. Slaughter in various way; the victims' descriptions also changed over time, suggesting their recollections aren't reliable. *See* Grounds One, Three(B), Three(C), Four(A), Four(B), Four(D). For example, Mr. Slaughter had scars on his face and a black eye at the time of the home invasion, but none of the victims mentioned a suspect with facial scars or a black eye. Tr. 5/19/11 at 22-24, 54-55.

Aside from the victims' in-court identifications, the rest of the evidence against Mr. Slaughter was entirely flimsy. While a few of the victims or witnesses saw the suspects leave the scene in a green car, and while Ms. Johnson's car is green, they tended to describe makes and models that are different from Ms. Johnson's car—and Detective Prieto misrepresented that fact in a search warrant affidavit. *See* Grounds Four(A), Four(C); *see also* Tr. 5/16/11 at 122, 128, 137-39 (Jennifer Dennis describes a teal or blue getaway car and notes the suspects referred to a Pontiac or a Buick, not a Ford). Ms. Johnson's car had a couple guns in them and a spent bullet and shell casing, but there was no way to tell whether those guns (or the bullet or casing) had any connection to the guns the suspects used and fired at the crime scene. *See* Ground Three(D). Finally, the prosecution showed the jury a video of someone at a 7-Eleven using an ATM machine, and the prosecution argued (without any shred of proof) that the person using the ATM must've been Mr. Slaughter, using a victim's ATM card. None of this circumstantial and highly dubious information is enough to overcome Mr. Slaughter's concrete alibi and the witnesses' failure to identify Mr. Slaughter from the second photo lineup.

There are other reasons to doubt that 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 (Tr. 5/16/11 at 183-84), nothing. The police investigation was sloppy; Detective Prieto rushed to judgment and failed to investigate the case fully. *See* Ground Four(A). A

review of all the evidence in the case points to one conclusion: Mr. Slaughter is innocent of participating in the home invasion. The Court should hear his claims on the merits in order to prevent a fundamental miscarriage of justice.

C. The State's counterarguments are wrong.

The State spends little if any time grappling with the factual basis of Mr. Slaughter's innocence argument. For example, it doesn't argue Mr. Slaughter has failed to prove his alibi. It barely tries to explain why anyone should have any confidence in the victims' identifications in light of the second photo lineup. And it doesn't demonstrate how any of the other evidence in the case is at all persuasive. Its failure to address these issues underscores the conclusion that Mr. Slaughter is innocent.

Instead of grappling with the facts, the State spends its time making mistaken legal arguments about the innocence inquiry. For one, it argues Mr. Slaughter's new evidence of innocence doesn't relate to all the claims in his petition. Response at 10. The State seems to be saying that even if Mr. Slaughter can prove his innocence based on new evidence, the gateway would only open up to claims that rely on the same new evidence. But that's not how it works. If Mr. Slaughter can convince the Court it's more likely than not that any reasonable juror would find reasonable doubt, then Mr. Slaughter is free to present *all* the constitutional claims in his new petition, not just the subset of claims that makes use of new evidence. *See Lisle*, 351 P.3d at 729-30 (stating that even if a petition is otherwise untimely and successive, the Court "may nevertheless reach the merits of *any* constitutional claims [in the petition] if the petitioner demonstrates" actual innocence) (emphasis added). Mr. Slaughter has proven his innocence, so the Court can hear all his claims on the merits.

The State also misunderstands the requirement that petitioners prove innocence based on new evidence. It thinks the "new evidence" has to have been *unavailable* previously, for example because the State withheld the evidence. Response at 10; *see also id. at* 11 (suggesting the Court shouldn't consider evidence "under the

actual innocence framework" unless the evidence wasn't reasonably available earlier). But, as explained above, a petitioner may rely on *any* evidence outside the trial record to satisfy the new evidence requirement, regardless of when the evidence was discovered. *See Griffin*, 350 F.3d at 963. The State's contrary statement is wrong.

Even if the State's view was correct, Mr. Slaughter would still be able to establish his innocence. As the previous sections explain, Mr. Slaughter's innocence argument relies on a host of new evidence that wasn't reasonably available to Mr. Slaughter before. For example, he couldn't prove until now that the 911 call came in precisely at 7:11 p.m. because the State withheld that fact and made related misrepresentations to the Court. He couldn't prove until now that Mr. Arbuckle had a motive for bias because the State withheld Mr. Arbuckle's trespassing complaint. And he couldn't prove until now that the witnesses failed to identify him from the second photo lineup because the prosecutor refused to admit that fact and instead implied the witnesses *did* pick out Mr. Slaughter from that lineup. Meanwhile, trial counsel ineffectively failed to discover this evidence, and Mr. Slaughter was unable to obtain it (despite diligent efforts) as a pro se petitioner. Thus, even if Mr. Slaughter needs to prove his innocence in light of new, *previously unavailable* evidence (as opposed to just newly presented evidence), Mr. Slaughter is able to do so.

Aside from those two incorrect legal arguments, the State has precious little to say about Mr. Slaughter's innocence. As the State's silence suggests, Mr. Slaughter has proven his innocence, and the Court should hear his claims.

IV. The Court should hold an evidentiary hearing.

Mr. Slaughter respectfully suggests he has already proven his entitlement to relief on the basis of his petition and this opposition. However, if the Court has any doubts about whether Mr. Slaughter may pursue this petition in light of the procedural bars, or if it has any doubts about the merits of his claims, Mr. Slaughter suggests the next step in this case is for the Court to deny the State's motion to dismiss

and schedule an evidentiary hearing. *See* NRS 34.770. At a hearing, Mr. Slaughter would intend to present additional evidence in support of his claims for relief. For example, Mr. Slaughter would intend to call trial counsel, in an effort to prove counsel performed deficiently in the various ways discussed in the petition. Mr. Slaughter would also intend to call the lead prosecutor in the case, Marc DiGiacomo, about the State's withholding of evidence in this case. (Mr. Slaughter has asked the federal court to allow him to depose Mr. DiGiacomo for similar reasons.) Mr. Slaughter would also intend to present other categories of evidence that help prove his claims for relief and his innocence. *See Berry v. State*, 131 Nev. Adv. Op. 96, 363 P.3d 1148, 1155 (2015) (discussing the standard for holding a hearing on actual innocence). Thus, while the Court should grant Mr. Slaughter relief now, Mr. Slaughter suggests in the alternative that the Court set this matter for a hearing.

CONCLUSION

For the forgoing reasons, Mr. Slaughter respectfully requests the Court deny the State's motion to dismiss.

AFFIRMATION PURSUANT TO NRS 239B.030

I affirm this document does not contain any social security numbers.

Dated January 3, 2019.

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 January 3, 2019, I electronically filed the foregoing with the Clerk of the Eighth Judicial District by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Steven Wolfson, Steven.Wolfson@clark-countyda.com, Motions@clarkcountyda.com

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

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/s/ Jessica Pillsbury
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Attorneys for Petitioner Rickie Slaughter

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

RICKIE SLAUGHTER,

Petitioner,

v.

RENEE BAKER, et al.,

Respondents.

Case No. A-18-784824-W
(04C204957)

Dept. No. III

Date of Hearing: January 10, 2019
Time of Hearing: 9:00 a.m.

INDEX OF EXHIBIT IN SUPPORT OF OPPOSITION TO THE STATE'S MOTION TO DISMISS

No.	DATE	DOCUMENT	COURT	CASE #
21.	6/29/2004	Court's Trial Exhibit 15	Eighth Judicial District Court	C204957

Dated January 3, 2019.

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

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An Employee of the Federal Public Defender, District of Nevada

NOTM
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

RICKIE SLAUGHTER, Petitioner, v. RENEE BAKER, et al., Respondents.	Case No. A-18-784824-W (04C204957) Dept. No. III Date of Hearing: January 10, 2019 Time of Hearing: 9:00 a.m.

NOTICE OF MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF THE FILINGS IN MR. SLAUGHTER'S CRIMINAL CASE NUMBER

Mr. Slaughter provides notice of his motion for the Court to take judicial notice of the filings in his criminal case number (04C204957). Mr. Slaughter requests to be heard on this motion during the hearing set for January 10, 2019, at 9:00 a.m., or anytime thereafter as he may be heard.

AFFIRMATION PURSUANT TO NRS 239B.030

I affirm this document does not contain any social security numbers.

Dated January 4, 2019.

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 January 4, 2019, I electronically filed the foregoing with the Clerk of the Eighth Judicial District by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Steven Wolfson, Steven.Wolfson@clarkcountyda.com, Motions@clarkcountyda.com

I further certify that some of the participants in the case are not registered 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:

Michael Bongard
Office of the Attorney General
1539 Ave. F Suite 2
Ely, NV 89301

Rickie Slaughter
No. 85902
Saguaro Correctional Center
1252 E. Arica Road
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/s/ Jessica Pillsbury
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MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF THE FILINGS IN MR. SLAUGHTER'S CRIMINAL CASE NUMBER

ARGUMENT

Mr. Slaughter respectfully requests the Court take judicial notice of the documents filed in Mr. Slaughter's original criminal case number in this Court (04C204957).

Generally, Nevada courts consider only documents that are filed in the operative case number. *See Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009); *see also* NRS 47.130 et seq. However, Nevada courts may take judicial notice of certain other categories of documents that haven't been filed in the relevant case number. For example, Nevada courts may take judicial notice of documents filed in the record of "another and different case" in the state court system. *Mack*, 125 Nev. at 91, 206 P.3d at 106. Whether judicial notice is appropriate depends in part on "the closeness of the relationship between the two cases." 125 Nev. at 91-92, 206 P.3d at 106.

This motion concerns the new procedure in this Court's clerk's office of requiring new post-conviction habeas petitions to be filed not in the petitioner's original criminal case number (as in the past), but instead in a new civil case number. Before this change occurred, many attorneys often followed a practice of *not* refiling the relevant documents from the original criminal case number (for example, pre-trial motions, trial transcripts, or previous petitions) as exhibits to a new post-conviction petition. That is because the new post-conviction petition was filed in the original criminal case number, so those documents were already on file in the operative case number. This process promoted judicial economy and allowed for cost-saving measures (in terms of copying and staff time) for indigent defense offices.

Mr. Slaughter followed the same practice when he filed his November 20, 2018, post-conviction petition in this Court; while he filed certain exhibits that hadn't already been filed in the original criminal case number, he did not refile documents

that had been previously filed in that case number (again, for example, pre-trial motions, trial transcripts, or previous petitions). Instead, he assumed the Court would access those documents through Mr. Slaughter's original criminal case number. On information and belief, when a petitioner files a new post-conviction petition and institutes a new civil case in this Court under this new procedure, the Court's clerk's office has been instructed to link or associate the civil and criminal cases in such a way that the criminal filings are accessible to the Court through the civil case number. However, it is not clear whether that has happened yet in this case.

In light of the new procedure for filing post-conviction petitions in this Court, and in an abundance of caution, Mr. Slaughter requests the Court formally take judicial notice of the documents filed in his original criminal case number. Judicial notice is particularly appropriate given "the closeness of the relationship between the two cases." *Mack*, 125 Nev. at 91-92, 206 P.3d at 106. Mr. Slaughter's petition in this civil case number challenges the judgment of conviction in his criminal case number and raises various constitutional claims regarding the pre-trial, trial, and post-trial proceedings; those claims turn on events that are memorialized by the documents filed in the criminal case number. It is hard to imagine a closer relationship between two case numbers, so the Court should take judicial notice of the documents filed in the original criminal case number. Again, Mr. Slaughter has already filed a number of documents that haven't previously been filed in the original criminal case number as exhibits to his new petition, and he proposes to continue doing so as necessary in this litigation.

In the event the Court prefers not to take judicial notice of the documents in the original criminal case number, Mr. Slaughter respectfully requests the opportunity to file the relevant documents in this civil case number before the Court enters any relevant orders in this case number, in order to ensure a complete record for this Court, and, if necessary, for the Nevada appellate courts.

CONCLUSION

For the forgoing reasons, Mr. Slaughter respectfully requests the Court take judicial notice of the documents filed in his criminal case number.

AFFIRMATION PURSUANT TO NRS 239B.030

I affirm this document does not contain any social security numbers.

Dated January 4, 2019.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

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

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/s/ Jessica Pillsbury
An Employee of the Federal Public Defender, District of Nevada

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5/6/2019 3:39 PM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

RICKIE SLAUGHTER, Petitioner, vs. RENEE BAKER, Respondent(s).	CASE NO. A-18-784824-W DEPT. NO. III

BEFORE THE HONORABLE DOUGLAS W. HERNDON, DISTRICT COURT JUDGE

THURSDAY, MARCH 7, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS
PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the Petitioner: JEREMY BARON
Assistant Federal Public Defender

For the Respondent: MARC DIGIACOMO
Chief Deputy District Attorney

RECORDED BY: SARA RICHARDSON, COURT RECORDER

LAS VEGAS, NEVADA, THURSDAY, MARCH 7, 2019, 10:22 A.M.

* * * * *

MR. DiGIACOMO: Do you want to call Rickie Slaughter? That's also for the Federal Public Defender.

THE COURT: Sure. What page is that one on?

MR. DiGIACOMO: 13.

MR. BARON: 13, Your Honor.

THE COURT: Thank you. 784284, this is an A case based on the petition for writ of habeas corpus filed in relation to Mr. Slaughter's criminal case.

All right. Counsel.

MR. BARON: Good morning, Your Honor.

THE COURT: Good morning.

MR. BARON: Jeremy Baron on behalf of Rickie Slaughter who is not present. He's in custody and we'll waive his appearance for today only.

THE COURT: Thank you.

MR. BARON: If the Court would like, I can discuss a little bit the issues that we've raised in the petition and why we feel we have good cause to bring this new petition.

THE COURT: Okay.

MR. BARON: So this is Rickie Slaughter's third petition in this court. It's the first one that he's had the benefit of counsel on and we recognize that there are procedural bars in Nevada, but we have alleged good cause to overcome those bars based on new evidence that we developed in 2018 through federal discovery.

THE COURT: Okay.

MR. BARON: And so based on that new evidence, we have good cause related to the claims that rely on that new evidence. We also believe the new evidence shows that Rickie Slaughter is innocent, which provides another path through the procedural bars and allows the Court to consider all the claims in the petition on the merits. So today I'd just like to describe the most important new evidence and explain why we believe it's important and why it amounts to good cause here.

THE COURT: Okay.

MR. BARON: And there are basically two categories of new evidence I want to discuss, the first has to do with the photo lineups and the eyewitness identifications. The second category has to do with Rickie Slaughter's alibi.

So with the photo lineups, this case was a home invasion, there were six people in the home at the time, there was an additional eyewitness outside who saw the two culprits leave. The police got a tip from a confidential informant that Mr. Slaughter was one of the two culprits. The police put together a first photo lineup with Rickie Slaughter's picture in it.

THE COURT: Correct.

MR. BARON: They showed that to the seven eyewitnesses, of those seven, four purported to ID Mr. Slaughter; and of those four, three gave an in-court identification at trial.

Now, as a side note, the reason for that -- those misidentifications is because the first lineup was so suggestive. The five filler photos in the six-pack, we believe were booking photos; but the photo of Rickie Slaughter was a different type of photo that Metro had and that made those lineups

unduly suggestive. And that's why the four misidentified Rickie Slaughter. But I don't want to focus on that today.

THE COURT: Okay.

MR. BARON: I want to focus on the second photo lineup in this case. So after the police developed Rickie Slaughter as a suspect as one of the two culprits, they developed another gentleman, Jacquan Richard, as a potential suspect as the second culprit, and so the police put together a second photo lineup with a picture of Jacquan Richard in it.

THE COURT: Correct.

MR. BARON: And they showed that lineup to at least six, if not all seven of the eyewitnesses, and none of the eyewitnesses identified Jacquan Richard from that lineup. But that lineup also had a photo of Rickie Slaughter in it.

Now before trial the defense knew all of that but they didn't know whether any of the eyewitnesses who saw that second photo lineup identified Rickie Slaughter from that lineup, that was an open question for the defense.

THE COURT: Okay.

MR. BARON: So they filed a pretrial motion on that issue and argued, hey, we think that none of these witnesses picked out Rickie Slaughter from that second photo lineup, and the Court had a pretrial hearing on that motion and again, the defense said we don't think any of the eyewitnesses picked out Rickie Slaughter and the prosecutor came back and said, well, it would take a giant leap to say Rickie Slaughter wasn't picked out of those lineups. So the prosecutor disputed the defense's assertion that none of the witnesses had picked out Rickie Slaughter from that second lineup.

But what we now know by virtue of the federal discovery process

through Detective Prieto, the lead detective's deposition in 2018, is that the defense was right all along, that none of the witnesses who saw that lineup, this is Detective Prieto's testimony, none of them picked out Rickie Slaughter from that second photo lineup. So that is a new fact, that's a new piece of evidence that the prosecution disputed back before trial that was not available to the defense at the time of trial, so that's new evidence that gives rise to new Brady claims and also supports some of the other claims in the petition.

And the reason why that's so critical, why that's such an important fact is that this case came down to the three eyewitness in-court identifications. The State presented some other evidence at trial, I don't find that evidence very convincing. I think our petition and the opposition discuss that in some detail. But really the IDs were at the center of the State's case, they made the State's case. And if the defense had been able to come in and say, yeah, they identified Rickie Slaughter off this first lineup, but there was a second lineup with his photo and none of the witnesses identified him off that second lineup, that would have been a great argument to rebut the credibility of the three in-court identifications.

I mean, at that point, it's basically 50-50. Either the witnesses got it wrong on the first lineup or they got it wrong on the second lineup, which by the way, is much less suggestive, featured a photo of Rickie Slaughter that was more contemporaneous with the crime, and was therefore a more neutral lineup. So that's a critical argument the defense could have had to dispute the three identifications that were the most important fact in the State's case.

And I also want to mention that normally with Brady, the standard for materiality is a reasonable probability of a different outcome, but because

the defense filed this pretrial motion on this issue and because the prosecution disputed the assertion that none of the witnesses picked out Rickie Slaughter from the second photo lineup, that lowers the materiality standard that we need to meet here. It's not a reasonable probability we need to show, we just need to show a reasonable possibility of a different outcome. And I think at the very least we've shown that.

So that's the new evidence about the second photo lineup and why we think we have good cause to raise the related claims now and why we think the Court should resolve those in our favor on the merits. And unless the Court has questions about the lineup, I'll move to the alibi at this point.

THE COURT: Okay. You can go ahead.

MR. BARON: So this was an alibi case. The defense ran an alibi defense. The defense was at the same time this home invasion was ending, Rickie Slaughter was halfway across town picking up his girlfriend from work. His girlfriend was Tiffany Johnson. She worked at a cleaners in North Las Vegas -- or in Las Vegas. And so the defense ran the alibi defense at trial, but didn't do a very good job of proving the alibi. But now based in part on new evidence that we uncovered in 2018, we can prove that alibi with a much greater degree of certainty and so we have good cause with respect to the alibi claims.

So there are essentially three components to the alibi the defense needed to show the jury. First is when did this home invasion end, when did the suspects leave; second is when did Rickie Slaughter get to his girlfriend's workplace to pick her up; and, third, how long would it have taken a culprit to get from the crime scene to the cleaners to pick up the girlfriend. Now as I

said, the defense did not do a very good job of proving that alibi at trial.

So let me start with when did the incident end. Well, the best evidence of when the incident ended is when the 9-1-1 calls came in, and before trial the defense didn't know when the 9-1-1 calls came in. They had some police reports that referenced a time of 7:11, but it wasn't clear that's when the 9-1-1 call came in.

Now at the time of closing arguments, the defense proposed they wanted to say the call came in at 7:11 and the prosecution came back and said, no, you can't say that, you haven't proved that at trial, the only thing you can tell the jury is that the 9-1-1 call came in at about 7:00 o'clock. And so that's what the defense ended up saying in closing.

But we now know because we got a relevant document in 2018 and we now know as a fact that the 9-1-1 came into Metro, was transferred to North Las Vegas at 7:11 p.m. and based on that we also know the suspects would have left the crime scene at about 7:08 p.m. So that's the first difference between the trial and now. At trial the argument was the suspects left about 7:00 o'clock, now we can pin that down to 7:08.

So the second part of the alibi is when did Rickie Slaughter get to his girlfriend's workplace to pick her up. His girlfriend testified at trial it was between 7:00 and 7:15, no later than 7:20. Her boss who was working that day testified, no, it was 7:30. Now the boss gave a prior inconsistent statement to the police that actually it was 7:15 and the defense was ineffective because they didn't get that prior inconsistent statement into evidence.

But another fact about the boss is that he had a motive for bias

against Rickie Slaughter and the defense was unaware of that at the time of trial. Specifically, the same month that this home invasion happened, Rickie Slaughter and the boss, Jeff Arbuckle, got into some sort of dispute and Jeff Arbuckle went so far as to call the police and register a trespassing complaint against Rickie Slaughter. And the defense was unaware of that trespassing complaint, that call to the police, at the time of trial. And that would have been material impeachment evidence because if the defense could have told the jury, hey, this guy, Jeff Arbuckle, he has a reason to give testimony that helps the State, that would have given the jury a reason to disbelieve Jeff Arbuckle, especially if the jury had known about the prior inconsistent statement about 7:15.

And the last part of the alibi is how long would it have taken to get from the crime scene to the cleaners, the defense didn't introduce evidence about that at trial. We know it would have been at least 20 or 30 minutes, probably longer than that.

So to sum up, let me just compare the alibi the way it looked at trial versus the alibi we have now based on new evidence. So at trial it was, well, the suspects left sometime around 7:00 o'clock, we're not sure, they showed up -- Rickie Slaughter showed up at the cleaners, maybe 7:00, maybe 7:15, 7:20, 7:30, it's not clear, and how long would it have taken to get from the crime scene to the cleaners, we don't know. That's not a very persuasive alibi. But now we can pin that alibi down with much greater specificity, we can say the suspects left at 7:08, we're confident Rickie Slaughter got to the cleaners at 7:15, that drive would have taken at least 20 or 30 minutes, and that means there's no way Rickie Slaughter could have left the crime scene at 7:08 and

gotten to the cleaners at 7:15, it's just physically impossible. So because we have new evidence that proves this alibi to a much greater level of persuasion, we have new evidence that gives good cause to raise the claims related to the alibi and we think the Court should hear those claims on the merits and decide them in our favor.

And in addition to the new evidence being good cause, we also think we've shown Rickie Slaughter is innocent. And, again, I think the pleadings discuss that argument in detail. Basically it comes down to, number one, you can't trust these witnesses' identifications, especially in light of the second lineup; number two, we've proven Rickie Slaughter's alibi; and, number three, the State's circumstantial evidence is not very persuasive. If the jury had known all of this, it is more likely than not no reasonable juror would have voted to convict. That means Rickie Slaughter is innocent within the meeting of the procedural bars, and the Court should hear every claim in the petition on the merits.

And the last thing I'll say is that we think we've shown good cause, innocence, and the merits of the claim based on these pleadings, but at the very least, the Court should set this case for an evidentiary hearing so that we can present additional evidence and make additional arguments about why Rickie Slaughter can show good cause, why he's innocent, and why his claims entitle him to relief.

THE COURT: All right. Mr. DiGiacomo.

MR. DiGIACOMO: Thank you. I'll start with the easiest one, it's the 7:11 time. Oh, yeah, that's in a police report in the possession of the defense at the time of trial. They didn't prove it up during the jury trial that it was 7:11,

but that information is contained in the police report, so it's not newly discovered evidence that they could maybe make an argument that they could have put that on and the time that they're saying, 7:08, the victims -- the suspects left, that's based upon, I guess, some sort of inference from the 9-1-1 call as someone's guestimate of the time that somebody left. It's not like it's set in stone that there's an identification at the time. But either way, there's nothing new about that evidence.

Let's talk about the photo lineup. Is there anything new about the photo lineup? No, they had the photo lineup, the photo lineup with Rickie's picture in it, and the statement in the police report that nobody picked out Jacquan Richard. So as it -- but itself, it's not new evidence. I would dispute with the defense that Jesse 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 and I didn't go back and look at every single one of our transcripts, but the Court may actually recall this that 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 Jacquan -- we couldn't identify the second suspect. Detective Prieto didn't know that Rickie Slaughter was in the second photo lineup; and thus, the defense in this case had all this evidence. There's nothing new about any of this evidence that they're suggesting to you.

As it relates to Mr. Arbuckle, the defendant certainly knew that he had some sort of dispute as it related to Mr. Arbuckle. My recollection as I stand here right now is that that was Metro's jurisdiction and not north town's jurisdiction where Mr. Arbuckle's thing is, and so if there is some sort of

complaint made, it wasn't certainly related to the investigative agency in this particular case, but certainly they knew about the dispute at the time. So that's not new evidence whatsoever. There's absolutely no new evidence in this case and, thus, there's no basis to go around the procedural bars in his third petition before the Court and I would submit it.

THE COURT: All right.

MR. BARON: Your Honor, just briefly, the State says the defense knew the 9-1-1 call was 7:11, they didn't know that. There were police reports that did say 7:11.

THE COURT: Right.

MR. BARON: It's been a little while since I've looked at them, by my recollection is none of them say the 9-1-1 call came in at 7:11. They say, "Time associated with event, 7:11." So the fact that we have --

THE COURT: Well, is that -- that's kind of a little form over substance, right? If it says in there the time and the reality of the trial is that nobody brought that out in evidence, I have to limit the attorneys to providing the juror with argument that's based on evidence. So I get your frustration that the attorneys didn't bring it out and then they were precluded from raising it, but it doesn't mean they didn't know about it.

MR. BARON: Well, I think, and we've quoted, this is in one of the colloquies with the Court, the defense admitted they didn't know the specific time. They thought it was 7:11 because the police reports mentioned 7:11. But I think the attorneys admitted to the Court they didn't have any documents that actually laid the foundation for 7:11 being the time the 9-1-1 call came in. And so that -- that's what's new is it's not just the defense guessing it's 7:11,

it's a document that actually shows 7:11. So that's number one.

Number two, the -- the State's argued, well, the defense had the second lineup and actually the witnesses told the State Rickie Slaughter was in it. There's no evidence of that. And, again, I've read through the transcripts, maybe I missed something, I don't think any of the witnesses ever testified or the State made any representations that any of the witnesses identified Rickie Slaughter.

THE COURT: I don't know if it was in testimony. My recollection was in a pretrial conference somebody mentioned something about the other lineups.

MR. BARON: That's right. There --

THE COURT: And that something then came up about the other lineups being provided where they were asked to identify the second suspect and somebody said by the way, Rickie Slaughter was in the other lineup. But I don't think they were asked to identify Rickie Slaughter in those lineups.

MR. BARON: Well, so, first, the Court's recollection is right, there was a pretrial motion to dismiss because the police failed to document the outcome of the second photo lineup. The Court had a hearing on that motion. The defense came in, they said, We don't really know a lot about these second photo -- I'm paraphrasing -- but we don't really know a lot about this second photo lineup, we don't think any of the witnesses identified him, we think the Court should dismiss the case because the State failed to document the outcome of the second photo lineup.

THE COURT: Right.

MR. BARON: And the prosecutor came back and said, well, we dispute the allegation that none of the witnesses identified Rickie Slaughter from that

second photo lineup, it would take a -- and this is a direct quote, "It would take a giant leap to say Rickie Slaughter wasn't picked out of those lineups." And the State never said, actually, you know, these witnesses picked him out, they didn't say there was a conversation between these witnesses and Detective -- there weren't any representations like that, they just disputed the allegation. There's no evidence any one picked Rickie Slaughter from that lineup and in fact Detective Prieto testified none of the witnesses picked him out of that second photo lineup. And if the State wants to come bring in additional evidence about that, then we need a hearing to resolve that factual dispute.

But, again, I recognize that what the police were hoping with the second photo lineup is that the witnesses would identify Jacquan Richard, again, didn't even realize Rickie Slaughter was in that, but that doesn't make a difference for the defense because the lineup says let us know if you can identify one or more suspects in connection with this crime. So if the witnesses see that second photo lineup and if they saw Rickie Slaughter and recognized him as one of the two suspects, they would have said that to the police, Detective Prieto would have written that down on the lineup, and that would have been memorialized. But that's not what happened. Instead, none of the witnesses picked him out of that second lineup, that means they failed to identify him out of that lineup, and that is a big piece of impeachment evidence to rebut their assertion that they can identify Mr. Slaughter as one of the culprits.

And the last thing I'll say about Mr. Arbuckle, yes, Mr. Slaughter knew he had had some sort of altercation with Jeff Arbuckle, he also know -- I don't know at what point he found this out, but at some point he knew

someone had called the cops on him for trespassing, so he thought that maybe that was Jeff Arbuckle, but he's never been able to prove that until 2018 when we got the Metro record memorializing that complaint. And the argument that, oh, that was Metro, that wasn't North Las Vegas, the prosecutor has to find exculpatory evidence that any of the State agencies possess. So the fact that, oh, Metro had this, not North Las Vegas, it's irrelevant to the Brady analysis.

THE COURT: Well, so here's the thing, first off, procedurally, Mr. Slaughter was convicted at trial, there was a direct appeal, remittitur issued in April of 2014 I believe, so this is substantially beyond the time period, and I know everybody's addressing, you know, why they believe or don't believe that there's good cause to overcome the procedural bars. This is also the third petition, so there's the issue of whether things are successive or should have been raised in earlier petitions.

I think, and from my opinion in reviewing everything, the only thing that's new is the idea of the trespass with the gentleman from the girlfriend's work. The other things, there's a difference between new evidence and a new take on old evidence or a new argument to be made from new evidence or a new perspective to criticize former counsel from old evidence, and I think that's really what we're dealing with. The issue of the alibi was presented at the time of trial. The issue of the 9-1 call -- 9-1-1 call time was in information that was had before so it's not new evidence, there may have been a failure at trial to explore that to ask the appropriate questions and get that evidence out there for use in closing argument, but that doesn't make it new evidence. Likewise in terms of the -- well, that was about the allegation on the 9-1-1 call.

In terms of the trespass issue with the gentleman, I would say that,

first off, I have a disagreement with the strength of the evidence that was produced at the time of trial. I think there was significantly stronger evidence in your viewing it on the record from -- from my recollection of sitting in the trial, and I think that anything related to a trespass citation would have been of minimal significance to that gentleman, such that I could not say that if the jury knew that that gentleman had a trespass citation issued previously against Mr. Slaughter, that that would somehow lead to a reasonable probability or even a reasonable possibility that there would be a different outcome at the time of trial.

Additionally, I believe the defense had the photo lineups at that time, so it's not that there's the existence of a photo lineup that is now new evidence. I understand the allegation being that Detective Prieto has testified that nobody identified Mr. Slaughter in lineups that weren't directed at identifying Mr. Slaughter. So, again, I don't think that there would be any reasonable possibility from that to render a new verdict at the time of trial. And obviously the fact that I'm making this ruling, my opinion would be that based on all of the pleadings, the ruling is, well, it's ripe for ruling right now as opposed to based on an idea of having any further evidentiary hearing.

So, yeah, I think that's it. I think I covered everything that I wanted to cover.

MR. BARON: Just one technical matter.

THE COURT: Sure.

MR. BARON: We had filed a motion for judicial notice, and this has to do with the new filing system where petitions get filed as civil cases, not criminal cases.

THE COURT: Sure.

MR. BARON: We had refiled the whole criminal record in the civil case that we cite transcripts from the trial and from hearings.

THE COURT: Right.

MR. BARON: And we didn't file those as exhibits.

THE COURT: Right.

MR. BARON: And we want to make sure, if necessary, we have a clean record for the Nevada appellate courts. So, we'd ask the Court to grant that motion and take judicial notice of the documents in the criminal case.

THE COURT: Oh, yeah, yeah, yeah. Absolutely, look, we're still kind of waiting in the -- in the juvenile years of our A filings as opposed to our C filings in terms of how this translates over. I always go back to the C filing in Odyssey to look at anything that I need to look at because not every -- I agree with what you're saying about everything being noticed under the A part, but I'll grant your judicial notice to the extent that that's of any kind of issue as it's move forward. Okay?

MR. BARON: Thank you.

MR. DiGIACOMO: Thank you, Judge.

THE COURT: All right, guys, thank you.

PROCEEDING CONCLUDED AT 10:46 A.M.

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case.

Sara Richardson

SARA RICHARDSON
Court Recorder/Transcriber

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RICKIE SLAUGHTER, *Petitioner,* vs. RENEE BAKER, *et al.*, *Respondents.*	3:16-cv-00721-RCJ-WGC ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court on petitioner's second motion for leave to conduct discovery (ECF No. 40) and unopposed (with reservation of defenses) motion for leave to file a second amended petition (ECF No. 50). The motion for discovery seeks leave to take one deposition following upon the discovery previously allowed by the Court's grant of petitioner's prior motion for discovery.

Background

Petitioner Rickie Slaughter challenges his 2012 Nevada state conviction, pursuant to a jury verdict, of multiple offenses arising from a home invasion in Las Vegas.

Slaughter's identity as one of the perpetrators and where he was at the specific time of the home invasion both were contested issues at trial.

Regarding identity, Slaughter maintains that: (a) a first photographic lineup was unduly suggestive because his picture was markedly different from the other pictures in the lineup; and (b) the prior discovery established that none of the victims identified Slaughter in a second, allegedly nonsuggestive, photographic lineup. He wants to depose the lead prosecutor at trial, Marc DiGiacomo, regarding the second photographic

lineup and his statements at trial allegedly suggesting that one or more victims identified Slaughter in the second lineup. Slaughter maintains that DiGiacomo's testimony, *inter alia*, "would help develop the record about what the prosecution knew about the outcome of the second photographic lineup, when they knew it, and the factual basis (if any) for the comments Mr. DiGiacomo made in open court." Grounds 1, 3(a), 4(a), 9(b) & 11(b) in the second amended petition present claims relating to the photographic identification evidence, including a new and unexhausted *Brady-Giglio*[1] claim in Ground 11(b). (*See* ECF No. 40, at 4-9; ECF No. 48, at 7-9; ECF No 50-1, at 2, 5-7, 12-14, 22-28, 37-38, 45-46, 57-58, 59-60 & 62-63.)

Regarding location, Slaughter maintains that: (a) his alibi defense at trial was that he was halfway across town picking up his girlfriend from work at or shortly after the time of the home invasion and therefore could not have been involved; (b) DiGiacomo objected to and prevented the defense from arguing at trial that the 911 call was received at or close to 7:11 p.m. and secured a court ruling allowing the defense to argue only a timeline where the call initially came in instead closer to 7:00 p.m.; (c) the recent discovery suggests that the 911 call allegedly did indeed come in closer to 7:11 p.m. rather than 7:00 p.m., consistent with the timeline that the defense sought to present at trial in support of Slaughter's alibi defense but that the State successfully prevented the defense from presenting; (d) the recent discovery further suggests that the State withheld substantial evidence impeaching prosecution witness Jeffrey Arbuckle's testimony that Slaughter had not picked up his girlfriend yet when he left at 7:30 p.m., including, *inter alia*, a prior inconsistent statement by Arbuckle that he instead left work fifteen minutes earlier and evidence that he further had a motive from the outset to lie to hurt Slaughter's alibi defense; and (e) the discovery suggests that the State withheld additional exculpatory evidence confirming that the victims said that the suspects had heavy Jamaican accents, wore wigs, and drove a different type of vehicle than the type that Slaughter allegedly drove. Slaughter wants to depose DiGiacomo regarding, *inter alia*, what the prosecution

[1] *See Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

knew about the 911 call evidence and further regarding the allegedly withheld exculpatory evidence. Grounds 2, 3(b), 4, 5, 6(a), 6(c), 6(d), 6(e), 7, 9(c), 11(a), and 11(c) in the second amended petition present claims relating to the foregoing, including new and unexhausted: (1) *Brady-Giglio* claims in Grounds 11(a) and (c); and (2) a *Napue*[2] claim in Ground 11(c). (*See* ECF No. 40, at 9-12; ECF No. 50-1, at 2-3, 29-36, 43-56 & 59-64.)

Governing Law

Rule 6(a) of the Rules Governing Section 2254 Cases (the "Habeas Rules") provides that "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure . . . ." In *Bracy v. Gramley*, 520 U.S. 899 (1997), the Supreme Court held that Rule 6 was meant to be applied consistently with its prior opinion in *Harris v. Nelson*, 394 U.S. 286 (1969), which expressly called for the adoption of the rule. 520 U.S. at 904 & 909. In *Harris*, the Supreme Court held that "where specific allegations before the court show reason to believe that the petitioner *may*, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." 394 U.S. at 300 (emphasis added). In *Bracy*, a unanimous Supreme Court overturned a decision denying discovery where the petitioner's claim of judicial bias in his particular case was based on "only a theory," where the claim was "not supported by any solid evidence" with regard to the theory, and where the Supreme Court expressly noted that "[i]t may well be, as the Court of Appeals predicted, that petitioner will be unable to obtain evidence sufficient to support" the theory that the petitioner sought to pursue in the discovery. 520 U.S. at 908 & 909.

The Ninth Circuit, consistent with *Bracy* and *Harris*, accordingly has held repeatedly that habeas discovery is appropriate in cases where the discovery sought only might provide support for a claim. *See, e.g., Pham v. Terhune*, 400 F.3d 740, 743 (9th Cir. 2005); *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997). *See also Osborne v. District Attorney's Office*, 521 F.3d 1118, 1133 (9th Cir. 2008), *reversed on other grounds*,

[2] *See Napue v. Illinois*, 360 U.S. 264 (1959).

District Attorney's Office v. Osborne, 557 U.S.52 (2009) (in discussing its precedent in *Jones* as to habeas discovery, the Ninth Circuit reinforced the point that a court should allow discovery that, as emphasized by the Court of Appeals, only "*may* establish" a factual basis for the petitioner's claim).[3]

Discussion

In its prior order, the Court rejected respondents' reliance upon the rule in *Cullen v. Pinholster*, 563 U.S. 170 (2011), as a basis for denying the discovery sought on the premise that the Court's review on the merits necessarily will be restricted to the record before the state courts. (ECF No. 31, at 1.) Respondents did not file a motion for rehearing from the Court's prior order, but respondents now seek to reargue the point in opposition to the current motion. (ECF No. 46, at 2-3.)

The Court again is not persuaded.

Pinholster restricts the consideration of evidence only as to claims that have been adjudicated on the merits by the state courts and that withstand deferential review under AEDPA. There are numerous potential steps to go through before the Court will be at a point where it will be determining whether, in the final analysis, *Pinholster* will apply to every claim herein to which the discovery pertains.

At the very outset, the pleadings, per petitioner's pending motion and this order, will have been amended subsequent to the parties' arguments on the second discovery motion. Slaughter presents new claims in the second amended petition that do not appear to have been exhausted and decided on the merits by the state courts at this point, including *Brady-Giglio* and *Napue* claims. As to Slaughter's new claims, it has not been definitively determined as yet, *inter alia*, (a) whether the new claims will relate back to timely claims and/or otherwise be timely based on other arguments; (b) whether a stay for exhaustion may be warranted; (c) during any such stay how the state courts might rule

[3] Contrary to respondents' suggestion (see ECF No. 46, at 2-3), neither Rule 6(a) nor *Bracy* were abrogated by AEDPA and, *inter alia*, its exhaustion requirement. Moreover, the exhaustion requirement long predates AEDPA. *See, e.g., Ex parte Hawk*, 321 U.S. 114, 116-17 (1944). The *Bracy* Court no doubt was well aware at the time of its decision both of the existence of the long-established exhaustion doctrine and of the prospect that federal discovery could render a theretofore exhausted claim unexhausted.

on such claims and/or other claims; and (d) whether the claims may be procedurally barred under state law and whether Slaughter can overcome any such procedural default in federal court.

Pinholster does not bar consideration of evidence *dehors* the state record presented by a petitioner for a purpose other than directly challenging a state court adjudication on the merits. *See, e.g., Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (*en banc*) (presentation of evidence to overcome a procedural default by establishing cause based on inadequate assistance of post-conviction counsel did not constitute presentation of evidence on the merits of a claim). *Pinholster* thus does not bar the consideration of evidence outside the state court record to determine whether a petitioner can demonstrate equitable tolling or another basis to overcome the federal time-bar, whether he can demonstrate good cause for a stay, and/or whether he can overcome a procedural default. Moreover, where a claim has been procedurally defaulted or remains unexhausted in the state courts, the claim has not been adjudicated on the merits in a state-court proceeding in any event. *See, e.g., id.* (procedurally defaulted claim had not been adjudicated on the merits); *see also Rodney v. Filson*, ___ F.3d ___, 2019 WL 985885 (9th Cir., March 1, 2019) (similar); *Gentry v. Sinclair*, 705 F.3d 884, 896 (9th Cir. 2013) (similar).

Applying *Pinholster* to bar discovery pertaining to a claim that has not yet been adjudicated on the merits by the state courts and which conceivably never may be adjudicated on the merits by those courts thus makes no sense. First, the evidence obtained in discovery can be used for a multitude of possible purposes that are not prohibited by *Pinholster*. Second, if the claim ultimately is procedurally barred under state law but the petitioner overcomes the procedural default in federal court, then *Pinholster* will have no application to the claim because it will not have been adjudicated on the merits by a state court.

Similarly, it has not yet been definitively determined at this point whether new allegations in the second amended petition and/or new evidence will fundamentally alter

and/or significantly strengthen previously exhausted claims that were decided on the merits in state court and thereby render them unexhausted.[4] As to any such claims, *Pinholster* similarly will not bar consideration of evidence outside the state court record with regard to any timeliness, stay, and/or procedural default issues. The Ninth Circuit has recognized that evidence developed during federal discovery potentially may lead to a previously-exhausted claim becoming unexhausted and further lead to a stay so that the state courts may be afforded an opportunity to address the altered or strengthened new claim in the first instance. *See Gonzalez v. Wong*, 667 F.3d 985, 971-72 & 978-80 (9th Cir. 2011). If the state courts ultimately, for example, were to find the claim procedurally barred and the petitioner succeeded in overcoming the procedural default in federal court, then such a new claim then also would not be subject to *Pinholster*.

Finally, even as to claims that clearly have been both exhausted and adjudicated on the merits by the state courts, it is not a foregone conclusion that the claims ultimately in fact will withstand deferential review under § 2254(d) on a federal court review restricted to the state court record. For example, a state court decision may apply a rule that is contrary to clearly established federal law as determined by the United States Supreme Court. In that circumstance, the claim then will be reviewed *de novo* on the merits by the federal court. *Pinholster* clearly would have no application during such a *de novo* review following an initial failure of the claim to withstand deferential review under AEDPA.

There may well be cases where it will be abundantly clear at the time of a discovery motion both that: (a) the requested discovery will not pertain to any other nonprohibited uses such as for establishing a basis for equitable tolling, good cause for a stay, or cause and prejudice to overcome a procedural default; and (b) all claims related to the requested discovery necessarily will be subject to the rule in *Pinholster* if and when the federal court reaches the merits, with no possibility of instead *de novo* review on the merits.

This is not such a case, however.

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[4] *See generally Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014) (*en banc*).

Rather, in the context of this specific case, to say that respondents have put the cart before the horse in seeking to apply *Pinholster* as a threshold limitation on permissible discovery is an understatement. *Pinholster* does not categorically prohibit all federal habeas discovery, particularly where potentially credible evidence of alleged withholding of material exculpatory evidence and/or use of false testimony is involved. The Court makes no definitive holding at this juncture as to any factual or legal issue in this case. But neither AEDPA nor justice countenance a federal court turning a wholly deaf ear to such possible evidence from the very outset, subject to, *inter alia*, the exhaustion requirement. *Cf. Gonzalez*, 667 F.3d at 972 ("Because it appears to us that [the discovery] materials strengthen Gonzales's *Brady* claim to the point that his argument would be potentially meritorious -- that is, that a reasonable state court might be persuaded to grant relief on that claim -- it is not appropriate for us to ignore those materials.") Slaughter has demonstrated good cause for the discovery sought under Rule 6(a), and nothing in *Pinholster* overrides that showing of good cause in this particular case. There will be a time to conclusively apply the law to the facts adduced, in one fashion or another. However, petitioner in the meantime has established good cause to first develop the facts that potentially may be considered in this case, to one extent or another.

The Court thus is unpersuaded by respondents' attempt to rehash an argument that it rejected in the prior order and as to which respondents did not seasonably seek reconsideration.

Respondents otherwise advance no other argument seeking to establish that the discovery should not be allowed. Respondents suggest only, as discussed further below, that the scope of the discovery should be limited.

The Court accordingly holds on the record and argument presented that petitioner has established good cause to pursue the discovery sought.

Regarding scope of the discovery, respondents suggest that petitioner has not demonstrated "why interrogatories are not a more expedient way to accomplish the

necessary discovery." (ECF No. 46, at 4.) Respondents cite no caselaw or rule requiring that a party seeking to take a discovery deposition must establish in the first instance that the deposition sought is more expedient than interrogatories. That is, interrogatories constitute one of many discovery methods, including depositions, that a party generally may pursue, not a presumptively preferential method that must be pursued in lieu of other methods unless the requesting party first shows specific good cause.

In any event, even if the Court were to assume *arguendo* also that DiGiacomo and/or a related person or entity is a party to whom interrogatories can be directed, the Court is not persuaded by respondents' one-sentence argument that Slaughter should be limited instead to interrogatories. The most direct and expedient method to obtain the discovery sought is by examining DiGiacomo directly under oath. The Court certainly is not going to have the matter potentially strung out by discovery disputes over objections to interrogatories and/or the adequacy of responses to interrogatories. DiGiacomo would appear from the parties' arguments to be an experienced prosecutor. He should be able to respond under oath to direct examination without the intermediation of attorneys instead preparing responses and/or objections to interrogatories.

Respondents further urge, in their argument on scope, that: (a) Slaughter "fails to demonstrate how the deposition of the prosecutor advances a claim that the defense counsel failed to ask questions of witnesses about the second line up, or further impeachment of Detective Prieto, who apparently was unable to testify at trial," and (b) Slaughter "also fails to demonstrate how defense counsel can be ineffective for failing to ask questions based upon answers obtained almost a decade after the prosecution." (ECF No. 46, at 4.) Even within the context of the ineffective-assistance claims, the Court is not sanguine that the discovery sought has no potential relevance, including as to the prejudice element. The Court will not predetermine the scope of the deposition inquiry by anticipatory rulings as to whether the prosecutor's possible testimony -- and/or other evidence -- might establish also deficient performance by defense counsel on the ineffective-assistance claims. The evidence sought further clearly would appear to be

relevant to multiple other claims now presented, including as to the new *Brady-Giglio* and *Napue* claims that are not based upon alleged ineffective assistance of counsel.

In short, the Court sees no utility in confining the scope of examination by advisory rulings as to how specific evidence ultimately may or may not impact specific claims.

The second motion for discovery therefore will be granted.

IT IS THEREFORE ORDERED that petitioner's second motion for discovery (ECF No. 40) is GRANTED and that petitioner is granted leave to take the discovery deposition of Marc DiGiacomo within thirty (30) days of entry of this order, subject to reasonable request for extension of time to schedule the deposition.

IT IS FURTHER ORDERED that the certification requirements of Rules 26(c)(1) and 37(a)(1) of the Federal Rules of Civil Procedure and Local Rule LR 26-7 apply to any disputes regarding the discovery allowed. The parties shall confer and endeavor in good faith to resolve any discovery disputes, and they shall seek court intervention only as a last resort. All applicable discovery sanction provisions of Rules 26 through 37 further shall apply. Any discovery matters in this habeas case, including any emergency discovery disputes under Local Rule LR 26-7(d), will be handled by the Presiding District Judge rather than the Magistrate Judge.

IT IS FURTHER ORDERED that petitioner's motion for leave to file a second amended petition (ECF No. 50) is GRANTED and that the second amended petition shall be filed. No response to the pleading is required at this time.

IT IS FURTHER ORDERED that: (1) within sixty (60) days from the date of the deposition, petitioner shall file any further motions seeking any further relief regarding the pleadings or a notice that such further relief is not then being sought;[5] and (2) if such a notice is filed, respondents then shall file a response to the second amended petition within sixty (60) days of service of the notice, with any in turn responsive filing by petitioner

[5] The Court assumes that an expedited transcript will be sought. The sixty-day period allows for the possibility that the witness could reserve the right to read and sign within thirty days per Rule 30(e). Petitioner of course need not wait the full sixty days to proceed if the deposition is finalized more quickly. The Court would prefer to move forward with as much alacrity as possible.

then to follow within thirty (30) days of service. If petitioner instead files a motion for further relief regarding the pleadings, the order addressing that motion will set the remaining schedule. All affirmative defenses to be raised by respondents must be raised in the initial response. Successive motions to dismiss will not be entertained for affirmative defenses that can be anticipated at the time of the initial response.

DATED: March 29, 2019.

ROBERT C. JONES
United States District Judge

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

RICKIE SLAUGHTER, Petitioner, v. RENEE BAKER, et al., Respondents.	Case No. A-18-784824-W (04C204957) Dept. No. III Date of Hearing: _____ Time of Hearing: _____

MOTION FOR THE COURT TO STAY ENTRY OF ITS WRITTEN ORDER AND FOR LEAVE TO REQUEST RECONSIDERATION

ARGUMENT

Mr. Slaughter respectfully requests the Court stay the entry of its written order in this case—and allow Mr. Slaughter to seek reconsideration of its decision, if necessary—because Mr. Slaughter may seek to supplement the petition he previously filed in this case in the coming months.

Mr. Slaughter filed the petition at issue in this case on November 20, 2018. The State filed a motion to dismiss on December 19, 2018, and Mr. Slaughter filed an opposition on January 3, 2019. The court held argument on the motion to dismiss on March 7, 2019, and orally announced its decision to dismiss the petition. *See* 3/7/19 Minutes.

As his petition and opposition to the motion to dismiss explain, the principal reason Mr. Slaughter filed his 2018 petition is because the federal court authorized Mr. Slaughter to conduct discovery; the initial federal discovery process led to the development of new evidence supporting his claims for relief, as well as his innocence. After Mr. Slaughter filed that first discovery motion, Mr. Slaughter filed a second discovery motion in federal court, on May 17, 2018. That motion asked for leave to conduct a deposition of Marc DiGiacomo, the lead prosecutor on Mr. Slaughter's case. At the time Mr. Slaughter filed his new petition in this Court (on November 20, 2018), the second discovery motion remained pending. Mr. Slaughter made brief note of this pending motion in his opposition to the State's motion to dismiss. 1/3/19 Opposition at 30 ("Mr. Slaughter has asked the federal court to allow him to depose Mr. DiGiacomo for similar reasons.").

On March 29, 2019, the federal court issued an order granting Mr. Slaughter's second discovery motion and allowing him leave to conduct a deposition of Mr. DiGiacomo. That order is attached to this motion as Exhibit 22. The parties have not yet scheduled a date for the deposition; Mr. Slaughter intends to conduct the deposition promptly, while taking into consideration Mr. DiGiacomo's schedule.

In light of the federal court's order granting additional discovery, Mr. Slaughter respectfully requests the Court stay the entry of a written decision dismissing Mr. Slaughter's 2018 petition. The deposition of Mr. DiGiacomo is likely to produce additional exculpatory information relevant to Mr. Slaughter's claims for relief. It is also likely to produce additional information supporting Mr. Slaughter's arguments regarding good cause and prejudice, as well as his argument that he is actually innocent of the crimes of conviction. The Court should therefore stay the entry of a written order in this case. Instead, it should allow Mr. Slaughter time to conduct the deposition and then supplement his 2018 petition. In turn, it should allow the parties to supplement their briefing on the State's motion to dismiss. The Court can then consider its decision to dismiss the petition in light of all the evidence Mr. Slaughter will have developed through the federal discovery process.

Separately, while the Court has not yet entered a written order, it has orally announced its decision to dismiss the petition. Under this Court's Local Rule 2.24, the Court may not rehear or reconsider matters it has already decided except "by leave of the court granted upon motion therefor." Thus, in an abundance of caution, this motion also asks the Court to grant leave to Mr. Slaughter to request reconsideration of the Court's oral decision. In particular, the Court should refrain from entering a written order in this case and should reconsider its oral decision in light of any supplemental pleadings the Court allows the parties to file after Mr. DiGiacomo's deposition.

The alternative to this proposal would likely prove judicially inefficient. If the Court enters a written order dismissing the petition at this point in time, Mr. Slaughter would intend to appeal that decision to the Nevada Supreme Court. Then, after Mr. Slaughter conducts the deposition of Mr. DiGiacomo, Mr. Slaughter would have to consider filing a fourth petition in this Court, incorporating the information learned in the deposition. If he took that route, the Court would then have to resolve

that petition, which could give rise to yet another appeal to the Nevada Supreme Court. By contrast, if the Court stays the issuance of its written opinion until it can take Mr. DiGiacomo's deposition into account, there is much less chance Mr. Slaughter will see the need to file a fourth petition; instead, the Court can issue a single written order, and the parties can take a single appeal to the Nevada Supreme Court, which would encompass all the facts learned through the federal discovery process.

CONCLUSION

For the forgoing reasons, Mr. Slaughter respectfully requests the Court stay the entry of its written order in this case, allow Mr. Slaughter to request reconsideration of the Court's oral decision, and allow the parties to supplement the pleadings in this case after Mr. DiGiacomo's deposition.

AFFIRMATION PURSUANT TO NRS 239B.030

I affirm this document does not contain any social security numbers.

Dated April 4, 2019.

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 April 4, 2019, I electronically filed the foregoing with the Clerk of the Eighth Judicial District by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Steven Owens, steven.owens@clark-countyda.com, Motions@clarkcountyda.com

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

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/s/ Jessica Pillsbury
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

RICKIE SLAUGHTER, Petitioner, v. RENEE BAKER, et al., Respondents.	Case No. A-18-784824-W (04C204957) Dept. No. III

INDEX OF EXHIBIT IN SUPPORT OF MOTION FOR THE COURT TO STAY ENTRY OF ITS WRITTEN ORDER AND FOR LEAVE TO REQUEST RECONSIDERATION

No.	DATE	DOCUMENT	COURT	CASE #
22.	3/29/2019	Order	United States District Court	3:16-cv-00721-RCJ-WGC

Dated April 4, 2019.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

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

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RICKIE LAMONT SLAUGHTER, #1896569

Defendant.

CASE NO: A-18-784824-W (04C204957)

DEPT NO: III

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO STAY

DATE OF HEARING:
TIME OF HEARING:

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to Stay.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On September 28, 2004, the State filed an Information charging Rickie Lamont Slaughter ("Defendant") with: Count 1 Conspiracy to Commit Kidnapping (Felony – NRS 199.480, 200.320); Count 2 – Conspiracy to Commit Robbery (Felony – NRS 199.480); Count

3 – Conspiracy to Commit Murder (Felony, NRS 199.480); Count 4 & 5 - Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165); Count 6 - Battery With Use of a Deadly Weapon (Felony – NRS 200.481); Count 7 - Attempt Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.330. 193.165); Count 8 - Robbery With Use of a Deadly Weapon (Felony – NRS 200.380, 193.165); Count 9 - Burglary While in Possession of a Firearm (Felony – NRS 205.060); Counts 10 - Burglary (Felony – NRS 205.060); Counts 11 through 16 - First Degree Kidnapping With Use of a Deadly Weapon (Felony – NRS 200.310, 200.320, 193.165); and Count 17 - Mayhem (Felony – NRS 200.280).

On April 4, 2005, Defendant entered into a Guilty Plea Agreement, wherein he agreed to plead guilty to: Count 1 – Attempt Murder With Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165); Count 2 - Robbery With Use of a Deadly Weapon (Felony – NRS 200.380, 193.165); Count 3 - First Degree Kidnapping (Felony – NRS 200.310, 200.320), and Count 4 - First Degree Kidnapping With Use of a Deadly Weapon (Felony – NRS 200.310, 200.320,193.165).

On August 8, 2005, Defendant was adjudicated guilty and sentenced to the Nevada Department of Corrections as follows: Count 1 – a minimum of 90 months and maximum of 240 months, plus an equal consecutive minimum of 90 months and maximum of 240 months for use of a deadly weapon; Count 2 – a minimum of 72 months a maximum of 180 months, plus an equal and consecutive minimum of 72 months a maximum of 180 months for the use of a deadly weapon; concurrent to Count 1; Count 3 – life with the possibility of parole after a minimum of 15 years; concurrent to Counts 1 and 2; Count 4 – life with a the possibility of parole after a minimum of 5 years, plus an equal consecutive life with the possibility of parole after a minimum of 5 years for the use of a deadly weapon; concurrent to Counts 1, 2, and 3. Defendant received no credit for time served. The Judgment of Conviction was filed on August 31, 2005. Defendant did not file a direct appeal.

On August 7, 2006, Defendant filed a Petition for Writ of Habeas Corpus. Among other things, Defendant claimed that his guilty plea was not voluntarily entered because he was promised and led to believe that he would be eligible for parole after serving a minimum of

15 years. The State filed its Opposition on November 17, 2006. This Court denied Defendant's Petition on December 18, 2006. The Findings of Fact, Conclusions of Law and Order was filed on January 29, 2007. On January 11, 2007, Defendant filed a Notice of Appeal. On July 24, 2007, the Nevada Supreme Court affirmed the denial of several of the Petitioner's claims but reversed the denial of Defendant's claim regarding the voluntariness of his plea and remanded the matter for an evidentiary hearing, directing the Attorney General to file a response to the underlying sentence structure/parole eligibility claim. Slaughter Jr. v. State, Docket No. 48742 (Order Affirming in Part, Vacating in Part and Remanding, July 24, 2007).

Upon remand, this Court appointed post-conviction counsel to assist Defendant, who later elected to proceed pro per. On June 19, 2008, this Court held an evidentiary hearing. Afterward, this Court denied Defendant's claim that his guilty plea was involuntarily entered but ordered Department of Corrections to parole Defendant from sentences for the deadly weapon enhancements for Counts 1, 2, and 4 at the same time as the sentences for the primary counts. Defendant filed a Notice of Appeal on September 9, 2008. On March 27, 2009, the Nevada Supreme Court reversed the judgment of this Court and ordered Defendant to be permitted an opportunity to withdraw his guilty plea. Slaughter Jr. v. State, Docket No. 52385 (Order of Reversal and Remand, March 27, 2009).

Defendant's jury trial commenced on May 12, 2011. On May 20, 2011, the jury returned a verdict of guilty on all counts in the original Information. On November 18, 2011, Defendant filed a Motion for a New Trial. The State filed its Opposition on January 12, 2012. Defendant filed a Reply on March 15, 2012. On May 17, 2012, this Court denied Defendant's Motion.

On October 16, 2012, Defendant was adjudicated guilty and sentenced to the Nevada Department of Corrections as follows: Count 1 - a minimum of 24 months and maximum of 60 months; Count 2 – a minimum of 24 months and maximum of 60 months, consecutive to Count 1; Count 3 – a minimum of 60 months and maximum of 180, plus a consecutive minimum of 60 months and maximum of 180 months for the deadly weapons enhancement, consecutive to Count 2; Count 5 – a minimum of 48 months and maximum of 120 months,

plus a consecutive minimum of 48 months and maximum of 120 months for the deadly weapon enhancement, concurrent to Count 3; Count 6 - a minimum of 48 months and maximum of 120 months, plus a consecutive minimum of 48 months and maximum of 120 months for the deadly weapon enhancement, consecutive to Count 3; Count 7 - a minimum of 48 months and maximum of 120 months, concurrent to Count 6; Count 8 – a minimum of 24 months and a maximum of 60 months, concurrent to count 7; Count 9 – life with the possibility of parole after a minimum of 15 years, plus a consecutive life with the possibility of parole after a minimum of 15 years for the deadly weapon enhancement; Counts 10 through 14 – life with the possibility of parole after 5 years, plus a consecutive life with the possibility of parole after 5 years, all concurrent to Count 9. Defendant received 2,626 days for credit time served. Defendant was not adjudicated on Count 4.

The Judgment of Conviction was filed on October 22, 2012. Defendant filed a Notice of Appeal on October 24, 2012. The Nevada Supreme Court affirmed the Judgment of Conviction on March 12, 2014. Remittitur issued on April 30, 2014.

On March 25, 2015, Defendant filed a post-conviction Petition for Writ of Habeas Corpus ("First Petition"). The State filed its Response on June 2, 2015. This Court denied Defendant's First Petition on June 18, 2015. The Findings of Fact, Conclusions of Law and Order were filed on July 15, 2015. On July 30, 2015, Defendant filed a Notice of Appeal. On July 13, 2016, the Nevada Supreme Court affirmed the denial of the First Petition. Remittitur issued on August 8, 2016.

On February 12, 2016, while the appeal from this First Petition was pending, Defendant filed a second post-conviction Petition for Writ of Habeas Corpus ("Second Petition"). The State filed its Response on April 6, 2016. This Court held a hearing on the Second Petition on April 28, 2016. This Court denied the Second Petition, finding that it was time-barred, with no good cause shown for delay. Defendant filed a Notice of Appeal. The Nevada Supreme Court affirmed the denial of the Second Petition. Remittitur issued April 19, 2017.

On August 8, 2017, Defendant filed an Amended Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 before the federal District of Nevada, asserting may of the same claims Defendant raised in the instant matter. The federal petition seems ongoing.

Defendant filed another Petition for Writ of Habeas Corpus (Post-Conviction) ("Third Petition") on November 20, 2018. The State filed its Response on December 19, 2018. Defendant filed an Opposition to the State's "Motion to Dismiss" on January 3, 2019. On January 10, 2019, the parties agreed to continue the matter and this Court granted the continuance. Ultimately, this Court heard argument on March 7, 2019 and DENIED this Third Petition in open court. Defendant filed the instant Motion to for the Court to Stay Entry of its Written Order and for Leave to Request Reconsideration ("Motion to Stay") on April 4, 2019. The State opposes this Motion.

ARGUMENT

THERE IS NO BASIS TO STAY THE FILING OF THE WRITTEN ORDER DENYING DEFENDANT'S THIRD PETITION OR TO GRANT DEFENDANT LEAVE TO FILE FOR RECONSIDERATION OF THAT ORDER

A petitioner may raise claims in his initial petition and, if the district court appoints post-conviction counsel, in a supplement filed within thirty (30) days. NRS 34.724(1); NRS 34.750(3). All other pleadings may only be filed if ordered by the district court. NRS 34.750(5). A district court has the discretion to allow a petitioner to raise "new claims even as late as the evidentiary hearing on the petition." State v. Powell, 122 Nev. 751, 758, 138 P.3d 453, 458 (2006) (citing Barnhart v. State, 122 Nev. 301, 303, 130 P.3d 650, 651-52 (2006)); see also NRS 34.750(5). However, if a district court allows a petitioner to raise new claims not included in the initial petition or in the supplemental petition, it should do so explicitly on the record and allow the State the opportunity to respond to the new claims. See Barnhart, 122 Nev. at 303–04, 130 P.3d at 652.

Defendant claims that the written order reflecting this Court's oral denial of the Third Petition should be delayed because the federal court has given him leave to conduct a deposition of Marc DiGiacomo, Chief Deputy District Attorney and prosecutor at Defendant's

trial. Motion to Stay at 2; Index of Exhibit in Support, Exhibit 22. However, any purported new factual claims that may or may not result from this deposition are not relevant to the Third Petition. The Court denied the Third Petition orally, without evidentiary hearing, on March 7, 2019. The Court ordered the State to draft a proposed Findings of Fact, Conclusions of Law. Thus, the State submitted those proposed Findings to chambers on Friday, March 29, 2019. There was no discussion of the spurious deposition facts on the record and the State has not had the opportunity to respond to them. See Barnhart, 122 Nev. at 303–04, 130 P.3d at 652. Accordingly, it is too late to supplement the written order with new facts.

In fact, Defendant himself has admitted that the proper remedy, if and when new facts are discovered, would be to file a brand-new petition for writ of habeas corpus. Motion to Stay at 3–4. There is no reason, or indeed legal basis on which, to delay the written order denying the instant Third Petition, which has already been resolved and which at this point cannot be supplemented. There is even less reason to delay when a date for Mr. DiGiacomo's deposition has not yet been scheduled—even less, when all Defendant can offer is sheer speculation that the deposition will lead to new facts that would support any new or existing post-conviction claims, and still less, when Defendant does not bother to articulate what those facts might be or how they would support any of the grounds in his Third Petition. Motion to Stay at 2–3.

Finally, Defendant has not attempted to offer a basis for reconsideration. Only in "very rare instances" should a motion for reconsideration be granted, as movants bear the burden of producing new issues of fact and/or law supporting a ruling contrary to a prior ruling. Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). And in his "abundance of caution," Defendant has failed to identify any facts he expects to discover at the deposition,

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let alone how they could justify any change in this Court's ruling on the Third Petition. Thus, there is no reason for the Court to give him leave to request reconsideration. Motion to Stay at 3; see EDCR 2.24(a). This Court must deny Defendant's Motion to Stay.

DATED this 8th day of April, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/STEVEN S. OWENS
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 8th day of April, 2019, by electronic transmission to:

JEREMY C. BARON, Asst. Fed. Public Defender
Email: jeremy baron@fd.org

BY: /s/ D. Daniels
Secretary for the District Attorney's Office

04FN0980X/SO/ao/Appeals/dd/MVU

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Steven D. Grierson
CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

RICKIE SLAUGHTER,

Petitioner,

vs.

RENEE BAKER; ET AL,

Respondent,

Case No: A-18-784824-W

Dept No: III

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on April 11, 2019, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on April 15, 2019.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Debra Donaldson
Debra Donaldson, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 15 day of April 2019, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Rickie Slaughter # 85902
1250 E. Arica Rd.
Eloy, AZ 85131
Last Known Address

Jeremy C. Baron
411 E. Bonneville Ave. #250
Las Vegas, NV 89101

/s/ Debra Donaldson
Debra Donaldson, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RICKIE LAMONT SLAUGHTER,
#1896569

Defendant.

CASE NO: A-18-784824-W
(04C204957)

DEPT NO: III

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: MARCH 7, 2019
TIME OF HEARING: 9:00 AM

THIS CAUSE having come on for hearing before the Honorable DOUGLAS HERNDON, District Judge, on the 7th day of March, 2019, the Petitioner not being present, represented by JEREMY C. BARON, ESQ., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through MARC DIGIACOMO, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

STATEMENT OF THE CASE

On September 28, 2004, the State filed an Information charging Rickie Lamont Slaughter ("Defendant") with: Count 1 Conspiracy to Commit Kidnapping (Felony – NRS

199.480, 200.320); Count 2 – Conspiracy to Commit Robbery (Felony – NRS 199.480); Count 3 – Conspiracy to Commit Murder (Felony, NRS 199.480); Count 4 & 5 - Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165); Count 6 - Battery With Use of a Deadly Weapon (Felony – NRS 200.481); Count 7 - Attempt Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.330. 193.165); Count 8 - Robbery With Use of a Deadly Weapon (Felony – NRS 200.380, 193.165); Count 9 - Burglary While in Possession of a Firearm (Felony – NRS 205.060); Counts 10 - Burglary (Felony – NRS 205.060); Counts 11, 12, 13, 14, 15, & 16 - First Degree Kidnapping With Use of a Deadly Weapon (Felony – NRS 200.310, 200.320, 193.165); and Count 17 - Mayhem (Felony – NRS 200.280).

On April 4, 2005, Defendant entered into a Guilty Plea Agreement, wherein he agreed to plead guilty to: Count 1 – Attempt Murder With Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165); Count 2 - Robbery With Use of a Deadly Weapon (Felony – NRS 200.380, 193.165); Count 3 - First Degree Kidnapping (Felony – NRS 200.310, 200.320), and Count 4 - First Degree Kidnapping With Use of a Deadly Weapon (Felony – NRS 200.310, 200.320,193.165).

On August 8, 2005, Defendant was adjudicated guilty and sentenced to the Nevada Department of Corrections as follows: as to Count 1 – a minimum of 90 months and maximum of 240 months, plus an equal consecutive minimum of 90 months and maximum of 240 months for use of a deadly weapon; as to Count 2 – a minimum of 72 months a maximum of 180 months, plus an equal and consecutive minimum of 72 months a maximum of 180 months for the use of a deadly weapon; concurrent to Count 1; as to Count 3 – life with the possibility of parole after a minimum of 15 years; concurrent to Counts 1 and 2; as to Count 4 – life with a the possibility of parole after a minimum of 5 years, plus an equal consecutive life with the possibility of parole after a minimum of 5 years for the use of a deadly weapon; concurrent to Counts 1, 2, and 3. Defendant received no credit for time served. The Judgment of Conviction was filed on August 31, 2005. Defendant did not file a direct appeal.

On August 7, 2006, Defendant filed a Petition for Writ of Habeas Corpus. Among other things, Defendant claimed that his guilty plea was not voluntarily entered because he was promised and led to believe that he would be eligible for parole after serving a minimum of 15 years. The State filed its Opposition on November 17, 2006. This Court denied Defendant's Petition on December 18, 2006. The Findings of Fact, Conclusions of Law and Order was filed on January 29, 2007. On January 11, 2007, Defendant filed a Notice of Appeal. On July 24, 2007, the Nevada Supreme Court affirmed the denial of several of the claims raised in Defendant's Petition, but reversed the denial of Defendant's claim regarding the voluntariness of his plea and remanded the matter for an evidentiary hearing, directing the Attorney General to file a response to the underlying sentence structure/parole eligibility claim. Slaughter Jr. v. State, Docket No. 48742 (Order Affirming in Part, Vacating in Part and Remanding, July 24, 2007).

Upon remand, this Court appointed post-conviction counsel to assist Defendant, who later elected to proceed pro per. On June 19, 2008, this Court held an evidentiary hearing. Afterward, this Court denied Defendant's claim that his guilty plea was involuntarily entered, but ordered Department of Corrections to parole Defendant from sentences for the deadly weapon enhancements for Counts 1, 2, and 4 at the same time as the sentences for the primary counts. Defendant filed a Notice of Appeal on September 9, 2008. On March 27, 2009, the Nevada Supreme Court reversed the judgment of this Court and ordered Defendant to be permitted an opportunity to withdraw his guilty plea. Slaughter Jr. v. State, Docket No. 52385 (Order of Reversal and Remand, March 27, 2009).

Defendant's jury trial commenced on May 12, 2011. On May 20, 2011, the jury returned a verdict of guilty on all counts in the original Information. On November 18, 2011, Defendant filed a Motion for a New Trial. The State filed its Opposition on January 12, 2012. Defendant filed a Reply on March 15, 2012. On May 17, 2012, this Court denied Defendant's Motion.

On October 16, 2012, Defendant was adjudicated guilty and sentenced to the Nevada Department of Corrections as follows: as to Count 1 - a minimum of 24 months and maximum

of 60 months; as to Count 2 – a minimum of 24 months and maximum of 60 months, consecutive to Count 1; as to Count 3 – a minimum of 60 months and maximum of 180, plus a consecutive minimum of 60 months and maximum of 180 months for the deadly weapons enhancement, consecutive to Count 2; as to Count 5 – a minimum of 48 months and maximum of 120 months, plus a consecutive minimum of 48 months and maximum of 120 months for the deadly weapon enhancement, concurrent to Count 3; as to Count 6 - a minimum of 48 months and maximum of 120 months, plus a consecutive minimum of 48 months and maximum of 120 months for the deadly weapon enhancement, consecutive to Count 3; as to Count 7 - a minimum of 48 months and maximum of 120 months, concurrent to Count 6; as to Count 8 – a minimum of 24 months and a maximum of 60 months, concurrent to count 7; as to Count 9 – life with the possibility of parole after a minimum of 15 years, plus a consecutive life with the possibility of parole after a minimum of 15 years for the deadly weapon enhancement; as to Count 10-14 – life with the possibility of parole after 5 years, plus a consecutive life with the possibility of parole after 5 years, all concurrent to Count 9. Defendant received 2,626 days for credit time served. Defendant was not adjudicated on Count 4.

The Judgment of Conviction was filed on October 22, 2012. Defendant filed a Notice of Appeal on October 24, 2012. The Nevada Supreme Court affirmed the Judgment of Conviction on March 12, 2014. Remittitur issued on April 30, 2014.

On March 25, 2015, Defendant filed a post-conviction Petition for Writ of Habeas Corpus ("First Petition"). The State filed its Response on June 2, 2015. This Court denied Defendant's Petition on June 18, 2015. The Findings of Fact, Conclusions of Law and Order were filed on July 15, 2015. On July 30, 2015, Defendant filed a Notice of Appeal. On July 13, 2016, the Nevada Supreme Court affirmed the denial of the First Petition. Remittitur issued on August 8, 2016.

On February 12, 2016, while the appeal from this First Petition was pending, Defendant filed a second post-conviction Petition for Writ of Habeas Corpus ("Second Petition"). The State filed its Response on April 6, 2016. This Court held a hearing on the Second Petition on

April 28, 2016. This Court denied the Second Petition, finding that it was time-barred, with no good cause shown for delay. Defendant filed a Notice of Appeal. The Nevada Supreme Court affirmed the denial of the Second Petition. Remittitur issued April 19, 2017.

On August 8, 2017, Defendant filed an Amended Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 before the federal District of Nevada, asserting may of the same claims Defendant raises in the instant matter. The federal petition seems ongoing.

Defendant filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) ("Third Petition") on November 20, 2018. The State filed its Response on December 19, 2018. Defendant filed an Opposition to the State's "Motion to Dismiss" on January 3, 2019. On January 10, 2019, the parties agreed to continue the matter and this Court granted the continuance. Ultimately, this Court heard argument on March 7, 2019 and DENIED this Third Petition in open court.

ANALYSIS

I. DEFENDANT'S PETITION IS PROCEDURALLY BARRED

A. Defendant's Third Petition is untimely.

Defendant's Third Petition was not filed within one year of Remittitur from his direct appeal. Thus, his Petition is time-barred. The mandatory provision of NRS 34.726(1) states:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
>
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from

the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit.

Furthermore, the Nevada Supreme Court has held that the district court has a duty to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied. Id.

Remittitur on Defendant's direct appeal issued on April 30, 2014. Therefore, Defendant had until April 30, 2015 to file a timely petition. However, the instant Third Petition was not filed until November 20, 2018, over three (3) years after the one-year time frame expired. Thus, Defendant's Third Petition is untimely.

B. Defendant's Third Petition is successive and an abuse of the writ.

NRS 34.810(2) provides that:

> A second or successive petition *must* be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if

> new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constitute an abuse of the writ.

(Emphasis added). Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

In this Third Petition, Defendant raises only grounds that were already raised in an earlier petition (or on direct appeal) and grounds that could have been raised in a prior petition. Third Petition at 11–12 (admitting that Grounds 1, 2, 3, 4, 5, parts of 6 and of 7, 8, and parts of 9 have already been raised); see also Section II(A)–(K), *infra* (discussing the grounds that could have been raised at an earlier time). Thus, this Third Petition is successive and an abuse of the writ.

II. DEFENDANT HAS NOT ESTABLISHED GOOD CAUSE OR PREJUDICE TO OVERCOME THE PROCEDURAL BARS

To avoid procedural default, under NRS 34.726, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in

earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will be unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a) (emphasis added); see Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). "A court ***must*** dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis added).

To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the following: (1) "[t]hat the delay is not the fault of the petitioner" and (2) that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely. NRS 34.726. To meet the first requirement, "a petitioner ***must*** show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (emphasis added). "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available ***at the time of default.***" Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 252, 71 P.3d at 506 (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Examples of good cause include interference by State officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Further, a petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to

excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

In order to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

A. Defendant's alleged good cause is not supported by new evidence.

As good cause to overcome the mandatory procedural bars to his Third Petition, Defendant alleges "actual innocence" based on so-called "new evidence [found] through the federal discovery process that supports *some* of the grounds for relief." Third Petition at 10–31 (emphasis added).[1] The United States Supreme Court has held that in order for a defendant to succeed based on a claim of actual innocence, he must prove that "'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in habeas proceedings." Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867 (1995)). Procedurally barred claims may be considered on the merits, only if the claim of actual innocence is sufficient to bring the petitioner within the narrow class of cases implicating a fundamental miscarriage of justice. Schlup, 513 U.S. at 314, 115 S. Ct. at 861).

As an initial matter, Defendant himself admits that the "new" evidence supporting his actual innocence theory does not support all of Defendant's current claims—only "some." Third Petition at 10–31. Defendant raises neither "new evidence" nor any other good cause for

[1] Defendant half-heartedly argues that all other claims are supported by "good cause" in that he "did not have counsel to assist him with his first post-conviction petition." Third Petition at 30. However, as even Defendant correctly notes, Nevada does "not recognize ineffective assistance of post-conviction course as good cause to excuse non-compliance with state procedural bars." Brown v. McDaniel, 130 Nev. __, __, 331 P.3d 867 (2014). With no other good cause asserted than the "new evidence" of actual innocence, all other claims are summarily denied as lacking good cause to overcome the procedural bars. See Sections II(B)–(L), *infra*.

re-raising the others or for not raising them in a timely manner, and thus, they are procedurally barred. See Section II(I), (K) *infra*. Namely, Grounds 2(E), 3(B), (C), and (D), 4(B), 3(C), (D), and (D), 6(A), (B), (F), and (G), 7(A), (B), (F), and (G), 8, 9(A) and (B), and 10 are summarily denied, as no good cause has been asserted for them. Id.; see also Third Petition at 11–12.

Moreover, Defendant has failed to make an adequate showing of actual innocence. Discovery of new evidence supporting an actual innocence claim is only good cause for delay when such evidence as withheld by the State, such as in a Brady claim, or if some other impediment external to the defense prevented the defense from being able to discover it sooner, or if the factual basis for a claim was not reasonably available to counsel. Hathaway, 119 Nev. at 252, 71 P.3d at 506; Huebler, 128 Nev. __, __, 275 P.3d at 95. Defendant's "new evidence" arguments utterly fail. Indeed, they are likely disingenuous, as well. Before this Court, Defendant speaks of a "federal discovery process" that brought to light the so-called "new" evidence. Third Petition at 10. However, before the federal district court, Appellant argued that his counsel was ineffective for not using the *exact same evidence*, about which he clearly knew, at trial. See generally State's Exhibit B.

As the first piece of "new evidence," Defendant claims in this Third Petition that not until the federal discovery process did he receive a "key document" showing when one of the victims made the 911 call. Third Petition at 13–14. However, Defendant himself admits that counsel knew—and attempted to present to the jury during closing argument at trial in 2011—that the call was placed at 7:11pm. Id.; see also Third Petition, Exhibit 12 at 9; State's Exhibit B at 29–30. Counsel did not need the "key document" itself, which reveals nothing other than that: the 911 call was received by the police at 7:11pm. Third Petition, Exhibit 6. Indeed, other police reports Defendant attaches to this Petition seem to suggest a time of 7:11pm; and Defendant does not even suggest that he did not have access to these documents at the time of trial. See Third Petition, Exhibits 2, 3, 4 7, 9. By no stretch of the imagination can this single police record be called "new evidence" when counsel had the underlying information in 2011. There is no excuse for not raising the alibi-related claims that the time of 7:11pm allegedly

support at some intervening time between 2011 and the 2018 filing of this procedurally barred Third Petition.

Second, Defendant claims that not until the federal discovery process did he receive impeachment evidence regarding Jeffrey Arbuckle, Defendant's girlfriend's manager who undermined Defendant's alibi timeline. Third Petition at 14–15. This allegedly included a trespass complaint Arbuckle had taken against Defendant. Id.; Third Petition, Exhibit 1. However, it is clear that Defendant knew about the alleged confrontations between Defendant and Arbuckle—including the trespass complaint—at the time of trial in 2011. State's Exhibit B at 32–33. In his federal petition, Defendant specifically argued that counsel was ineffective for not impeaching Arbuckle with this information at trial. Id. Defendant provides no rationale for how this information is "new"—let alone why trial counsel, who knew about the alleged difficulties, did not do his due diligence and discovery the trespass complaint before trial. If the claim is strictly that the trespass complaint, specifically, is "new evidence," Defendant had knowledge of this at the very latest when he filed his federal Motion for Leave to Conduct Discovery on August 2, 2017. Third Petition, Exhibit 12 at 10. Though it is unclear when after that date he received the actual complaint document, even if Arbuckle's trespass complaint did constitute new evidence, Defendant waited at least an entire year and three months to bring the claim before this Court. That is, he did not bring the claim within a reasonable time after the good cause arose. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26. Because of this delay, and because the failure to discover this "new evidence" was entirely Defendant' fault, there was no fundamental miscarriage of justice and this Court does not find that this so-called new evidence falls under the actual innocence framework. Schlup, 513 U.S. at 314, 115 S. Ct. at 861.

Third, Defendant claims that not until the federal discovery process did he obtain the full information about the second photographic lineup, wherein Defendant's photo was present but not identified. Third Petition at 15–16. However, it must first be noted that Defendant obtained this information in this specific format from his recent deposition of Detective Prieto, a lead detective on the case. Id., Exhibit 14 at 1, 87–88. Defendant offers absolutely no excuse

for why this exact information could not have been obtained from Detective during trial discovery. Thus, similar to Arbuckle's trespass complaint discussed *supra*, the failure to discover this evidence was purely Defendant's fault—and thus, it does not constitute good cause. Hathaway, 119 Nev. at 252, 71 P.3d at 506.

More importantly, Defendant utterly fails to disclose to this Court that Defendant knew that Defendant "was not selected as a suspect by any of the State's eyewitness" in the second photo lineup as far back as 2009. See State's Exhibit A (Defendant's Motion to Dismiss Case for Failure to Preserve or Destruction of Exculpatory Photo Lineup Identification Evidence, filed October 27, 2009). Thus, any argument that the evidence provided in Detective Prieto's recent deposition is even "new" to Defendant is belied by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that "bare" and "naked" allegations, as well as those belied and repelled by the record, are insufficient for post-conviction relief).

Finally, Defendant fails to disclose the key fact that makes the second photo lineup utterly irrelevant to his actual innocence claim. When the investigation used this second photo lineup,[2] the witnesses had not been asked to identify Defendant but rather *another* suspect--Richard Jacquan—in that lineup. Third Petition, Exhibit 14 at 60–85. Defendant's photo had been included in that lineup by mistake; the various copies of this lineup were explicitly referred to in Detective Prieto's contemporary reports as "photo lineups of Richard." Id. at 67–68, 79–81. Detective Prieto's reports specifically say, "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." Id. at 68. Detective Prieto said "yes" when he was asked at his deposition whether "[t]he purpose of these lineups was to identify Richard"—and that he would not have used the same lineup to have witnesses identify Defendant. Id. at 86–87.

It is vital to note that Defendant did not claim that any of these three pieces of evidence were "new" when he argued these exact issues before the federal district court in his Amended

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[2] This second photo lineup is identified as Exhibits 7, 9, 11, and 113 in Detective Prieto's recent deposition, due to different quality and color copies being used during that deposition. Third Petition, Exhibit 14 at 60–85.

Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, filed August 2, 2017. See State's Exhibit B. Indeed, there, Defendant admitted that at the time of trial, counsel knew about *all* these issues. Id. Specifically, he argued that counsel knew what time the 911 call was placed and that to support his arguments, he should have subpoenaed the 911 records; in his closing argument PowerPoint, counsel attempted to include a slide that said the 911 call was made at 7:11pm, but the trial court did not permit him to show this slide to the jury because he had not elicited any evidence to support that time. Id. at 29–30. Defendant also argued that counsel knew about the problems between Arbuckle and Defendant—including the trespass complaint, which Defendant attached as an exhibit to his 2017 federal petition—and that counsel was ineffective for not impeaching Arbuckle with that information. Id. at 32–33. Finally, Defendant argued that counsel was ineffective for not questioning eyewitnesses regarding whether they identified Defendant in the second photo lineup. Id. at 36–37. Defendant also admitted that he made a pre-trial motion regarding the issues with the second photo lineup. Id. at 11–12, 19. In other words, before the federal court, Defendant specifically argued that counsel was aware of these three pieces of evidence but that he was ineffective for not presenting them to the jury and/or for not obtaining specific documents. Now, before this Court, Defendant has reframed these same arguments to suggest that the evidence is, in fact, brand new. This is disingenuous, and this Court does not credit the arguments.

Indeed, Defendant's arguments in this very Petition undermine his argument that this so-called "new" evidence is good cause to reassert these claims or to assert them for this first time in this successive Third Petition. For example, Defendant's Ground Three explicitly accuses Defendant's trial counsel of not "tak[ing] the hint" that the second photo lineup "would be a suitable subject for cross-examination"—and indeed, would have revealed that "the victims did not identify [Defendant] as a suspect" in that second photo lineup. Third Petition at 45–46. Yet as good cause, Defendant explicitly relies upon Detective Prieto's deposition, wherein Prieto discussed this exact information: that Defendant was not identified in the second photo lineup. Defendant cannot have it both ways. Either the information from Detective Prieto's deposition is new and could not have been discovered by reasonable

diligence before or during trial, and is thus evidence of actual innocence that can overcome the procedural bars—or, counsel was ineffective for not eliciting this information which he knew about at trial.

Lacking new evidence supporting a finding of actual innocence, Defendant cannot demonstrate good cause for re-raising or for the failure to previously raise his various Third Petition claims. For his claims to succeed, he would need to establish both good cause and prejudice. NRS 34.726. Though the lack of new evidence means he has not established good cause for any claim, this Court specifically examines each claim, *infra*.

B. First and Second Photo Lineups

In Ground 1, Defendant claims that the first photo lineup was unduly suggestive and that, combined with alleged issues with the second photo lineup, meant there was no reliable identification. Third Petition at 31–37. Defendant admits that he raised the issue of the first lineup on direct appeal. Id. at 17; see also Slaughter Jr. v. State, Docket No. 61991, Order of Affirmance, filed March 12, 2014, at 2–3. Where an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Pellegrini v. State, 117 Nev. 860, 884, 34 P.3d 519, 535 (2001); McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999), Hall v. State, 91 Nev. 314, 315–16, 535 P.2d 797, 798–99 (1975), see also Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993). A defendant cannot avoid the doctrine of law of the case by a more detailed and precisely focused argument. Hall, 91 Nev. at 316, 535 P.2d at 798–99; see also Pertgen v. State, 110 Nev. 557, 557–58, 875 P.2d 316, 362 (1994).

There is no good cause to re-raise the issue of the first photo lineup because nothing in Detective Prieto's recent deposition—Defendant's "new evidence"—changes the decision from the Nevada Supreme Court that the first photo lineup was *not* impermissibly suggestive. See Slaughter Jr. v. State, Docket No. 61991, Order of Affirmance, filed March 12, 2014, at 2–3. The issue is barred by the procedural bar against claims that "fail[] to allege new or different grounds for relief [where] the prior determination was on the merits." NRS 34.810 (2). Defendant does not even attempt to address this procedural bar.

Further, the issue of the second photo lineup was already raised in Defendant Second Petition. Third Petition at 8. There is no good cause for re-raising it because the evidence from Detective Prieto's 2018 deposition, concerning details about the second photo lineup, is not new. Section II(A), *supra*. Lacking good cause to re-raise this claim, it is dismissed.

C. Ineffective Assistance of Counsel Regarding Establishing Alibi

In Ground 2, Defendant complains trial counsel was ineffective for failing to present 911 records—which Defendant alleges the State suppressed—and to present other evidence that would have established a timeline for Defendant's alibi. Third Petition at 37–45. This issue was previously raised in Defendant's First Petition and denied on the merits by this Court, this decision being affirmed by the Nevada Supreme Court. Id. at 5; see also Slaughter Jr. v. State, Docket No. 68532, Order of Affirmance, filed July 13, 2016, at 1–3. There is no good cause for re-raising it now because *none* of the "new evidence" raised here to support Ground 2's various sub-parts is actually new: not the 911 call sheet, not the information from Detective Prieto's 2018 deposition, and not Arbuckle trespass complaint. Section II(A), *supra*. Thus, the good cause asserted for Grounds 2(A) to (D) fails. Moreover, Defendant does not assert that the "new evidence" is good cause to re-raise Ground 2(E)—nor does he offer any other good cause. See Third Petition at 11, 20–21, 43. All Ground 2's subsections are dismissed as lacking good cause.

Though this Court need not examine anything beyond the lack of good cause, Defendant would never be able to show prejudice because the underlying claim is meritless. Even assuming counsel was deficient in not eliciting the exact time of the 911 call, there was no prejudice under Strickland due to the overwhelming evidence of guilt as found by the Nevada Supreme Court. See Slaughter Jr. v. State, Docket No. 68532, Order of Affirmance, filed July 13, 2016, at 2. Some of this evidence would have undermined any alibi argument counsel could have made, since it included statements that Defendant was attempting to fabricate the alibi altogether. See, e.g., Third Petition, Exhibit 9 at 3 (detailing how Defendant instructed his girlfriend over the jail phone what to tell the jury about when he picked her up from work). Absent both good cause and prejudice, this claim is dismissed.

D. Ineffective Assistance of Counsel Regarding Cross-examination and Impeachment

In Ground 3, Defendant complains that trial counsel was ineffective for failing to cross-examine and impeach the State's witnesses. Third Petition at 45–50. This issue was previously raised in Defendant's First Petition and denied on the merits by this Court, this decision being affirmed by the Nevada Supreme Court. Id. at 4; Slaughter Jr. v. State, Docket No. 68532, Order of Affirmance, filed July 13, 2016, at 1–3. There is no good cause for re-raising it now because the information from Detective Prieto's 2018 deposition regarding the second phot lineup, presented in this Third Petition to support one sub-part of this claim, is not new. Section II(A), *supra*. Further, nothing in Detective Prieto's deposition changes the Nevada Supreme Court's decision that even assuming counsel was, there was no prejudice under Strickland due to the overwhelming evidence of guilt. See Slaughter Jr. v. State, Docket No. 68532, Order of Affirmance, filed July 13, 2016, at 2. The good cause asserted for Grounds 3(A) fails. Defendant does not even attempt to assert good cause for Ground 3(B) through (D). See Third Petition at 11, 21, 47–50. All Ground 3's subsections are dismissed as lacking good cause to re-assert them.

E. Ineffective Assistance of Counsel for Failure to Call Witness re: 2nd Photo Lineup

In Ground 4, Defendant complains that trial counsel was ineffective for failing to call additional witnesses, including Detective Prieto and others who could have testified regarding the investigation (including the second photo lineup) and regarding Defendant's alibi. Third Petition at 50–57. This issue was previously raised in Defendant's First Petition and denied on the merits by this Court, this decision being affirmed by the Nevada Supreme Court. Id. at 4; Slaughter Jr. v. State, Docket No. 68532, Order of Affirmance, filed July 13, 2016, at 1–3. There is no good cause for re-raising it now because the information from Detective Prieto's 2018 deposition, presented in this Third Petition to support just one sub-part of this claim, is not new. Section II(A), *supra*. Indeed, Defendant's argument in Ground 4(A) itself makes it clear that Detective Prieto was available to the defense at the time of trial to call as a witness and elicit this information from him—but the defense did not do so. Third Petition at 50–55. Defendant does not argue there was any impediment from the State, or from any other source,

which would have withheld Detective Prieto's testimony from the defense. See id. In fact, Defendant seems to blame trial counsel utterly: counsel "didn't bother" to speak to Detective Prieto before trial, and "did not bother to subpoena him" for trial. Id. at 51.

Further, nothing in Detective Prieto's deposition changes the Nevada Supreme Court's decision that even assuming counsel was deficient, there was no prejudice under Strickland due to the overwhelming evidence of guilt. See Slaughter Jr. v. State, Docket No. 68532, Order of Affirmance, filed July 13, 2016, at 2. The good cause asserted for Ground 4(A) fails. Defendant does not even attempt to assert good cause for Grounds 4(B) through (D). See Third Petition at 11, 21, 50–57. All Ground 4's subsections are dismissed as lacking good cause to re-assert them.

F. Ineffective Assistance of Counsel for Failure to Deliver on Opening Statement Promises

In Ground 5, Defendant complains that trial counsel was ineffective for failing to deliver on promises made during opening statement, including that the alibi would be established and that the jury would hear from Detective Prieto. Third Petition at 57–58. This issue was previously raised in Defendant's First and Second Petitions and denied on the merits by this Court, this decision being affirmed by the Nevada Supreme Court. Id. at 4; Slaughter Jr. v. State, Docket No. 68532, Order of Affirmance, filed July 13, 2016, at 1–3; Slaughter Jr. v. State, Docket No. 70676, Order of Affirmance, filed April 19, 2017, at 1–3. There is no good cause for re-raising it now because, as discussed at length, the information from Detective Prieto's 2018 deposition is not new. Sections II(A) and (E), *supra*. Further, nothing in Detective Prieto's deposition changes the Nevada Supreme Court's decision that even assuming counsel was deficient, there was no prejudice under Strickland due to the overwhelming evidence of guilt. See Slaughter Jr. v. State, Docket No. 68532, Order of Affirmance, filed July 13, 2016, at 2. The good cause asserted for Ground 5 fails. Thus, this claim is dismissed as lacking good cause.

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G. Ineffective Assistance of Counsel for Failure to Object to Prosecutorial Misconduct

In Ground 6, Defendant claims that counsel was ineffective for failing to object to various instances of alleged prosecutorial misconduct. Third Petition at 58–61. Some of the individual instances of alleged misconduct have been brought previously, and denied on the merits by this Court and the Nevada Supreme Court. Third Petition at 11; see also Slaughter Jr. v. State, Docket No. 61991, Order of Affirmance, filed March 12, 2014, at 4–6; Slaughter Jr. v. State, Docket No. 68532, Order of Affirmance, filed July 13, 2016, at 2–3. However, Appellant admits that several sub-sections of this claim do not rely upon the "new" evidence discussed *supra*. Third Petition at 11 (noting that Grounds 6(A), (B), (F), and (G) do not rely on new evidence). Thus, Defendant has asserted no good cause for re-raising or for not raising these particular IAC claims in an earlier petition.[3] Grounds 6(A), (B), (F), and (G) are summarily dismissed as lacking good cause to overcome the procedural bars.

Grounds 6(C), (D), and (E)—all concerning treatment of Defendant's alibi—are also unsupported by the "new" evidence discussed under the actual innocence framework. Appellant alleges that lately-gathered evidence of the alibi timeline, including information about Arbuckle, and of Detective Prieto's deposition regarding that alibi reveals that there previously-unknown prosecutorial misconduct. Third Petition at 11. However, none of the evidence Defendant offers to support this claim can be called "new." Information about Arbuckle—including his potential motives to lie, including the much-discussed trespass complaint—was known or could have been discovered before trial; it is not new evidence. Third Petition, Exhibit 12 at 10; see also State's Exhibit B at 32–33. Further, information from

[3] Defendant states he "is re-alleging some of his ineffectiveness claims that don't rely on new evidence" because the cumulative effect of such alleged errors is relevant. Third Petition at 25. However, the Nevada Supreme Court has not endorsed application of its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Nor does cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denial, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test").

Detective Prieto was not withheld from the defense. Indeed, Defendant would know what he did and did not discuss with Detective Prieto. See Third Petition, Exhibit 7, at 6. Knowing this, Defendant could have called Detective Prieto as a witness to elicit the so-called alibi information. Thus, any evidence lately gathered from Detective Prieto[4] cannot be called "new" because Defendant has not argued that this information was not reasonably available to him at the time of procedural default—that is, upon filing of this first petition—and because there was no impediment external to the defense preventing Defendant from pursuing this claim at an earlier time. Clem, 119 Nev. at 621, 81 P.3d at 525; Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07. Thus, the "good cause" alleged to assert these grounds fails. Thus, all subsections of this claim are dismissed as lacking good cause.

H. Prosecutorial Misconduct

In Ground 7, Defendant discusses the same alleged prosecutorial misconduct as alleged under an ineffective assistance of counsel claim in Ground 6. Third Petition at 58–61. Again, some of the individual instances of alleged misconduct have already been brought and rejected on the merits. Third Petition at 11; see also Slaughter Jr. v. State, Docket No. 61991, Order of Affirmance, filed March 12, 2014, at 4–6; Slaughter Jr. v. State, Docket No. 68532, Order of Affirmance, filed July 13, 2016, at 2–3. However, Appellant admits that several sub-sections of this claim do not rely upon the "new" evidence discussed *supra*. Third Petition at 11–12 (noting that Grounds 7(A), (B), (F), and (G) do not rely on new evidence). Thus, Defendant has asserted no good cause for re-raising or for not raising these particular claims in an earlier petition. Grounds 7(A), (B), (F), and (G) are summarily dismissed as lacking good cause to overcome the procedural bars. And as discussed, Grounds 7(C), (D), and (E) all concern treatment of Defendant's alibi and could have been brought at an earlier time. Section II(H),

[4] If Defendant is indeed arguing that the alleged misconduct could not have been known until the recent information from Detective Prieto, it simply does not make sense to accuse counsel of being ineffective for not objecting to prosecutorial misconduct of which he could not have known. Counsel could not have been ineffective under Defendant's logic.

supra. The "good cause" alleged to assert these grounds fails. Thus, all subsections of this claim are dismissed as lacking good cause.

I. State's Alleged Introduction of Hearsay

In Ground 8, Defendant complains that the State tied surveillance footage from the night of the kidnappings to him via hearsay. Third Petition at 63. However, Defendant raised this alleged hearsay issue on direct appeal, and the Nevada Supreme Court denied it. See Slaughter Jr. v. State, Docket No. 61991, Order of Affirmance, filed March 12, 2014, at 3–4. It is thus barred by the procedural bar against claims that "fail[] to allege new or different grounds for relief [where] the prior determination was on the merits." NRS 34.810 (2).

Defendant does not even attempt to address the procedural bar. Instead, he attempts to re-raise this claim by arguing the issue in a slightly different manner—and with absolutely no showing of good cause for not raising these differing arguments in an earlier petition. Appellant admits that this claim does not rely upon the "new" evidence discussed *supra*. Third Petition at 12. Thus, there was no impediment external to the defense preventing him from bringing this claim in a timely manner. Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26; Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07. Because there is no good cause alleged regarding this claim, this Court need not examine prejudice. Thus, this claim is summarily dismissed.

J. Ineffective Assistance of Counsel for Failure to Raise Direct Appeal Claims

In Ground 9, Defendant claims that counsel was ineffective for failing to raise a Batson claim, police failures regarding the second photo lineup, and specific instances of alleged prosecutorial misconduct on direct appeal. Third Petition at 63–65. The Batson issue was brought previously and denied by this Court on the merits, this decision being affirmed by the Nevada Supreme Court. Third Petition at 6, 11; Slaughter Jr. v. State, Docket No. 68532, Order of Affirmance, filed July 13, 2016, at 2–3. Appellant admits that this and other Ground 9 sub-sections do not rely upon the "new" evidence discussed *supra*. Third Petition at 12 (noting that Grounds 9(A), (B), (C1), and (C2) do not rely on new evidence). Thus, Defendant has asserted no good cause for re-raising or for not raising these particular IAC claims in an earlier petition.

Grounds 9(A), (B), (C1), and (C2) are summarily dismissed as lacking good cause to overcome the procedural bars.

The rest of Ground 9(C) concerns alleged prosecutorial misconduct and relates to Grounds 6(C) and (D). As discussed, these arguments are also unsupported by the "new" evidence discussed under the actual innocence framework. Section II(G), *supra*. Thus, all subsections of this claim are dismissed as lacking good cause.

K. Alleged Batson Violation

In Ground 10, Defendant complains of an alleged Batson violation. Third Petition at 65. However, Defendant raised this alleged Batson issue through an ineffective assistance of appellate counsel claim during his First Petition; this Court denied it, and the Nevada Supreme Court denied it on appeal from this Court's denial. See Slaughter Jr. v. State, Docket No. 68532, Order of Affirmance, filed July 13, 2016, at 2. The Supreme Court ruled that Defendant filed to show that the issue would have had the probability of success on appeal. Id. Like Ground 8, it is thus barred the procedural bar against claims that "fail[] to allege new or different grounds for relief [where] the prior determination was on the merits." NRS 34.810 (2).

Defendant does not even attempt to address the procedural. Instead, he attempts to re-raise this claim by arguing the issue in a slightly different manner as detailed in Ground 9—and, moreover, with absolutely no showing of good cause for not raising it in an earlier petition. Appellant admits that this claim does not rely upon the "new" evidence discussed *supra*. Third Petition at 12. Thus, there was no impediment external to the defense preventing him from bringing this claim in a timely manner. Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26; Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07. Because there is no good cause alleged for not raising this claim, this Court need not examine prejudice. Thus, this claim is summarily dismissed.

L. Alleged Brady Issue

In Ground 11, Defendant complains of an alleged Brady violation. Third Petition at 66–70. This is a new claim not previously raised due to Defendant's allegedly "new" evidence.

Third Petition at 12. As discussed, Defendant had knowledge of the alleged "suppression" of all of this so-called new evidence at the very latest on August 2, 2017. Section II(A), *supra*. Defendant waited over a year to bring the claims before this Court—well beyond a reasonable time after the alleged good cause arose. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26.

Nonetheless, the State can show that the Brady claim is meritless. Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. U.S., 405 U.S. 150 (1972). First, Defendant alleges the State withheld Defendant's current Exhibit 6, showing that the time of the 911 call was 7:11pm. However, as discussed, trial counsel already knew the time of the 911 call. Section II(A), *supra*. He had several other documents supporting a time of 7:11pm. Id. Counsel attempted to put that information in his PowerPoint in his closing argument; but since he had failed to elicit it, the trial court prohibited him from doing so. Id. This does not constitute suppression by the State.

Second, Defendant alleges that the State withheld information that none of the victims identified Defendant in the second photo lineup—discussed by Detective Prieto in Defendant's current Exhibit 14. As discussed, Defendant knew at the time of trial that none of the victims identified Defendant in the second photo lineup. Third Petition, Exhibit 12 at 10; State's Exhibit B at 36. Counsel thus could have inquired into this second photo lineup on cross-examination of the victims or by calling Detective Prieto himself. None of this information was "suppressed" by the State.

Third, Defendant alleges the State withheld Arbuckle's trespass complaint included as Defendant's current Exhibit 1. However, even if Defendant did not have the particular police report until the federal habeas discovery process, the document itself is not impeachment or exculpatory evidence under Brady. Indeed, it is significant that Defendant does not offer any authority supporting that such a complaint constitutes impeachment evidence under Brady or its progeny. See Third Petition at 69–70. At most, it is evidence that Arbuckle may have had *motive* to lie; it does not necessarily challenge his credibility and is therefore likely not material.

Regardless, Defendant cannot establish that State withheld it. Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25 (2000); Jimenez v. State, 112 Nev. 610, 618–19, 918 P.2d 687 (1996). Arbuckle's trespass complaint was clearly generated by Las Vegas Metropolitan Place Department ("LVMPD"). Third Petition, Exhibit 1. The law enforcement agency working with the State prosecutors on this case was North Las Vegas Police ("NLVP"). See Third Petition, Exhibits 2–9, Exhibit 14 at 3–6. While it is true that "the state attorney is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers," it would not "appropriate to charge the State with constructive knowledge of the evidence" in this case because, unlike in other cases where the State is charged with such constructive knowledge, there is absolutely no evidence that LVMPD "assisted in the investigation of this crime" or "supplied [any] information" to NLVP other than routing the 911 call. State v. Bennett, 119 Nev. 589, 603, 81 P.3d 1, 10 (2003). Because the State did not have constructive knowledge of Arbuckle's trespass complaint, it did not "withhold it," and there was no Brady violation. And because the complaint was not suppressed, Defendant himself should have done his due diligence and obtained it before trial. There was no impediment external to the defense that prevented its discovery, and the failure to discover it was entirely Defendant's fault; it cannot constitute good cause. Hathaway, 119 Nev. at 252, 71 P.3d at 506.

Because of Defendant's delay of over a year in bringing the so-called new evidence before this Court, and because the failure to discover it in the first place was not the result of State suppression but was entirely Defendant' fault, there was no fundamental miscarriage of justice and Defendant's Brady claim does not support actual innocence. Schlup, 513 U.S. at 314, 115 S. Ct. at 861. Thus, this claim is dismissed as lacking good cause.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus (Post-Conviction) shall be, and it is, hereby denied.

DATED this 9 day of ~~March~~ April, 2019.

DISTRICT JUDGE

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/STEVEN S. OWENS
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 29th day of March, 2019, by electronic transmission to:

JEREMY C. BARON, Asst. Fed. Public Defender
Email: jeremy baron@fd.org

BY: /s/ D. Daniels
Secretary for the District Attorney's Office

04FN0980X/SO/ao/Appeals/dd/MVU

Deana Daniels

From: Deana Daniels
Sent: Friday, March 29, 2019 4:17 PM
To: 'jeremy_baron@fd.org'
Subject: Findings - Slaughter
Attachments: slaughter fof.pdf

Good afternoon.
Attached, please find a copy of the Findings of Fact for Rickie Slaughter, C204957/A-18-784824-W.

Please let me know if you are unable to open the attachment.

Thank you.

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

RICKIE SLAUGHTER, Petitioner, v. RENEE BAKER, et al., Respondents.	Case No. A-18-784824-W (04C204957) Dept. No. III Date of Hearing: _____ Time of Hearing: _____

REPLY IN SUPPORT OF MOTION FOR THE COURT TO STAY ENTRY OF ITS WRITTEN ORDER AND FOR LEAVE TO REQUEST RECONSIDERATION

ARGUMENT

Mr. Slaughter filed a motion for the Court to stay its entry of a written order in this case, and for leave to request reconsideration, on April 4, 2019. As he explained, the federal district court recently granted Mr. Slaughter leave to conduct additional discovery, namely a deposition of the lead prosecutor, Marc DiGiacomo. The deposition is highly likely to produce additional evidence relevant to the claims for relief in Mr. Slaughter's November 20, 2018, petition. Mr. Slaughter therefore asked the Court to abstain from entering a written order until after the deposition, since Mr. Slaughter would likely intend to supplement his petition with additional information from the deposition.

The State filed an opposition on April 8, 2019. The Court filed a written order on April 11, 2019. However, to Mr. Slaughter's knowledge, the Court has not yet filed a notice of entry of a written order. While Mr. Slaughter recognizes the Court has filed a written order, which may signal its intent to deny Mr. Slaughter's motion, Mr. Slaughter nonetheless respectfully submits this reply in support of his motion. With all due respect, the Court should vacate its written order and abstain from filing a notice of entry of a written order at least until it resolves this motion.

The State's opposition argues the deposition won't be relevant to the 2018 petition. 4/8/19 Opposition at 6. But Mr. Slaughter intends to cover topics with Mr. DiGiacomo that would be relevant to many of the claims for relief in the 2018 petition, especially topics relevant to Ground Eleven (which raises claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264, 266 (1959)), as well as other claims for relief. The information Mr. Slaughter learns in the deposition will likely strengthen the claims for relief in the petition, as well as Mr. Slaughter's innocence argument. The deposition will therefore be material to instant petition.

The State also suggests that rather than the Court delaying its entry of a written order, it would be preferable for Mr. Slaughter to simply file a new post-conviction

petition after the deposition. 4/8/19 Opposition at 6. But that would be a more complicated and judicially inefficient process. It would require the filing of another complete petition and potentially another round of briefing in this Court. All this could take place while an appeal is still pending in the Nevada appellate courts regarding the Court's dismissal of the 2018 petition, and the Court's resolution of a new petition could give rise to a second appeal to the Nevada appellate courts. The more streamlined and sensible course is for the Court to allow Mr. Slaughter an opportunity to supplement his existing 2018 petition, resolve the supplemented petition, and allow the parties to litigate a single appeal from that decision.

Next, the State argues there is no "legal basis on which[] to delay the written order denying" the 2018 petition. But the Court has "inherent authority" over its "day-to-day functioning [and] regular management of its internal affairs" (*City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 363, 302 P.3d 1118, 1129 (2013)), which should give the Court the authority to follow Mr. Slaughter's proposal. In any event, in addition to proposing the Court delay the entry of its written order, Mr. Slaughter also asked for leave to request reconsideration. That is an established legal vehicle to ask the Court to alter its decision in a case, and the Court should allow Mr. Slaughter to request reconsideration to the extent that is necessary.

The State also complains it's not clear when the deposition of Mr. DiGiacomo will take place, or what "new facts" will come about from the deposition. But Mr. Slaughter is attempting to plan and conduct the deposition promptly, while taking into account Mr. DiGiacomo's schedule. Mr. Slaughter also has substantial reason to believe the deposition will lead to material information regarding the claims in the 2018 petition. In fact, the federal court agreed, which is why it found good cause to allow Mr. DiGiacomo to conduct this deposition. Exhibit 22. The Court should reach the same conclusion.

CONCLUSION

Mr. Slaughter respectfully requests the Court vacate its written order in this case, stay its notice of entry of its written order, allow Mr. Slaughter to request reconsideration of the Court's decision, and allow the parties to supplement the pleadings in this case after Mr. DiGiacomo's deposition.

AFFIRMATION PURSUANT TO NRS 239B.030

I affirm this document does not contain any social security numbers.

Dated April 15, 2019.

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 April 15, 2019, I electronically filed the foregoing with the Clerk of the Eighth Judicial District by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Steven Owens, steven.owens@clark-countyda.com, Motions@clarkcountyda.com

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

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

RICKIE SLAUGHTER, Petitioner, v. RENEE BAKER, et al., Respondents.	Case No. A-18-784824-W (04C204957) Dept. No. III

NOTICE OF APPEAL

Petitioner Rickie Slaughter hereby provides notice that he appeals to the Nevada Supreme Court from the findings of fact, conclusions of law, and order denying Mr. Slaughter's November 20, 2018, post-conviction petition for a writ of habeas corpus. This Court entered its order denying the petition on April 11, 2019, and filed a notice of entry of the order on April 15, 2019.

Dated May 6, 2019.

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 May 6, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States District Court, District of Nevada by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system and include: Steven Owens, steven.owens@clarkcountyda.com, motions@clarkcountyda.com

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

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